

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

T.H., Appellant

and

**DEPARTMENT OF DEFENSE, DEFENSE
CONTRACT AUDIT AGENCY,
Los Angeles, CA, Employer**

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**Docket No. 07-2300
Issued: March 7, 2008**

Appearances:

Max Gest, Esq., for the appellant

Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On September 7, 2007 appellant filed a timely appeal from a June 15, 2007 decision of the Office of Workers' Compensation Programs denying his claim for a traumatic injury on March 6, 2006. 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 sustained an injury on March 6, 2006 while in the performance of duty.

FACTUAL HISTORY

On March 9, 2006 appellant, then a 56-year-old auditor, filed a traumatic injury claim alleging that he injured his neck and shoulders on March 6, 2006 after moving furniture, books and equipment to a new office. His claimed injury occurred when he moved a heavy printer. A

March 8, 2006 disability certificate from a chiropractor indicated that appellant was totally disabled on March 7 and 8, 2006 and that he could return to regular work on March 9, 2006.

In a March 27, 2006 report, Dr. William T. Tontz, Jr., an attending Board-certified orthopedic surgeon, stated that appellant was moving office materials on March 6, 2006 when he felt pain between his shoulder blades and in his low back. He provided findings on physical examination and made a tentative diagnosis of cervical stenosis. A March 31, 2006 magnetic resonance imaging (MRI) scan report revealed multilevel degenerative disc and facet disease in appellant's cervical spine.

On April 5, 2006 the Office requested additional evidence, including a medical report containing a diagnosis of appellant's condition and medical rationale explaining how the condition was causally related to the March 6, 2006 employment activities.

On June 12, 2006 the Office asked Dr. Tontz to provide additional information, including a rationalized opinion as to whether appellant's back condition was caused or aggravated by his activities on March 6, 2006, moving office equipment.

In May 9 and June 7, 2006 disability certificates, Dr. Tontz stated that appellant was totally disabled from March 7 to July 31, 2006 due to cervical disc disease.

By decision dated July 13, 2006, the Office denied appellant's claim on the grounds that the medical evidence did not establish that he sustained an injury on March 6, 2006 causally related to his employment.

Appellant requested an oral hearing that was held on April 4, 2007.

Additional medical evidence was submitted following the hearing. In a report dated August 4, 2006, Dr. Lance L. Altenau, a neurosurgeon, stated that appellant experienced severe neck and low back pain on March 6, 2006 when he lifted a printer at work. He provided findings on physical examination but no diagnosis. Dr. Altenau noted that an MRI scan of the cervical spine revealed "a small C3-4 and C5-6 cervical disc" with foraminal narrowing noted at the C3-4, C4-5 and C5-6 levels. A May 15, 2006 MRI scan of the lumbar spine revealed mild facet arthrosis.

Dr. Tontz stated that he first examined appellant on March 27, 2006 following the March 6, 2006 work incident. He initially released appellant to four hours of work a day because he did not wish to stop work. However, appellant became totally disabled due to the severity of his spinal conditions and the fact that his work duties severely aggravated his condition. Dr. Tontz provided findings on physical examination and diagnosed multilevel degenerative disc disease of the cervical, thoracic and lumbar spine and chronic pain syndrome. On June 7 and July 19, 2006 he diagnosed preexisting cervical degenerative disc disease. On July 25, 2006 Dr. Tontz diagnosed preexisting degenerative disc disease and cervical radiculopathy. He stated that appellant's underlying degenerative condition was "clearly exacerbated" on March 6, 2006 when he lifted a heavy printer. On August 29, 2006 Dr. Tontz stated that appellant's back pain was likely the result of a lumbosacral strain.

