

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MARIO J. FORMATO and U.S. POSTAL SERVICE,
PROCESSING & DELIVERY CENTER, Whippany, NJ

*Docket No. 01-369; Submitted on the Record;
Issued December 4, 2001*

DECISION and ORDER

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

The issues are: (1) whether appellant has met his burden of proof in establishing that he sustained an injury in the performance of duty on December 31, 1997; and (2) whether the Branch of Hearings and Review properly denied appellant's second request for an oral hearing.

Appellant, a 48-year-old custodian/laborer, filed a notice of traumatic injury on July 10, 1998 alleging that he injured his elbow, shoulder and neck when he fell in the performance of duty on December 31, 1997. By decision dated September 24, 1998, the Office of Workers' Compensation Programs denied appellant's claim finding that he failed to submit sufficient medical evidence. Appellant requested an oral hearing on October 21, 1998. By decision dated June 30, 1999 and finalized July 1, 1999, the hearing representative affirmed the Office's September 24, 1998 decision.

In a letter dated March 3, 2000, appellant's representative requested reconsideration and asked when the matter would be scheduled for a hearing. By decision dated April 11, 2000, the Branch of Hearings and Review denied appellant's request for a hearing.

Appellant, through his representative, requested reconsideration on March 22, 2000. By decision dated July 19, 2000, the Office denied modification of its prior decisions. Appellant again requested reconsideration on July 28, 2000. By decision dated October 26, 2000, the Office denied modification of its prior decisions.

The Board finds that appellant has met his burden of proof in establishing that he sustained contusions of the right shoulder, elbow and hip and right shoulder strain due to his December 31, 1997 employment injury. The Board further finds the case not in posture for decision on the issue of whether appellant has established that his cervical disc herniation at C4-5 is causally related to his accepted employment injury.

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.¹ The second component is whether the employment incident caused a personal injury and generally can be established only by medical evidence. To establish a causal relationship between the condition, as well as any attendant disability, claimed and the employment event or incident, the employee must submit rationalized medical opinion evidence, based on a complete factual and medical background, supporting such a causal relationship.² Rationalized medical opinion evidence is medical evidence which includes a physician's rationalized opinion on the issue of whether there is a causal relationship between the claimant's diagnosed condition and the implicated employment factors. The opinion of the physician must be based on a complete factual and medical background of the claimant, must be one of reasonable medical certainty and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant. The weight of medical evidence is determined by its reliability, its probative value, its convincing quality, the care of analysis manifested and the medical rationale expressed in support of the physician's opinion.³

In this case, appellant has submitted a consistent history of injury relating to his employment incident on December 31, 1997. He repeatedly stated that he stepped back to remove a hamper from a truck, that he then landed on his right side with bleeding from his right elbow. Appellant submitted a witness statement in support of this incident. Appellant reported that the following morning he experienced shoulder pain and that he sought medical treatment following the January 1, 1998 holiday.

In a note dated January 2, 1998, a physician whose signature is illegible, stated that appellant fell at work on December 31, 1997 when he stepped off the tailgate of a truck landing on his right elbow, hip and shoulder and diagnosed contusion right shoulder, elbow and hip and strain right shoulder. In a work release note dated January 2, 1998, Dr. A. William Thomas, an osteopath, diagnosed contusion and strain right shoulder.

There are no discrepancies, inconsistencies or contradictions in the evidence to create serious doubt that appellant sustained an injury in the performance of duty on December 31, 1997.⁴ Given the nature of the employment incident and the swiftness of seeking medical treatment, the Board finds that the medical evidence is sufficient to establish appellant's injury of contusions and right shoulder strain due to the December 31, 1997 employment injury.⁵ The Office should determine any periods of disability due to this accepted injury and authorize appropriate compensation benefits.

¹ *Elaine Pendleton*, 40 ECAB 1143 (1989).

² *See* 20 C.F.R. § 10.110(a); *John M. Tornello*, 35 ECAB 234 (1983).

³ *James Mack*, 43 ECAB 321 (1991).

⁴ *Linda S. Christian*, 46 ECAB 598, 601 (1995).

⁵ *Melissa A. Carter*, 45 ECAB 618, 620 (1994).

In regard to appellant's claim that the additional condition of herniated disc C4-5 resulted from the accepted employment injury, the Board finds the case not in posture for decision.

