

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of DEAN A. MARTIN and U.S. POSTAL SERVICE,  
POST OFFICE, Boise, ID

*Docket No. 99-479; Submitted on the Record;  
Issued May 9, 2000*

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DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,  
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 June 17, 1997.

Appellant, then a 43-year-old labor relations specialist, filed a notice of traumatic injury and claim for compensation on December 31, 1997 with the Office of Workers' Compensation Programs alleging that on June 17, 1997 at approximately 1:30 a.m. he awakened with severe left flank pain and that this pain was employment related.<sup>1</sup> On the reverse side of the claim form appellant's supervisor, Mitchell J. Hicks, indicated that appellant notified him that, upon waking on the alleged date of injury, appellant noticed severe pain radiating from his back. Mr. Hicks noted his disbelief that appellant was injured in the performance of duty because appellant's claim was submitted more than 30 days after the stated date of injury.

Although appellant did not specify details related to his alleged injury on his CA-1 form, the record later established that on June 17, 1997 appellant flew to Denver to attend a conference from June 17 to 20, 1997 in Breckenridge, Colorado on behalf of his employing establishment. Appellant alleged in medical reports that at 1:30 a.m. on June 17, 1997 he awoke in his motel room in Breckenridge to the severe pain alleged on his claim for compensation. Appellant stopped work on June 23 until July 11, 1997.

Appellant submitted with his claim a medical report by Dr. Don Stritzke, a Board-certified urologist, that indicated he was evaluated for left flank pain on June 27, 1997. The June 27, 1997 report notes that on June 17, 1997 appellant awoke with severe left flank pain that sometimes radiates into the upper left quadrant. The pain was noted to be exacerbated by activities such as standing, lifting and bending. The report indicated that appellant had been seen

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<sup>1</sup> While appellant claimed that his alleged injury occurred on June 17, 1997 at 1:30 a.m., as the evidence suggests that the alleged event occurred during the night between June 17 and 18, 1997, the 1:30 a.m. alleged incident would in fact have occurred on June 18, 1997.

in the emergency room at Saint Alphonsus Regional Medical Center in Boise, Idaho when he returned home and was told that he might be passing a kidney stone. The June 27, 1997 evaluation revealed no urological problems and the etiology of the pain was not identified. Dr. Stritzke diagnosed appellant with “musculoskeletal back pain with probable spasms, possible costochondritis, no evidence of stone disease or urologic pathology.” The report indicated that appellant was referred to Dr. Belinda Murphy, a Board-certified family practitioner, for further evaluation.

Appellant also submitted Dr. Murphy’s report dated July 9, 1997, which further noted appellant’s flank and back pain, and that appellant’s pain was sustained on June 17, 1997 during a business trip. The report referred to a statement made by appellant that “[h]e had been pulling a Pullman suitcase with his right hand and carrying a heavy bag in his left hand but, other than this, relates no history of trauma to the back. He states that he had some pain in the left side which he associated with gas. He went to bed and, when he awoke in the morning, the pain was more severe. He tried [T]ums which gave him no relief. He states the pain continues to date and is more severe with deep inspiration or twisting, especially twisting to the right.” Dr. Murphy diagnosed appellant with “T-9 costotransverse joint subluxation, left, with intercostal radicular pain.”

Appellant further submitted a report from Dr. Theodore Baird, a Board-certified family practitioner, who examined appellant on December 5, 1997 and indicated that appellant had been seen by three or four doctors over a six-month period for reported back problems which began with sudden onset of severe back pain in Breckenridge, Colorado. An additional report submitted by appellant from Dr. Baird notes a follow-up examination on December 15, 1997 which provided that appellant’s pain had not subsided and he should be referred out to determine if appellant suffers from an unusual connective disorder.

On February 26, 1998 the Office requested additional information from appellant in order to make a determination regarding his claim. The Office specifically requested information regarding medical examinations and treatment, whether appellant had ever filed a claim for workers’ compensation benefits prior to his December 31, 1997 claim and whether appellant had any similar disability or symptoms before the injury. The Office requested particular information including the reasons why appellant had not reported his injury to his supervisor within 30 days in accordance with the Federal Employees’ Compensation Act and the details of his travel with regard to the injury alleged to have occurred during that time. The Office cautioned appellant that the information submitted with appellant’s claim was insufficient to establish that he sustained an injury on June 17, 1997. The Office afforded appellant 30 days with which to respond.

A March 16, 1998 memorandum to the Director recommended that appellant’s claim be denied because he failed to establish fact of injury. The memorandum stated that appellant’s claim was deficient because he failed to describe the work activities or the incident that he believes caused his condition, after the Office made a specific request for such information. The memorandum pointed out that, although one of appellant’s medical reports mentioned that he had been pulling his luggage with his right hand while carrying a heavy bag with his left hand, appellant himself has never stated how his alleged injury occurred.

