

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of BILLY J. REEVES and DEPARTMENT OF VETERANS AFFAIRS,
WALLA WALLA VETERANS HOSPITAL, Walla Walla, Wash.

*Docket No. 97-369; Submitted on the Record;
Issued October 26, 1998*

DECISION and ORDER

Before MICHAEL J. WALSH, GEORGE E. RIVERS,
WILLIE T.C. THOMAS

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

The Board has duly reviewed the case record and finds that appellant did not sustain an injury in the performance of duty, as alleged.

An employee seeking benefits under the Federal Employees' Compensation Act 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 filed within the applicable time limitation of the Act, that an 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.¹ These are the essential elements of each and every compensation claim regardless of whether the claim is predicated upon a traumatic injury or occupational disease.² 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.³ 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.⁴

¹ *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

² *Daniel J. Overfield*, 42 ECAB 718, 721 (1991).

³ *Robert J. Krstyen*, 44 ECAB 227, 229 (1992); *John J. Carlone*, 41 ECAB 354, 356-57 (1989).

⁴ *Id.*

To establish that an injury occurred as alleged, the injury need not be confirmed by eyewitnesses, but the employee's statements must be consistent with the surrounding facts and circumstances and his subsequent course of action. In determining whether a prima facie case has been established, such circumstances as late notification of injury, lack of confirmation of injury, and failure to obtain medical treatment may, if otherwise unexplained, cast serious doubt on a claimant's statements. The employee has not met his burden when there are such inconsistencies in the evidence as to cast serious doubt on the validity of the claim.⁵ However, an employee's statement 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

The Office of Workers' Compensation Programs accepted that appellant sustained a low back strain as a result of a November 14, 1994 employment injury. On February 28, 1995 appellant filed a notice of recurrence, Form CA-2a, alleging that on February 21, 1995 he aggravated his back while lifting sod. By decision dated October 19, 1995, the Office found that the lumbar strain had resolved as of December 12, 1994 and therefore appellant did not suffer a recurrence of disability due to the November 14, 1994 employment injury. The Office advised appellant to file a new Form CA-1, notice of traumatic injury, to address the effect of his lifting sod on February 21, 1995.

On October 24, 1995 appellant filed a claim, Form CA-1, alleging that on February 13, 1995, while he was working on snow removal of the sidewalks, the brush jumped off the sprocket of the tractor he was using, that while lifting the brush to tie it to the chassis, and then driving to the shop and reinstalling the brush on the machine aggravated his back. Appellant stated that he continued working on light duty as he could endure the pain. Appellant's supervisor stated that appellant did not report the injury until October 24, 1995.

To support his claim, appellant submitted a computerized axial tomography (CAT) scan of the lumbar spine dated September 20, 1995, a description of his job duties a bone scan dated May 12, 1995, hospital notes dated from December 12, 1994 to July 3, 1995, x-rays of the lumbosacral spine dated February 21 and May 11, 1995 and a disability note from Dr. Peter T. Simonian, an orthopedic surgeon, dated July 3, 1995 stating that appellant had chronic low back pain, that he could not do light work and should be retrained.

By letter dated October 31, 1994, the employing establishment controverted the claim.

By letter dated December 7, 1995, the Office requested additional information from appellant, including more details about the alleged incident occurring on February 13, 1995.

By decision dated January 16, 1996, the Office denied the claim, stating that the evidence of record did not establish fact of injury.

In an undated letter received by the Office on March 5, 1996, appellant requested reconsideration of the Office's January 16, 1996 decision. Appellant submitted additional

⁵ *Linda S. Christian*, 46 ECAB 598, 600-01 (1995); *Carmen Dickerson*, 36 ECAB 409, 415 (1985).

