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

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| **F.M., Appellant** | ) | |
| **and** | ) | **Docket No. 09-591** |
| | ) | **Issued: November 18, 2009** |
| **U.S. POSTAL SERVICE, POST OFFICE, Des Moines, IA, Employer** | ) | |

*Appearances:*
*Appellant, pro se*
*Office of Solicitor,* for the Director

*Case Submitted on the Record*

## DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
COLLEEN DUFFY KIKO, Judge

### ***JURISDICTION***

On December 31, 2008 appellant filed a timely appeal from the Office of Workers' Compensation Programs' September 24, 2008 merit decision concerning the termination of his compensation. 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 is entitled to wage-loss compensation after August 5, 2006 due to residuals of his October 17, 1998 employment injury.

### ***FACTUAL HISTORY***

The Office accepted that on October 17, 1998 appellant, then a 44-year-old sack sort operator sustained a right groin strain and herniated disc at L4-5 while pushing and sorting mail

sacks.[1] On February 9, 1999 he underwent lumbar laminectomy surgery at L4-5, which was authorized by the Office. Appellant returned to modified-duty work for six hours per day at the employing establishment and the Office began paying him compensation for two hours per day.

Since late 1999, appellant received treatment from Dr. Kenneth L. Pollack, an attending Board-certified orthopedic surgeon, who continued him on his modified-duty work. In late 2004, surveillance video from July 6, September 8 and November 3, 2004 was added to the record. The videos showed appellant engaging in activities away from work such as lifting and carrying furniture, boxes and other items. In a February 24, 2005 letter, Dr. Pollack indicated that he had watched the videos and felt that appellant engaged in appropriate activities.

In periodic reports dated through late 2005, Dr. Pollack diagnosed post lumbar laminectomy syndrome and often noted that appellant's condition had not changed dramatically from visit to visit. He generally recommended that appellant could work six hours per day but could not lift more than 20 pounds, push or pull more than 25 pounds or engage in activities such as twisting, kneeling and reaching for more than one hour per day.

On February 27, 2006 appellant saw Dr. Keith W. Riggins, a Board-certified orthopedic surgeon, for a second opinion examination. Dr. Riggins detailed appellant's factual and medical history, including an extensive discussion of his prior medical history. He reported range of motion findings and indicated that appellant was able to toe rise with some difficulty bilaterally. Attempts to test reflex function at the Achilles level produced pain due to local tenderness.[2] Muscle strength in the lower extremities was Grade 5 without apparent atrophy. Straight leg raising caused low back pain bilaterally which was relieved by knee flexion and no sciatic pain was produced. Dr. Riggins diagnosed status post lumbar surgery and bilateral Achilles tendinitis with possible impending disruption. He completed a work restrictions form, which indicated that appellant could work five hours per day and that he was able to lift, push or pull up to 60 pounds for five hours per day. Appellant could not twist, bend, squat, twist, stoop, kneel or climb.

The Office determined that there was a conflict in the medical evidence between Dr. Pollack and Dr. Riggins regarding appellant's ability to work and referred the case to Dr. Peter Wirtz, a Board-certified orthopedic surgeon, for impartial evaluation. In a May 1, 2006 report, Dr. Wirtz provided a discussion of appellant's factual and medical history. He noted that on examination appellant exhibited 45 degrees of forward flexion of his back and 20 degrees of lateral flexion. Palpation of appellant's surgical scar revealed sensitivity without muscle spasm. There was sensitivity and swelling one inch from the calcaneus of both Achilles tendons and decreased feeling over the right thigh midline to the fifth toe. Sitting straight leg raising was to 90 degrees and quadriceps strength was 5/5. Dr. Wirtz stated that April 25, 2001 magnetic resonance imaging (MRI) scan testing showed loss of disc fluid at L2-3 and L3-4 and no posterior bulging at the L2-3, L3-4 and L4-5 disc spaces. Surveillance video from July 6,

[1] Appellant's job required lifting and carrying up to 70 pounds; intermittent sitting, walking, climbing, bending, stooping and reaching above the shoulder up to eight hours per day; and continuous standing, twisting, pulling, pushing, simple grasping and fine manipulation up to eight hours per day.

[2] Examination of appellant's Achilles tendons bilaterally demonstrated palpable nodular swellings in both tendons about one inch from the calcaneus which were tender and painful on toe rise.

