

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of VIRGIL HERRING and U.S. POSTAL SERVICE,  
POST OFFICE, Redlands, CA

*Docket No. 98-2454; Submitted on the Record;  
Issued March 28, 2000*

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DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,  
BRADLEY T. KNOTT

The issues are: (1) whether appellant sustained a traumatic injury on November 19, 1994 as alleged; and (2) whether appellant's low back condition, including his herniated nucleus pulposus at L5-S1, is causally related to factors of his employment.

On February 18, 1997 appellant filed a claim for an occupational disease on an Office of Workers' Compensation Programs' Form CA-2 for a "back injury." In an accompanying 11-page letter, appellant attributed his back condition both to the heavy lifting and pushing and pulling he performed in various positions at the employing establishment beginning March 7, 1981 and to a November 19, 1994 incident in which he was pushing a hamper with his waist because his hands hurt. Regarding the November 19, 1994 incident, appellant stated:

"On November 19, 1994 I was pushing a hamper with my waist across the dock and I felt something in my lower back give. It was like one big sharp flash of excruciating pain. I went to the dock office and took a couple of Vicodin.

"Over the next week it kept escalating up and down. I was living on a lot of pain pills. Due to my hands already being out. I was one mass of solid pain from the neck down. Just to move was torture. For the next [2] years I lived in bed."

Appellant stopped work on December 9, 1994 and did not return. On April 18, 1995 he underwent a laminectomy and discectomy to correct a herniated nucleus pulposus at L5-S1. Effective August 2, 1995 the employing establishment separated him for being absent without leave and failing to provide acceptable documentation. On September 17, 1996 appellant underwent a decompressive laminectomy of L4 through S1 and a fusion of L5-S1. Both appellant's surgeries were performed by Dr. Edgar Vyhmeister, a Board-certified orthopedic surgeon.

By decision dated August 11, 1997, the Office found that the evidence did not establish that the injury occurred at the time, place and in the manner alleged. The Office also found that the medical evidence was insufficient to establish that appellant's back condition was caused by the work activities alleged.

The Board finds that appellant has not established that he sustained a traumatic injury on November 19, 1994 as alleged.

An employee has the burden of establishing the occurrence of an injury at the time, place and in the manner alleged, by the preponderance of the reliable, probative and substantial evidence. An injury does not have to be confirmed by eyewitnesses in order to establish the fact that the employee sustained an injury in the performance of duty, but the employee's statements must be consistent with the surrounding facts and circumstances and his subsequent course of action. An employee has not met his burden of proof when there are such inconsistencies in the evidence as to cast serious doubt upon the validity of the claim.<sup>1</sup> Such circumstances as late notification of injury, lack of confirmation of injury, continuing to work without apparent difficulty following the alleged injury and the failure to obtain medical treatment may, if otherwise unexplained, cast sufficient doubt on an employee's statements in determining whether a *prima facie* case has been established.<sup>2</sup>

In the present case, appellant did not file a claim for the alleged November 19, 1994 employment injury until February 18, 1997, which was also the first time he reported this alleged injury to the employing establishment. He continued to work until December 9, 1994 and the physician who was treating appellant for his arm condition indicated that this work stoppage was due to recurrent arm pain after separating two dogs. A December 20, 1994 note from Dr. Achana Bhanu, a Board-certified family practitioner, notes that appellant was "still having pain lower back radiating to RLE [right lower extremity]," but does not mention a traumatic injury. In a report dated January 5, 1995, Dr. Vyhmeister, to whom Dr. Bhanu referred appellant, stated: "He has been complaining of pain in his right hip for about three and a half weeks, since November 20, 1994. [Appellant] has had no known injury. He woke up with pain on November 20, 1994."

Contrary to the Office's finding in its August 11, 1997 decision, the evidence shows that appellant pushed hampers in the performance of his modified distribution clerk position. Appellant's assertion that he did so was supported by the statements of three coworkers and the employing establishment's tour superintendent stated in a July 24, 1997 conference with the Office that "there may have been rare occasions when the claimant moved a hamper." However, the fact that appellant pushed hampers on occasion or even on November 19, 1994 does not establish that the November 19, 1994 incident occurred as alleged. The delay in reporting the alleged injury and in seeking medical attention, and the absence of a history of this alleged incident in the medical reports most contemporaneous with the alleged incident<sup>3</sup> cast serious

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<sup>1</sup> *Joseph A. Fournier*, 35 ECAB 1175 (1984).

<sup>2</sup> *Dorothy Kelsey*, 32 ECAB 998 (1981).

<sup>3</sup> The earliest medical report that alludes to an incident such as the one described by appellant is a January 8, 1996 report from Dr. Vyhmeister, and this report does not indicate when such an incident occurred. In addition, as

doubt upon its occurrence as alleged. Appellant has not met his burden of proving that he sustained a traumatic injury on November 19, 1994 as alleged.

The Board further finds that appellant has not established that his low back condition, including his herniated nucleus pulposus at L5-S1, is causally related to factors of his employment.

In his letter accompanying his claim form, appellant implicated not only the alleged November 19, 1994 incident but also the heavy lifting and pushing and pulling required by his various positions at the employing establishment. The position description for one of appellant's positions of machine distribution clerk indicates that lifting up to 70 pounds and pushing are required. There is no reason to disbelieve appellant's statement that he performed such activities, but appellant nonetheless has the burden to establish that such activities caused or aggravated his low back condition. This burden includes the necessity of furnishing rationalized medical opinion evidence of causal relation, based on a complete factual and medical history.<sup>4</sup> The only medical report that lends any support to appellant's claim that his low back condition is causally related to factors of his employment is the January 8, 1996 report from Dr. Vyhmeister, wherein he stated, "Pushing around carts and lifting heavy loads could definitely be related to this incident of herniated nucleus pulposus." Not only is this statement speculative<sup>5</sup> and not supported by medical rationale,<sup>6</sup> but Dr. Vyhmeister does not show an awareness that appellant did not do any heavy lifting since his return to a modified job in June 1993. The medical evidence is insufficient to establish that appellant's low back condition, including his herniated nucleus pulposus at L5-S1, is causally related to factors of his employment.

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noted above, Dr. Vyhmeister reported a year earlier that appellant sustained no known injury to account for his complaints of right hip and back pain.

<sup>4</sup> *Froilan Negron Marrero*, 33 ECAB 796 (1982).

<sup>5</sup> While the medical opinion of a physician supporting causal relationship does not have to reduce the cause or etiology of a disease or condition to an absolute medical certainty, neither can such opinion be speculative or equivocal. *Philip J. Deroo*, 39 ECAB 1294 (1988).

<sup>6</sup> Medical reports not containing rationale on causal relation are entitled to little probative value and are generally insufficient to meet an employee's burden of proof. *Ceferino L. Gonzales*, 32 ECAB 1591 (1981).

The decision of the Office of Workers' Compensation Programs dated August 11, 1997 is affirmed.

Dated, Washington, D.C.  
March 28, 2000

David S. Gerson  
Member

Willie T.C. Thomas  
Alternate Member

Bradley T. Knott  
Alternate Member