

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of WALTER E. BELONOS and U.S. POSTAL SERVICE,
POST OFFICE, Providence, RI

*Docket No. 98-467; Submitted on the Record;
Issued September 10, 1999*

DECISION and ORDER

Before GEORGE E. RIVERS, BRADLEY T. KNOTT,
A. PETER KANJORSKI

The issue is whether appellant has established that he sustained an injury in the performance of duty on January 23 or January 30, 1997.

In the present case, appellant, a 44-year-old letter carrier, on February 11, 1997 filed a traumatic injury claim and claim for continuing compensation alleging that on January 30, 1997 he felt a twinge in his lower back while in the performance of duty which caused tightness in his right calf the next day. By decision dated April 7, 1997, the Office of Workers' Compensation Programs denied appellant's claim on the grounds that fact of injury was not established. In a decision issued and finalized on July 9, 1997, the hearing representative affirmed the Office's April 7, 1997 decision denying benefits. On October 28, 1997 the Office, in a merit decision, denied appellant's request for modification.

The Board has reviewed the record and finds that appellant has not established that he sustained an injury in the performance of duty on January 23 or January 30, 1997.

An employee seeking benefits under the Federal Employees' Compensation Act¹ has the burden of establishing that he or she sustained an injury while in the performance of duty.² In order to determine whether an employee actually sustained an injury in the performance of duty, the Office begins with an analysis of whether "fact of injury" has been established. Generally "fact of injury" consists of two components which must be considered in conjunction with one another. The first component to be established is that the employee actually experienced the employment incident which is alleged to have occurred. The second component is whether the

¹ 5 U.S.C. §§ 8101-8193.

² *Melinda C. Epperly*, 45 ECAB 196, 198 (1993); *see also* 20 C.F.R. § 10.110(a).

employment incident caused a personal injury, and generally this can be established only by medical evidence.³

With respect to the alleged employment injury on January 30, 1997 appellant stated in his February 11, 1997 claim form that he continued to work that day after feeling a twinge in his back on January 30, 1997, but that on the following day he experienced tightness in his right calf. He added that: “[B]y Tuesday, February 4, 1997 I was feeling pins and needles in leg.” In an attached narrative, appellant stated that he did not make an immediate connection between his right leg tightness of January 31, 1997 and prior “twinge in my back.”

On February 12, 1997 the employing establishment controverted appellant’s claim stating that appellant had notified his supervisor on January 25, 1997 that he had a calf injury but that it was not job related. The employing establishment then noted that appellant took sick leave on January 26, 1997, and returned to work without apparent difficulty until February 5, 1997, when he was seen by a nurse practitioner and placed on sick leave for a nonwork-related low back condition. The employing establishment noted that appellant’s treating physician placed him on sick leave from February 10 to 17, 1997 for a work-related sciatica. Appellant then filed a claim indicating that he “remembered doing something on January 30, 1997.” The employing establishment noted appellant’s inconsistent recollections of his work-related injury and recommended that the Office deny his claim on the grounds that he had failed to establish fact of injury.

By letter dated February 20, 1997, the Office advised appellant that he needed to submit additional information regarding his claim for traumatic injury and continuing compensation including a detailed narrative medical report containing a well-rationalized medical opinion as to the relationship between his January 30, 1997 employment injury and his present condition.

In a letter received on February 13, 1997, appellant’s supervisor noted that appellant asked for sick leave on January 25, 1997 due to pain in his calf but that he made no reference to any other medical condition.

In medical report dated February 14, 1997, Dr. Steven McCloy, appellant’s treating physician, stated that appellant was referred to him for examination based on a January 30, 1997 work-related injury. In relating appellant’s history of injury, Dr. McCloy noted that appellant injured his back on January 30, 1997,⁴ and that he had increasing discomfort during work on Saturday. Appellant then rested on Sunday, returned to work on Monday but that his discomfort continued resulting in his treatment by his “primary care team on February 5, 1997.” He then stated that appellant had sustained an S1 radiculopathy, most probably caused by an L5 herniated nucleus pulposus. Dr. McCloy also noted that a magnetic resonance imaging (MRI) scan would be able to determine whether the herniated nucleus pulposus was partial or complete. Dr. McCloy noted that “This is a compensable injury.”

³ *John J. Carlone*, 41 ECAB 354 (1989).

⁴ Dr. McCloy stated that January 30, 1997 was a Friday.

In a February 15, 1997 limited-duty job offer form, appellant agreed to perform the tasks of letter carrier, filling his routes from a seated position and delivering mail to apartment houses.

On February 21, 1997 appellant stated that he had injured his back on Thursday, January 30, 1997 that on Friday January 31, 1997 he had discomfort in his calf but that he had made no connection with that condition and his January 30, 1997 incident, that on Saturday, February 1, 1997 he worked but left after casing his mail on sick leave, that Sunday was a day off, that on Monday, February 3 and Tuesday, February 4, 1997 he was in again in discomfort and sought medical treatment on Wednesday, February 5, 1997.

On February 27, 1997 appellant stated that he had erred in noting that his injury occurred on January 30, 1997, noting that: "It is documented that I complained of a knot in my leg on January 25, 1997, so the correct date of my back pull is January 23, 1997 and not January 30, 1997."

In an attending physician's report dated February 28, 1997, Dr. McCloy stated that appellant's date of injury was January 30, 1997.

In a decision dated April 7, 1997, the Office denied appellant's claim on the grounds that the evidence failed to establish fact of injury either on January 23 or January 30, 1997.

