

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of STEPHEN G. KENALL and U.S. POSTAL SERVICE,
POST OFFICE, Urbana, MO

*Docket No. 99-1139; Submitted on the Record;
Issued June 21, 2000*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issue is whether appellant sustained an injury in the performance of duty.

On October 14, 1996 appellant, then a 48-year-old rural letter carrier, filed a claim for compensation, stating that on September 12, 1996, as he was reaching for a bundle of mail to deliver, he felt a sharp pain in his back. He indicated that he sustained a herniated L4-5 disc. In a December 31, 1996 decision, the Office of Workers' Compensation Programs denied appellant's claim on the grounds that the evidence of record failed to establish that appellant sustained an injury as he alleged. In an accompanying memorandum, the Office found that appellant had complained of preexisting back problems and the medical evidence submitted was not sufficiently well rationalized to show that appellant's condition was causally related to the reported incident. In a June 19, 1997 letter, appellant requested reconsideration. In a July 8, 1997 merit decision, the Office denied appellant's request for modification of the prior decision. In a September 17, 1997 letter, appellant, through his attorney, again requested reconsideration. In a February 9, 1999 merit decision, the Office again denied modification of its prior decisions.

The Board finds that the case is not in posture for decision.

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.¹ The employee has the burden of establishing the occurrence of the alleged injury at the time, place and in the manner alleged, by a preponderance of the reliable, probative and substantial evidence. An employee has not met

¹ *Merton J. Sills*, 39 ECAB 572 (1988).

this burden when there are such inconsistencies in the evidence as to cast doubt upon the validity of the claim. However, his or her statement alleging that an injury occurred at a given time and manner is of great probative value and will stand unless refuted by substantial evidence.²

Appellant stated that on September 12, 1992 he was twisting to reach behind in the back of his vehicle to pick up a bundle of mail to place in a mailbox and felt a sharp pain in his back. In an October 11, 1992 report, Dr. William H. Berner, a specialist in occupational medicine, stated appellant felt a sharp pain in his back, while stretching from the seat of his car to a mailbox. He noted that the pain became more severe over the next few days. Dr. Berner reported that a magnetic resonance imaging (MRI) scan showed an extruded disc fragment in the L4-5 region. He diagnosed a herniated nucleus pulposus at L4-5.

Appellant's postmaster, in an October 17, 1996 note, indicated that several days prior to the incident, he and several other officials discussed appellant's complaints about his back. The postmaster related that appellant complained of pain in the lower back and right hip. The postmaster reported that when appellant came back from his route on September 12, 1996 he reported to his supervisor that he had a sharp pain in his back. The postmaster indicated that the supervisor interpreted the comment to be just talk and not a report of an injury on the job. In a subsequent statement, the postmaster noted that appellant was active in farming, including haying, raising cattle and clearing land for use, turning the trees cut down into fence posts and firewood. He noted appellant complained about the length of his route and his fatigue in delivering mail.

Appellant submitted a report from Dr. Thomas D. Briggs, a Board-certified neurosurgeon, who gave a history of appellant reaching over his right shoulder to get mail from the back seat and experiencing severe pain down his right leg, through the knee and down the lateral aspect to the superolateral aspect of the right ankle. He noted an MRI scan showed a lateral disc herniation at L4-5 on the right side. Appellant also submitted office notes from prior medical treatment. Notes dated August 31, 1990 and December 28, 1994 indicated that appellant had bilateral sacroiliac complaints. A September 13, 1996 note gave a history of appellant lifting one and a half weeks previously and having a hot sensation in the right hip with pain in the right ankle.

In a December 4, 1996 report, Dr. Robert C. Woods, an osteopath, commented that a review of appellant's medical records showed that he had previous back pain but it was located in the sacroiliac region. Dr. Woods stated that appellant had never had discogenic pain symptoms. In a March 14, 1997 report, Dr. Woods stated that he had treated appellant on several occasions in September 1996 for hip and leg pain. He indicated that appellant's pain began when he lifted and twisted to the right to pick up a 25-pound bundle of mail from the back seat of his car. Dr. Woods reported that appellant had at that time a severe pain, which ran down his back and leg.

