# United States Department of Labor
# Employees' Compensation Appeals Board

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| **H.M., Appellant** | ) | |
| **and** | ) | **Docket No. 09-482** |
| | ) | **Issued: August 25, 2009** |
| **U.S. POSTAL SERVICE, POST OFFICE, Oakland, CA, Employer** | ) | |

*Appearances:*
*Mark Coby, Esq.*, for the appellant
*Office of Solicitor*, for the Director

*Case Submitted on the Record*

## DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

### ***JURISDICTION***

On December 9, 2008 appellant filed a timely appeal from the Office of Workers' Compensation Programs' August 18, 2008 merit decision denying her recurrence of disability claim. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

### ***ISSUE***

The issue is whether appellant met her burden of proof to establish that she sustained a recurrence of total disability from April to June 2007 due to her March 7, 2001 employment injury.

### ***FACTUAL HISTORY***

The Office accepted that on March 7, 2001 appellant, then a 39-year-old letter carrier, sustained a left hip strain and an Achilles tendon strain due to a fall at work. It subsequently accepted left sciatica and displacement of a lumbar disc. Appellant returned to light-duty work at the employing establishment and received compensation.

In August 2004, the Office referred appellant to Dr. Philip Wirganowicz, a Board-certified orthopedic surgeon, for a second opinion evaluation. In a September 20, 2004 report, Dr. Wirganonicz reviewed appellant's medical history and the findings on examination of appellant. He determined that appellant could work eight hours per day with restrictions to include lifting up to 25 pounds for up to six hours per day. Appellant could sit for six hours per day, walk for one hour and stand for one hour.

The Office determined that the opinion of Dr. Wirganowicz conflicted with that of Dr. Susan Lambert, an attending Board-certified occupational medicine physician, who found a greater degree of disability. It referred appellant to Dr. Howard Sturtz, a Board-certified orthopedic surgeon, for an impartial medical examination and opinion on her capacity to work. In a January 27, 2005 report, Dr. Sturtz opined that appellant could work eight hours per day and concurred with the medical limitations as outlined by Dr. Wirganowicz.[1] He stated:

> "The patient's alleged level of function is quite minimal in which the patient stated she can only perform these activities 10 to 15 minutes a day. Furthermore, she claims that bending kills her and she can only lift 5 to 10 pounds. Yet she is able to work four hours a day. Consequently I believe there is a certain level of symptom magnification.
>
> "My examination as well as that of other examiners was not particularly remarkable except for the findings consistent with her having had a previous impingement of the S1 nerve root. I found no atrophy of her calf which would he supplied by that nerve root. Furthermore, I found no weakness or positive straight leg raising test.
>
> "In conclusion, it is my opinion that the patient is capable of working eight hours a day and apparently has been doing so since Thanksgiving. I believe that she can safely continue doing so for the indefinite future. It should he noted she is only taking anti-inflammatory and no real pain medication."

Appellant returned to work for eight hours a day in a limited-duty job for the employing establishment on November 22, 2004. The job she accepted indicated that she would do no driving. The duties of the job were within the work restrictions recommended by Dr. Wirganowicz and Dr. Sturtz.

On April 2, 2007 appellant stated in a telephone call with an Office claims examiner that she had been sent home by her employer after refusing to sign a new limited-duty job offer for a job which required her to drive at work and carry a satchel. She did not believe she could perform the new limited-duty job because she was not supposed to drive other than to commute and she could not carry a satchel. Appellant was advised by the Office claims examiner that the job offer appeared to be consistent with the work limitations as defined by Dr. Sturtz. Neither Dr. Wirganowicz nor Dr. Sturtz had mentioned any driving limitation or that she could not carry a satchel.

[1] Neither Dr. Wirganowicz nor Dr. Sturtz indicated that appellant should not drive.

In an April 11, 2007 letter, the Office advised appellant of the evidence necessary to establish that she had sustained a recurrence of disability as a result of her medical condition. It indicated that the weight of medical evidence rested with the medical opinion of the impartial medical specialist, Dr. Sturtz.

Appellant submitted a statement indicating that Dr. Lambert had imposed work limitations that made the job offer improper. In a May 14, 2007 report, Dr. Lambert indicated that she had examined appellant and found her objective and subjective findings to be the same as when she was examined in September 2004. She indicated that appellant could not drive other than to commute to and from work.

In a May 29, 2007 decision, the Office denied appellant's claim for a recurrence of disability on the basis that the weight of medical evidence rested with the medical opinion of the impartial medical specialist, Dr. Sturtz. It found that the job offer was in keeping with the opinion of Dr. Sturtz and was a valid offer with regard to appellant's limitations. The Office noted that, while Dr. Lambert had imposed other limitations, she had not provided any medical reasoning for these limitations. Therefore, appellant had not submitted evidence sufficient to establish that she was disabled for the limited-duty work offered.

