

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of CARLOS M. DEL VALLE and U.S. POSTAL SERVICE,
POST OFFICE, Bridgeport, Conn.

*Docket No. 97-1811; Submitted on the Record;
Issued April 14, 1999*

DECISION and ORDER

Before MICHAEL J. WALSH, GEORGE E. RIVERS,
WILLIE T.C. THOMAS:

The issue is whether appellant has met his burden of proof in establishing that he sustained an injury in the performance of duty.

On June 6, 1994 appellant, then a 48-year-old letter carrier, filed a notice of traumatic injury and claim for compensation, Form CA-1, alleging that on June 4, 1994 he sustained an injury to his lower back. Appellant provided the following description of his injury: "Bending putting trays in the truck May 30 [, 1994]then it started hurting little till [sic] June 4, 1994 I complained." Shortly after reporting to work on the morning of June 4 [, 1994], appellant received authorization from the employing establishment to return home because of his back condition. On June 6, 1994 the employing establishment instructed appellant to report to work so that he could be examined by a physician of their choice.¹ Dr. Jane G. Marshall, a Board-certified internist, examined appellant that same day, and diagnosed lumbosacral strain and spasm. She indicated that appellant felt pain while lifting trays. Dr. Marshall further indicated her belief that the condition was employment related, and advised appellant not to return to work for at least four days. On June 9, 1994 the employing establishment controverted appellant's claim on the basis that appellant had provided inconsistent information concerning the date of his alleged injury. Specifically, the employing establishment noted that at one point on appellant's Form CA-1 he identified June 4, 1994 as the date of injury while at another point he described a May 30, 1994 incident as the cause of his injury. The employing establishment further noted that May 30, 1994 was a holiday, and appellant had not worked that day.

¹ On June 6, 1996 the employing establishment completed a Form CA-16, Authorization for Examination and/or Treatment, which lists the date of injury as May 30, 1994. The employing establishment also placed a check mark in the box at item 6, B-2, indicating that there was doubt whether appellant's condition was caused by an injury sustained in the performance of duty. The issuance of a properly executed Office Form CA-16 creates a contractual obligation, which does not involve the employee directly, to pay the cost for the authorized medical examination regardless of the action taken on the claim. *Danita E. Lindsey*, 40 ECAB 1038 (1989).

By letter dated June 27, 1994, the Office of Workers' Compensation Programs advised appellant of the need for additional information in order to make a determination regarding his alleged injury of June 4, 1994. The Office specifically requested, *inter alia*, a detailed description of how the injury occurred, the names of any witnesses to the injury, the immediate effects of the injury, and whether appellant had any symptoms or a similar disability prior to the alleged injury. The Office further noted that "According to the documents received, there is a discrepancy as to the date," however, the Office did not clearly identify the "date" in dispute. In his July 5, 1994 response, appellant explained that he injured himself while placing a 15-pound tray of mail in his truck, and as a result he experienced a small pain in his back, but kept on working for at least a week. With respect to the Office's awkwardly phrased statement regarding "a discrepancy as to the date," appellant simply responded "yes."

By decision dated July 29, 1994, the Office denied appellant's claim on the basis that the evidence of record failed to establish that an injury was sustained as alleged. In an accompanying memorandum, the Office explained that there was insufficient or conflicting evidence in the file regarding whether or not the claimed event, incident or exposure occurred at the time, place and in the manner alleged. The Office specifically noted that appellant identified both May 30 and June 4, 1994 as the date of injury on his Form CA-1. Additionally, the Office noted that the employing establishment indicated that appellant had not worked on May 30, 1994, as that day was a holiday. Finally, the Office stated that while the record included a July 14, 1994 medical report noting a history of a May 31, 1994 employment-related injury,² appellant had not otherwise alleged that an injury occurred at work on that date. The Office, therefore, concluded that the conflicting evidence of record failed to support that an injury occurred as alleged.