September 8 and November 3, 2004 revealed functional capabilities without restriction as to lifting, carrying objects and walking with weights. The videos also showed that appellant had back flexion to 90 degrees and the ability to jump out of a tailgate landing on his feet, load a pick-up truck, sweep with a broom, carry a ladder and mow a lawn. Dr. Wirtz diagnosed status post lumbar laminectomy surgery and bilateral Achilles tendinitis. He indicated that appellant's current treatment of analgesics was not consistent with the physical examination findings, diagnostic testing findings and surveillance videos and noted that based on the lack of objective findings for his subjective back and leg symptoms no further specific treatment was recommended. Dr. Wirtz indicated that the surveillance video demonstrated the physical abilities of appellant's back without restrictions in motion and strength function and asserted that these findings were in conflict with the subjective activity limitations by history. He completed a work restrictions form indicating that appellant could perform his regular work for eight hours per day with only a restriction from lifting more than 70 pounds.

In a June 21, 2006 letter, the Office advised appellant of its proposed termination of his entitlement to wage-loss compensation benefits because he was no longer disabled from this date-of-injury job.[3] It indicated that the weight of the medical evidence regarding appellant's disability rested with the opinion of Dr. Wirtz.

Appellant submitted a June 28, 2006 report in which Dr. Pollack stated that he disagreed with Dr. Wirtz's May 1, 2006 report and noted that he was physically limited by his low back and lower extremity pain and was working under appropriate restrictions.

In a July 17, 2006 letter, appellant argued that Dr. Wirtz's opinion was biased because he was a contract physician for the employing establishment. He also asserted that it was unclear what evidence Dr. Wirtz considered in reaching his opinion. Appellant felt that Dr. Wirtz misinterpreted and overemphasized the surveillance video and posited that Dr. Pollack's February 24, 2005 letter showed that the video did not contradict his need for work restrictions.

In a July 25, 2006 decision, the Office terminated appellant's wage-loss compensation effective August 5, 2006 on the grounds that he no longer had disability due to his October 17, 1998 employment injury after that date. It found that the opinion of the impartial medical specialist, Dr. Wirtz, justified the termination.

Appellant requested a hearing before an Office hearing representative. At the hearing held on April 17, 2007, appellant's attorney at the time argued that Dr. Wirtz's one-time evaluation should not outweigh the many years of Dr. Pollack's opinions. He argued that Dr. Wirtz was biased against appellant because he was a contract physician for the employing establishment; that Dr. Wirtz's report was stale because it was more than one year old; and that the surveillance video was too old to be relevant to his condition at the time of termination. Appellant testified that he currently was working in a modified-duty job rewrapping damaged packages and parcels and that he felt that he could not return to the twisting, turning and bending that was required by his regular-duty job.

[3] The Office indicated that it was not terminating appellant's entitlement to medical benefits related to his work injury.

Appellant submitted an August 10, 2006 report in which Dr. Pollack diagnosed postlaminectomy syndrome with severe persistent low back and right radicular pain, exacerbated by repetitive bending and twisting and repetitive heavy lifting. He recommended work restrictions based largely upon a combination of functional capacity evaluation findings, underlying structural changes following back surgery and observed lumbar spine and lower extremity mechanics. Dr. Pollack stated that appellant could work eight hours per day and lift up to 50 pounds on an occasional basis, but could not engage in repetitive bending or twisting. In several reports dated between late 2006 and early 2007, he indicated that appellant had postlaminectomy syndrome and required work restrictions.

In an undated report received by the Office on May 29, 2007, Dr. Pollack stated that appellant had shown some overall improvement in his pain levels and functional level but had increased symptoms if he engaged in lifting, bending or twisting on a repetitive basis. He indicated that modified-duty work was more appropriate for appellant than his regular job. Dr. Pollack stated that appellant had not developed any new neurologic symptoms and the "structural condition of his back has not worsened" and therefore he did not need any new MRI scan studies.

In an August 20, 2007 decision, the Office hearing representative affirmed the Office's July 25, 2006 decision. She found that the opinion of Dr. Wirtz justified the termination of wage-loss compensation and indicated that the reports of Dr. Pollack did not show work-related disability after August 5, 2006.

Appellant submitted reports of Dr. Pollack dated September 4 and November 29, 2007 and March 27, 2008. In these reports, Dr. Pollack diagnosed postlaminectomy syndrome and reported appellant's back and leg symptoms, including stiffness of movement in the low back, inability to stand fully erect and a shuffling gait but no obvious limp.

In a September 24, 2008 decision, the Office affirmed its August 20, 2007 decision noting that the reports of Dr. Pollack did not show work-related disability after August 5, 2006.

