

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

D.D., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Barnesville, PA, Employer**

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**Docket No. 08-429
Issued: November 10, 2008**

Appearances:

David H. Rattigan, Esq., for the appellant

Hans K. Wild, Esq., for the Director

Oral Argument September 16, 2008

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge

COLLEEN DUFFY KIKO, Judge

JAMES A. HAYNES, Alternate Judge

JURISDICTION

On November 26, 2007 appellant, through her representative, filed a timely appeal from merit decisions of the Office of Workers' Compensation Programs dated April 25 and October 3, 2007 denying her traumatic injury 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 has established that she sustained an aggravation of a preexisting back condition on August 9, 2005 in the performance of duty.

FACTUAL HISTORY

On September 19, 2005 appellant, then a 45-year-old postmaster, filed a claim alleging that on August 9, 2005 she sustained low back pain and a herniated disc due to lifting and moving heavy tubs of mail. She indicated that her injury was "a preexisting injury from a previous claim." Appellant stopped work on August 10, 2005 and did not return.

On August 11, 2005 Dr. Thomas Guastavino, a Board-certified orthopedic surgeon and appellant's attending physician, evaluated her for complaints of "about a one-week history of lower back pain radiating down her left leg. This is actually not a new problem." He noted appellant's 13-year history of treatment for periodic low back pain. Dr. Guastavino diagnosed recurrent low back pain, possible bilateral sacroiliitis and degenerative disc disease at L5-S1.

In an August 15, 2005 treatment note, a physical therapist indicated that appellant experienced severe pain after she tried to stand up after pulling weeds at home. On August 29, 2005 Dr. Guastavino noted that physical therapy and medication had not resolved appellant's back pain which was "actually more of a chronic problem." He recommended a magnetic resonance imaging (MRI) scan study and electromyogram (EMG) as she had not had previous diagnostic studies. On September 12, 2005 Dr. Guastavino interpreted an MRI scan study as showing "multilevel degenerative disc disease. At L3-4, there are left paracentral and lateral protrusions and at L4-5 there is a right paracentral and lateral protrusion." He found that the EMG was essentially negative and diagnosed multilevel degenerative disc disease with herniations at L3-4 and L4-5.¹

In a note dated September 22, 2005, Dr. Guastavino's office noted that appellant reported that her injury was a compensation case as it was "the same problem she experienced in the past." On September 28, 2005 Dr. Prakash N. Nayak, a Board-certified anesthesiologist and Dr. Guastavino performed a lumbar epidural steroid injection. The report listed the history of injury as acute low back pain for two months with "no history of any injury to the back."

On October 25, 2005 the employing establishment controverted the claim as appellant had a preexisting back condition. She informed the employing establishment of the employment incident on August 9, 2005. In a statement received December 22, 2005, appellant related that when she arrived at the employing establishment on August 9, 2005 her back already hurt from the day prior. She reached into a hamper to lift a tub and flats and was unable to straighten up. Appellant notified her supervisor immediately after the incident.

In a report dated January 6, 2006 Dr. James Weis, a Board-certified orthopedic surgeon, evaluated appellant to determine whether she required surgery. He described a history of work injuries in 1993, 1998 and on August 9, 2005. Dr. Weis opined that appellant's symptoms "were consistent with multilevel degenerative spinal disease." He found that surgery was not an option due to multilevel involvement.

By decision dated January 30, 2006, the Office denied appellant's claim on the grounds that she did not establish an injury as alleged. It found that she had established that the August 9, 2005 employment incident occurred as alleged but that the medical evidence was insufficient to show that her current condition was causally related to the accepted work incident.

¹ An EMG performed on September 6, 2005 revealed decreased recruitment pattern in the left rectous femoris likely due to pain rather than a neurological deficit. The remaining study was within normal limits. An MRI scan study performed on September 6, 2006 showed disc bulges at L3-4, L4-5 and L5-S1.

In a report dated January 24, 2006, Dr. Brent Millet, a Board-certified physiatrist, noted that appellant experienced symptoms of low back pain radiating into the left thigh in August 2005 after lifting and bending. He diagnosed lumbar spine pain due to discogenic pain, possible left S1 joint pain, left L3 radiculopathy and degenerative disease at L3-4, L4-5 and L5-S1.

