United States Department of Labor
Employees' Compensation Appeals Board

N.W., Appellant	)	
and	)	**Docket No. 11-530**
	)	**Issued: November 7, 2011**
U.S. POSTAL SERVICE, RIO GRANDE PERFORMANCE CLUSTER, San Antonio, TX, Employer	)	

Appearances:
Alan J. Shaprio, Esq., for the appellant
Office of the Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
RICHARD J. DASCHBACH, Chief Judge
ALEC J. KOROMILAS, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On December 28, 2010 appellant filed an appeal of a November 16, 2010 merit decision of the Office of Workers' Compensation Programs (OWCP) denying his claim. Pursuant to the Federal Employees' Compensation Act (FECA)[1] and 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 met his burden of proof to establish that he sustained an injury in the performance of duty on May 19, 2010, as alleged.

FACTUAL HISTORY

On May 25, 2010 appellant, then a 47-year-old temporary carrier, filed a traumatic injury claim alleging that on May 20, 2010 at approximately 10:45 a.m. he reinjured his lower back.

[1] 5 U.S.C. § 8101 *et seq.*

He stated that he returned to the loading dock after pulling uprights weighing 50 to 200 pounds and felt pain in his lower back when he stooped down to lift and put the ramp plate in place. Appellant previously injured his back at work on April 30, 2010. He submitted a May 19, 2010 note from Dr. Matthew Hill, an osteopath and Board-certified internist, who indicated that appellant could work with restrictions for one week. Appellant also submitted a June 3, 2010 duty status report from a physician with an illegible signature and a May 26, 2010 diagnostic test.

Appellant's supervisor, James Dodd, customer service manager, controverted the claim. He indicated that appellant stopped work at 11:00 a.m. on May 19, 2010. Mr. Dodd denied that appellant was injured in the performance of duty on May 20, 2010 as he had "left work on May 20, 2010 angry at supervisor for assignment that day." He stated that appellant did not report any injury. In a May 25, 2010 statement, Dr. Dodd noted at approximately 11:00 a.m. on May 19, 2010 that appellant told him, in front of Supervisor Wilbert Wright, that he disagreed with the collection schedule for that day. Supervisor Wright informed appellant that he had already discussed the schedule with him and instructed him to do the collection run as scheduled. Appellant stated that he was not going to do collections and that he would go to a doctor and get a note that he could not do collections. Supervisor Wright told appellant that, "if he walked out of the door without permission, not to come back, because he would not have a job." Appellant left and did not perform his carrier duties for the rest of the day. The next day, May 20, 2010, he gave Supervisor Wright a medical note advising that he was seen on May 19, 2010. When appellant asked what his schedule was for the rest of the week, Mr. Dodd indicated that appellant was not on schedule for the rest of the week. Appellant subsequently indicated that the accident occurred on May 20, 2010 but the incident he described and the doctor's slip were dated May 19, 2010. Mr. Dodd advised that appellant stated that his condition was a reinjury of an April 30, 2010 event for which the employer had no paperwork.

In a June 14, 2010 letter, OWCP advised appellant of the deficiencies in his claim and requested additional factual and medical evidence.

In an undated statement, appellant noted that he reported to work at 9:46 am on May 20, 2010 and was told by Supervisor Wright to check the two-ton mail truck. He indicated that the mail truck with the lift was out of service, but the other mail truck, which did not have a lift, worked. Appellant stated that he had been working in pain since he injured his back on April 30, 2010. He retrieved mail from the mail clerks to make the unit run and felt pain in his back when he rolled the mail uprights onto the two-ton mail truck. Appellant completed the unit run and the pain in his lower back became greater when he stooped down to place the steel ramp. He went inside and spoke to Mr. Dodd, when Supervisor Wright told him he would do the unit run for the rest of the week. Appellant stated that he told Mr. Dodd and Supervisor Wright that he was going to the doctor. He indicated that Supervisor Wright told him not to come back and that a conversation ensued. Appellant left because he needed medical attention and did not quit his job.

