

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of AMEDEO MANNINO and DEPARTMENT OF VETERANS AFFAIRS,  
JERRY L. PETTIS MEMORIAL VETERANS ADMINISTRATION HOSPITAL,  
Loma Linda, Calif.

*Docket No. 97-698; Submitted on the Record;  
Issued November 20, 1998*

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DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,  
A. PETER KANJORSKI

The issue is whether appellant had met his burden of proof in establishing that he sustained an injury in the performance of duty on May 3, 1996, as alleged.

On June 11, 1996 appellant, then a 65-year-old patient representative, filed a notice of traumatic injury and claim for continuation of pay/compensation (Form CA-1) alleging that he sustained an employment-related injury to his lower back on May 3, 1996. Appellant stated:

“For the 7<sup>th</sup> time in approximately 12 years I was in the process of moving my office and relocating it from the 4<sup>th</sup> floor to the 1<sup>st</sup> floor of the employing establishment. While awaiting for my new office to become available and working in between patients, for approximately two weeks I was busy gathering boxes and lifted and removed a multitude of files from a five drawer upright legal file cabinet and also a very large five drawer upright storage and file cabinet. I personally removed a large quantity of files and folders from both cabinets and placed them in various boxes. When I filed a box I lifted it and placed it inside or outside my office to give me an area to work with clients. When I moved into my new office I had to lift a multitude of boxes and removed the contents from the boxes and placed them in various storage cabinets. During this period of time I was experiencing acute lower back spasms which caused me excruciating pain in my lower back. The spasms were so acute and the pain got so intense that I took two days of sick leave on May 13 and 14, 1996. On June 4, 1996 at 4:20 a.m. my wife rushed me to the ER [emergency room] at the VA [Veterans Administration] Medical Ctr [Center]. Due to intense lower back pain and also a large presence of blood in the urine.”

The record shows that appellant did not lose time from work following the alleged incident until May 13 and 14, 1996; first sought medical treatment on June 6, 1996; placed off

work; prescribed bed rest with an antiinflammatory; pain medication; and an appointment to return in two weeks.

By letter dated July 24, 1996, the employing establishment controverted appellant's claim on the grounds: (1) that appellant stated that he injured himself on the job on May 3, 1996, but did not report it to his supervisor until June 11, 1996; (2) that on July 19, 1996 appellant requested sick leave, not leave without pay due to his on-the-job injury; (3) that appellant replied to a question of whether his back pain was a result of other nonindustrial condition as "I [am] not sure, I guess we have to wait for the results of the tests;" (4) that appellant never informed the employing establishment that he was seeking care for his back from his private physician; (5) that appellant's supervisor and a coworker in correspondence dated June 28, 1996, noted that appellant was inconsistent when he described injuring his back at home instead of work on May 12, 1996; (6) that appellant was not very happy about the move and told someone "that because of that, I [will not] be back;" (7) that appellant was counseled concerning the poor body mechanics in lifting items; (8) that the facilities management service conducted the move and it was not necessary for appellant to move boxes at all; and (9) that appellant's physician was exploring the possibility of prostate cancer because of blood in appellant's urine.

By letter dated August 30, 1996, the Office of Workers' Compensation Programs advised appellant that additional information was needed in order to process his claim. Appellant was advised to have his attending physician submit a detailed narrative report which included: history of injury, examination findings, test results, diagnosis, treatment provided, prognosis, period and extent of disability, and an opinion on the relationship of the diagnosed condition to his federal employment activity. The Office also advised appellant to provide a Form CA-3, if appellant lost time from work. If appellant was treated at an employing establishment medical clinic or dispensary for the alleged injury, treatment notes were needed. Appellant was allotted 30 days within which to submit the requested information. Accompanying this August 30, 1996, informational letter was the Office's memorandum of conference regarding the issue of whether appellant had injured himself as alleged. Appellant was allotted 21 days within which to respond.

By letter dated September 21, 1996, appellant responded to the Office's memorandum of conference by explaining that he delayed medical evaluation and treatment because he expected his lower back pain symptomatic to resolve; that he tolerated the situation as long as he reasonably could; that he had a previous lumbar sacral injury in 1992 and continued to experience residuals of that injury which was complicated by his age and the normal spinal degeneration which is expected with age. Appellant went on to say, that as a result of this experience he believed that with rest and the medication always available to him when he suffered occasional chronic back pain, the acute symptoms resulting from the May 3, 1996 incident would resolve; that since the pain and associated symptoms did not resolve, but gradually worsened and ambulation became more difficult he reported to the emergency room on June 4, 1996, but by then he had episodes of excruciating pain and blood in his urine; that his physician was checking him for prostate cancer which turned out to be negative. He also denies having told his supervisor and a coworker that he injured himself at home. Appellant stated:

“I can only conclude that both coworkers misunderstood any conversation I may have had with them. I did not state that I was injured at home or that I believed I may have been injured at home. I can only conclude that I may have stated that my injury as associated symptoms prevented me from doing routine work around the house which may have been misinterpreted by Ms. Waldron and Ms. Previte. I know that I definitely referred to my back pain during routine conversations with fellow employees during the month I attempted to continue to work following the on-the-job injury.”