On February 14, 2006 appellant, through her attorney, requested an oral hearing.² In a progress report dated March 8, 2006, Dr. Millet diagnosed left L4 radiculopathy and degenerative disc disease at L3-4.³ Appellant described her complaints as beginning after lifting at work.

In a report dated February 22, 2006, Dr. Steven J. Valentino, an osteopath certified by the American Osteopathic Association in orthopedic surgery, related that appellant experienced low back pain, weakness and paresthesia at L4 through S1 after lifting mail on August 9, 2005. He diagnosed a lumbar disc herniation, aggravation of degenerative disc disease, sciatica and facet syndrome.

On October 13, 2006 Dr. Robert W. Mauthe, a Board-certified physiatrist, discussed appellant's history of prior back problems in 1993 and 1998. Appellant performed her usual employment until August 9, 2005, when she experienced a sudden onset of back pain after picking up a tub of mail. He reviewed Dr. Guastavino's August 11, 2005 office visit note in which he indicated that she had a history of pain for a week prior. Dr. Mauthe stated, "I do not have any prior MRI scan to compare, but clearly [appellant] had the onset of her back pain in the course of her employment." He diagnosed an aggravation of lumbar discogenic pain.

On December 1, 2006 Dr. Mauthe noted that appellant had a history of back pain since 1993 and 1998 but had been "doing well until August 9, 2005." On December 11, 2006 he interpreted a lumbar MRI scan as showing disc protrusions at L3-4, L4-5 and L5-S1 and a disc protrusion at C4-5, C5-6 and C6-7. Dr. Mauthe opined that she was disabled from employment. In a January 5, 2007 report, he stated:

"It is my opinion within reasonable medical certainty, having reviewed the medical records and seen her for treatment that the work activities on or about August 9, 2005 resulting in an aggravation of a preexisting disc protrusion at L3-4 and L4-5 are the substantial and material factors which have led to her inability to return to work at the [employing establishment]."

Dr. Mauthe asserted that lifting catalogs on August 9, 2005 permanently aggravated appellant's back condition. He noted that she had multilevel preexisting disc protrusions but

² On January 16, 2007 appellant's attorney requested a review of the written record in lieu of an oral hearing.

³ On May 11, 2006 Dr. Kelley C. Crozier, a Board-certified physiatrist, discussed appellant's history of injury and recommended a pain program. On July 20, 2006 Dr. Crozier, evaluated appellant following her completion of a chronic pain program. The physician diagnosed low back pain, chronic S1 joint dysfunction and degenerative joint disease.

found that “the mechanics of the lifting is what has led to her permanent aggravation and the inability to return to gainful employment at the [employing establishment].”⁴

In a January 5, 2007 affidavit, appellant related that her back had bothered her for a week before the August 9, 2005 incident because she had performed routine lifting. She initially sustained a work injury in 1993 but was able to continue working until August 9, 2005.

By decision dated April 25, 2007, an Office hearing representative affirmed the January 30, 2006 decision. She found that appellant had not submitted sufficient rationalized medical evidence to show that she sustained an aggravation of a preexisting back condition causally related to the August 9, 2005 lifting incident.

On June 29, 2007 appellant, through her attorney, requested reconsideration. She submitted a May 29, 2007 report from Dr. Mauthe, who reviewed an August 15, 2005 physical therapy report listing a history of appellant experiencing severe pain when she stood up after pulling weeds at home. She pulled the weeds on August 3, 2005. Dr. Mauthe noted that appellant continued to work after the weed-pulling incident. He stated:

“Therefore, although [appellant] may have had a sprain or strain, she did continue working. In fact, she was working full duty without restrictions up to the August 9, 2005 incident.

“[Appellant] has not worked since August 9, 2005 and but were it not for the incident sustained on August 9, 2005, she would have continued working and there would not be an impairment of the lower spine and a lumbar disc herniation. Although she has had chronic back pain in the past, it appears that the lifting of the tubs was the substantial and material factor which caused a significant protrusion of the lumbar disc from which she has not fully recovered.”