In a June 24, 2010 statement, Dale Delaney, a union vice president, indicated that on June 24, 2010 he asked Rebecca Curb, a clerk, if she knew what happened to appellant. Ms. Curb stated that in early May she saw appellant hold his back in extreme pain. She indicated that appellant laid down on the floor and she got him some padded envelopes to use as a pillow.

Ms. Curb also stated that Anthony Palimino, a manager, was notified of appellant's condition. Mr. Delaney further indicated that appellant had told him that he had to use both two-ton mail trucks, the one with a lift gate and the one without a lift gate, and that the mail truck without a lift gate put a lot of strain on his back because everything had to be done manually.

In a June 24, 2010 report, Dr. Les Benson, a specialist in occupational and emergency medicine, noted that appellant related injuring his lower back pulling/pushing uprights while working as a letter carrier on May 20, 2010. He had immediate pain that radiated down his leg and across his back and he was unable to complete his shift. Appellant had previous back pain on May 6, 2010 while pitching mail into box on route five and, when he sneezed, his back "went out." He also had back pain while in the armed forces, but had no service-connected disability. Dr. Benson diagnosed intervertebral disc injury with spinal stenosis due to pushing/pulling 80- to 180-pound uprights on May 20, 2010. He further opined that appellant was totally disabled for 8 to 12 weeks.

In a June 25, 2010 statement, appellant's mother and father in-law stated on May 3, 2010 that their daughter called them saying appellant was hurt on the job and was unable to drive. They drove their daughter to appellant's work and Mr. Grove and their daughter went inside. Mr. Grove indicated that they found appellant lying on the floor in lots of pain with Mr. Dodd standing over him saying appellant had injured his back. They got appellant in the car and took him to Scott & White Hospital.

In a June 25, 2010 statement, appellant's wife indicated that appellant called her on May 3, 2010 and stated that he hurt his back on the job and he could not drive home. She stated that she called her parents and they took her to appellant's office to pick him up. Appellant's wife stated that she went in with her father and Mr. Dodd led them to appellant, who was lying on the floor. She stated that they took him to the hospital. Appellant's wife also indicated that appellant told her he was pitching mail and when he sneezed, his back locked up. She asked appellant whether he filled out the proper paperwork and appellant indicated that his supervisor, Mr. Dodd, did not know the proper papers and would handle it later.

In a June 9, 2010 statement, Lauren Chambers, a clerk, indicated that on May 20, 2010 she overheard Supervisor Wright tell appellant that he was to do the unit run and come back and do a hand off for one of the routes. Supervisor Wright informed appellant that the lift on the truck was broken and appellant stated that it might take longer to finish because his back was still hurting and he might need some help. Ms. Chambers stated that appellant then did his unit run.

In a June 14, 2010 statement, Brian McCaster, a distribution clerk, stated on May 20, 2010 between 10:45 and 11:00 a.m. that he saw appellant on the loading dock unloading the mail from the unit run. Appellant was limping at the time and told him his back was bothering him, when he asked him if he was alright. Mr. McCaster stated that appellant went in the building over to the supervisor desk where Mr. Dodd was standing and Supervisor Wright was on the computer. When Mr. Dodd asked appellant how it was going, appellant responded that he did not know. Appellant then asked Mr. Dodd when the lift on the truck would get fixed and was told two weeks. He then told Mr. Dodd he would be a little slower or it would take a little longer to finish the rest of the run and carry a handoff. Supervisor Wright turned from his computer and

told appellant that he would do the unit run and carry a handoff for the next 10 days. Appellant then stated that he was leaving and Supervisor Wright told him that, if he left, not to come back.

In a July 1, 2010 statement, Gaye Gresham, a senior health and resource management, advised that the employing establishment had no record of an April 30, 2010 work injury and appellant did not work on May 20, 2010.

OWCP also received a copy of a May 28, 2010 magnetic resonance imaging (MRI) scan.

