

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of RONNIE A. DULIN and U.S. POSTAL SERVICE,
POST OFFICE, Powell, OH

*Docket No. 99-1845; Submitted on the Record;
Issued November 20, 2000*

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
A. PETER KANJORSKI

The issue is whether appellant has established that he sustained an injury in the performance of duty on February 19, 1998.

On April 2, 1998 appellant filed a notice of traumatic injury and claim for continuation of pay/compensation (Form CA-1) alleging that his herniated disc was due to his supervisor assaulting him by a hard gouge in his back on February 19, 1998.¹ Appellant stopped work on February 23, 1998.

In a memorandum of conference dated April 30, 1998, the Office noted the facts of the case and that no medical documentation had been submitted to support appellant's claim. In an accompanying letter dated April 30, 1998, the Office advised appellant of the type of medical information required to support his claim.

Appellant submitted various reports dated March 9, 17 and 25, May 20, 1998, a May 28, 1998 attending physician's report (Form CA-20), a May 26, 1998 Family Medical Leave Act certificate from Dr. James E. Barnes, a Board-certified neurological surgeon, and an April 19, 1995 magnetic resonance imaging (MRI) test in support of his claim.

By letter dated June 10, 1998, the Office requested additional information from Dr. Barnes and provided him with a statement of accepted facts, Office definitions and questions regarding appellant's condition.

¹ This was initially assigned claim number A9-439776. Appellant had previously filed a claim for an injury sustained on February 10, 1994, which was assigned claim number A9-387343 and denied by the Office of Workers' Compensation Programs on September 12, 1995. On October 13, 1997 appellant filed an occupational injury claim, which was assigned claim number A9-436910 and accepted by the Office for aggravation of spinal stenosis, specifically bilateral foraminal stenosis C5, right stenosis C6, foraminal stenosis C4-5 and cervical radiculopathy. By letter dated July 22, 1998, the Office combined claim numbers A9-387843 and A9-439766 into claim number A9-436910.

Dr. Barnes, in a report dated June 17, 1998, noted he first saw appellant on October 10, 1997 where appellant related a history of neck pain for the past two and one-half years. He stated that he “did not record a history of the injury as you described or as a matter of fact, any other injury, it cannot be my opinion that a specific injured (sic) caused the patient’s herniated nucleus pulposus.”

By decision dated June 23, 1998, the Office denied appellant’s claim on the basis that causal relationship had not been established between appellant’s disability and his employment injury.

By letter dated July 7, 1998, appellant’s counsel requested a hearing before an Office representative.

On September 21, 1998 the Office received reports dated June 24 and August 3, 1998 by Dr. Jeffrey A. Strakowski, a Board-certified physical medicine and rehabilitation physician and a June 24, 1998 report by Dr. Rebecca P. Brightman, a Board-certified neurological surgeon.

A hearing was held on January 26, 1999, at which appellant was represented by counsel and was allowed to testify.

On April 1, 1999 the Office received a March 15, 1999 medical report by Dr. Peter Hucek, an attending Board-certified family practitioner.² In his report, Dr. Hucek opined that appellant’s L5-S1 left lumbar disc herniation was due to being jabbed in the back by his supervisor, which caused appellant to arch his back violently.

In an April 22, 1999 decision, the Office hearing representative affirmed the June 23, 1998 decision, which found that appellant had not established that he sustained an injury in the performance of duty. Prior to the analysis of the evidence, the hearing representative noted that the record was held open for 30 days to receive additional information and indicated that no further medical evidence had been received. In affirming the decision, the hearing representative noted that Dr. Barnes’ June 17, 1998 report failed to support that appellant had sustained an injury due to his accepted February 19, 1998 employment injury.

The Board finds that this case is not in posture for a determination of whether appellant sustained an injury in the performance of duty.

In the case of *William A. Couch*,³ the Office did not review medical evidence received four days prior to the issuance of its final decision denying the claim. The Board set aside the final decision and remanded the case for the Office to consider this evidence fully. The Board explained that its jurisdiction of a case is limited to reviewing the evidence that was before the Office at the time of the Office’s final decision,⁴ and that Board decisions are final as to the

² There are two pieces of evidence designated as “1 & 2.”

³ 41 ECAB 548 (1990).

⁴ 20 C.F.R. § 501.2(c).

subject matter appealed,⁵ therefore, it is critical that the Office review all evidence relevant to that subject matter and received by the Office prior to the issuance of its final decision.⁶

In the instant case, the Office hearing representative did not address the March 15, 1999 report by Dr. Hucek, which was stamped received on April 1, 1999, prior to the issuance of the April 22, 1999 final decision. The Office hearing representative in her April 22, 1999 incorrectly stated that no evidence had been received since the January 26, 1999 hearing, when in fact the Office had received new evidence, *i.e.*, Dr. Hucek's March 15, 1999 report. This report was date stamped as being received by the Office on April 1, 1999 at least 21 days prior to the issuance of the Office's April 22, 1999 decision. The Board will, therefore, set aside the April 22, 1999 decision and remand the case to the Office to fully consider the evidence which appellant submitted prior to the issuance of the hearing representative's decision.

The decision of the Office of Workers' Compensation Programs dated April 22, 1999 is set aside and the case remanded for further action consistent with this opinion.

Dated, Washington, DC
November 20, 2000

Michael J. Walsh
Chairman

David S. Gerson
Member

A. Peter Kanjorski
Alternate Member

⁵ *Id.*; § 501.6(c).

⁶ *William A. Couch, supra* note 3, (remanding the case to the Office for full consideration of the evidence submitted prior to the date of the Office's final decision).