

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

E.K., Appellant

and

**DEPARTMENT OF HOMELAND SECURITY,
CUSTOMS & BORDER PROTECTION,
Tucson, AZ, Employer**

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**Docket No. 11-1728
Issued: March 5, 2012**

Appearances:
Max Gest, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On July 19, 2011 appellant, through his attorney, filed a timely appeal from a June 29, 2011 merit decision of the Office of Workers' Compensation Programs (OWCP) denying his claim for an employment-related injury. Pursuant to the Federal Employees' Compensation Act¹ (FECA) 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 met his burden of proof to establish that he sustained a permanent aggravation of his herniated disc at L4-5 and a right foot drop in the performance of duty on August 16, 2010 as alleged.

¹ 5 U.S.C. § 8101 *et seq.*

On appeal, appellant's attorney contends that OWCP has an obligation to see that justice is done and requested that appellant's claim be accepted for the conditions of permanent aggravation of the herniated disc at L4-5 and right foot drop.

FACTUAL HISTORY

On August 19, 2010 appellant, then a 35-year-old customs and border patrol agriculture specialist, filed a traumatic injury (Form CA-1) alleging that he sustained an injury to the right side of his lower back with pain radiating down his right leg as a result of moving a large piece of luggage in the performance of duty on August 16, 2010.

In her narrative statements, Tracey Tilley, an employing establishment representative, indicated that appellant moved a large piece of luggage on August 16, 2010 while inspecting baggage from a passenger vehicle and felt a sharp pain in his lower right back which radiated down his right leg. Thinking he had tweaked a nerve, appellant continued to work and took ibuprofen for the pain. The next two days were his regular days off and he continued to take pain medication but the pain in his back and leg worsened. During the night on August 18, 2010 appellant sought urgent medical care and was admitted to a hospital because his right leg ceased to have feeling or function. Back surgery to repair a vertebral disc was scheduled for August 20, 2010. Ms. Tilley reported that appellant had indicated that he hurt his back at work, but could not pinpoint an event (time/date) that triggered it as it had been aching for a week or so.

In an August 18, 2010 report, Dr. Nicholas C. Fraley, a Board-certified radiologist, reviewed a magnetic resonance imaging (MRI) scan of the lumbar spine and diagnosed right paracentral disc herniation with some cranial and caudal migration which likely contributed to mass effect and compression on both the exiting right L4 nerve root, as well as the descending right L5 nerve root. He also found small disc bulges at L2-3 and L5-S1 without mass effect, as well as some mild facet arthropathy present in the lumbar spine.

On August 18, 2010 Dr. Stacy L. Brodrick, a physician Board-certified in emergency medicine, diagnosed herniated disc at L4-5. She indicated that appellant's right leg gave out around 11:00 a.m. and his entire leg hurt. Dr. Brodrick reported a history of a herniated disc in his back in 2007 that caused sciatica and noted that this was very different. Appellant's previous back pain was successfully treated with physical therapy. Dr. Brodrick indicated that there had been no trauma or falls.

In another August 18, 2010 report, Dr. Talal Alsbiei, a Board-certified internist, diagnosed right radiculopathy with herniated disc at L4-5. He also noted a history of previous herniated disc and reported that appellant had similar symptoms, though with less weakness, four years ago that improved with physical therapy.

On August 19, 2010 Dr. Marco N. Marsella, a neurosurgeon, diagnosed acute right-sided radiculopathy and profound right ankle dorsiflexion weakness. He indicated that appellant presented to the emergency room on August 18, 2010 without any triggering event such as lifting weights or heavy exercise.

In an August 20, 2010 report, Dr. Atif M. Khan, a Board-certified internist, indicated that appellant was admitted with back pain and otherwise did not have any other significant medical history. He reported that appellant had a history of prior herniated disc and was scheduled for L4-5 right microdiscectomy surgery that same day.

On August 20, 2010 Dr. Marsella performed an L4-5 right microdiscectomy. On September 1, 2010 he diagnosed right ankle dorsiflexion weakness.

On August 23, 2010, Dr. Thomas R. Stejskal, a Board-certified radiologist, reviewed an x-ray of the lumbar spine and diagnosed posterior retractors in place with the metallic marker positioned posteriorly at the lower interlumbar level-presumably L4-5.

Appellant, through his attorney, filed a claim on September 22, 2010 for wage-loss compensation for the period October 4 to 29, 2010. He submitted an August 30, 2010 preoperative report by Dr. Marsella who reported appellant's concerns about his work duties, which included driving and lifting moderate amounts of weights. Dr. Marsella opined that appellant was not ready to return to work and recommended physical therapy. In a September 23, 2010 progress report, he reported that appellant had not recovered any significant right ankle dorsiflexion despite successful surgery. Dr. Marsella restricted appellant from returning to work or driving.