By decision dated July 16, 2010, OWCP denied appellant's claim on the grounds that he had not established that he sustained an injury at work on May 20, 2010 at the time, place and in the manner alleged as the employing establishment indicated that he was not at work on the day of the alleged injury.

On July 29, 2010 appellant requested a review of the written record. In an August 14, 2010 statement, he wrote that "after going over and over in his mind why the post office did not have the May 20, 2010 down on his time card, as the day of injury, I finally realized that my injured happened on May 19, 2010, which I went to the VA emergency room right after it happened." Appellant stated that the medication had made him drowsy and incoherent. He apologized noting that a simple mistake was made because of the pain and stress his family had been under.

Medical information from Scott & White Emergency Department was received. In an April 30, 2010 report, Dr. Craig Cowan, an osteopath specializing in emergency medicine, prescribed ibuprofen and Vicodin. An April 30, 2010 leave slip indicated that appellant was seen in the Scott & White Emergency Department on April 30, 2010 and could return to work on May 3, 2010.

In a May 19, 2010 report, Dr. Matthew S. Hill, an osteopath specializing in family medicine, indicated that appellant had chronic low back pain, acutely worse past three weeks. He noted that appellant was recently prescribed pain medication and was requesting more. Dr. Hill noted that appellant works at the post office and is required to lift, push and pull heavy boxes. Acute chronic low back pain was diagnosed. In a May 24 2010, report, Dr. Benson noted his initial evaluation of appellant and set forth the history of the May 20, 2010 injury as set forth in his June 24, 2010 report and opined that appellant's condition was due to his work duties.

By decision dated November 16, 2010, an OWCP hearing representative affirmed the July 16, 2010 decision denying appellant's claim. The hearing representative found there were serious unexplained inconsistencies in the evidence as the witnesses did not submit new statements rescinding their prior statements and the May 19, 2010 medical report did not provide a history of work injury occurring that day.

LEGAL PRECEDENT

An employee seeking benefits under FECA 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 FECA, that the claim was timely filed within the applicable time

limitation period of FECA[2] and that an injury was sustained in the performance of duty.[3] These are the essential elements of each compensation claim, regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.[4]

An injury does not have to be confirmed by eyewitnesses in order to establish the fact that the employee sustained an injury in the performance of duty, but the employee's statements must be consistent with the surrounding facts and circumstances and his subsequent course of action.[5] Such circumstances as late notification of injury, lack of confirmation of injury, continuing to work without apparent difficulty following the alleged injury and failure to obtain medical treatment may cast doubt on an employee's statements in determining whether he or she has established a prima facie case.[6] However, an employee's statement alleging that an injury occurred at a given time and in a given manner is of great probative value and will stand unless refuted by strong or persuasive evidence.[7]

When an employee claims that he sustained an injury in the performance of duty he must submit sufficient evidence to establish that he experienced a specific event, incident or exposure occurring at the time, place and in the manner alleged. He must establish that such event, incident or exposure caused an injury.[8] Once an employee establishes that he sustained an injury in the performance of duty, he has the burden of proof to establish that, any subsequent medical condition or disability for work, for which he claims compensation, is causally related to the accepted injury.[9]

ANALYSIS

OWCP denied appellant's claim finding that he did not establish fact of injury and that the May 19, 2010 incident did not happen at the time, place and in the manner alleged. It found that there were inconsistencies in the various statements of record and the medical report of May 19, 2010 did not provide a history of injury. On appeal, appellant's counsel argues that OWCP's decision is contrary to fact and law. The Board finds that the evidence of record is sufficient to establish that the May 19, 2010 incident occurred as alleged.

[2] *Joe D. Cameron*, 41 ECAB 153 (1989).

[3] *James E. Chadden, Sr.*, 40 ECAB 312 (1988).

[4] *Delores C. Ellyet*, 41 ECAB 992 (1990).

