

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of L.C. WADE and U.S. POSTAL SERVICE,
MAIN POST OFFICE, Homer, La.

*Docket No. 97-1944; Submitted on the Record;
Issued July 6, 1999*

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,
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 September 2, 1995.

On September 28, 1995 appellant, then a 45-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 back on September 2, 1995 when he stepped down off the steps of a house and made a sudden turn. Appellant stated he informed his supervisor of the incident on September 5, 1995. On the reverse side of the form, T.E. Pixley, appellant's supervisor, noted that appellant had been complaining of a sore back for the past three weeks and first mentioned his injury on the job on September 25, 1995. Mr. Pixley also noted that appellant began missing work on September 5, 1995 as well as turning in poor job performances and that appellant indicated his back hurt, but made no mention of an injury when requesting to take annual leave in lieu of sick leave. Mr. Pixley stated that appellant's injury did come up in a conversation on September 5, 1995

In a September 4, 1995 medical certificate from the Veterans Administration (VA) hospital, Pamela Gladney-Jackson, LPN, noted a history of rheumatoid arthritis, that appellant denied injury and had lower back pain for a week. In a September 14, 1995 report from the VA hospital, it was noted that appellant had a history of back pain for the past two weeks. In a September 26, 1995 report from the VA hospital, it was noted that appellant had been in back pain for the past three weeks which started when he stepped off a step and sprained his back. In the October 5, 1995 VA hospital report, it was noted that appellant injured his back on September 2, 1995 and that he continued to have pain.

In a progress note dated October 4, 1995, it was noted that appellant stated that he injured his back on Labor Day September 1995 when he was walking down a flight of stairs, stepped down, shifted his weight and twisted his back.

By letter dated October 17, 1995, the Office of Workers' Compensation Programs informed appellant that the evidence of record was insufficient to establish that he sustained an injury in the performance of duty. The Office then advised appellant of the medical evidence needed to support his claim.

In a decision dated November 22, 1995, the Office denied appellant's claim on the basis that the evidence was insufficient to establish that appellant sustained an injury in the performance of duty. The Office accepted that the incident occurred, but found that the medical evidence was insufficient to establish that any disability resulted from the alleged injury.

Appellant requested a hearing before an Office hearing representative in a letter dated November 29, 1995.

In a medical report dated January 8, 1996, Dr. Carl G. Goodman, appellant's attending Board-certified orthopedic surgeon, noted that appellant injured his back on September 2, 1995 when he stepped off a step and turned quickly causing pain in his lower back. He noted that appellant was off work for a week, returned for two weeks and then stopped work due to intense pain. Dr. Goodman opined that appellant was disabled and diagnosed lumbar disc injury with bilateral leg pain and possible disc herniation on the left.

In a February 9, 1996 report, Dr. Anil Nanda, a Board-certified neurological surgeon, diagnosed a herniated lumbar disc at L5-S1 and recommended surgery. Dr. Nanda opined that it was "possible that [appellant] received this injury from his on the job accident."

In a letter dated July 22, 1996, Dr. Goodman noted he saw appellant in January 1996 and that appellant told him that he made a misstep and twisted his back while carrying mail and that this was consistent with a lumbar disc herniation. He opined that appellant's herniated disc was due to his twisting his back while delivering mail.

In an affidavit dated August 23, 1996, Ms. Gladney-Jackson, LPN, stated that she was working at the VA hospital on September 4, 1995 when appellant checked in. She stated that she believed she may have asked appellant if he had been in an accident and then wrote "denies injury" on the report.

In a decision dated October 10, 1996 decision, the hearing representative found the evidence insufficient to establish that appellant sustained an injury in the performance of duty. The hearing representative found that appellant did not establish that the injury occurred on the date or manner alleged.

By letter dated February 18, 1997, appellant requested reconsideration of the October 10, 1996 hearing representative's decision and submitted evidence in support of his request. (letters dated July 22, 1996 and January 6, 1997 from Dr. Goodman and medical certificates dated September 4, 14, 26 and October 5, 1995 from the Department of Veterans Affairs and a progress report dated October 3, 1995)

By decision dated March 19, 1997, the Office denied appellant's request for modification of the hearing representative's decision. In the attached memorandum, the Office found the

evidence submitted was insufficient to establish that appellant had sustained an injury at the time, place and manner alleged. The Office found that Dr. Goodman's opinion did not provide any medical rationale to support his opinion that appellant's ruptured disc was due to his stepping down a flight of stairs.

The Board finds that the September 2, 1995 employment injury occurred at the time, place and in the manner described by appellant and that the case is not in posture which respect to whether any disability or specific condition for which compensation is claimed is causally related to the employment injury.

