

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

R.O., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Baton Rouge, LA, Employer**

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**Docket No. 10-153
Issued: July 22, 2010**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On October 20, 2009 appellant, filed a timely appeal of an April 29, 2009 Office of Workers' Compensation Programs' merit decision. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(e), the Board has jurisdiction to consider the merits of the claim.

ISSUE

The issue is whether appellant met his burden of proof to establish that he sustained an injury on November 2, 2004, as alleged.

FACTUAL HISTORY

This case has previously been before the Board.¹ On November 3, 2004 appellant filed a recurrence of disability claim alleging that on November 2, 2004 he was pushing a dust mop and experienced severe muscle spasms in the back, neck and shoulders. On November 17, 2004

¹ See Docket No. 02-872 (issued August 21, 2002). The Board found that the constructed position of custodian represented appellant's wage-earning capacity.

appellant's attending physician, Dr. Martin A. Langston, a Board-certified neurologist, found that diagnostic studies revealed a disc bulge at C6-7 which he opined could account for appellant's severe cervical pain. In a February 1, 2005 decision, the Office denied his claim.

On May 13, 2005 Dr. Langston reviewed a whole body bone scan which was reported as normal. He listed appellant's complaints of neck pain, occipital pain and posterior thoracic spine pain between the shoulders. Dr. Langston stated that he had exhausted all known treatment and that appellant had reached maximum medical improvement. On June 27, 2005 he suggested a possible diagnosis of fibromyalgia. On February 10, 2006 Dr. Langston reported that appellant's pain was reduced through physical therapy, but he still experienced mid-thoracic pain. In a March 3, 2006 note, he reported that appellant's thoracic spine was normal on x-ray, but that he had evidence of an old injury to the central third of his sternum.

Dr. Kevin McCarthy, a Board-certified orthopedic surgeon, examined appellant on June 23, 2006 and listed injuries in 1990 and 1999. He did not mention the 2004 employment incident described by appellant on his claim form. Dr. McCarthy diagnosed thoracic pain and cervical stenosis and recommended thoracic and cervical magnetic resonance imaging (MRI) scans.

On February 7, 2007 Dr. Langston examined appellant and noted that he experienced additional pain after physical therapy. He diagnosed brachial neuritis. On March 2, 2007 Dr. Langston reviewed appellant's cervical and thoracic MRI scans and found signs of degenerative disc disease at C4-5 and C3-4 as well as disc protrusion at T5-6 and T10-11.

Dr. McCarthy examined appellant and the MRI scan studies on March 8, 2007. He found a disc protrusion at C4-5 with bulging at C3-4. He also found a disc protrusion at T5-6 which approximated the ventral aspect of the spinal cord on the right. Dr. McCarthy noted that appellant's initial injury of carrying an 80-pound motor and recommended additional diagnostic testing.

Appellant requested an oral hearing. In a decision dated May 8, 2007, the Branch of Hearings and Review affirmed the Office's decision denying a recurrence of disability on November 2, 2004 causally related to his April 16, 1999 employment injury. He appealed this decision to the Board.

On January 12, 2009 the Board found that appellant did not establish a recurrence of disability due to his 1999 neck injury.² The Board found that the Office should have developed appellant's November 2, 2004 injury as a new traumatic injury claim and remanded the case for the Office to undertake appropriate development. The facts of the case as set out in the Board's prior decision are incorporated herein by reference.

In a January 27, 2009 letter, the Office informed appellant that it would adjudicate his claim as a new traumatic injury claim. On March 30, 2009 it requested additional information from appellant and provided 30 days for a response. By decision dated April 29, 2009, the

² Docket No. 07-2070 (issued January 12, 2009).

Office denied appellant's traumatic injury claim as he failed to submit any additional evidence as requested on March 30, 2009.

LEGAL PRECEDENT

An employee seeking benefits under the Federal Employees' Compensation Act³ has the burden of establishing the essential elements of his or her claim by the weight of the reliable, probative and substantial evidence, including the fact that the individual is an "employee of the United States" within the meaning of the Act and that the claim was timely filed within the applicable time limitation period of the Act, that an injury was sustained in the performance of duty as alleged and that any disability or specific condition for which compensation is claimed is causally related to the employment injury.⁴ These are the essential elements of each and every compensation claim regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.⁵

The Office defines a traumatic injury as, "[A] condition of the body caused by a specific event or incident or series of events or incidents, within a single workday or shift. Such condition must be caused by external force, including stress or strain which is identifiable as to time and place of occurrence and member or function of the body affected."⁶ 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.⁷ Second, the employee must submit sufficient evidence, generally only in the form a medical evidence, to establish that the employment incident caused a personal injury.⁸

ANALYSIS

The Board previously noted that the Office should adjudicate appellant's claim for disability on November 2, 2004 as a new traumatic injury. On the claim form he identified specific employment duties on November 2, 2004 as causing or contributing to his back and neck pain. Specifically, appellant stated that he was pushing a dust mop and experienced muscle spasms in his back and shoulders. Following the Board's January 12, 2009 decision, the Office issued a development letter to appellant dated March 30, 2009 and requested additional factual

³ 5 U.S.C. §§ 8101-1893.

⁴ *Kathryn Haggerty*, 45 ECAB 383, 388 (1994); *Elaine Pendleton*, 41 ECAB 1143 (1989).

⁵ *Victor J. Woodhams*, 41 ECAB 345 (1989).

⁶ 20 C.F.R. § 10.5(ee).

⁷ *John J. Carlone*, 41 ECAB 354 (1989).

⁸ *J.Z.*, 58 ECAB 529 (2007).

and medical evidence in support of his traumatic injury claim. Appellant did not respond within 30 days.⁹

The Board finds that the evidence in the record is not sufficient to meet appellant's burden of proof to establish that he sustained a traumatic injury on November 2, 2004. Appellant submitted medical reports from Dr. Langston, a Board-certified neurologist, dated after November 2, 2004. However, Dr. Langston failed to mention or describe the November 2, 2004 employment incident of pushing a dust mop. He did not offer any opinion as to the causal relationship between appellant's alleged employment duties that day and his diagnosed condition. These reports are not sufficient to meet appellant's burden of proof.

Appellant also submitted medical reports from Dr. McCarthy, a Board-certified orthopedic surgeon, addressing his physical condition after November 2, 2004. Dr. McCarthy noted a 1999 employment injury, but did not provide any history of the employment incident in 2004. These reports do not address whether appellant's November 2, 2004 employment activities caused or contributed to his ongoing cervical and thoracic conditions. Dr. McCarthy's reports do not support his claim for a traumatic injury and are not sufficient to establish his claim.

CONCLUSION

The Board finds that appellant failed to submit the requested factual and medical evidence necessary to establish that he sustained a traumatic injury on November 2, 2004 due to pushing a dust mop in the performance of duty and that the Office properly denied his claim.

⁹ The Office's regulations require that a claimant receive at least 30 days to respond to an initial request for information from the Office. 20 C.F.R. § 10.121. The Office issued the April 29, 2009 decision on the 30th day of the 30-day period. Appellant therefore received an appropriate time period to respond to its request for information.

ORDER

IT IS HEREBY ORDERED THAT the April 29, 2009 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 22, 2010
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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