In a June 25, 2007 affidavit, appellant related that she did describe the August 9, 2005 incident at work to Dr. Gustavino as well as the incident where she was pulling weeds at home. She noted that the medical report indicated that it was a compensation visit.

By decision dated October 3, 2007, the Office denied modification of the April 25, 2007 decision.

LEGAL PRECEDENT

An employee seeking benefits under the Federal Employees’ Compensation Act⁵ 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 filed within the applicable time limitation; that an injury was sustained while in the

⁴ The results of a December 7, 2006 MRI scan study included “advanced circumferential bulging of the intervertebral disc with a superimposed broad-based central disc protrusion with mild inferior extrusion of disc material documented.”

⁵ 5 U.S.C. §§ 8101-8193.

performance of duty as alleged; and that any disability and/or specific condition for which compensation is claimed are causally related to the employment injury.⁶ These are the essential elements of each and every compensation claim regardless of whether the claim is predicated on a traumatic injury or an occupational disease.⁷

To determine whether an employee sustained a traumatic injury in the performance of duty, the Office must determine whether “fact of injury” is established. First, an employee has the burden of demonstrating the occurrence of an injury at the time, place and in the manner alleged, by a preponderance of the reliable, probative and substantial evidence.⁸ Second, the employee must submit sufficient evidence, generally only in the form of medical evidence, to establish a causal relationship between the employment incident and the alleged disability and/or condition for which compensation is claimed.⁹ An employee may establish that the employment incident occurred as alleged, but fail to show that his or her disability and/or condition relates to the employment incident.¹⁰

ANALYSIS

Appellant alleged that she experienced an aggravation of a preexisting back condition due to lifting heavy tubs of mail on August 9, 2005. The Office accepted the occurrence of the claimed work factors on that date. The issue, consequently, is whether the medical evidence establishes that she sustained an injury as a result of this incident. The determination of whether an employment incident caused an injury is generally established by medical evidence.¹¹

On August 11, 2005 Dr. Guastavino described appellant’s complaints of low back pain radiating into her left leg for the past week. He noted that she had received treatment for her back for 13 years. Dr. Guastavino diagnosed recurrent low back pain, possible bilateral sacroiliitis and degenerative disc disease at L5-S1. On August 29, 2005 he related that appellant’s back pain was a chronic problem and recommended diagnostic studies. On September 12, 2005 Dr. Guastavino diagnosed multilevel degenerative disc disease and disc herniations at L3-4 and L4-5 based on the results of diagnostic studies. As he did not address the August 9, 2005 work incident, his reports fail to support that appellant sustained an employment-related aggravation of her preexisting back condition.

On January 6, 2006 Dr. Weis evaluated appellant for possible surgery. He discussed her history of work injuries in 1993, 1998 and on August 9, 2005. Dr. Weiss attributed appellant’s condition to degenerative spinal disease at multiple levels and recommended against surgery. In reports dated January 24, 2006, Dr. Millet noted that appellant attributed her symptoms to lifting

⁶ *Anthony P. Silva*, 55 ECAB 179 (2003).

⁷ *See Ellen L. Noble*, 55 ECAB 530 (2004).

⁸ *Delphyne L. Glover*, 51 ECAB 146 (1999).

⁹ *Gary J. Watling*, 52 ECAB 278 (2001); *Shirley A. Temple*, 48 ECAB 404, 407 (1997).

¹⁰ *Id.*

¹¹ *Lois E. Culver (Clair L. Culver)*, 53 ECAB 412 (2002).

at work. He diagnosed lumbar spine pain due to discogenic pain, possible left S1 joint pain, left L3 radiculopathy and degenerative disease at L3-4, L4-5 and L5-S1. On March 8, 2006 Dr. Millet diagnosed left L4 radiculopathy and degenerative disc disease at L3-4. On February 22, 2006 Dr. Valentino related that appellant experienced pain, weakness and paresthesia at L4 through S1 after lifting mail on August 9, 2005. He diagnosed a lumbar disc herniation, aggravation of degenerative disc disease, sciatica and facet syndrome. In these reports, however, none of the physicians specifically addressed causation. Medical evidence that does not offer any opinion regarding the cause of an employee's condition is of diminished probative value on the issue of causal relationship.¹²