An employee seeking benefits under the Federal Employees' Compensation Act¹ has the burden of establishing the essential elements of his or her claim² including the fact that the individual is an "employee of the United States" within the meaning of the Act,³ that the claim was timely filed within the applicable time limitation period of the Act,⁴ 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.⁵ These are essential elements of each compensation claim regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.⁶

To determine whether an 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.⁷ Second, the employee must submit sufficient evidence to establish that the employment incident caused a personal injury.⁸ An employee may establish that an injury occurred in the performance of duty as alleged but fail to establish that his or her disability and/or a specific condition for which compensation is claimed are causally related to the injury.⁹ The Office cannot accept fact of injury if there are such inconsistencies in the evidence as to seriously question whether the specific event or incident occurred at the time, place and in the manner alleged, or whether the alleged injury was

¹ 5 U.S.C. §§ 8101-8193.

² See *Daniel R. Hickman*, 34 ECAB 1220 (1983); see also 20 C.F.R. § 10.110.

³ See *James A. Lynch*, 32 ECAB 216 (1980); see also 5 U.S.C. § 8101(1).

⁴ 5 U.S.C. § 8122.

⁵ See *Melinda C. Epperly*, 45 ECAB 196 (1993); *Elaine Pendleton*, 40 ECAB 1143 (1989).

⁶ See *Delores C. Ellyett*, 41 ECAB 992 (1990); *Victor J. Woodhams*, 41 ECAB 345 (1989).

⁷ See *John J. Carlone*, 41 ECAB 354 (1989).

⁸ *Id.* For a definition of the term "injury," see 20 C.F.R. § 10.5(a)(14).

⁹ As used in the Act, the term "disability" means incapacity because of an injury in employment to earn wages the employee was receiving at the time of the injury, *i.e.*, a physical impairment resulting in loss of wage-earning capacity; see *Frazier v. Nichol*, 37 ECAB 528 (1986).

in the performance of duty.¹⁰ 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 his or her claim.¹¹ 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.¹²

Appellant's claim is consistent with the facts of the case and his subsequent course of action and there are no discrepancies, inconsistencies or contradictions in the evidence, which create serious doubt that appellant sustained an injury in the performance of duty on September 2, 1995. Appellant repeatedly alleged in the factual statements he provided in support of his claim that he injured his back when he stepped down off the steps of a house and made a sudden turn while delivering mail on September 2, 1995. Although appellant did not immediately file his Form CA-1, he indicated that he notified his supervisor on September 5, 1995 of the incident. On the back of the CA-1 form, appellant's supervisor indicated that appellant began missing work on September 5, 1995 and that he had complained of a sore back for the past three weeks. Further, his account is essentially consistent with the history he provided when he obtained medical treatment. Appellant submitted medical reports from the VA hospital dated September 4, 15, 26 and October 5, 1995, which indicate that appellant had complained of back pain. Specifically, the October 5, 1995 report reported that appellant had injured his back on September 2, 1995. There is no contemporaneous factual evidence indicating that the claimed incident did not occur as alleged.¹³ In view of this, the Board finds that the claimed September 2, 1995 incident occurred as alleged.

With respect to whether the September 2, 1995 work incident resulted in an injury, appellant sought medical treatment on September 4, 1995, two days after the incident and initial medical reports are consistent in diagnosing lower back pain. In a September 26, 1995 report from the VA hospital, it was reported that appellant had been experiencing back for the past three weeks which started when he stepped of a step and sprained his back. In progress notes dated October 4, 1995, it was reported that appellant injured his back over Labor Day weekend when he walked down a flight of stairs, stepped down, shifted his weight and twisted his back. In an October 5, 1995 VA hospital report, it was noted that appellant continued to have pain from injuring his back on September 2, 1995. The Board finds that there is no strong or persuasive evidence refuting that appellant sustained back pain as alleged.

Consequently, the Board finds that appellant sustained an injury at the time, place and in the manner alleged. Because of this, the case must be remanded for the Office to determine whether the September 2, 1995 employment injury resulted in any continuing condition, for which he would be entitled to medical benefits, or any periods of disability.

¹⁰ *Elaine Pendleton*, *supra* note 5.

¹¹ *Merton J. Sills*, 39 ECAB 572, 575 (1988).

¹² *Constance G. Patterson*, 41 ECAB 206 (1989); *Thelma S. Buffington*, 34 ECAB 104 (1982).

¹³ *See Thelma Rogers*, 42 ECAB 866, 870 (1991).

The decisions of the Office of Workers' Compensation Programs dated March 19, 1997 and October 10, 1996 hereby set aside and the case remanded for further development in accordance with this decision.

Dated, Washington, D.C.
July 6, 1999

Michael J. Walsh
Chairman

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member