U.S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ANTHONY JEROME DUDLEY and U.S. POSTAL SERVICE, POST OFFICE, Detroit, Mich.

Docket No. 96-2023; Submitted on the Record;
Issued October 15, 1998

DECISION and ORDER

Before WILLIE T.C. THOMAS, MICHAEL E. GROOM, A. PETER KANJORSKI

The issue is whether appellant has met his burden of proof in establishing that he sustained an injury in the performance of duty on March 31, 1994.

On April 1, 1995 appellant, then a 42-year-old letter carrier, filed a notice of traumatic injury and claim for continuation of pay/compensation (Form CA-1) alleging that he injured his left shoulder on March 31, 1994 when he heard his shoulder snap or pop while placing his mailbag on his shoulder. In an attached narrative statement, appellant noted:

> "On March 31, 1994 while carring (sic) my route, I was setting another loop out of my vehicle and placing my mailbag on my shoulder and heard a pop or snap in my shoulder. I continue to carry my route but the pain worsen. The pain got so bad I couldn't finish my route.
>
> "A patron on my route brought me into her house and called the station and told the manager she had a carrier at her house in pain and couldn't move his arm (left).
>
> "The manager and a carrier came out on the route to get me. The carrier drove my car back to the station and I went to Henry Ford Fairlane Emergency.
>
> "The incident was reported to management that day."
>
> Appellant was placed on light-duty work upon return to work.

An emergency room note indicated that appellant was seen on March 31, 1994 at approximately 3:55 p.m. and gave the following history to the nurse:

> "Complains of stiffness left arm, left shoulder radiating across to mid back since 12:15 today. No history of injury. States he carries mailbag with left arm. States symptoms on and off. States pain increases greatly when lifting left arm."

Appellant was diagnosed with muscle strain, left shoulder and discharged with instructions to take Torapol, apply warm heat to his arm and follow-up with his regular physician by the emergency room physician, Dr. J. Kidd.

In a follow-up note dated April 11, 1994, Dr. Bryon Wolffing, appellant's treating Board-certified immunologist, stated:

> "Patient comes in for follow-up. He was seen in the emergency room, March 31, 1994 with musculoskeletal pain of the left shoulder, neck and arm. The only thing that seems to have brought it on was that he works as a mail carrier and was carrying a heavy mailbag around and found that it got worse and worse as the day went on."

By letter dated May 8, 1995, the Office of Workers' Compensation Programs informed appellant that additional information was required to reach a determination on his claim. The Office requested appellant to state why he had not filed his claim within 30 days of the injury, the names of any person(s) who had knowledge or witnessed his injury, the immediate effects of the injury and other information related to treatment of his injury.

In response to the Office's May 8, 1995 letter appellant submitted the following statement:

> "On the day in question I didn't report the injury right away because Mr. C[hristopher] Jacks advised me, he had a lot of accidents at that time and it would look bad for the station.
>
> "For a year or better I was doing clerk and maintenance work around the station, running errands, doing express mail and other light jobs.
>
> "When all the light-duty personnel were sent home or told there wasn't any work for them. I felt cheated because my injury was job related and I felt Mr. Jacks would take care of me.
>
> "I also found out that there was a difference between limited and light duty after almost 17 years of service, I wasn't sure of the difference.
>
> "Other supervisors knew of the accident. On March 28, 1995 after seeing Dr. [Patricia A.] Kolowich [an orthopedic surgeon] at Henry Ford 2799 W Grand Blvd. in Detroit, I found out that I may need an operation for the injury.

"This all came from the day of the accident, which was March 31, 1994, from emergency to follow-up visit to my doctor, which refer me to rheumatology (Dr. Van Dellen) to physical therapy which after a lot of complaining about my injury I was finally refer to Athletic Medicine (Dr. Kolowich). A day or so after the accident Mr. Jacks (station manager) told me it would be my word against his. A patron on the route Mrs. [Dianna] Riley 18411 Avon call the station and asked for Mr. Jacks and clerk Keith Steward took the call.

"Mr. Jacks and letter carrier Mr. [Willie B.] Lee on route 1952 came out to get me, Mr. Lee drove my car back to the stations. I was seen in emergency that same day by Dr. Kidd and Dr. Williams at Henry Ford Fairlane Medical Center in Dearborn, I was [given] pain medication for the pain."

By decision dated June 29, 1995, the Office denied appellant's claim on the basis that the evidence was insufficient to establish that he sustained an injury as alleged. In the attached memorandum, the Office found appellant's factual statement to be of little probative value as it was uncorroborated. The Office also found that the record failed to contain any medical evidence linking appellant's diagnosed condition with his alleged injury on March 31, 1994.

By letter dated July 6, 1995, appellant, through his representative, requested an oral hearing and submitted evidence in support of his request.

A hearing was held on February 16, 1996. At the hearing, appellant was represented by a union representative and allowed to testify and submit evidence. Appellant testified regarding the injury and why he delayed in filing a claim.

By letter dated February 16, 1996, appellant, through his union representative, submitted witness statements and a brief in support of his claim.

In a statement dated July 19, 1995, Mr. Lee, a letter carrier, stated that on March 31, 1994, he and Mr. Jack drove to 18411 Avon Street, Detroit. Mr. Lee stated that he and Mr. Jack found appellant "sitting on a couch in Mr & Mrs. Rileys' living room." Appellant informed Mr. Lee and Mr. Jacks "that he was unable to move his left arm without assistance with his right hand." Mr. Lee assisted appellant to his personal vehicle, noted that he "was unstable from the left side" while walking and drove appellant in his personal vehicle back to the station.