## ***LEGAL PRECEDENT***

Under the Federal Employees' Compensation Act,[4] once the Office has accepted a claim it has the burden of justifying termination or modification of compensation benefits.[5] The Office may not terminate compensation without establishing that the disability ceased or that it was no longer related to the employment.[6] Its burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.[7] After termination or modification of compensation benefits, clearly warranted on the basis of the evidence, the burden for reinstating compensation benefits shifts to appellant. In order to

[4] 5 U.S.C. §§ 8101-8193.

[5] *Charles E. Minniss,* 40 ECAB 708, 716 (1989); *Vivien L. Minor,* 37 ECAB 541, 546 (1986).

[6] *Id.*

[7] *See Del K. Rykert,* 40 ECAB 284, 295-96 (1988).

prevail, appellant must establish by the weight of the reliable, probative and substantial evidence that he or she had an employment-related disability which continued after termination of compensation benefits.[8]

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."[9] 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.[10] The Board has found that a medical opinion not fortified by medical rationale is of little probative value.[11]

## ***ANALYSIS***

The Office accepted on October 17, 1998 appellant sustained a right groin strain and herniated disc at L4-5 while pushing and sorting mail sacks.[12] On February 9, 1999 appellant underwent lumbar laminectomy surgery at L4-5, which was authorized by the Office. He returned to modified-duty work for six hours per day at the employing establishment. The Office terminated appellant's wage-loss compensation effective August 5, 2006 based on the opinion of Dr. Wirtz.

The Board noted that the Office properly determined that there was a conflict in the medical opinion between Dr. Pollack, an attending Board-certified orthopedic surgeon, and Dr. Riggins, a Board-certified orthopedic surgeon acting as an Office referral physician, regarding appellant's ability to work.[13] In order to resolve the conflict, the Office properly referred appellant, pursuant to section 8123(a) of the Act, to Dr. Wirtz for an impartial medical examination and an opinion on the matter.[14]

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[8] *Wentworth M. Murray*, 7 ECAB 570, 572 (1955).

[9] 5 U.S.C. § 8123(a).

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

[11] *See George Randolph Taylor*, 6 ECAB 986, 988 (1954).

[12] At the time, appellant was working as a sack sort operator. The job required lifting and carrying up to 70 pounds; intermittent sitting, walking, climbing, bending, stooping and reaching above the shoulder up to eight hours per day; and continuous standing, twisting, pulling, pushing, simple grasping and fine manipulation up to eight hours per day.

[13] In periodic reports dated through late 2005, Dr. Pollack recommended that appellant could work six hours per day but could not lift more than 20 pounds, push or pull more than 25 pounds or engage in activities such as twisting, kneeling and reaching for more than one hour per day. In contrast Dr. Riggins indicated on February 27, 2006 that appellant could lift, push or pull up to 60 pounds. His opinion also differed in that he indicated that appellant could only work for five hours per day. Dr. Riggins recommended that appellant not twist or kneel but placed no restrictions on reaching.

[14] *See supra* note 9 and accompanying text.

The Board finds that the weight of the medical evidence is represented by the thorough, well-rationalized opinion of Dr. Wirtz, the impartial medical specialist selected to resolve the conflict in the medical opinion.[15] The May 1, 2006 report of Dr. Wirtz establishes that appellant had no disability due to his October 17, 1998 employment injury after August 5, 2006.

In his report, Dr. Wirtz noted that on examination appellant exhibited straight leg raising of 90 degrees, quadriceps strength of 5/5, forward back flexion of 45 degrees and lateral back flexion of 20 degrees. Palpation of his surgical scar at L4-5 revealed sensitivity without muscle spasm. There was sensitivity and swelling one inch from the calcaneus of both Achilles tendons and decreased feeling over the right thigh midline to the fifth toe.[16] Dr. Wirtz stated that April 25, 2001 MRI scan testing showed loss of disc fluid at L2-3 and L3-4 and no posterior bulging at the L2-3, L3-4 and L4-5 disc spaces. He noted that surveillance video from July 6, September 8 and November 3, 2004 revealed functional capabilities without restriction as to lifting, carrying objects and walking with weights. The videos also showed that appellant had back flexion to 90 degrees and the ability to jump out of a tailgate landing on his feet, load a pick-up truck, sweep with a broom, carry a ladder and mow a lawn. Dr. Wirtz diagnosed status post lumbar laminectomy surgery and bilateral Achilles tendinitis and indicated that appellant could perform his regular work for eight hours per day with only a restriction from lifting more than 70 pounds.