In support of his claim for a cervical condition, appellant submitted a report undated report from Dr. Sanford Fineman, a Board-certified neurosurgeon. Dr. Fineman noted that appellant fell at work unloading a truck, noted that he first examined appellant on October 28, 1998 and diagnosed cervical radiculopathy with evidence of disc herniation. Dr. Fineman stated that he believed that appellant's current condition was due to his fall at work. In a report dated September 5, 2000, Dr. Fineman again opined that appellant's December 31, 1997 injury was the cause of his C4-5 herniated disc. He described appellant treatment in 1988 and stated that appellant was asymptomatic prior to the 1997 injury. Dr. Fineman stated that within a degree of medical probability that appellant's injury to his neck from the fall was the reason for appellant's symptoms.

In a report dated September 7, 1999, Dr. Mark Friedman, a Board-certified physiatrist, noted appellant's history of injury and diagnostic tests. He provided appellant's work restrictions and stated, "I believe that this difficulty is related to his accident of December 31, 1997...." In an addendum dated March 9, 2000, Dr. Friedman attributed appellant's C4-5 injury to the December 31, 1997 employment injury. He stated that prior to the accident appellant was doing well and had resolved his difficulties from his 1988 surgery. Dr. Friedman stated, "After the accident he developed difficulties with his neck and [magnetic resonance imaging scan] confirmed [herniated nucleus pulposus] at the C4-5 level. It is likely that the cause of the difficulty from the accident of December 31, 1997 was the cause of this despite the fact that it took a while to develop." On August 9, 2000 Dr. Friedman stated that appellant had no findings referable to the C4-5 area until after the December 31, 1997 employment injury. He concluded, "This showed that this was directly caused by this accident."

These reports contain a history of injury, diagnosis and an opinion that appellant's condition was caused by the accepted employment incident. While the reports are not sufficient to meet appellant's burden of proof, the reports do raise an uncontroverted inference of causal relation between appellant's accepted employment incident on December 31, 1997 and his diagnosed condition of cervical disc herniation and are sufficient to require the Office to undertake further development of appellant's claim.⁶ On remand the Office should prepare a statement of accepted facts and refer appellant to an appropriate physician to determine the causal relationship between his accepted employment incident and his diagnosed condition of herniated cervical disc. After this and such other development as the Office deems necessary, the Office should issue an appropriate decision.

The Board further finds that the Branch of Hearings and Review did not abuse its discretion in denying appellant's request for a second hearing.

Section 8124(b) of the Federal Employees' Compensation Act,⁷ concerning a claimant's entitlement to a hearing before an Office representative, states: "Before review under section

⁶ *John J. Carlone*, 41 ECAB 354, 358-60 (1989).

⁷ 5 U.S.C. §§ 8101-8193.

8128(a) of this title, a claimant ... not satisfied with a decision of the Secretary ... is entitled, on request made within 30 days after the date of issuance of the decision, to a hearing on his claim before a representative of the Secretary.”⁸

Appellant requested an oral hearing on October 21, 1998 and received an oral hearing on April 22, 1999 and a written decision on July 1, 1999. Appellant, having exercised his appellate remedy under section 8124(b)(1), no longer had an entitlement to a hearing before the Office as a matter of right.⁹ The Office, therefore, properly denied appellant’s March 3, 2000 request for an oral hearing on April 11, 2000 as a matter of right.

The Office then proceeded to exercise its discretion, in accordance with Board precedent, to determine whether to grant a hearing in this case. The Office determined that a hearing was not necessary as the issue in the case was medical and could be resolved through the submission of medical evidence in the reconsideration process. Therefore, the Office properly denied appellant’s request for a hearing and properly exercised its discretion in determining to deny appellant’s request for a hearing as he had other review options available.

The October 26 and July 19, 2000 decisions of the Office of Workers’ Compensation Programs are set aside and remanded for further development of the issue of compensation benefits regarding appellant’s shoulder injury. The decisions are also remanded for medical development on the issue of herniated disc and appropriate decisions. The April 11, 2000 decision is hereby affirmed.

Dated, Washington, DC
December 4, 2001

David S. Gerson
Member

Willie T.C. Thomas
Member

Bradley T. Knott
Alternate Member

⁸ 5 U.S.C. § 8124(b)(1).

⁹ *Eileen A. Nelson*, 46 ECAB 377, 381 (1994).