On August 17, 1994 appellant filed a request for reconsideration, arguing that the correct date of his injury was May 31, 1994. Appellant also submitted several additional items of medical evidence that were not previously considered by the Office. In a November 18, 1994 merit decision, the Office concluded that the evidence submitted in support of reconsideration was insufficient to warrant modification of its prior decision. In an accompanying memorandum, the Office explained that while appellant stated that the correct date of injury was May 31, 1994, the newly submitted evidence identified the date of injury as June 4, 1994. Additionally, the Office stated that Dr. Axline's treatment notes "[gave] no date of injury." The Office, therefore, concluded that the newly submitted evidence did little to clarify the issue of the date of injury.

² Dr. J. Warren Axline, a Board-certified orthopedic surgeon, examined appellant on July 14, 1994 and reported the following history:

"He was bending over, lifting a 20-pound tray of mail in an awkward position on May 31, 1994 when he developed low back discomfort, stiffness. He continued to work, but by June 4, 1994, he had increased pain and reported to a supervisor and was released from work early that day. Two days later, he was sent to the IMCC as an on-the-job injury and evaluated by Dr. Marshall."

In an undated letter received by the Office on December 15, 1994, appellant submitted a statement in support of his claim which identified May 31, 1994 as the date of his injury.³ Appellant also provided a copy of a June 4, 1994 leave request, indicating that he received approval for five hours of sick leave because his “back hurt.” By letter dated April 5, 1995, the Office advised appellant that the information he submitted was insufficient to reverse its prior decision, and that if he wished to pursue the claim further he should refer to the notice of appeal rights included with the Office’s November 18, 1994 decision. On April 19, 1995 appellant responded to the Office’s letter, noting that contrary to the statement in the Office’s November 18, 1994 decision, Dr. Axline did in fact note a date of injury. In support of his assertion, appellant attached a highlighted copy of Dr. Axline’s July 14, 1994 treatment notes. Approximately six months later, the Office responded by letter dated October 13, 1995. The Office briefly outlined certain inconsistencies in the record and again referred appellant to his appeal rights included in the November 18, 1994 decision.

On November 7, 1995 appellant wrote another letter to the Office and resubmitted the evidence that was previously received by the Office on December 15, 1994. In his letter, appellant reiterated that his injury occurred on May 31, 1994. Appellant also described a June 6, 1994 meeting wherein an employing establishment supervisor acknowledged his awareness that appellant had inadvertently noted May 30, 1994 as the date of injury on his Form CA-1. The supervisor allegedly stated “I knew [appellant] put the wrong date and that is his problem.” At the conclusion of his letter, appellant explained that if the matter was not cleared up, he would apply for an oral hearing.

In a letter dated October 6, 1996, appellant requested reconsideration of his claim.⁴ Furthermore, appellant noted that he had not received a response to his previous inquiry dated November 7, 1995, a copy of which was enclosed, including the previously submitted evidence.

By decision dated December 13, 1996, the Office explained that a merit review of the claim was conducted pursuant to 5 U.S.C. § 8128, but that the evidence submitted in support of reconsideration was insufficient to warrant modification of its November 18, 1994 decision. In an accompanying memorandum, the Office explained that while appellant’s October 6, 1996 request for reconsideration was untimely, reopening of the claim was nonetheless warranted in view of the Office’s failure to respond to appellant’s November 7, 1995 letter, which was filed within a year of the Office’s prior decision. Regarding the merits of the claim, the Office explained that the statement submitted with appellant’s request for reconsideration lacked credibility because it was both unsigned and undated.⁵ The Office further explained that the

³ The statement indicates that appellant’s injury occurred on May 31, 1994, and that the May 30, 1994 date appearing on his Form CA-1 was a mistake due to the confusion over the Memorial Day holiday. Additionally, the statement alleges that the employing establishment was aware of the mistake prior to submitting the claim, but failed to bring it to appellant’s attention. The statement also attempts to clarify the incorrect reporting of June 4, 1994 as the date of injury. In brief, the statement explains that appellant left work on June 4, 1994 due to his incapacity, and not because he sustained an injury that day.