The Board has carefully reviewed the opinion of Dr. Wirtz and notes that it has reliability, probative value and convincing quality with respect to its conclusions regarding the relevant issue of the present case. Dr. Wirtz only provided a work restriction of no lifting more than 70 pounds and therefore his report shows that appellant could perform his date-of-injury job, sack sort operator. His opinion is based on a proper factual and medical history in that he had the benefit of an accurate and up-to-date statement of accepted facts, provided a thorough factual and medical history and accurately summarized the relevant medical evidence.[17] Dr. Wirtz provided medical rationale for his opinion by explaining that appellant's medical treatment and work restrictions were not consistent with the physical examination findings, diagnostic testing findings and surveillance videos and noted that based on the lack of objective findings for his subjective back and leg symptoms no further specific treatment was recommended. He indicated that the limited findings on examination did not support appellant's subjective activity limitations.[18]

[15] *See supra* note 10 and accompanying text.

[16] The Board notes that the Office has not accepted that appellant sustained Achilles tendon problems on October 17, 1998.

[17] *See Melvina Jackson*, 38 ECAB 443, 449-50 (1987); *Naomi Lilly*, 10 ECAB 560, 573 (1957).

[18] Appellant submitted a June 28, 2006 report in which Dr. Pollack stated that he disagreed with Dr. Wirtz's May 1, 2006 report and noted that he was physically limited by his low back and lower extremity pain and was working under appropriate restrictions. However, as Dr. Pollack was on one side of the conflict, his additional report is essentially duplicative of his stated opinion and is insufficient to give rise to a new conflict. *See Richard O'Brien*, 53 ECAB 234 (2001).

Appellant and his attorney at the time of termination argued that Dr. Wirtz's opinion was biased because he was a contract physician for the employing establishment. However, he did not submit sufficient evidence to support this assertion. They also asserted that it was unclear what evidence Dr. Wirtz considered in reaching his opinion, but he had the entire case record available for his review prior to rendering his opinion. It was also argued that Dr. Wirtz's report was stale because it was more than one year old and that the surveillance video was too old to be relevant to appellant's condition at the time of termination. Dr. Wirtz's report was only three months old at the time of the July 25, 2006 termination decision and he considered appellant's findings on examination and diagnostic testing in addition to the surveillance videos in reaching his determination.

After the Office's July 25, 2006 decision terminating appellant's compensation effective August 5, 2006, appellant submitted additional medical evidence, which he felt showed that he was entitled to wage-loss compensation after August 5, 2006 due to his work-related condition. Given that the Board has found that the Office properly relied on the opinion of the impartial medical examiner, Dr. Wirtz, in terminating appellant's compensation effective August 5, 2006, the burden shifts to appellant to establish that he is entitled to compensation after that date. The Board has reviewed the additional evidence submitted by appellant and notes that it is not of sufficient probative value to establish that he had residuals of his October 17, 1998 employment injury after August 5, 2006.

Appellant submitted several reports of Dr. Pollack, dated between late 2006 and early 2008, in support of his claim of continuing work-related disability after August 5, 2006. For example, in an August 10, 2006 report, Dr. Pollack diagnosed postlaminectomy syndrome with severe persistent low back and right radicular pain, exacerbated by repetitive bending and twisting and repetitive heavy lifting. He recommended work restrictions based largely upon a combination of functional capacity evaluation findings, underlying structural changes following back surgery and observed lumbar spine and lower extremity mechanics. In an undated report received by the Office on May 29, 2007, Dr. Pollack stated that appellant had shown some overall improvement in his pain levels and functional level but had increased symptoms if he engaged in lifting, bending or twisting on a repetitive basis. He indicated that modified-duty work was more appropriate for appellant than his regular job.

Although Dr. Pollack indicated in these and other reports that appellant continued to be unable to perform his date-of-injury job, he did not provide a rationalized medical opinion explaining how this degree of disability was related to the October 17, 1998 work injury. He did not explain how the October 17, 1998 injury could have been responsible for disability so many years after the injury. Dr. Pollack suggested that appellant sustained a work-related condition called postlaminectomy syndrome, but the Office has not accepted such a condition and he has not explained how it could have occurred and caused continuing disability. Therefore, appellant has not shown that he had work-related disability after August 5, 2006.

## ***CONCLUSION***

The Board finds that appellant is not entitled to wage-loss compensation after August 5, 2006 due to residuals of his October 17, 1998 employment injury.

## ***ORDER***

**IT IS HEREBY ORDERED THAT** the Office of Workers' Compensation Programs' September 24, 2008 decision is affirmed.

Issued: November 18, 2009
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board