By letter dated November 9, 2010, OWCP informed appellant that his claim was originally received as a simple, uncontroverted case administratively handled to allow a limited amount of medical payments. However, since a claim for wage loss had been received, it would formally consider the merits of the claim. After review, OWCP found that the evidence of record failed to establish that the incident occurred as alleged. It specifically requested an explanation as to why appellant originally reported to Ms. Tilley that he could not pinpoint an event (time/date) that triggered his injury as he had been aching for a week or so. OWCP allotted 30 days for him to submit additional evidence and respond to its inquiries.

Subsequently, appellant submitted a narrative statement dated December 4, 2010 in which he described his job duties and requirements. He explained that he suffered a herniated disc in his lumbar spine in 2006, unrelated to his federal employment. Appellant was able to perform all of his duties as an agriculture specialist since January 2009, despite the herniated lumbar disc. On August 16, 2010 he was inspecting various types of vehicles and had to lift and move luggage as part of his duties. Appellant felt increased symptoms of aches and pain in his lumbar spine, but was able to complete his work shift. Following his shift, he took ibuprofen and iced his lower back. The next day, August 17, 2010, appellant had a regular day off and found it difficult to walk or sit. The morning of August 18, 2010 he had to go to the hospital due to extreme back pain and weakness in his right leg. Appellant contended that his work duties of lifting and moving luggage on August 16, 2010 directly aggravated his underlying herniated lumbar disc and drop foot conditions.

Appellant submitted a February 24, 2006 report by Dr. Arlo B. Brakel, a Board-certified neurosurgeon, who saw appellant for a disorder of low back and left leg pain. He stated that the onset of symptoms was rather gradual and dated them to September 2005. Appellant had a persistent syndrome of intermittent severe low back spasms and occasionally a tingling sensation

radiating in particular down the left lower extremity from the sciatic notch, down the posterolateral thigh and ending in the anterior tibial region, which did not extend to the foot. Sitting was bothersome and he had not been able to jog and avoided weightlifting.

In a November 2, 2010 report, Dr. Fraley diagnosed interval right L4-5 hemilaminectomy and discectomy. He also saw nonenhancing material consistent with small recurrent/residual disc herniation.

On November 9, 2010 Dr. Marsella placed appellant on temporary total disability until December 6, 2010. In another report dated November 9, 2010, he stated that appellant related the onset of his condition to moving heavy pieces of luggage while at work. Dr. Marsella opined that appellant had a fixed neurological deficit which would prevent him from returning to work as his ankle dorsiflexion and big toes weakness predisposed him to gait instability and ultimately unpredictable falls, therefore, he could not easily and safely climb in trucks, jump from any height or drive a car for long distances. He advised that appellant could function in any kind of sedentary work such as sitting behind a desk or any activity that did not require impact, such as running, walking many hours, lifting heavy weights or operation of heavy equipment. Dr. Marsella reported on November 23, 2010 that appellant's neurological examination remained significant for established foot drop on the right and had managed to adjust his gait and performance to the point where he was able to walk without obvious "foot slapping" and to drive for short distances. Appellant reported that he had noticed some tingling and occasional shooting pain down the distribution of the right L5. Dr. Marsella indicated that appellant's right foot drop occurred while he was moving heavy luggage at work. He further opined that the herniated disc was compressing the L5 nerve root which controls the ankle dorsiflexion as well as big toe dorsiflexion which caused the neurological deficits shown by appellant.

By decision dated December 30, 2010, OWCP denied appellant's claim on the basis that the evidence he submitted was not sufficient to establish that the described employment incident occurred as alleged. It found that his December 4, 2010 statement failed to identify a specific traumatic injury event that occurred on August 16, 2010 and failed to explain why he informed Ms. Tilley on August 19, 2010 that he could not pinpoint an event (time/date) that triggered his back pain as it had been aching for a week or so. OWCP also based its decision on Dr. Marsella's August 19, 2010 report which stated that appellant had increasing lower back pain and weakness of the right lower extremity without any triggering event such as lifting weights or heavy exercise. It found that these reports were sufficient to cast serious doubt as to whether the injury occurred at the time, place and in the manner alleged.

On January 7, 2011 appellant, through his attorney, requested an oral hearing before an OWCP hearing representative. He submitted a January 18, 2006 report by Dr. Harold Trief, a Board-certified radiologist, diagnosing moderate to moderate-large herniated disc in the midline and to the right at L4-5, a December 3, 2010 report by Dr. Marsella releasing appellant to work on December 2, 2010 with restrictions, a January 18, 2011 report by Dr. Marsella reiterating his opinion that appellant should not be released to full-duty work due to his neurological deficit and reporting that he stated that his job description did not require running or heavy lifting and a position description from the employing establishment.