⁴ Although this letter is dated October 6, 1996, it was received by the Office on September 16, 1996.

⁵ As previously noted, appellant’s statement was initially received by the Office on December 15, 1994.

credibility of the evidence was also compromised by the fact that appellant's request for reconsideration, although dated October 6, 1996, was received in the Office on September 16, 1996.

By letter dated January 3, 1997, appellant again requested reconsideration of his claim. In support of his request, appellant submitted a copy of the Office's December 13, 1996 memorandum and he also resubmitted copies of correspondence dated November 7, 1995 and October 6, 1996. Additionally, appellant provided a copy of a receipt for certified mail, noting that an article addressed to the Office was delivered on September 16, 1996. On April 11, 1997 the Office denied appellant's request for merit review on the basis that the evidence submitted was repetitious and irrelevant in nature. In an accompanying memorandum, the Office noted that with the exception of the certified mail receipt, all of the evidence submitted on reconsideration was previously of record and thus, held no new evidentiary value. With respect to the certified mail receipt, the Office explained that this evidence was irrelevant inasmuch as the issue was not whether appellant's October 6, 1996 request for reconsideration was incorrectly dated, but whether an injury occurred as alleged. Consequently, the Office concluded that appellant failed to satisfy any of the requirements for merit review under 20 C.F.R. § 10.138(b)(1).

The Board finds that appellant has established that he sustained an injury on May 31, 1994.

An employee seeking benefits under the Federal Employees' Compensation Act⁶ has the burden of establishing the essential elements of his or her claim, including the fact that the individual is an "employee of the United States" within the meaning of the Act, that the claim was timely filed under the Act, that an injury was sustained in the performance of duty, and that any disability or specific condition for which compensation is being claimed is causally related to the employment injury.⁷ These are the essential elements of each and every compensation claim regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.⁸

In order to determine whether an employee actually sustained an injury in the performance of duty, the Office begins with an analysis of whether fact of injury has been established. Generally, fact of injury consists of two components which must be considered in conjunction with one another. The first component to be established is that the employee actually experienced the employment incident which is alleged to have occurred.⁹ The second component is whether the employment incident caused a personal injury. This latter component generally can be established only by medical evidence.¹⁰

⁶ 5 U.S.C. §§ 8101-8193.

⁷ *Joe Cameron*, 42 ECAB 153 (1989); *Elaine Pendleton*, 40 ECAB 1143 (1989).

⁸ *Victor J. Woodhams*, 41 ECAB 345 (1989).

⁹ *Elaine Pendleton*, *supra* note 7.

¹⁰ *See* 20 C.F.R. § 10.110(a); *John M. Tornello*, 35 ECAB 234 (1983).

In the instant case, appellant's claim was denied because he failed to establish that he actually experienced the employment incident which is alleged to have occurred. As previously noted, appellant's Form CA-1 identifies the date of injury as June 4, 1994, but describes the cause of injury as a "May 30 [, 1994]" incident when he was "Bending putting trays in the truck." The record indicates that although appellant reported to work on June 4, 1994, he did not work on May 30, 1994; the Memorial Day holiday. Appellant subsequently asserted that the employment-related incident he described on his Form CA-1 occurred on May 31, 1994. While the record certainly includes conflicting evidence regarding the date of injury, the Office, other than noting this discrepancy, appears to have done very little to resolve the conflicting evidence. From the outset of the adjudication process, it was apparent from the record that there was a controversy regarding appellant's date of injury. In fact, the Office may have inadvertently contributed to the ongoing controversy by failing to properly advise appellant of the specific discrepancy.

The question remains as to whether appellant was injured on May 30, May 31 or June 4, 1994. The record indicates that the employing establishment was aware of the discrepancy as early as June 6, 1994 and promptly advised the Office of its concerns when it controverted the claim on June 9, 1994. However, there is no indication from the record that the employing establishment advised appellant of its concerns at that time. Furthermore, the Office neglected to advise appellant of the specific discrepancy regarding the date of injury when it requested additional information on June 27, 1994.¹¹ Thus, there is no indication that appellant was aware of the specific discrepancy regarding the date of injury prior to the Office's initial denial of the claim on July 29, 1994.

