

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

STANLEY E. MARTINEZ, Appellant)	
)	
and)	Docket No. 04-1331
)	Issued: September 3, 2004
DEPARTMENT OF THE INTERIOR,)	
NATIONAL PARK SERVICE,)	
Boulder City, NV, Employer)	
)	

Appearances:
Stanley E. Martinez, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chairman
WILLIE T.C. THOMAS, Alternate Member
A. PETER KANJORSKI, Alternate Member

JURISDICTION

On April 22, 2004 appellant filed a timely appeal of the January 28, 2004 merit decision of the Office of Workers' Compensation Programs, which denied appellant's claim for a low back injury. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d), the Board has jurisdiction over the merits of appellant's claim.

ISSUE

The issue is whether appellant sustained an injury in the performance of duty on September 15, 2002.

FACTUAL HISTORY

On October 22, 2002 appellant, then a 50-year-old maintenance man, filed an occupational disease claim for a pinched sciatic nerve at L4-5. Appellant identified September 15, 2002 as the date he first became aware of his condition. He first realized his condition was employment related on October 9, 2002. Appellant explained that he injured his

back at home on September 1, 2002 and he went to the doctor for treatment on September 4, 2002. He further stated that while working at the picnic area digging a ditch on September 15, 2002 he noticed that his sciatica was bothering him. Appellant believed that his pinched sciatic nerve at L4-5 was directly related to an injury he sustained at work in 1999 (A13-1194941). Appellant did not submit any medical evidence with his claim.

In a telephone conversation with the Office on November 18, 2002, appellant stated that on or about September 4, 2002 he was squatting at home behind a washer when he felt back pain, but not anything down his leg. He began taking medication for what he believed to be a muscle strain and several weeks later he experienced back pain and pain down his leg after stooping while working on a ditch at work. At the time appellant was not entirely sure whether the pain developed over a period of days or on a single day. Appellant stated that he would review his work records to determine the date he was working on the ditch.

In a statement dated November 19, 2002, appellant explained that on September 15, 2002 he was repairing a water leak and dug a three-foot square ditch that was three feet deep. Appellant was squatting at the side of the ditch while shoveling dirt from around a broken pipe. He reported experiencing pain that day in his left buttock, which radiated down his left leg. Appellant stated that the awkward position he was in caused his discs to bulge at L4 and L5, which in turn squeezed his sciatic nerve.

On November 27, 2002 the Office advised appellant of the need for medical evidence and additional factual information regarding his alleged injury on September 15, 2002. In a November 29, 2002 response, appellant explained that he was initially unaware that his claim was employment related and, therefore, he did not immediately advise the employing establishment of the September 15, 2002 injury. Appellant further stated that he knew his injury at home was not work related and he was not sure after September 15, 2002 if his sciatic pain was the result of his home injury. It was not until October 9, 2002 when appellant spoke with his doctor that he realized the sciatic pinch was caused by the September 15, 2002 employment incident.

On December 17, 2002 Robert T. Morton, appellant's team leader, stated that appellant told him on October 23, 2002 that he had injured his back while working at home on September 9, 2002. Mr. Morton further stated that he questioned appellant as to why he was completing a claim form for an injury that occurred at home. Appellant reportedly did not respond.

The Office received an October 4, 2002 magnetic resonance imaging (MRI) scan of the lumbar spine that revealed a large left paracentral disc herniation at L4-5. The reviewing radiologist noted that he could not rule out compression of the left L5 nerve root. Additionally, the Office received treatment records from Dr. Hugh L. Bassewitz, a Board-certified orthopedic surgeon, who initially examined appellant on September 25, 2002 and diagnosed sciatica. Dr. Bassewitz noted a prior history of disc herniation at L4-5. Appellant presented with complaints of low back pain radiating down his left leg. According to Dr. Bassewitz, appellant stated that the pain began about three to four weeks ago when he was bending over. In a follow-up report dated October 9, 2002, Dr. Bassewitz reviewed the October 4, 2002 lumbar MRI scan and reported a worsening of appellant's disc herniation at L4-5.

In a decision dated January 28, 2003, the Office denied appellant's claim based upon his failure to establish that he sustained an injury in the performance of duty. The Office found that neither the factual evidence nor medical evidence established that appellant sustained an employment-related injury on September 15, 2002.

Appellant requested a hearing, which was held on October 27, 2003. He submitted February 14 and 27, 2003 treatment records from Dr. Bassewitz regarding his left leg radiculopathy and disc herniation. Appellant also provided an October 24, 2003 report from Dr. Daniel L. Burkhead, a Board-certified anesthesiologist specializing in pain management, who diagnosed lumbar disc displacement without myelopathy, degenerative lumbar disc disease and sacroiliitis.