By decision dated March 16, 1998, the Office denied appellant entitlement to benefits under the Act because he did not establish fact of injury.

Although appellant had not affirmatively asserted any appeal rights, on March 23, 1998, he submitted other medical reports in support of his claim, which indicated that various cervical, thoracic and lumbar evaluations, physical therapy, a hematology panel, a computerized tomography and multiple magnetic resonance imaging (MRI) screenings of the lumbar spine and left upper arm had been performed to determine the cause of his left flank and back pain. Various diagnoses were given, but an etiology of the pain was not clearly determined in any of the reports. Appellant also submitted on March 23, 1998 answers to the questions raised by the Office in its February 26, 1998 letter, that he informed his supervisor about his pain while at the Colorado conference and that to his knowledge he had never sustained any similar disabilities or filed a workers' compensation claim for benefits. He further attached his travel voucher for the June 17, 1997 Colorado trip, his itinerary, flight and lodging information and a conference schedule in response to related questions raised by the Office.

On June 25, 1998 the Office received from appellant a written request for reconsideration, dated April 30, 1998, of the Office's March 16, 1998 decision. Appellant enclosed with his request a medical report dated April 20, 1998 from Dr. Robert H. Friedman, a Board-certified physician in physical medicine and rehabilitation and electrodiagnostic medicine. Appellant alleged that Dr. Friedman's report was prepared in response to the letter request of information by the Office dated February 26, 1998. Dr. Friedman opined in his report that appellant's injury was work related because at the onset of appellant's pain, he was at an elevated altitude specifically for work. He further opined that appellant sustained a thoracic radiculopathy most likely due to ischemia. Dr. Friedman reasoned that, at extremely high altitudes, hypoxia may have caused a local sickling and infarct to the thoracic nerve root. He further explained that this would not have occurred at his normal station or normal altitude in southwest Idaho and because appellant was at an elevated altitude and participating in work activities that his condition was work related.

In a July 17, 1998 memorandum to the Director, an Office claims examiner reiterated that appellant's claim was deficient because the case record did not contain a description of how appellant injured himself, nor a description of the work incident or incidents that appellant believed caused his pain. The memorandum referred again to the medical report that noted appellant had been pulling his luggage with his right hand while carrying a heavy bag with his left hand, however, pointed out that appellant himself has never stated how his alleged injury occurred.

By decision dated July 17, 1998, the Office denied appellant entitlement to compensation under the Act because appellant's evidence of record failed to establish fact of injury.

The Office noted in its July 17, 1998 decision that the initial decision dated March 16, 1998, was made prematurely because appellant had been given 30 days to respond to the deficiencies of his claim, however, a decision was made before the allotted time period expired. The Office, therefore, found that the March 16, 1998 decision would be set aside. The Office further explained in its July 17, 1998 decision that its present denial of compensation benefits had considered additional evidence submitted by appellant per the February 26, 1998 request by

the Office, prior to its March 16, 1998 decision. The Office determined that, since the primary issue was the manner in which appellant was injured and because appellant had not submitted a statement describing how the injury occurred, appellant's claim had been denied. The Office informed appellant that, if he later described an incident or work factor, he would then be required to submit medical documentation explaining the relationship between a clearly defined injury and the work incident or factor he identified.

On September 9, 1998 appellant submitted a letter to the Office with the same date requesting reconsideration of the Office's July 17, 1998 decision to deny appellant's claim. Appellant supported his request with clinical notes dated August 20, 1998 from Dr. Jonathan Swerdlow, an attending physician and Dr. Janis L. Abkowitz, a Board-certified internist at the Division of Hematology of the University of Washington Medical Center, who offered an addendum to the report on August 28, 1998. The clinical notes provided:

“[W]hile on a business trip to Breckenridge, Colorado at approximately 10,000 feet, the patient developed acute left[-]sided flank pain which persisted for several days. Laboratory work two to three days later, showed evidence of hemolysis, including an elevated bilirubin and LDH. That episode resolved, however, the patient has had persistent left-sided back pain which is located mid-clavicular, just below the scapula. For this, he has undergone [an] MRI scan and a skeletal film, neither of which have revealed any pathology. He self-referred to the University of Washington Medical Center Hematology Clinic to find out whether or not this chronic pain is related to his diagnosis of sickle cell trait.”

Dr. Swerdlow assessed, “[g]iven that he has sickle cell trait, it is possible that he had a splenic infarct while at altitude. This would be consistent with his presenting symptoms and laboratory data from that time.” “There is no clear explanation for the patient's chronic pain and it is not related to his diagnosis of sickle cell trait, nor is there any evidence that it occurred as a consequence of his acute painful episode while at Breckenridge.” Dr. Swerdlow concluded his report by stating his belief that appellant has some form of chronic, uncompensated hemolysis, however, he did not relate appellant's chronic pain to this condition.