Shortly after his claim was denied, appellant advised the Office that the correct date of his injury was May 31, 1994.¹² Appellant later explained that the May 30, 1994 date appearing on the Form CA-1 was due to confusion caused by the Memorial Day holiday. Appellant has provided a plausible explanation for incorrectly noting May 30, 1994 as the date of injury. Moreover, appellant's assertion that his injury occurred on May 31, 1994 is corroborated in the record by Dr. Axline's July 14, 1994 treatment notes in which he indicates a history of appellant "lifting a 20 lb. tray of mail in an awkward position on [May 31, 1994] when he developed low back discomfort, stiffness." His notes further indicate that appellant "continued to work, but by [June 4, 1994], he had increased pain and reported to a supervisor and was released from work early that day." Appellant reported a similar history to Dr. Marshall. His June 6, 1994 report includes the following notations: "[Patient] states while lifting full trays -- felt pain in lower back -- getting progressively worse." Dr. Marshall also noted: "Had pain in back last week. Much worse [June 4, 1994]." Notwithstanding these notations, his report inexplicably lists the date of injury as June 4, 1994.

¹¹ As previously noted, item number 7 in the Office's June 27, 1994 request for additional information reads as follows: "According to documents received, there is a discrepancy as to the date."

¹² The record does not contain any evidence refuting appellant's claim that he was on duty status on May 31, 1994.

Appellant has consistently described an incident involving the lifting and placement of a mail tray in his truck as the cause of his injury. Having ruled out May 30, 1994 as the date of injury, the question remains as to whether this incident occurred on May 31, 1994, as alleged by appellant, or on June 4, 1994, as noted elsewhere in the record. Dr. Marshall's reference to June 4, 1994 as the date of injury is contradicted by the initial history she obtained from appellant. Furthermore, a June 6, 1994 statement from appellant's supervisor indicates that he left work on June 4, 1994 at 10:30 a.m. after casing his mail. There is no evidence of record indicating that appellant either attempted to or actually loaded any mail on his truck during the morning of June 4, 1994. The record also includes a June 6, 1994 statement from J. Rooney in which he recounts a conversation he had with appellant earlier that day wherein appellant allegedly stated that he hurt his back on Saturday (June 4, 1994) at work. Assuming *arguendo* that Mr. Rooney accurately reported the substance of his conversation with appellant, this evidence is nonetheless outweighed by the history appellant provided in seeking medical attention later that day with Dr. Marshall and subsequently with Dr. Axline on July 14, 1994. Furthermore, if appellant injured his back at work on June 4, 1994, it is more likely that he would have reported the incident to his supervisor when he approached her, in the presence of a union steward, and requested leave to go home because of his back pain.

The totality of the evidence supports that on May 31, 1994, appellant felt pain in his back while placing a mail tray in his truck and that this pain progressed to a point that on June 4, 1994 appellant could no longer continue to work. Thus, the Board finds that the incident alleged to have initially caused appellant's back pain occurred on May 31, 1994. While the Board finds that the credible evidence of record establishes that appellant experienced an employment-related incident on May 31, 1994, the question remains as to whether this incident caused a personal injury. The Board finds that the medical report of Dr. Axline dated July 14, 1994 and Dr. Marshall who diagnosed lumbosacral strain and spasm are sufficiently probative to find appellant sustained an injury on May 31, 1994. However, it is necessary to remand the case for a finding on the period or periods of disability causally related to the lumbosacral strain and for payment of appropriate medical benefits.

The decisions of the Office of Workers' Compensation Programs dated April 11, 1997 and December 13, 1996 are, hereby, reversed, and the case is remanded for further appropriate action consistent with this decision of the Board.

Dated, Washington, D.C.
April 14, 1999

Michael J. Walsh
Chairman

George E. Rivers
Member

Willie T.C. Thomas
Alternate Member