In a report dated December 1, 2003, Dr. Burkhead explained that he had been treating appellant in his pain management clinic since October 2002. He reported that appellant had originally injured his lower back while working on his job in 1999. Dr. Burkhead stated that appellant initially received conservative treatment and his condition improved to a moderate extent until August or September 2002 when the back pain returned. He further stated that he did not have any old MRI scans to evaluate appellant's condition after his 1999 work injury, but his current MRI scan from October 2002 revealed a disc herniation at the L4-5 level, which could certainly be consistent with an old injury. Dr. Burkhead concluded that appellant's problems began in 1999 following his work injury.

By decision dated January 28, 2004, the Office hearing representative affirmed the January 28, 2003 decision.

LEGAL PRECEDENT

In order to determine whether an employee sustained a traumatic 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 that must be considered in conjunction with one another. The first component to be established is that the employee actually experienced the employment incident that is alleged to have occurred.¹ The second component is whether the employment incident caused a personal injury.² Causal relationship is a medical question that can generally be resolved only by rationalized medical opinion evidence.³

¹ *Elaine Pendleton*, 40 ECAB 1143 (1989).

² *John J. Carlone*, 41 ECAB 354 (1989).

³ *See Robert G. Morris*, 48 ECAB 238 (1996). A physician's opinion on the issue of causal relationship must be based on a complete factual and medical background of the claimant. *Victor J. Woodhams*, 41 ECAB 345, 352 (1989). Additionally, in order to be considered rationalized, the opinion must be expressed in terms of a reasonable degree of medical certainty, and must be supported by medical rationale, explaining the nature of the relationship between the diagnosed condition and the claimant's specific employment factors. *Id.*

ANALYSIS

Appellant claimed to have injured his back at work on September 15, 2002 while digging a ditch to repair a broken pipe. He also acknowledged that he injured his back on or about September 1, 2002 while squatting behind a washer at home. Appellant did not inform the employing establishment of his alleged September 15, 2002 back injury until October 23, 2002.

At various stages during the adjudication process appellant provided differing accounts of the cause of his current back condition. Initially, he was unsure whether the pain was due to a September 1, 2002 injury he sustained at home. After consulting with Dr. Bassewitz in October 2002 appellant believed the condition to be related to a prior injury in 1999. Appellant, himself, surmised that his back condition was related to his awkward position while digging a ditch at work on September 15, 2002. On appeal, he asserted that he should have probably filed a recurrence claim for aggravation of his 1999 injury. Although appellant filed an occupational disease claim, he clearly indicated that his injury occurred on September 15, 2002 while digging a ditch. However, both the factual and medical evidence fail to substantiate appellant's claim that he was injured while in the performance of duty on September 15, 2002. There is no contemporaneous factual evidence to support appellant's allegation that he was digging a ditch at work on September 15, 2002 and experienced back pain in the process.

The first evidence of medical treatment for appellant's claimed low back condition is dated September 25, 2002. At that time, Dr. Bassewitz reported that appellant complained of low back pain radiating down his left leg, which began about three to four weeks ago when he was bending over. Thus, according to Dr. Bassewitz appellant's low back and left leg pain predated his alleged September 15, 2002 injury by as much as two and a half weeks. Furthermore, Dr. Bassewitz did not indicate what appellant was doing while "he was bending over." None of the doctor's reports make any reference to a September 15, 2002 injury while digging a ditch at work. Consequently, Dr. Bassewitz's treatment records are insufficient to establish that appellant sustained a back injury while in the performance of duty on September 15, 2002.

Dr. Burkhead's October 24 and December 1, 2003 reports are similarly insufficient to satisfy appellant's burden of proof. In his October 24, 2003 report, Dr. Burkhead did not offer an opinion regarding causal relationship and his December 1, 2003 report attributed appellant's condition to an unspecified 1999 back injury. While noting that appellant's back pain returned in "August or September of 2002," Dr. Burkhead did not otherwise provide any specific information concerning the alleged September 15, 2002 injury.

Neither Dr. Bassewitz nor Dr. Burkhead reported a history of injury consistent with that noted on appellant's claim form or in his subsequent statements. Accordingly, both the factual and medical evidence fail to establish that appellant sustained an injury in the performance of duty.⁴

⁴ 20 C.F.R. § 10.115 (1999).

CONCLUSION

The Board finds that appellant failed to establish that he sustained an injury in the performance of duty on September 15, 2002.

ORDER

IT IS HEREBY ORDERED THAT the January 28, 2004 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 3, 2004
Washington, DC

Alec J. Koromilas
Chairman

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member