In a December 4, 2006 report, Dr. Tontz stated that on March 6, 2006 appellant was moving furniture, books and heavy equipment. He diagnosed multilevel degenerative disc disease and facet disease with significant neural foraminal narrowing at C3-4, C4-5 and C5-6. Dr. Tontz stated:

“At this time, [appellant] is having more low back pain following the industrial injury in question. [His] diagnoses are of cervical radiculopathy with underlying preexistent cervical degenerative disc disease and thoracic and lumbosacral strains as a result of the industrial injury in question on March 6, 2006. I would state that the industrial injury in question was not, in fact, the direct cause; however, [it] was an aggravation of the preexisting condition. It is difficult to state if this is a temporary or permanent aggravation, as [appellant] has had persistent pain[.] [W]hether or not there is continuing nerve vessel change [in] the underlying condition has yet to be seen with [him]. The natural history in the literature is that the majority of patients with cervical radiculopathy do improve over time, although [he] has had persistent symptoms in his cervical, thoracic and lumbar spine as a result of the industrial injury in question. If [appellant] continued to have these symptoms for the rest of his life, this would be stated as a permanent aggravation. However, again the majority of patients have temporary aggravations, which plateau and/or improve.”

In a second report dated December 4, 2006, Dr. Tontz noted that appellant's job was usually sedentary. He stated:

“[Appellant] suffered an injury to his spine on March 6, 2006. On that date, [he] was engaged in lifting activities. [Appellant] was moving furniture, books and a heavy printer into a new office. In the course of performing these duties, he injured his neck and back. The MRI [scan] of the neck revealed multilevel degenerative disc and facet disease with significant neural foraminal narrowing noted bilaterally at C3-4, on the right at C4-5, and on the left at C5-6 with resulting impingement upon respective exiting nerve root[s]. In addition, the MRI [scan] of the lumbar spine revealed mild facet arthrosis involving the lumbar spine. Due primarily to the fact that [appellant] must sit for the vast majority of the day working on the computer, his job activities exacerbate the spinal condition from which he suffers. I placed [appellant] on partial disability, allowing him to work only four hours per day. This was due primarily to the fact that [he] did not wish to be taken off work totally. I acquiesced to [appellant's] request. At this point, however, due to the severity of the spinal conditions from which [he] suffers and the fact that his work duties are severely exacerbating the underlying work-related conditions from which he suffers, I have no choice but to take [him] off work. It is hoped that[,] with rest, the cycle of pain will be broken and [appellant's] condition can begin to heal. I have also instructed [him] in home exercises. I am hopeful that a conservative course of treatment for [appellant] will result in a diminution of the severity of [his] symptoms.... Hopefully [he] will be able to return to work at some point in the future -- perhaps in three or four months upon further evaluation. However, in my professional opinion and to a degree of medical certainty, the work-related conditions from which [appellant]

suffers, combined with the work duties performed by [him] at his employment ... has rendered him to be temporarily totally disabled from his date[-]of[-]injury position.”

In a February 8, 2007 report, Dr. Jacob E. Tauber, a Board-certified orthopedic surgeon, stated that on March 6, 2006 appellant was moving into a new office. When he moved a heavy printer, he experienced pain in his neck, radiating down both shoulders, and gradually began to experience pain in his upper, mid and lower back. Appellant continued to work until he completed his shift but missed the next two days of work. Dr. Tauber provided findings on physical examination and diagnosed degenerative disc disease of the cervical spine and a permanent work-related aggravation of this condition. He stated:

“[Appellant clearly has long[-]standing degenerative disc disease in his cervical spine. The degenerative disc disease is clearly not the result of a one-time trauma in and of itself. However, it should be noted that [appellant] did carry out employment duties for the [employing establishment] beginning in 1989. He has performed extensive duties over the years, including repetitive motion duties, and frankly, had to scrutinize books, which would contribute to holding his head in a fixed position for extended periods of time. These types of duties will contribute to degenerative disease in the cervical spine. Therefore, his underlying degenerative disease is partly industrial in etiology. However, his cervical spine was not symptomatic until the work incident of March 6, 2006. Although it is probable in [appellant], given the extent of his degenerative disease, that at some point he would have become symptomatic, such a date would be speculative at best. It is clear that[,] since the incident in question, he has required extensive care and an MRI [scan] as a result of immediately becoming symptomatic following the incident in question.

“It is, therefore, clear that this incident was the catalyst causing [appellant] to become symptomatic. Therefore, as a result of the incident in question, given the fact that [he] has remained symptomatic and significant time has elapsed since the incident in question, [he] has sustained a permanent aggravation as an underlying degenerative disc disease of the cervical spine.”