By decision dated September 22, 1998, the Office reviewed appellant's case on the merits and denied modification of the prior decision on the grounds that the evidence submitted was insufficient to warrant modification.

The Board finds that appellant failed to carry his burden in establishing that he sustained an injury in connection with his employment on June 17, 1997.

An employee seeking benefits under the Act<sup>2</sup> 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 timely 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

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<sup>2</sup> 5 U.S.C. §§ 8101-8193.

the employment injury.<sup>3</sup> These are essential elements of each compensation claim regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.<sup>4</sup>

Where an employee is on temporary-duty assignment away from his regular place of employment, he is covered by the Act 24 hours a day with respect to any injury that results from activities essential or incidental to his temporary assignment.<sup>5</sup>

The Board has also previously recognized that Larson, in his treatise, *The Law of Workers' Compensation*, sets forth the general criteria for performance of duty as it relates to travel employees or employees on temporary-duty assignments as follows:

“Employees whose work entails travel away from the employer’s premises are held in the majority of jurisdictions to be within the course of their employment continuously during the trip, except when a distinct departure on a personal errand is shown. Thus, injuries arising out of the necessity of sleeping in hotels or eating in restaurants away from home are usually held compensable.”<sup>6</sup>

However, the fact that an employee is on a special mission or in travel status during the time a disabling condition manifests itself does not raise an inference that the condition is causally related to the incidents of the employment.<sup>7</sup> A condition that occurs spontaneously during a special mission or travel status is not compensable. The medical evidence must establish a causal relationship between the condition and factors of employment.<sup>8</sup>

In the instant case, the Office reviewed the facts established by the record and found that appellant never provided a description of what he believed had injured him on or about June 17, 1997. The Office reviewed all of the medical evidence from June 27, 1997 onward where appellant is referenced in numerous medical reports alleging the circumstances of his injury, however, appellant never offered a statement with his claim or as additional evidence as to a specific employment incident he believed caused the injury to his left flank. Appellant is essentially alleging that he awoke at 1:30 a.m., with spontaneous pain. While appellant had noted to a physician that he lifted luggage the previous day, appellant had not claimed that any lifting episode on June 17, 1997 caused his sudden onset of pain at 1:30 a.m., the next morning. Appellant has, therefore, not established a specific incident of employment as a cause of his alleged injury, but only a spontaneous occurrence of pain.

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<sup>3</sup> *Elaine Pendleton*, 40 ECAB 1143 (1989).

<sup>4</sup> *Victor J. Woodhams*, 41 ECAB 345 (1989).

<sup>5</sup> *Jennifer L. Sharp*, 48 ECAB 209 (1996).

<sup>6</sup> 1A. Larson, *The Law of Workers' Compensation* § 25.00 at 5-275 (1993); see also *Lawrence J. Kolodzi*, 44 ECAB 818 (1993).

<sup>7</sup> See *Jane A. White*, 34 ECAB 515 (1983).

<sup>8</sup> See *William B. Merrill*, 24 ECAB 215 (1973).

Furthermore, appellant has not submitted the necessary medical evidence to establish a diagnosis and injury. Medical reports provided by appellant initially rule out a kidney condition and made various diagnoses that all relate in some way to his sickle cell trait and to some musculoskeletal and joint pain. However, none of the medical reports clearly establish an etiology of appellant's pain, as they all couched appellant's diagnosis in speculative terms. Although some reports refer to the possibility that high altitude elevations in Colorado could have contributed to his condition, the medical reports cannot be considered probative and substantial evidence at this time because they were couched in speculative terms and, in fact, did not establish whether appellant's sudden pain on June 17, 1997 was a result of his sickle cell condition or a thoracic condition. The Board has long held that a physician's opinion that an employee's complaints "may have been" or "could have been" related to a work injury are speculative and of diminished probative value.<sup>9</sup> Neither the fact that appellant's left flank and back pain became apparent during a period of employment, nor the belief of appellant that his condition was caused or aggravated by employment conditions, is sufficient to establish causal relationship.<sup>10</sup> Thus, as appellant himself has not identified an employment factor or incident he believes has caused his injury and as a consequence, and has not established by sufficient medical evidence that the cause of his left flank and back pain resulted from a specific event or employment incident, the Office properly denied his claim for compensation.

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<sup>9</sup> *Jacquelyn L. Oliver*, 48 ECAB 232 (1996).

<sup>10</sup> *Victor J. Woodhams*, *supra* note 4.

The decisions of the Office of Workers' Compensation Programs dated September 22 and July 17, 1998 are affirmed.

Dated, Washington, D.C.  
May 9, 2000

Michael J. Walsh  
Chairman

David S. Gerson  
Member

A. Peter Kanjorski  
Alternate Member