Appellant's attorney submitted a December 14, 1998 report from Dr. David G. Paff, a specialist in occupational medicine, who gave a history that on September 7, 1996 appellant was

² *Carmen Dickerson*, 36 ECAB 409 (1985).

reaching behind his seat to pick up a 25-pound bundle of mail to deliver when he felt a sharp, excruciating pain in his back on the right side, which radiated down the right leg as far as the ankle. Appellant noted that he had back pain off and on for 12 to 15 years, which involved the sacroiliac joint until the current episode. Dr. Paff commented that appellant had a history of intermittent back pain with heavy activity in the past, but the pain had been of a different character and had been in the sacroiliac joint. He stated that the pain occurring on or about September 7, 1996 symptomatically suggested a herniated disc, which was confirmed by the subsequent MRI scan. Dr. Paff concluded appellant had a preexisting problem with his back which, based on a reasonable degree of medical certainty, was exacerbated by the September 7, 1996 incident, which resulted in herniation of the disc. He noted that the Office claims examiners had commented that previous physicians were unaware of appellant's onset of back pain several days prior to the incident and were unaware of his strenuous activities outside of work. Dr. Paff stated that he was aware of both factors and saw no reason why the factors should interfere with appellant's claim. He indicated that appellant had a long history of intermittent problems with his back but they were of a different nature and not evidence of a herniated disc prior to the September 1996 incident. Dr. Paff stated the fact that appellant was complaining of some problem prior to the incident, was not an indication that there was no injury in September 1996 as that was when the pain became unbearable. Dr. Paff concluded that it was clear that the September 1996 incident was when the herniated disc occurred.

The evidence of record reveals appellant experienced severe back pain, radiating down his leg to his ankle, on September 12, 1996 when he twisted in his seat to pick up a bundle of mail. Dr. Briggs and Dr. Wood presented the same history of injury as appellant. Other medical reports contained minor inconsistencies from the medical history given by appellant. Dr. Berner stated that the pain occurred when appellant was reaching from his car seat to the mailbox. However, that history showed the back pain occurred in the course of delivering mail to a mailbox. A September 13, 1996 note gave a history of a lifting incident one and a half weeks previously. The note did refer to lifting and indicated that appellant had pain in the right hip and right ankle. This is consistent with appellant's history of lifting a bundle of mail and having pain radiate down his leg to the right ankle. The discrepancy as to the date of the incident is a minor inconsistency as the employing establishment and the Office have not produced any other evidence that appellant had a prior incident, which caused back pain. Similarly, Dr. Paff gave a history of injury that corresponded precisely with appellant's history except that Dr. Paff listed September 7, 1996 as the date of injury. However, a five-day discrepancy in the date of injury is inconsequential when, in all other respects, the history of the injury is consistent with the history that appellant has given repeatedly in the course of the development of the case.

The Office pointed to the postmaster's statement that appellant had complained of back pain prior to the September 12, 1996 incident and performed heavy labor when not working for the employing establishment. However, as Dr. Paff and Dr. Wood pointed out, the pain appellant experienced on September 12, 1996 was a different type of pain, a sharp pain that radiated down his leg. The fact that appellant had preexisting back pain and performed heavy labor does not contradict or call into question appellant's claim that the September 12, 1996 incident caused a new back injury, not comparable with the type of back pain he had previously experienced.

The evidence of record, therefore, establishes that appellant sustained an employment-related back incident on September 12, 1996 when he twisted in the seat of his vehicle to pick up a bundle of mail for delivery to a mailbox. Dr. Paff, in his report, concluded that this incident was when appellant's herniated disc occurred. This report, while insufficient to establish appellant's burden of proof, is uncontradicted by any medical evidence and is sufficiently rationalized to require further development of the record.³ The case will, therefore, be remanded for such development, to be followed by a *de novo* decision.

The decision of the Office of Workers' Compensation Programs dated February 9, 1999, is hereby set aside and the case remanded for further development as set forth in this decision.

Dated, Washington, D.C.
June 21, 2000

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

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