

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of WILLIAM SWARTZ and U.S. POSTAL SERVICE,
POST OFFICE, Baltimore, MD

*Docket No. 99-1309; Submitted on the Record;
Issued August 4, 2000*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issue is whether appellant has established that he sustained an injury while in the performance of duty as alleged on March 28, 1995.

The record reveals an undated claim for a traumatic injury alleged to have occurred on March 28, 1995 when appellant injured his back while moving mail. He stopped work on June 9, 1995. The Office of Workers' Compensation Programs assigned claim number A25-0485563 to appellant's claim.

In a medical report dated May 31, 1995, a doctor noted that appellant had been treated that day for a back reinjury and that appellant was unable to work from June 6 to 24, 1995. A magnetic resonance imaging (MRI) scan was scheduled.¹

Appellant also filed a claim for recurrence of disability on June 16, 1995 alleging that his recurrence occurred on or about March or April 1995 and was based on an initial injury of November 1971.² The Office issued claim number A25-10541.

In a medical report dated June 23, 1995, Dr. Ronald P. Byank, Board-certified in orthopedic surgery, examined appellant in a follow-up evaluation and ruled out herniated nucleus pulposus. He noted that appellant had been out of work due to his inability to drive and his back injury.

¹ The doctor's name was illegible.

² Mr. Carlos Castillo, a coworker, stated that appellant injured himself on March 28, 1995 and that "We filled out a [w]orkers' [c]ompensation Form CA-1 that day." Mr. Castillo and appellant filed a second claim form "about two months later after learning that the original was lost in the interoffice mail." Mr. Castillo's statement was submitted in support of a subsequent request for reconsideration.

In a medical report dated July 25, 1995, Dr. Prakash Sampath, a neurosurgeon and a colleague of Dr. Alessandro Olivi, appellant's treating physician, Board-certified in neurological surgery, noted that appellant related a work-related injury in May 1995 while pulling a heavy trolley. He noted an essentially normal examination except for pain and mild stenosis at L3-4 and L5-S1 levels but no evidence of marked disc herniation or protusion. Dr. Sampath recommended a computerized tomography (CT) scan myelogram "to have a better assessment of his bony anomaly as well as to further evaluate the scar tissue surrounding his previous laminectomy and fusion site."

In a medical report dated August 23, 1995, Dr. Olivi read the recent CT scan as revealing moderate L3-4 stenosis but no significant stenosis at L4-5 or L5-S1. He recommended decompression at L3-4.

In a medical report dated September 27, 1995, Dr. Kahlia Anderson, a colleague of Dr. Olivi's, noted that appellant was status post lumbar laminectomy performed on August 25, 1995. He related appellant's subjective complaints of low back pain, pain radiating to his right leg, bilateral knee numbness, a foot tic, right-sided weakness and scar swelling. Upon examination, Dr. Anderson noted 4 by 5 strength on the right generally and 5 by 5 strength on the left. He added that the examination was limited by appellant's effort and pain.

In a medical report dated October 17, 1995, Dr. Sampath noted upon examination that appellant was in no apparent distress, that all muscle groups in the lower extremity appeared to be normal. He also noted that reflexes were diminished but symmetric. Dr. Sampath noted that appellant related symptoms of pain but also noted improvement on the left side. He commented that "the exam[ination] is somewhat limited secondary to effort."

In a medical report dated November 29, 1995, Dr. Olivi stated that appellant related symptoms of pain but that he could find no objective basis for the symptoms. He then recommended a second CT scan myelogram "to ensure there is no further decompression syndrome." Dr. Olivi also noted that he did not see why long-term disability was required given his condition.

In a medical report dated January 23, 1996, Dr. Olivi stated that appellant related subjective complaints of pain, but that he could not render an objective diagnosis to support appellant's complaints. He noted upon examination that appellant was 5 by 5 strength in all muscle groups except for some weakness and pain in the right lower extremity distally. Dr. Olivi recommended physical therapy. In a supplemental medical report that day, he stated that appellant was unable to work from July 1995 to March 1996.

In a medical report dated March 20, 1996, Dr. Olivi stated that the CT scan myelogram post surgery revealed excellent decompression with free flow of cerebrospinal fluid at all levels and into all roots. He noted that appellant's spinal stenosis had been relieved but also noted that appellant was "very uncooperative with [the] motor objective examination." Dr. Olivi noted:

"There is no objective evidence at this time that [appellant] is disabled or unable to work and we have subsequently elected not to offer this patient a work slip. If

[he] does need to be evaluated for his ability to work, he should be sent to a work evaluation center.”