Appellant requested a hearing before an Office hearing representative. At the May 28, 2008 hearing, she was represented by her attorney. Appellant indicated that she had not been given a reason for the change in job assignment but believed it was due to her testimony on behalf of another employee in a dispute he was having with the employing establishment. Counsel contended that the weight of medical evidence should not be given to Dr. Stutz as his report was more than two years old. Appellant submitted reports, including a September 28, 2007 report, in which Dr. Lambert reiterated that she could not drive other than to commute to and from work.

In an August 18, 2008 decision, the Office hearing representative affirmed the May 29, 2007 decision.

## ***LEGAL PRECEDENT***

When an employee, who is disabled from the job she held when injured on account of employment-related residuals, returns to a light-duty position or the medical evidence of record establishes that she can perform the light-duty position, the employee has the burden to establish by the weight of the reliable, probative, and substantial evidence a recurrence of total disability and show that she cannot perform such light duty. As part of this burden the employee must show a change in the nature and extent of the injury-related condition or a change in the nature and extent of the light-duty job requirements.[2] Office procedure provides that a recurrence of disability can be caused by withdrawal of a light-duty assignment made specifically to accommodate an employee if the withdrawal is not due to misconduct or nonperformance of job duties.[3]

[2] *Cynthia M. Judd*, 42 ECAB 246, 250 (1990); *Terry R. Hedman*, 38 ECAB 222, 227 (1986).

[3] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Recurrences*, Chapter 2.1500.3b(1)(c) (January 1995).

Section 8123(a) of the Act provides in pertinent part: "If there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination."[4] When there are opposing reports of virtually equal weight and rationale, the case must be referred to an impartial medical specialist, pursuant to section 8123(a) of the Act, to resolve the conflict in the medical evidence.[5] In situations where there exist opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.[6]

## ***ANALYSIS***

In the present case, appellant returned to work for eight hours per day in 2004 and was able to continue working until April 2007. At that time, she was presented with a change in job duties that included driving at work and delivering mail carrying a satchel. Appellant refused to sign the job offer and stopped work. The Office advised her that the job offer was in keeping with the medical limitations imposed by the impartial medical specialist, Dr. Sturtz. It advised appellant that, although the employing establishment had not required her to drive when she first returned to work, there was in fact no preclusion to her driving according to the reports of either Dr. Sturtz or Dr. Wirganowicz, a Board-certified orthopedic surgeon who served as a second opinion physician.

The Board finds that the Office properly determined that there was a conflict in the medical evidence regarding appellant's ability to work and referred appellant to Dr. Sturtz for an impartial medical examination and an opinion on her ability to work. Dr. Sturtz's well-rationalized January 2005 evaluation represents the weight of the medical evidence with respect to appellant's ability to work. He indicated that appellant could lift up to 25 pounds for up to six hours per day and could sit for six hours per day, walk for one hour and stand for one hour. Dr. Sturtz explained that these restrictions were supported by appellant's limited examination and diagnostic testing findings. These restrictions would not prevent appellant from performing the duties of the job she was offered in April 2007. Appellant's attorney argued that Dr. Sturtz's evaluation was too old, but there is no probative medical evidence of record showing that appellant's condition had changed such that she was totally disabled between April and June 2007 due to her March 7, 2001 employment injury.

Appellant submitted medical reports in which Dr. Lambert, an attending Board-certified occupational medicine physician, indicated that she could not drive except to commute to and from work. However, these reports are not supported by any objective findings or medical rationale. Dr. Lambert imposed no driving limitations in 2004. In 2007 she reiterated that appellant's medical condition and findings had not changed since September 2004. As noted, a conflict in medical opinion was based, in part, on Dr. Lambert's opinion in 2004 and resolved by

[4] 5 U.S.C. § 8123(a).

[5] *William C. Bush*, 40 ECAB 1064, 1975 (1989).

[6] *Jack R. Smith*, 41 ECAB 691, 701 (1990); *James P. Roberts*, 31 ECAB 1010, 1021 (1980).

the 2005 opinion of Dr. Sturtz. Under these circumstances, the Board does not find the opinion of the impartial specialist to be stale. After refusing to sign the job offer, appellant remained off work until June 2007 when she returned to work contending that she was forced to sign the new job offer.[7] There is no indication that the employing establishment withdrew limited-duty work or required appellant to work outside of her work limitations. For these reasons, appellant did not show that she sustained a recurrence of total disability between April and June 2007 due to her March 7, 2001 employment injury.

## ***CONCLUSION***

The Board finds that appellant did not meet her burden of proof to establish that she sustained a recurrence of total disability between April and June 2007 due to her March 7, 2001 employment injury.

## ***ORDER***

**IT IS HEREBY ORDERED THAT** the Office of Workers' Compensation Programs' August 18, 2008 decision is affirmed.

Issued: August 25, 2009
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
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[7] There are no medical reports subsequent to her return to work showing an objective worsening of her condition.