On April 29, 2011 an oral hearing was held before an OWCP hearing representative. Appellant was not present at the oral hearing and was represented by his attorney who testified that the statements by Ms. Tilley were contradictory in nature. Appellant's attorney explained that it was Ms. Tilley who filled out the claim form on appellant's behalf indicating that he was injured while moving a large piece of luggage on August 16, 2010. Ms. Tilley then wrote a statement indicating that appellant hurt his back at work, but could not pinpoint an event (time/date) that triggered it as it has been aching for a week or so. Appellant's attorney argued that Dr. Marsella's August 19, 2010 report indicating that appellant had increasing lower back pain and weakness of the right lower extremity without any triggering event such as lifting weights or heavy exercise was based on the physician's misunderstanding of triggering event to mean a slip and fall or a motor vehicle accident and not an employment duty, such as moving luggage. The hearing representative raised concerns that Dr. Marsella did not provide the date of injury in his reports and granted appellant's request to hold the case open for 30 days for submission of additional medical evidence.

Subsequently, appellant, through his attorney, submitted a May 2, 2011 narrative statement indicated that he returned to work on or about December 2, 2010 in a light-duty capacity and underwent epidural steroid injections some time in 2006 or the first half of 2007. He had physical therapy and did not recall having any evaluations or treatment for his back condition after or around July 2007 to August 19, 2010.

On June 10, 2011 appellant's attorney submitted a number of corrections to the hearing transcript.

In a June 11, 2011 report, Dr. Marsella indicated that appellant had been his patient since August 2010, seen on an urgent basis following the sudden development of a right-sided ankle dorsiflexion weakness or foot drop. A lumbar MRI scan documented a sizable disc herniation at L4-5 on the right compressing the L5 nerve root responsible for the acute deficit. Dr. Marsella stated that, according to appellant's own description, he was performing his usual job duties as an agriculture specialist, such as moving heavy luggage, when he began suffering from a greater degree of lower back pain which was not new in his medical history. This was accompanied by right ankle weakness, causing some gait abnormality, which was a new symptom not previously suffered by appellant. Dr. Marsella indicated that, a few years before the current injury, appellant was already complaining of lower back pain, not associated with any neurological deficit. Although a lumbar MRI scan at the time documented a disc herniation at L4-5, consultation with another neurosurgeon led to the recommendation of conservative treatment because lower back pain rarely, if ever, was responsive to removal of a herniated disc. Dr. Marsella stated that the reported date of injury was August 16, 2010 and he opined that it was on that date that appellant, as a result of his performance of duties at the employing establishment, suffered an aggravation of the underlying herniated disc at L4-5 resulting in right-sided foot drop which necessitated emergency surgery performed by himself on August 20, 2010.

By decision dated June 29, 2011, an OWCP hearing representative affirmed the December 30, 2010 decision on the grounds that, due to inconsistencies in the presentation of the factual and medical history, appellant failed to establish fact of injury. Although it was undisputed that at some point on August 19, 2010 appellant or his spouse told Ms. Tilley that the

cause of the injury may have been moving luggage on August 16, 2010, which she indicated on the claim form, the hearing representative found that appellant failed to explain his statement to Ms. Tilley that he was unsure what triggered his back pain as his back had been aching for a week or so. OWCP's hearing representative also noted that Dr. Marsella did not clarify the discrepancy between his November 23, 2010 history and his initial report dated August 19, 2010 in which he indicated that there was no triggering event such as lifting weights or heavy exercise. She further found that Dr. Marsella did not provide a rationalized medical opinion as to how the claimed luggage moving activity on August 16, 2010 would have resulted in the aggravation of appellant's back condition which was critical considering he had a significant preexisting back condition and his back had been aching for a week or so prior to August 16, 2010.

LEGAL PRECEDENT

An employee seeking benefits under FECA² 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, that an injury³ 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.⁴

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. A fact of injury determination is based on two elements. 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. Second, the employee must submit sufficient evidence, generally only in the form of medical evidence, to establish that the employment incident caused a personal injury. An employee may establish that the employment incident occurred as alleged but fail to show that his or her condition relates to the employment incident.⁵

An injury does not have to be confirmed by eyewitnesses in order to establish the fact that an employee sustained an injury while in the performance of duty. However, the employee's statements must be consistent with the surrounding facts and circumstances and his or her subsequent course of action.⁶ 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

² 5 U.S.C. §§ 8101-8193.