On October 13, 2006 Dr. Mauthe noted that appellant resumed her usual employment after experiencing back problems in 1993 and 1998. On August 9, 2005 she experienced sudden back pain after lifting a tub of mail. He diagnosed an aggravation of lumbar discogenic pain. He reviewed Dr. Guastavino's August 11, 2005 office visit note and stated, "I do not have any prior MRI scans to compare, but clearly [appellant] had the onset of her back pain in the course of her employment." A medical opinion, however, that a condition is causally related to an employment injury because the employee was asymptomatic before the injury but symptomatic after it is insufficient, without supporting rationale, to establish causal relationship.¹³ A physician must provide a narrative description of the identified employment incident and a reasoned opinion on whether the employment incident described caused or contributed to appellant's diagnosed medical condition.¹⁴

On December 1, 2006 Dr. Mauthe opined that appellant had a poor prognosis due to the chronic nature of her condition and the fact that she was not a candidate for surgery. In a report dated December 11, 2006, he found that she was disabled from employment and discussed the results of lumbar and cervical MRI scan studies. As Dr. Mauthe did not address the causation and thus these reports are of diminished probative value.¹⁵

In a January 5, 2007 report, Dr. Mauthe asserted that appellant's August 9, 2005 work activities permanently aggravated her preexisting L3-4 and L4-5 disc protrusions and caused her disability from employment. He concluded that while she had preexisting disc protrusions, "the mechanics of the lifting is what has led to her permanent aggravation and the inability to return to gainful employment at the [employing establishment]." Dr. Mauthe, however, did not evidence knowledge that appellant experienced back pain on August 3, 2005 after pulling weeds. Consequently, it does not appear that his report is based on a complete and accurate history of injury.¹⁶

¹² *Conard Hightower*, 54 ECAB 796 (2003).

¹³ *Cleopatra McDougal-Saddler*, 47 ECAB 480 (1996).

¹⁴ *John W. Montoya*, 54 ECAB 306 (2003).

¹⁵ *See Conard Hightower*, *supra* note 12.

¹⁶ *See M.W.*, 57 ECAB 710 (2006) (medical conclusions based on an inaccurate or incomplete factual history are of diminished probative value).

On May 29, 2007 Dr. Mauthe noted that an August 15, 2005 physical therapy report listed a history of appellant experiencing severe pain when she stood up after pulling weeds at home. Appellant pulled the weeds on August 3, 2005 but continued to work until after the August 9, 2005 incident at work. Dr. Mauthe found that pulling weeds may have caused a strain but did not cause disability for work. He attributed her lumbar disc herniation and lower spine impairment to lifting tubs of mail at work on August 9, 2005. Dr. Mauthe, however, did not provide sufficient rationale for his finding that lifting tubs of mail rather than pulling weeds caused an aggravation of appellant's preexisting back condition. A physician must provide an opinion on whether the employment incident described caused or contributed to the claimant's diagnosed medical condition and support that opinion with medical reasoning to demonstrate that the conclusion reached is sound, logical and rationale.¹⁷ The need for medical rationale is particularly necessary in this case given that appellant experienced the onset of back pain from a contemporaneous nonemployment-related incident and had a long-standing history of back pain.

An award of compensation may not be based on surmise, conjecture, speculation, or upon appellant's own belief that there is a causal relationship between her claimed condition and his employment.¹⁸ She must submit a physician's report in which the physician reviews those factors of employment identified by her as causing his condition and, taking these factors into consideration as well as findings upon examination and the medical history, explain how employment factors caused or aggravated any diagnosed condition and present medical rationale in support of his or her opinion.¹⁹ Appellant failed to submit such evidence and therefore failed to discharge her burden of proof.

CONCLUSION

The Board finds that appellant has not established that she sustained an aggravation of a preexisting back condition on August 9, 2005 in the performance of duty.

¹⁷ See *supra* note 14.

¹⁸ *Patricia J. Glenn*, 53 ECAB 159 (2001).

¹⁹ *Robert Broome*, 55 ECAB 339 (2004).

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated October 3 and April 25, 2007 are affirmed.

Issued: November 10, 2008
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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