On March 29, 1996 the Office notified appellant in reference to the recurrence of disability claim “filed with this Office for an injury sustained in March or April 1995,” that a “[R]eview of documentation received from your (sic) and the [employing establishment] indicates that you suffered a new occupational injury/condition and recurrence of your work injury of November 24, 1971.” The Office thereupon advised appellant to file a claim for occupational disease with the employing establishment.

On April 9, 1996 appellant then filed a claim for occupational disease, alleging that on May 19, 1995 he sustained lower back pain while in the performance of duty.³ In a follow-up narrative received by the employing establishment on April 17, 1996, appellant stated that he was on disability from 1971 to 1981, had returned to light duty at that time and returned to full duty until the incident in March 1995. In a narrative dated April 10, 1996, appellant stated that he sustained an injury to his back on or about March 28, 1995 while moving pallets of mail in a hand truck while going down a ramp. He then noted that the “load started to fall” and he “pushed it back upright to stop it,” when he started to feel pain and weakness in his back. Appellant subsequently had surgery on August 25, 1995 which he related did not relieve his condition. He also referred to his initial November 1971 injury which required surgical intervention on six occasions.

On May 1, 1996 the Office notified appellant that it needed additional information to process claim number A25-485563. The Office did not indicate whether this was his claim for traumatic injury or for occupational disease. The Office referenced Dr. Sampath’s note that appellant related a May 1995 injury.

On May 15, 1996 Dr. Edward Fancovic, Board-certified in internal medicine, stated that appellant complained of an eye condition on March 28, 1995 but that no mention was made of a back condition. He noted that after review of appellant’s records that appellant had chronic back pain.

On June 10, 1996 the Office denied appellant’s claim for occupational exposure, A25-485563, on the grounds that the medical evidence failed to establish that he had a work-related injury. The Office noted inconsistencies in appellant’s history of injury, noting that he had given several dates of the injury and noting that the medical evidence failed to establish that he had a disabling condition as a result of a work-related injury. The Board notes that the Office used the claim number that referred to appellant’s traumatic injury claim, A25-485563.

On June 11, 1996 the Office advised appellant that it needed additional information to process his appeal, claim number A25-487731.

³ The Board notes that appellant stated that his recurrence of disability occurred in May 1995 in spite of the Office noting that he earlier indicated that it was in March or April, 1995. He also noted that he was able to return to regular duty after the 1971 incident “until the incident in March of 1995.”

On July 1, 1996 the claims examiner explained in a memorandum for the record that he had discussed appellant's two claims, noting that one was a recurrence of disability based on a 1971 injury which was alleged to have occurred on March 28, 1995 and a separate claim for traumatic injury which was also alleged to have occurred on March 28, 1995. The examiner advised appellant that there was no medical evidence in either case which supported his claims, noting that the only medical evidence of record for March 28, 1995 concerned an eye injury. Appellant was given until July 14, 1995 to submit medical evidence in support of his claim. The claims examiner used claim number A25-487731.

In a letter received on July 10, 1996, appellant requested a review of the written record on A25-485563.

On July 27, 1996 the Office denied appellant's claim for traumatic injury on the grounds that the medical evidence failed to establish that an injury was sustained as alleged. The Office found that the incident occurred as alleged on March 28, 1995 but that no injury ensued as a result of the incident. However, the Office used claim number A25-0487731, a claim number different from the number the Office issued in processing appellant's initial claim for traumatic injury.

In a medical report dated August 8, 1996, Dr. Fancovic stated that appellant had been treated by his office on March 28, 1995 for an eye condition. He further noted appellant's medical history and commented that that he "was unable to comment as to how the reported injury of March 1995 exacerbated his previously existing lower back problems for which he had received multiple previous operations. No specific disc rupture was seen; it is possible that he may have had a relatively minor injury, but that it aggravated the preexisting lumbar stenosis due to post surgical changes."

On August 25, 1996 appellant requested review of the Office's denial of his claim for traumatic injury, claim number A25-0487731.

In a decision on the written record issued and finalized on December 5, 1996, the hearing representative affirmed the Office's denial of appellant's occupational disease claim, A25-485563.

In a decision on the written record issued on April 29, 1997 and finalized on April 30, 1997, the hearing representative affirmed the Office's denial of appellant's traumatic injury claim, A25-487731.

In a letter received by the Office on March 30, 1998, appellant requested reconsideration of the Office's April 30, 1997 decision on his claim for traumatic injury, claim number A25-487731. He enclosed a medical report dated February 27, 1998 from Dr. Mary Anne Nidiry, Board-certified in internal medicine and his treating physician, who noted that appellant's back condition began in November 24, 1971 when he was involved in a motor vehicle accident. She

noted that appellant was not under her care at the time. Dr. Nidiry, after review of appellant's medical file, then stated:

"Although this is difficult to document fully, it is felt by the consultants, the previous physician, Dr. Fancovic, and by myself -- (appellant's) present physician, that his current injury is a progression of his previous injury in 1971. This is particularly evident since his most recent surgery for spinal stenosis had to be done at the same site of his previous injury and previous surgeries."