[5] *See Early David Seal*, 49 ECAB 152 (1997); *Mary Jo Coppolino*, 43 ECAB 551 (2002).

[6] *Merton J. Sills*, 39 ECAB 572, 575 (1988).

[7] *Thelma S. Buffington*, 34 ECAB 104 (1982).

[8] *See generally John J. Carlone*, 41 ECAB 354 (1989); *see also* 5 U.S.C. § 8101(5) (injury defined); 20 C.F.R. § 10.5(q) and (ee) (1999) (occupational disease or illness and traumatic injury defined). *See Victor J. Woodhams*, 41 ECAB 345 (1989) regarding a claimant's burden of proof in an occupational disease claim.

[9] *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

Appellant originally claimed that he was injured on May 20, 2010 and submitted witness statements from Ms. Chambers and Mr. McCaster claiming that appellant worked on May 20, 2010. However, the record reflected that appellant did not work on May 20, 2010. Appellant then claimed he was injured on May 19, 2010, explaining that he made a simple mistake because of pain and stress. OWCP focused on the fact that Ms. Chambers and Mr. McCaster did not submit new statements rescinding their prior statements; however, this, in and of itself, does not weaken appellant's allegation that the injury occurred on May 19, 2010 at the time, place and in the manner alleged as the witnesses reported what they saw and heard.

Ms. Chambers reported that appellant went to do a unit run after Mr. Wright told him the lift on the truck was broken. She also reported overhearing appellant tell Supervisor Wright it might take longer to finish because his back hurt and he might need some help. Mr. McCaster reported seeing appellant limping after he completed a unit run and appellant told him that his back bothered him. He also overheard the conversation between appellant and Mr. Dodd as to when the lift would be fixed and that appellant stated that he would be slower at work. He also heard Mr. Wright instruct appellant to do the unit run and carry a handoff for the next 10 days and the ensuing exchange between appellant and Mr. Wright. Mr. Dodd's May 25, 2010 statement confirms that on May 19, 2010 Mr. Wright told appellant to do the collection run for that day and for the rest of the week, as scheduled, and appellant indicated that he was leaving to go to the doctors. These statements establish that on May 19, 2010 appellant completed a unit run, after which he reported to Mr. McCaster and his supervisors that his back hurt and he was going to the doctors. This is consistent with appellant's statement that he made the unit run in the mail truck that did not have the forklift. Appellant felt pain in his back when he rolled the mail uprights onto the two-ton mail truck and his lower back pain increased, after he completed the unit run, when he stooped down to place the steel ramp. The fact that he may have had a preexisting back condition or the fact that no one witnessed when he injured his back, does not preclude a finding that the May 19, 2010 incident occurred as alleged.[10] The record also reflects that appellant sought prompt medical attention on May 19, 2010. While the May 19, 2010 report does not provide a history of injury, a May 24, 2010 report from Dr. Benson indicates that appellant injured his low back pulling/pushing uprights while at work. The evidence does not contain such inconsistencies as to cast doubt on the validity of appellant's claim.

The Board finds that the evidence of record establishes that the May 19, 2010 incident, loading and unloading mail on a truck with no forklift, occurred at the time, place and in the manner alleged. The inconsistencies as noted by OWCP are insufficient to deny that the May 19, 2010 incident occurred as alleged.[11] The case will be returned to OWCP for further development of the medical evidence and an appropriate decision regarding whether the May 19, 2010 incident caused or aggravated appellant's back condition.

CONCLUSION

The Board finds that the May 19, 2010 incident occurred as alleged. The case is remanded to OWCP for further development.

[10] *See Willie J. Clements*, 43 ECAB 244 (1991).

[11] *See M.H.*, 59 ECAB 461 (2008): *Bill H. Harris*, 41 ECAB 216 (1989).

ORDER

IT IS HEREBY ORDERED THAT the November 16, 2010 decision of the Office of Workers' Compensation Programs is set aside and remanded to OWCP for further action in conformance with this decision.

Issued: November 7, 2011
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

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