In a May 2, 2007 report, Dr. Tontz stated that appellant had multilevel degenerative disc disease. He stated:

“This condition has been severely and permanently aggravated as a result of [appellant’s] performance of his work duties in general and the March 6, 2006 incident in particular. At this point, [appellant] suffers from chronic pain syndrome.... [Appellant] is not capable of performing the duties of his date-of-injury position as an auditor....”

By decision dated June 15, 2007, the Office hearing representative affirmed the July 13, 2006 decision.

LEGAL PRECEDENT

An employee seeking benefits under the Federal Employees' Compensation Act¹ has the burden to establish the essential elements of his 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, that an injury was sustained in the performance of duty as alleged and that any disability or medical condition for which compensation is claimed is causally related to the employment injury.²

To determine whether a federal employee has sustained a traumatic injury in the performance of duty, it first must be determined whether the "fact of injury" has been established. There are two components involved in establishing the fact of injury. First, the employee must submit sufficient evidence to establish that he actually experienced the employment incident at the time, place and in the manner alleged.³ Second, the employee must submit medical evidence to establish that the employment incident caused a personal injury.⁴ An employee may establish that the employment incident occurred as alleged but fail to show that his disability or condition relates to the employment incident.

To establish a causal relationship between a claimant's condition and any attendant disability claimed and the employment event or incident, he must submit rationalized medical opinion evidence based on a complete factual and medical background supporting such a causal relationship. Rationalized medical opinion evidence is medical evidence which includes a physician's 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.⁵

ANALYSIS

The Board finds that the medical evidence is insufficient to establish that appellant sustained an injury on March 6, 2006 while in the performance of duty.

Dr. Altenau stated that appellant experienced severe neck and low back pain on March 6, 2006 when he lifted a printer at work. However, he did not provide a diagnosis or medical rationale explaining how appellant's neck and low back pain was caused or aggravated by the March 6, 2006 lifting incident. Therefore, Dr. Altenau's report is not sufficient to establish that appellant sustained a work-related injury on March 6, 2006.

¹ 5 U.S.C. §§ 8101-8193.

² *Steven S. Saleh*, 55 ECAB 169 (2003); *Elaine Pendleton*, 40 ECAB 1143 (1989).

³ *John J. Carlone*, 41 ECAB 354 (1989).

⁴ *Shirley A. Temple*, 48 ECAB 404 (1997).

⁵ *Gary J. Watling*, 52 ECAB 278 (2001); *Shirley A. Temple*, *supra* note 4.

Dr. Tauber stated that on March 6, 2006 appellant was moving into a new office when he experienced pain in his neck, back and shoulders when he lifted a heavy printer. He continued to work until he completed his shift but missed the next two days of work. Dr. Tauber diagnosed degenerative disc disease of the cervical spine and a permanent work-related aggravation of this condition. He indicated that appellant's degenerative disc disease was not the result of a one-time trauma on March 6, 2006. Appellant's regular duties as an auditor, including reading books and holding his head in a fixed position for extended periods of time, contributed to his degenerative cervical disc disease. Dr. Tauber opined that the March 6, 2006 work incident was the catalyst that caused appellant to become symptomatic and sustain a permanent aggravation of his underlying degenerative cervical disc disease. However, Dr. Tauber provided insufficient medical rationale explaining the mechanism of injury and causal relationship. He did not describe the physical or anatomic change in appellant's cervical spine caused by the March 6, 2006 moving activities and how it resulted in his becoming symptomatic. Lacking thorough medical rationale on the issue of causal relationship, Dr. Tauber's opinion is not sufficient to establish that appellant sustained an injury on March 6, 2006 while in the performance of duty.

