



## **FACTUAL HISTORY**

On May 22, 2003 appellant, then a 41-year-old mail carrier, filed an occupational disease claim for a left foot injury due to constant walking while carrying mail. The Office accepted her claim for bilateral plantar fibromatosis, bilateral hallux rigidus, a March 29, 2007 left foot cheilectomy and first metatarsal osteotomy with fixation and a July 19, 2007 right foot cheilectomy and first metatarsal osteotomy of the right foot with fixation. On February 4, 2008 appellant returned to work for one day and then stopped work for clarification of her work restrictions.<sup>1</sup> She returned to work on February 20, 2008 in a light-duty capacity with restrictions of no lifting or carrying more than 10 pounds, sitting limited to 7 hours, standing limited to 1 hour, but no more than 10 minutes at a time, only occasional bending and stooping and the use of a CAM walker (an orthopedic boot) on her left foot.

On April 4, 2008 the employing establishment advised appellant that she would be removed from her position effective May 9, 2008 for improper conduct and misrepresentation of her medical restrictions. A supervisor stated that on December 18, 2007 appellant received a letter instructing her to report for a predisciplinary interview. On December 20, 2007 appellant contacted Postmaster Steve Stapleton and told him that it was not legal for her to drive, that her feet were not healing properly and she did not want to return to work at the employing establishment because no one there liked her. On March 12, 2008 the supervisor interviewed appellant, who advised that she was never totally incapacitated. Following appellant's foot surgeries, she needed only crutches. She advised that her physician told her that it was not legal for her to drive with a CAM walker. Appellant wore the walker all day, except when sleeping. The supervisor stated that from November 6, 2007 to January 15, 2008 special agents from the employing establishment's Office of Inspector General (OIG) observed appellant driving, shopping, walking, raking leaves and attending to other personal tasks. He stated that investigative videotapes of appellant's activities demonstrated that she was capable of performing the sedentary job offered to her. On January 10, 2008 an OIG agent interviewed Dr. Gregory L. Barbour, appellant's attending podiatrist, about her work restrictions. Appellant informed Dr. Barbour that she was attempting to obtain a mounted route (a delivery route for which the letter carrier uses a vehicle as opposed to a foot delivery route) but the employing establishment could not accommodate her request. She never told Dr. Barbour that sedentary work was available within her restrictions. Dr. Barbour provided the OIG agent with a duty status report indicating that appellant could work with standing and walking limited to one hour a day and sitting for six hours a day. On February 4, 2008 the employing establishment offered a light-duty position within appellant's restrictions. Appellant refused to sign the job offer until she could discuss it with her assigned nurse. On February 19, 2008 she accepted the job offer under protest. The supervisor noted that on May 10, 2005 appellant had signed a statement acknowledging that she was responsible for notifying her treating physician when there was work available within her restrictions for her accepted foot conditions. He indicated that her failure to so advise her physician was an improper attempt to remain off work as long as possible. The supervisor stated that appellant had attempted to bypass her assigned supervisor

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<sup>1</sup> In a February 5, 2008 letter, the employing establishment stated that it made a valid light-duty job offer within appellant's work restrictions. Appellant refused the position because of personal problems with Craig Moore, a supervisor.

by contacting Jeffery Whitehair, a retired postmaster, to complete the employing establishment portion of her compensation claim forms.<sup>2</sup> He advised appellant that her actions violated employing establishment standards of conduct which required employees to be honest, reliable and trustworthy and of good character and reputation. The conduct standards required that, when off-duty, employees were prohibited from engaging in criminal, dishonest or other conduct prejudicial to the employing establishment. The supervisor advised that the severity of appellant's misconduct warranted removal from her position.