He also notes that the employing establishment does not appear to dispute the fact that on May 3, 1996, he was relocating offices and as a result, lifted and moved boxes of records, office supplies, etc. The employing establishment also responded to the Office’s August 30, 1996 memorandum of conference.

In a decision dated September 30, 1996, the Office rejected appellant’s claim on the grounds that fact of injury had not been established. The Office found that there was insufficient or conflicting evidence in the file regarding whether or not the claimed event, incident or exposure occurred at the time, place and in the manner alleged.

The Board finds that appellant has not met his burden of proof in establishing that he sustained an injury to his back in the performance of duty on May 3, 1996.

An employee who claims benefits under the Federal Employees’ Compensation Act<sup>1</sup> has the burden of establishing the occurrence of an injury at the time, place, and in the manner alleged, by a preponderance of the reliable, probative and substantial evidence.<sup>2</sup> An injury does not have to be confirmed by eyewitnesses in order to establish the fact that an 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 or her subsequent course of action.<sup>3</sup> An employee has not met his burden of proof of establishing the occurrence of an injury when there are such inconsistencies in the evidence as to cast serious doubt upon the validity of the claim.<sup>4</sup> 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, if otherwise unexplained, cast sufficient doubt on an employee’s statements in determining whether a *prima facie* case has been established.<sup>5</sup> 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.<sup>6</sup>

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<sup>1</sup> 5 U.S.C. §§ 8101-8193.

<sup>2</sup> *William Sircovitch*, 38 ECAB 756 (1987); *John G. Schaberg*, 30 ECAB 389 (1979).

<sup>3</sup> *Charles B. Ward*, 38 ECAB 667 (1987); *Joseph Albert Fournier, Jr.*, 35 ECAB 1175 (1984).

<sup>4</sup> *Tia L. Love*, 40 ECAB 586 (1989); *Merton J. Sills*, 39 ECAB 572 (1988).

<sup>5</sup> *Samuel J. Chiarella*, 38 ECAB 363 (1987); *Henry W.B. Stanford*, 36 ECAB 160 (1984).

<sup>6</sup> *Robert A. Gregory*, 40 ECAB 478 (1989); *Thelma S. Buffington*, 34 ECAB 104 (1982).

In the instant case, there is strong or persuasive evidence to dispute that the incident occurred at the time, place and in the manner alleged by appellant. Appellant filed a timely traumatic injury claim on June 11, 1996, alleging an employment-related injury to his back on May 3, 1996.<sup>7</sup> He continued to work following the alleged injury and did not seek medical treatment for the alleged injury until June 4, 1996, approximately one month later. Appellant stated that his wife rushed him to the emergency room on June 4, 1996, because of excruciating pain and blood in the urine. He then explained that he delayed treatment for his back because he had a previous back injury which resulted in suffering occasional chronic back pain and he was already taking medication previously prescribed when this new injury occurred, that dealing with his previous chronic back condition, the complications with age and the normal spinal degeneration expected with age, he believed the new symptoms presented with his new injury to his back on May 3, 1996 would resolve itself. However, appellant's supervisor and a coworker stated that appellant told them that he hurt himself at home on May 12, 1996, and the record shows a copy of a request for sick leave for two days immediately following May 12, 1996, the day appellant allegedly hurt himself at home, for May 13 and 14, 1996.

Further to cast serious doubt on the validity of this claim, the employing establishment noted that the facilities management service conducted the move and it was not necessary for appellant to move boxes, and that he had previously been counseled concerning the poor body mechanics in lifting items, it is not clear why appellant continued to lift and move boxes during the relocation of his office. The Office cannot accept fact of injury if there are such inconsistencies in the evidence as to cast serious doubt as to whether the specific event or incident occurred at the time, place and in the manner alleged or if the evidence established that the specific event or incident to which the employee attributes the injury was not in the performance of duty.<sup>8</sup> As such, the evidence is insufficient to establish fact of injury.

In view of these circumstances, appellant has failed to establish an injury to his back on May 3, 1996 by a preponderance of reliable, probative and substantial evidence.<sup>9</sup>

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<sup>7</sup> See *supra* note 1.

<sup>8</sup> *Joe D. Cameron*, 41 ECAB 153 (1989); *Elaine Pendleton*, 40 ECAB 1143 (1989).

<sup>9</sup> See *William Sircovitch*, *supra* note 2.

The decision of the Office of Workers' Compensation Programs dated September 30, 1996 is hereby affirmed.<sup>10</sup>

Dated, Washington, D.C.  
November 20, 1998

Michael J. Walsh  
Chairman

Willie T.C. Thomas  
Alternate Member

A. Peter Kanjorski  
Alternate Member

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<sup>10</sup> Following the Office's September 30, 1996 decision, appellant submitted additional evidence not previously considered by the Office. The Board's jurisdiction, however, is limited to reviewing the evidence that was before the Office at the time of its final decision. The Board therefore has no jurisdiction to review any evidence submitted to the record after the Office's September 30, 1996 decision. 20 C.F.R. § 501.2(c). This decision does not preclude appellant from having such evidence considered by the Office as part of a reconsideration request.