Dr. Tontz stated that appellant was moving office materials on March 6, 2006 when he felt pain between his shoulder blades and in his low back. He diagnosed preexisting multilevel degenerative disc disease of the cervical, thoracic and lumbosacral spine, cervical and lumbar strains, cervical radiculopathy and chronic pain syndrome. Dr. Tontz opined that appellant's underlying degenerative condition was aggravated on March 6, 2006 when he lifted a heavy printer and moved furniture, books and equipment into a new office. He also stated that appellant's sedentary regular job activities aggravated his preexisting spinal conditions. Dr. Tontz opined that appellant's spinal conditions were severely and permanently aggravated as a result of his work duties in general and the March 6, 2006 incident in particular. However, he did not explain the mechanism of injury on March 6, 2006 which resulted in multiple medical conditions: thoracic and lumbar strains; cervical radiculopathy; chronic pain syndrome; and the aggravation of appellant's preexisting multilevel degenerative disc disease of the cervical, thoracic and spinal conditions. Lacking thorough medical rationale on the issue of causal relationship of appellant's several spinal conditions and his chronic pain syndrome, the opinion of Dr. Tontz is not sufficient to establish that appellant sustained an injury on March 6, 2006 while in the performance of duty.

Appellant failed to provide rationalized medical evidence, based on a complete and accurate factual and medical background, establishing that he sustained an injury causally related to his March 6, 2006 work activities when he moved furniture, books and equipment to a new office. Therefore, he did not meet his burden of proof. The Office properly denied appellant's claim.

CONCLUSION

The Board finds that appellant failed to establish that he sustained an injury on March 6, 2006 while in the performance of duty.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated June 15, 2007 is affirmed.

Issued: March 7, 2008
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

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

Michael E. Groom, Alternate Judge, dissenting:

On March 6, 2006 appellant was engaged in lifting activities while moving heavy furniture and office equipment, an incident established by the factual evidence of record. He stopped work and initially sought medical treatment with a chiropractor. When appellant did not obtain relief of his symptoms, he consulted his attending physician, Dr. Bhupinder Khehar, who referred him for consultation with Dr. William T. Tontz, Jr., a Board-certified orthopedic surgeon. On March 27, 2006 Dr. Tontz conducted a physical examination, noting moderate pain at the extreme of cervical motion. Appellant exhibited hyperreflexia in the upper extremities. An MRI scan was obtained on March 31, 2006, which revealed multilevel degenerative disc disease of the cervical spine, with significant neural foraminal narrowing bilaterally at C3-4, C4-5 and C5-6, with impingement upon the respective exiting nerve roots.

On April 5, 2006 Dr. Tontz noted the diagnostic findings and commenced a course of physical therapy and anti-inflammatory medication for appellant's persistent right arm pain. He found appellant totally disabled for work commencing March 7, 2006. On June 12, 2006 the Office requested that Dr. Tontz address the relationship of the diagnosed condition to appellant's March 6, 2006 incident at work. On July 25, 2006 he noted that appellant had preexisting degenerative disc disease which was "clearly exacerbated" by lifting a laser jet printer at work weight approximately 51 pounds and, in turn, resulted in radiculopathy affecting appellant's right upper extremity. On December 4, 2006 Dr. Tontz again attributed appellant's cervical radiculopathy to the March 6, 2006 incident. He noted that, while the incident was not the direct cause of appellant's preexisting disease, it did aggravate his condition. Dr. Tontz reiterated that appellant was engaged in lifting activities, moving heavy objects into a new office. These activities resulted in an aggravation of the degenerative disease and resulted in impingement

upon the exiting cervical nerve roots. Dr. Tontz reiterated that appellant was disabled as a result of his cervical condition. Dr. Jacob E. Tauber, a Board-certified orthopedic surgeon, obtained an accurate history of the March 6, 2006 incident and diagnosed an aggravation of the preexisting cervical degenerative disease. He described the accepted incident as the catalyst which caused appellant to become symptomatic.

I find that Dr. Tontz and Dr. Tauber provided medical opinions which are based on an accurate factual and medical history. Both physicians described appellant's work activities on March 6, 2006 and provided detailed findings on physical examination and review of diagnostic testing of the cervical spine. While the majority finds that these reports are not sufficient to establish appellant's claim of injury on that date, I find that the medical evidence of record raises a *prima facie* claim of injury between the lifting activities in which appellant was engaged and an aggravation of his preexisting cervical degenerative disease as described in the medical evidence. I would remand the case for further development of the medical evidence.

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board