On May 21, 2008 appellant filed a claim for a recurrence of total disability beginning May 9, 2008. She alleged that the employing establishment improperly terminated her employment and falsely accused her of misrepresenting her medical restrictions. By decision dated June 20, 2008, the Office denied appellant's claim on the grounds that the evidence did not establish that she sustained a recurrence of total disability beginning May 9, 2008 causally related to her May 22, 2003 employment injury.<sup>3</sup>

### **LEGAL PRECEDENT**

When an employee, who is disabled from the job he or she held when injured on account of employment-related residuals, returns to a light-duty position or the medical evidence of record establishes that he or 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 he or she cannot perform such light duty. As part of this burden, the employee must show either 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.<sup>4</sup> To establish a change in the nature and extent of the injury-related condition, there must be probative medical evidence of record. The evidence must include a medical opinion, based on a complete and accurate factual and medical history, and supported by sound medical reasoning, that the disabling condition is causally related to employment factors.<sup>5</sup>

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<sup>2</sup> A February 25, 2008 OIG investigative memorandum shows that Mr. Whitehair advised an agent that he completed several compensation forms for appellant while he was retired from the employing establishment. He indicated that he did so to help appellant because she was a personal friend. Mr. Whitehair acknowledged that he wrote the name of Kenneth Strickland at the bottom of the forms, rather than his name, because Mr. Strickland was the correct contact person. He acknowledged that he was retired and no longer represented the employing establishment in any official capacity. Mr. Whitehair admitted that he contacted the employing establishment officials in order to obtain information regarding appellant's claim. He stated that he should not have gotten involved in appellant's compensation claim but he wanted to help his friend. Appellant acknowledged in an OIG interview that Mr. Whitehair completed compensation forms and submitted them for her. She admitted to signing the compensation documents with knowledge that Mr. Whitehair had not verified the accuracy of her representations regarding her compensation claim. A February 28, 2008 OIG final investigative report concluded that appellant engaged in a pattern of deceptive or contradictory behavior in order to extend her compensation benefits and/or manipulate her modified job offer.

<sup>3</sup> Subsequent to the June 20, 2008 Office decision, additional evidence was associated with the file. The Board's jurisdiction is limited to the evidence that was before the Office at the time it issued its final decision. *See* 20 C.F.R. § 501.2(c). The Board may not consider this evidence for the first time on appeal.

<sup>4</sup> *Albert C. Brown*, 52 ECAB 152, 154-55 (2000); *Terry R. Hedman*, 38 ECAB 222, 227 (1986);

<sup>5</sup> *Mary A. Ceglia*, 55 ECAB 626, 629 (2004); *Maurissa Mack*, 50 ECAB 498, 503 (1999).

## ANALYSIS

Appellant has the burden to provide medical evidence establishing that she was totally disabled beginning May 9, 2008 due to a worsening of her accepted bilateral foot conditions or a change in her job duties such that she was unable to perform her light-duty work.

The record establishes that the employing establishment terminated appellant from her position effective May 9, 2008 for improper conduct and misrepresentation of her medical restrictions. The termination of appellant's employment is supported by documentation which includes an OIG investigative report and admissions by her and Mr. Whitehair regarding the completion of forms related to her compensation claim.

The Board finds that appellant failed to establish that she was totally disabled beginning May 9, 2008 due to a change in the nature and extent of her employment-related foot conditions or a change in the nature and extent of her light-duty job requirements.

Title 20 C.F.R. § 10.5(x) provides:

*“Recurrence of disability means an inability to work after an employee has returned to work, caused by a spontaneous change in a medical condition which had resulted from a previous injury or illness without an intervening injury or new exposure to the work environment that caused the illness. This term also means an inability to work that takes place when a light-duty assignment made specifically to accommodate an employee's physical limitations due to his or her work-related injury or illness is withdrawn (except when such withdrawal occurs for reasons of misconduct, nonperformance of job duties or a reduction-in-force), or when the physical requirements of such an assignment are altered so that they exceed his or her established physical limitations.”*

As noted, Office regulations provide that the withdrawal of a light-duty position by the employing establishment for reasons of misconduct by the employee does not constitute a recurrence of total disability. Based on the evidence of record, the Office properly denied her claim for a recurrence of total disability as appellant was terminated from employment due to misconduct.

## CONCLUSION

The Board finds that appellant failed to establish that she sustained a recurrence of total disability beginning May 9, 2008 causally related to her May 22, 2003 employment-related bilateral foot conditions.

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated June 20, 2008 is affirmed.

Issued: July 23, 2009  
Washington, DC

David S. Gerson, Judge  
Employees' Compensation Appeals Board

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

James A. Haynes, Alternate Judge  
Employees' Compensation Appeals Board