⁶ *Linda S. Christian*, *supra* note 5 at 601; *Virgil F. Clark*, 40 ECAB 575, 584-86 (1989).

medical evidence to support his claim including a medical report from his treating physician, Dr. Joseph F. Meyer, an internist, dated February 29, 1996, hospital notes dated from October 18, 1994 through July 3, 1995, most of which he had previously submitted, Dr. Meyer's notes dated from April 6 through October 19, 1994, Dr. Meyer's report dated September 6, 1995 and a medical report from Dr. Guy F. Gehling, a neurological surgeon, dated October 20, 1995. In a note dated April 6, 1994, Dr. Meyer stated that appellant's right shoulder was bothering him for almost eight months and that he was raking dirt and leaves at the employing establishment. A hospital note dated October 18, 1994, stated that a ladder fell on appellant striking his back. In a note dated October 19, 1994, Dr. Meyer stated that a ladder fell on appellant at work on October 18, 1994 hitting the back of his head and his upper back. In his September 6, 1995 report, Dr. Meyer noted that appellant strained his back lifting sod in mid-November 1995 [apparently meaning 1994], then later had a flare-up shoveling snow and missed some work. In his October 20, 1995 report, Dr. Gehling, to whom appellant was referred by Dr. Meyer, stated that appellant told him that on November 14, 1994, he was moving four or five pallets of sod and developed some back aching, and following that, he used a mower blowing leaves and his pains got worse. He stated that appellant's symptoms vacillated in severity and that "on February 21, 1995 while working on snow removal, his pains became unbearable." Dr. Gehling stated that appellant was off work for approximately three or four days and had been on light duty since the February 21, 1995 incident.

In his February 29, 1996 report, Dr. Meyer noted that he had treated appellant for low back pain since 1991, that on November 14, 1994 he treated appellant for low back pain after appellant had placed sod, and appellant relayed the history of heavy lifting during a period of snow removal in mid-February 1995 "as well as lifting accessories for a tractor that weighed perhaps 300 pounds which flared his back." He stated that he reviewed numerous diagnostic tests which revealed severe disc herniation at the L4-5 level. Dr. Meyer opined that on "a more probable than not basis," appellant's severe disc herniation was caused by his work activities for the employing establishment, more specifically the November 14, 1994 employment injury.

By decision dated March 18, 1996, the Office denied appellant's reconsideration request.

By letter dated April 11, 1996, appellant requested reconsideration of the Office's decision.

By decision dated July 15, 1996, the Office denied appellant's reconsideration request.

In the present case, appellant has not established that the February 21, 1995 incident occurred at the time, place and in the manner alleged. Appellant did not report that he aggravated his back lifting and reinstalling the brush on the tractor to his supervisor until October 24, 1995, more than seven months after it allegedly occurred. None of the contemporaneous hospital records mention that appellant injured his back while working on snow removal. The first mention of the incident is in Dr. Meyer's September 6, 1996 report, about six months after the alleged incident occurred, in which Dr. Meyer stated that appellant had a flare-up of his back problem shoveling snow some time after mid-November 1994. In his October 20, 1995 report, Dr. Gehling stated that appellant's back pain became unbearable while appellant was working on snow removal on February 21, 1995 apparently in 1995. His report, however, is also dated several months after the alleged February 13, 1995 employment injury,

and the date of the incident is inconsistent with appellant's alleged date. The record contains references to appellant injuring his back when a ladder fell on him at work or when he was raking sod on February 21, 1995. Appellant, however, did not file claims for these injuries.

Moreover, even if appellant had established that the snow removal incident occurred as alleged on February 13, 1995, there is no rationalized medical opinion in the record which establishes appellant's present condition arose from that incident. Only Dr. Meyer addressed causation in his February 29, 1996 report and he stated that appellant's severe disc herniation "on a more probable than not basis" was caused by his work activities for the employing establishment, more specifically the November 14, 1994 employment injury. His opinion is speculative in relating appellant's disc herniation to his work and he does not specifically relate appellant's condition to the alleged February 13, 1995 brush incident. Therefore, Dr. Meyer's opinion is not probative.⁷ Further, the Office found that appellant had recovered from the November 14, 1994 employment injury. Appellant has therefore not established that he sustained an injury in the performance of duty, as alleged.

The decisions of the Office of Workers' Compensation Programs dated July 15, March 18, and January 16, 1996 are hereby affirmed.

Dated, Washington, D.C.
October 26, 1998

Michael J. Walsh
Chairman

George E. Rivers
Member

Willie T.C. Thomas
Alternate Member

⁷ See *Geraldine H. Johnson*, 45 ECAB 745, 750 (1993).