By merit decision dated May 29, 1998, the Office denied appellant's request for reconsideration of his traumatic injury claim, A25-487731, on the grounds that "The evidence on file casts serious doubt as to the occurrence of the alleged injury."

In a letter dated August 4, 1998 and received by the Office on November 17, 1998, appellant requested reconsideration of the Office's May 29, 1998 decision. He included a June 29, 1998 statement from Mr. Castillo, appellant's supervisor on March 28, 1995,⁴ who stated that he remembered appellant injuring himself on March 28, 1995 when appellant attempted to stop a pallet of mail from falling. Mr. Castillo noted that he helped appellant fill out a claim form that day but after not hearing from workers' compensation, they "filled out another form and filed it about two months later after learning that the original was lost in the interoffice mail."

By merit decision dated December 9, 1998, the Office denied appellant's request for reconsideration of his traumatic injury claim, A25-487731. The Office noted that Mr. Castillo's statement met the first component of establishing fact of injury that the incident occurred as alleged, however, the Office further found that the record contained no medical evidence to support appellant's contention that the incident caused a compensable injury. The Office further noted that appellant's claims had been combined under the master record claim number A25-10541.⁵

The Board finds that appellant failed to establish that he had sustained injury on March 28, 1995 while in the performance of duty.

An employee seeking benefits under the Federal Employees' Compensation Act⁶ has the burden of establishing the essential elements of his or her claim.⁷ When a claim for compensation is based on a traumatic injury, the employee must establish the fact of injury by proof of an accident or fortuitous event having relative definiteness with respect to time, place

⁴ Appellant noted that Mr. Castillo was his supervisor at the time of the incident.

⁵ The Office had found previously that the incident had occurred as alleged in its July 27, 1996 decision.

⁶ 5 U.S.C. §§ 8101-8193.

⁷ *Mark A. Cacchione*, 46 ECAB 148 (1994).

and circumstance and having occurred in the performance of duty and by proof that such accident or fortuitous event caused an “injury” as defined in the Act and its regulations.⁸

To establish that an injury occurred as alleged, the injury need not be confirmed by eyewitnesses, but the employee’s statements must be consistent with the facts and circumstances and her subsequent course of action. In determining whether a *prima facie* case has been established, such circumstances as late notification of injury, lack of confirmation of injury and failure to obtain medical treatment may, if otherwise unexplained, cast sufficient doubt on a claimant’s statements. The employee has not met this burden when there are such inconsistencies in the evidence as to cast serious doubt on the validity of the claim.⁹ However, an employee’s statement that an injury occurred at given time and in a given manner is of great probative value and will stand unless refuted by strong or persuasive evidence.¹⁰

In this case, appellant presented no probative medical evidence to support his alleged back injury on March 28, 1995. Dr. Fancovic, appellant’s treating physician, stated after review of appellant’s records that was unable to comment as to how the reported injury of March 1995 exacerbated his preexisting existing lower back condition, noting that no specific disc rupture was identified. Dr. Sampath, a neurosurgeon, noted that appellant related a work-related injury in May 1995 while pulling a heavy trolley. He further noted an essentially normal examination except for pain and mild stenosis but no evidence of marked disc herniation or protusion. Further, Dr. Olivi, Board-certified in neurological surgery and appellant’s treating physician, stated that the CT scan myelogram post surgery revealed excellent decompression, that appellant’s spinal stenosis had been relieved but also noted that appellant was “very uncooperative with motor objective examination.” He noted no objective evidence that appellant was disabled or unable to work and subsequently refused to provide a work slip. Finally, Dr. Nidiry, Board-certified in internal medicine and also appellant’s treating physician, noted that appellant’s back condition began in November 24, 1971 when he was involved in a motor vehicle accident and that his current injury is a progression of his previous injury in 1971. She added: “This is particularly evident since [appellant’s] most recent surgery for spinal stenosis had to be done at the same site of his previous injury and previous surgeries.”

Inasmuch as appellant has failed to submit medical evidence establishing that he sustained an injury while in the performance of duty on March 28, 1995, the Board finds that he has failed to meet his burden of proof.

⁸ *Daniel J. Overfield*, 42 ECAB 718 (1991).

⁹ *Karen Humphrey*, 44 ECAB 908 (1993).

¹⁰ *Linda S. Christian*, 46 ECAB 598 (1995).

The decisions of the Office of Workers' Compensation Programs dated December 9 and May 29, 1998 are hereby affirmed.

Dated, Washington, D.C.
August 4, 2000

David S. Gerson
Member

Willie T.C. Thomas
Member

A. Peter Kanjorski
Alternate Member