

U. S. DEPARTMENT OF LABOR
Employees' Compensation Appeals Board

In the Matter of NESTOR JUSTINIANO and U.S. POSTAL SERVICE,
POST SERVICE, Denver, Colo.

*Docket No. 97-2747; Submitted on the Record;
Issued June 23, 1999*

DECISION and ORDER

Before WILLIE T.C. THOMAS, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issue is whether appellant sustained an injury in the performance of duty.

The Board has duly reviewed the case record and finds that appellant failed to establish that he sustained an injury in the performance of duty.

On November 4, 1996 appellant, then a 41-year-old carrier, filed a claim for an occupational disease, Form CA-2, alleging that he sustained pain in his legs and lower back due to heavy lifting.

Appellant submitted a report dated November 7, 1996, from Dr. Kerry E. Mahan, a Board-certified internist, who noted that appellant complained of chronic back pain with some radiation down his legs and reported years of heavy lifting although he was then under a 30-pound lifting restriction.

In a report dated November 20, 1996, Dr. David A. Wong, a Board-certified orthopedic surgeon, noted that appellant had the onset of his present difficulties about three years ago without a specific precipitating event and appellant's symptoms increased with mechanical activities towards the end of a day or week and that he is quite tired and sore by the end of a regular work week. He stated that appellant had some radicular irritation.

By letter dated November 29, 1996, the Office of Workers' Compensation Programs advised appellant that more information was necessary to establish his claim.

Appellant subsequently changed his claim to a recurrence of disability, Form CA-2a.

By decision dated February 19, 1997, the Office denied the occupational disease claim, stating that appellant did not establish that he sustained an injury in the performance of duty, as alleged.

Appellant subsequently filed a claim for a traumatic injury, Form CA-1, received by the Office on March 24, 1997, alleging that on October 28, 1996 he injured his lower back and left leg while lifting heavy sacks and flat tubs. He sought medical treatment on November 4, 1996. In a statement dated December 2, 1996, appellant stated that he sustained a thigh muscle strain at work on December 20, 1993 and returned to modified work on December 27, 1993. Appellant stated that two weeks later he felt pain in his back thigh and left leg which he still felt and sought treatment in November 1996 when the pain became constant.

By letter dated March 19, 1997, the employing establishment controverted the claim. The employing establishment stated that appellant's claim for a left thigh strain occurring on December 20, 1993, No. A12-0143639, was accepted and the case closed on January 3, 1994.

By letter dated March 24, 1997, appellant requested reconsideration of the Office's February 19, 1997 decision but submitted no additional evidence.

By decision dated March 27, 1997, the Office denied appellant's reconsideration request.

By letter dated March 31, 1997, Dr. Mahan stated that appellant had a reinjury to his herniated disc.

By letter dated April 4, 1997, appellant requested reconsideration of the Office's decision and submitted additional evidence. In a report dated March 5, 1997, Dr. Wong stated that appellant had a recurrence of back pain two weeks ago, diagnosed persistent back and left sciatic pain and recommended that a magnetic resonance imaging (MRI) scan be performed. Appellant submitted an MRI scan dated March 11, 1997, showing a very low grade, rather broad based diffuse disc protrusion on the left side at L5-S1.

In a report dated May 6, 1997, Dr. Mahan stated that on March 5, 1997 appellant sustained a lifting injury on the job and was treated by Dr. Wong who diagnosed a herniated disc. She stated that the MRI confirmed the herniated disc and the diagnosis was consistent with a work-related lifting and rotation injury.

By decision dated May 21, 1997, the Office denied appellant's reconsideration request.

By letter dated July 28, 1997, appellant requested reconsideration of the Office's decision and submitted no additional evidence.

By decision dated August 13, 1997, the Office denied appellant's reconsideration request.

To determine whether a federal employee has sustained a traumatic injury in the performance of duty, it must first be determined whether a "fact of injury" has been established. First, the employee must submit sufficient evidence to establish that he or she actually experienced the employment incident at the time, place and in the manner alleged.¹ Second, the

¹ *Robert J. Krstyen*, 44 ECAB 227, 229 (1992); *John J. Carlone*, 41 ECAB 354, 356-57 (1989).

employee must submit sufficient evidence, generally only in the form of medical evidence, to establish that the employment incident caused a personal injury.²

The medical evidence required to establish a causal relationship, generally, is rationalized medical evidence. Rationalized medical evidence is medical evidence which includes a physician's rationalized medical opinion on the issue of whether there is a causal relationship between the claimant's diagnosed condition and the implicated employment factors. The opinion of the physician must be based on a complete factual and medical background of the claimant, must be one of reasonable medical certainty, and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.³

In the present case, the evidence is unclear as to when appellant allegedly sustained an injury at work. In his Form CA-1 received by the Office on March 24, 1997, appellant stated that he sustained a traumatic injury on October 28, 1996 to his lower back and left leg while lifting heavy sacks and flat tubs. In his March 5, 1997 report, Dr. Wong stated that appellant had a recurrence of back pain "two weeks ago." In his May 6, 1997 report, Dr. Mahan stated that appellant sustained a new back injury on March 5, 1997 while performing lifting on the job. Because of the inconsistent dates of his injury, appellant has not established a fact of injury. Further, Dr. Wong's reports dated November 20, 1996 and March 5, 1997, and Dr. Mahan's reports dated November 7, 1996 and March 31, 1997, do not address causation and are, therefore, not probative.⁴ In his May 6, 1997 report, Dr. Mahan diagnosed herniated disc consistent with a lifting, rotating injury but did not describe the details of the lifting incident and did not provide a rationalized medical opinion explaining how the lifting incident caused the herniated disc. This report is also not probative.⁵ Although the Office provided appellant with the opportunity to submit medical evidence to establish his claim, appellant was not responsive to this request. Appellant has, therefore, failed to meet his burden to establish his claim.

² *Id.*

³ *Ern Reynolds*, 45 ECAB 690, 695 (1994); *Gary L. Fowler*, 45 ECAB 365, 371 (1994).

⁴ *See Ern Reynolds*, *supra* note 3 at 695.

⁵ *See Roger Dingess*, 47 ECAB 123, 127 (1995).

The decisions of the Office of Workers' Compensation Programs dated August 13, May 21, March 27 and February 19, 1997 are hereby affirmed.

Dated, Washington, D.C.
June 23, 1999

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member