³ OWCP's regulations define 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. 20 C.F.R. § 10.5(ee).

⁴ *T.H.*, 59 ECAB 388 (2008). See *Steven S. Saleh*, 55 ECAB 169 (2003); *Elaine Pendleton*, 40 ECAB 1143 (1989).

⁵ *Id.* See *Shirley A. Temple*, 48 ECAB 404 (1997); *John J. Carlone*, 41 ECAB 354 (1989).

⁶ See *Mary Jo Coppolino*, 43 ECAB 988 (1992).

determining whether he or she has established a *prima facie* claim for compensation. The employee has the burden of establishing the occurrence of an alleged injury at the time, place and in the manner alleged by a preponderance of the evidence.⁷ An employee has not met this burden when there are such inconsistencies in the evidence that cast serious doubt upon the validity of the claim. 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 and persuasive evidence.⁸

ANALYSIS

The Board finds that appellant did not meet his burden of proof in establishing that on August 16, 2010 he sustained a permanent aggravation of his herniated disc at L4-5 and a right foot drop as a result of moving a large piece of luggage. As noted above, the first element of fact of injury requires that he submit evidence establishing that an incident occurred at the time, place and in the manner alleged. Appellant did not report any witnesses to the event. As he was alone at the time the incident occurred and there were no eyewitnesses, his statement alleging that an injury occurred at a given time and in a given manner is of great probative value.⁹ However, the Board finds that there are such inconsistencies in the evidence to cast doubt upon the validity of appellant's claim.

There are unresolved discrepancies regarding the manner in which the alleged employment incident occurred. In the claim form she completed on behalf of appellant, Ms. Tilley indicated that he moved a large piece of luggage on August 16, 2010 while inspecting baggage from a passenger vehicle and felt a sharp pain in his lower right back which radiated down his right leg. Yet, in another statement, she reported that he had indicated that he hurt his back at work, but could not pinpoint an event (time/date) that triggered it as it had been aching for a week or so. At the April 29, 2011 oral hearing, held before an OWCP hearing representative, appellant's attorney acknowledged that Ms. Tilley's own statements were contradictory in nature. Appellant did not provide an explanation to why he would tell Ms. Tilley that he could not pinpoint the date or time of his injury or alternatively, why her statement was erroneous. The Board finds that it is not clear whether he was injured on August 16, 2010 or a week or so before.

In an August 19, 2010 report, Dr. Marsella indicated that appellant presented to the emergency room on August 18, 2010 without any triggering event such as lifting weights or heavy exercise. At the oral hearing, appellant's attorney argued that Dr. Marsella misunderstood the term "triggering event" to mean a slip and fall or motor vehicle accident and not an employment duty, such as moving luggage. However, in his June 11, 2011 report, Dr. Marsella did not provide any clarification of his statement or what he meant by "triggering event."

⁷ See *R.T.* Docket No. 08-408 (issued December 16, 2008).

⁸ See *Allen C. Hundley*, 53 ECAB 551 (2002); *Earl David Seal*, 49 ECAB 152 (1997).

⁹ *Id.*

Ms. Tilley's statements and Dr. Marsella's reports are inconsistent with the surrounding facts and circumstances.¹⁰ Appellant has not reconciled these contradictions in the record. Moreover, he completed his work shift after the alleged incident before he went to the emergency room two days later on August 18, 2010.

The evidence submitted contains such inconsistencies as to cast doubt on the validity of appellant's claim. Accordingly, the Board finds that he has not met his burden of proof in establishing that he experienced an employment-related incident at the time, place and in the manner alleged.¹¹

On appeal, appellant's attorney contends that OWCP has an obligation to see that justice is done and requested that appellant's claim be accepted for the conditions of permanent aggravation of the herniated disc at L4-5 and right foot drop. For the reasons stated above, the Board finds that the attorney's argument is not substantiated.

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

CONCLUSION

The Board finds that appellant has not submitted sufficient evidence to establish that he sustained an injury in the performance of duty on August 16, 2010, as alleged.

¹⁰ Cf. S.A., Docket No. 10-1786 (issued May 4, 2011) (where the Board found that appellant established that the incident occurred as alleged, as there were no inconsistent statements from appellant or other evidence refuting the occurrence of the alleged incident).

¹¹ Given that appellant did not establish an employment incident, further consideration of the medical evidence is unnecessary. See *Bonnie A. Contreras*, 57 ECAB 364, 368 n.10 (2006).

ORDER

IT IS HEREBY ORDERED THAT the June 29, 2011 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 5, 2012
Washington, DC

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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