In an undated letter received by the Office on April 24, 1997, appellant requested a review of the written record. Appellant repeated his assertion that his work-related injury occurred on January 23, 1997, noting that he had reported his injury to his supervisor on January 25, 1997 although he was unaware that the injury was work related at that time.

In an employee's statement dated April 16, 1997, Roland Boisvert stated that appellant related to him on January 25, 1997 that he had a knot on the back of his leg which may have been caused by his "taking out two to three gurneys of mail on a daily basis." In an April 30, 1997 medical report, Dr. McCloy stated that there was confusion regarding appellant's claim. He noted that appellant initially injured himself on January 23, 1997, that he spent the next day, Friday, January 24, 1997 at home, he then reported his leg condition to his supervisor on Saturday, January 25, 1997. After being seen by his primary medical provider, he was referred to Dr. McCloy on February 14, 1997, three weeks post injury. He noted:

"The sensation of a knot in the calf is an uncommon, but not particularly rare manifestation of early neuropathy or radiculopathy. I think that that is an indication that appellant had suffered a herniated nucleus pulposus at the time he developed a 'twinge' in his low back."

In a decision issued and finalized on July 9, 1997, the hearing representative affirmed the Office's April 7, 1997 decision of the Office denying appellant's claim on the grounds that the evidence of record failed to establish that appellant had sustained an injury on January 30, 1997.⁵

In a letter received by the Office on July 27, 1997, appellant requested reconsideration.⁶ On October 28, 1997 the Office, in a merit decision, denied appellant's request for modification.

In this case, appellant was unable to establish that he had sustained an injury on January 23 or January 30, 1997.

As noted above, to establish fact of injury appellant must also establish that he actually experienced the employment incident which is alleged to have occurred. In this case, appellant initially stated that his work-related injury occurred on January 30, 1997 and later, in a detailed narrative, described the chronology from January 30, 1997 and each day following the incident to February 5, 1997 when he sought and received medical treatment. Appellant alleged that he felt pain on the day of the incident, Thursday, January 30, 1997, was in distress the next day, Friday, January 31, 1997 as well as the next work days, Saturday, February 1, 1997 and Monday and Tuesday, February 3 and 4, respectively. However appellant then notified the Office that he had erred and that the correct date of the injury was January 23, 1997 as he had reported a calf injury to his supervisor on January 25, 1997. Appellant was unable to establish that he had in fact sustained an injury on January 23, 1997 other than his comment to his supervisor that he hurt his calf on January 25, 1997. Appellant was unable to explain why he was able to work on his normal workdays between January 23, 1997, the amended date of the alleged incident, and January 30, 1997, the initial date of the alleged incident, a period of seven days. Appellant noted that he was unaware of how many days had passed since he made his initial claim and that because of his medication he had lost track of time. Considering appellant's detailed chronology tracking each day after the alleged January 30, 1997 incident, his inability to note his work activities after the corrected date of January 23, 1997 lacks credibility. Given the detailed explanation of appellant's condition following the alleged January 30, 1997 incident, his resort to medical care after six days, February 5, 1997 appeared reasonable. However, appellant's revised chronology opens a window of seven days after notice to his supervisor, January 25, 1997 after which time he appeared to work without reporting any discomfort, to Saturday, February 1, 1997 when he left work early on account of right calf pain. This period of time in which appellant worked without complaint suggests that any incident that may have occurred on January 23, 1997 was not disabling. Further, no medical evidence has been submitted that would explain why a calf injury was causally related to a low back injury nine days after the alleged incident (January 23, 1997 the revised date of the alleged incident, to January 31, 1997, the date appellant initially noted calf pain).

In support of his request for reconsideration, appellant alleged that he had informed his manager on January 23, 1997 that he had sustained an injury on that day and that because the

⁵ The hearing representative defined the issue as to whether appellant sustained work-related injury on January 30, 1997. He did not include the amended January 23, 1997 which the Office noted in its decision.

⁶ Appellant argued that he had injured himself on January 23, 1997 not January 30, 1997.

manager had subsequently asked appellant's supervisor for a statement regarding when appellant notified him that he had injured himself, this represented proof that he had, in fact, injured himself on January 23, 1997 and had properly notified his manager. This assertion is not supported by the record. Appellant's supervisor stated that appellant notified him on January 25, 1997 that he had a calf condition, not that he had injured himself on January 23, 1997. Further the record does not support that appellant's manager noted appellant's notice to him of an incident or injury on January 23, 1997. Appellant's additional argument raised in his request for reconsideration was that the Office failed to consider Dr. McCloy's medical reports. However, since in this case sufficient doubt exists regarding whether the incident occurred, a physician's statement regarding causality is immaterial. Given appellant's failure to establish a fact of injury, it is unnecessary to address the medical evidence in this case to establish continuing disability.

However, the Board notes that the hearing representative's decision correctly affirmed the Office's April 7, 1997 decision but incorrectly stated that appellant failed to establish fact of injury on January 30, 1997 only while the April 7, 1997 decision found that appellant failed to establish fact of injury on either January 23 or January 30, 1997. The decisions of the hearing representative and the Office's October 28, 1997 decision on reconsideration are modified to include affirming the Office's denial of fact of injury for either January 23 or January 30, 1997.

The decisions of the Office of Workers' Compensation Programs dated October 28, July 9 and April 7, 1997 are affirmed as modified.

Dated, Washington, D.C.
September 10, 1999

George E. Rivers
Member

Bradley T. Knott
Alternate Member

A. Peter Kanjorski
Alternate Member