In a statement dated August 1, 1995, Ms. Riley stated that on March 31, 1994 around 3:00 p.m. she went to check her mail and saw appellant sitting in his car. She noted that appellant was still sitting in his car 15 to 20 minutes later and went out to see if he was all right. Ms. Riley helped appellant into her home and then called appellant's supervisor, Mr. Jack. Ms. Riley stated she informed Mr. Jack that appellant appeared to be ill and gave her address and name so he could come and see appellant. Approximately 15 to 20 minutes later, Mr. Jack arrived with another employee, at which time appellant indicated that he could not move his hand, arm and shoulder. Ms. Riley "suggested that they might want to take him to emergency" and that appellant was in great pain. Lastly, Ms. Riley stated that appellant was assisted by "the other employee" out to his car.

In a statement dated September 5, 1995, Mr. Lorenzo Heath stated:

> "[W]hile visiting Ms. Rileys in her home, saw [appellant] sitting in her living room. I spoke to him and noticed 'that he seem[ed] to be in great pain,' which caused me to become concerned.
>
> "I ask[ed] him 'what was the matter and what was wrong.'
>
> "He told me 'that his arm and shoulder was hurting severly (sic) and could not or could hardly move it.'
>
> "We offered to take him to the hospital, home and or call his superviser's (sic) and the latter was done. His Supervisers (sic) were called and they came to Ms. Rileys' home."

By letter dated March 14, 1996, the employing establishment submitted a witness statement from Mr. Jacks, appellant's supervisor. In his witness statement, Mr. Jacks agreed with the statements given by Ms. Riley, Mr. Heath and Mr. Lee. Mr. Jacks stated he asked if appellant "intended to file a CA-1, he did not elect to file on March 3, 1994." Mr. Jacks stated he did "not recall him ever saying that the weight of the mail & satchel caused any shoulder injury, to make me believe it was job related." Mr. Jacks offered appellant light-duty work upon his return based on the restrictions issued by appellant's physician.

By decision dated April 23, 1996, the hearing representative affirmed the Office's June 29, 1995 decision denying appellant's claim. The hearing representative found inconsistencies in the evidence such as appellant filing one year after the alleged injury and none of the lay witnesses "indicated that the claimant told them of the 'injury' that occurred when he placed the mailbag on his left shoulder" The hearing representative also noted a further inconsistency of appellant's supervisor, Mr. Jacks, denying appellant's allegation that he would provide appellant with modified work if he did not file a claim. The hearing representative thus found that fact of injury was not established.

The Board finds that appellant has established that he sustained an injury in the performance of duty on March 31, 1994.

An employee seeking benefits under the Federal Employees' Compensation Act[1] 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 the Act, that the claim was timely filed within the applicable time limitation period of the Act, that the injury was sustained in the performance of duty as alleged and that any disability and/or specific condition, for which compensation is claimed are causally related to the employment injury.[2] These are the

[1] 5 U.S.C. §§ 8101-8193.

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

essential elements of each and every compensation claim regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.[3]

In order to establish an injury, an employee must show that the injury occurred at the time, place and in the manner alleged by a preponderance of the reliable, probative and substantial evidence.[4] 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, as alleged, but the employee's statements must be consistent with surrounding facts and circumstances and his or her subsequent course of action. 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.[5] 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.[6]

Appellant's claim that he sustained a left should injury at work on March 31, 1994 is consistent with the facts of the case and his subsequent course of action. Following the alleged work injury on March 31, 1994 appellant immediately sought medical treatment at the Henry Ford Hospital emergency room. The Henry Ford Hospital emergency room notes indicate that appellant was treated March 31, 1994 at approximately 3:55 p.m., at which time the nurse noted that appellant complained that his left arm and shoulder were stiff and the pain radiated across to his mid-back since 12:15 p.m. The nurse also indicated that appellant felt increased pain when lifting his left arm. The emergency room physician diagnosed muscle strain, left shoulder and discharged with a prescription and instructions apply warm heat to his arm and follow-up with his regular physician.

In addition, the witness statements from Ms. Riley, Mr. Heath, Mr. Lee and Mr. Jacks all corroborate appellant's statement as to the occurrence of the injury on March 31, 1994. All the statements from the witnesses indicate that appellant was in pain on March 31, 1994. Ms. Riley called Mr. Jacks, appellant's supervisor, who drove out to her house to check on appellant. Mr. Jacks and Mr. Lee both agree that they went to Ms. Riley's house and that Mr. Lee drove appellant back in his car. All the witness statements are consistent with appellant's version of the incident in his statement. The Board thus finds that the witness statements, as well as appellant's statement and the medical evidence, are consistent and probative to establish that the incident occurred at the time, place and in the manner alleged despite appellant's waiting approximately one year to file a formal CA-1 claim. The Board notes that appellant's allegation for not filing the claim initially is consistent with the apparent accommodation of light duty by his supervisor.

[3] *Victor J. Woodhams*, 41 ECAB 345 (1989).

[4] *Bill H. Harris*, 41 ECAB 216 (1989); *Charles B. Ward*, 38 ECAB 667 (1987).

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

[6] *Thelma Rogers*, 42 ECAB 866 (1991); *Thelma S. Buffington*, 34 ECAB 104 (1982).

The Board further finds, however, that the case must be remanded to the Office for further development to determine the nature of the injury sustained, the period or periods of disability, if any and for a specific finding as to whether the injury sustained on March 31, 1994 resulted in the need for medical treatment rendered for the injury to his left shoulder.

The decision of the Office of Workers' Compensation Programs dated April 23, 1996 is reversed as to the finding that appellant did not sustain an injury as alleged on March 31, 1994 and the case is remanded for further development consistent with this decision of the Board.

Dated, Washington, D.C.
October 15, 1998

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member