

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of CAROLE L. GRESS and U.S. POSTAL SERVICE,  
MAIN POST OFFICE, Jupiter, FL

*Docket No. 00-472; Submitted on the Record;  
Issued May 9, 2001*

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DECISION and ORDER

Before DAVID S. GERSON, A. PETER KANJORSKI,  
PRISCILLA ANNE SCHWAB

The issue is whether appellant sustained an injury in the performance of duty on March 12, 1998.

On April 3, 1998 appellant filed a traumatic injury claim, alleging that on March 12, 1998, while lifting flats of mail out of a cage, she sustained a disc herniation at L4-5. The employing establishment controverted the claim.

By letter dated April 16, 1998, the Office of Workers' Compensation Programs requested further information from appellant.

In response, appellant submitted an April 8, 1998 medical report by Dr. Lawrence D. Gerber, a Board-certified internist, who stated that appellant has been under his care for a right L4-5 disc herniation and right L5 radiculopathy since March 23, 1998. He submitted the results of his March 24, 1998 magnetic resonance imaging (MRI) scan of appellant's spine, which showed a moderate left lateral disc herniation at T10-11 with extension into the left neuroforamen with probable left T10 nerve root impingement and a small right paracentral disc herniation at L4-5 without definite evidence of nerve root impingement.

In a medical report dated April 10, 1998, Dr. Lare Ziemba, a chiropractor, noted that appellant came to his office on April 16, 1998 for a low back injury that she sustained a few weeks earlier and that she had continued treatment. Dr. Ziemba attached unsigned progress notes. An entry for March 16, 1998 notes that appellant complained of lower back pain on the right side and pain in right leg, which began last week after lifting buckets of flats at work.

At Dr. Gerber's request, appellant was seen by Dr. John K.B. Afshar, a neurosurgeon. In his medical report dated April 14, 1998, Dr. Afshar found that appellant had chronic low back pain, with associated right lower extremity radiculitis, secondary to L4-5 herniated disc. He recommended that appellant undergo an L4-5 hemilaminotomy microscopic excision of the disc.

In response to questions propounded by the Office, appellant stated that she delayed making an injury report because she was unaware of the seriousness of the injury, but that after seeing Dr. Gerber, she knew she needed a doctor's care.

In a decision dated May 29, 1998, the Office denied appellant's claim on the grounds that the medical evidence was insufficient to establish that her condition was caused by the alleged injury. Specifically, no medical evidence established any relationship between the diagnosed herniated disc and the lifting incident. The Office found that "some sort of incident" did occur at work on March 12, 1998.

By letter dated June 17, 1998, appellant requested reconsideration and submitted a June 9, 1998 report from Dr. Afshar who stated that appellant was first seen in his office on April 14, 1998 complaining of low back pain and right lower extremity radiculitis/numbness. She told him that she had none of those symptoms prior to lifting flats on her job on March 12, 1998. He opined that lifting the flats could have herniated her disc. Appellant also submitted a June 10, 1998 letter from Dr. Ziemba, who she stated that appellant did injure her lower back while on the job and on March 16, 1998 requested treatment for injuries she sustained while lifting mail out of bins.

On August 12, 1998 the Office denied appellant's request for reconsideration on the grounds that the medical evidence was insufficient to establish a causal relationship because Dr. Afshar's report was speculative and equivocal and Dr. Ziemba was a chiropractor whose report did not provide a diagnosis of subluxation of the spine as demonstrated by x-ray to exist.

By letter dated September 28, 1998, appellant again requested reconsideration and submitted pay stubs showing that she worked excessive hours. In a September 16, 1998 report, Dr. Shah indicated that he never treated appellant for any type of back problem. In a September 1, 1998 report, Dr. Afshar opined that lifting the flats caused appellant's L4-5 disc problems.

Appellant also submitted a report of a "full exam[ination]" by Dr. Gerber on February 19, 1998, who discussed appellant's problems with carpal tunnel syndrome but did not mention back pain; a March 23, 1998 report which indicates that appellant is suffering from back pain and paresthesias down the right leg; a March 30, 1998 report which notes that appellant has evidence of an L5 radiculopathy with no obvious nerve impingement at L5 although there is right paracentral disc herniation; and a May 18, 1998 report in which Dr. Gerber agrees with Dr. Afshar that appellant should not return to work at this point.

In a decision dated December 22, 1998, the Office denied appellant's request, finding that the evidence of record failed to establish that work factors resulted in a material worsening of her low back condition. The Office noted several inconsistencies in the record. For example, although appellant denied having a preexisting low back problem, the records from Dr. Ziemba establish that she did; appellant failed to report the alleged March 12, 1998 injury to her supervisor when she talked with her on March 12, 13, 17 and 21, 1998; and despite being familiar with workers' compensation procedure, appellant did not report an injury for more than two weeks.

In a November 13, 1998 neurological fitness-for-duty examination, received by the Office on January 8, 1999, Dr. Fred L. Cohen, a Board-certified neurosurgeon, diagnosed a right L4-5 herniated lumbar disc and concluded that the events of March 12, 1998 did accelerate or aggravate a preexisting back condition. He explained:

“Do any of the present conditions have causal relationship to postal employment? This depends in part on whose version of the facts one believes. There is no question, based on medical documentation here, that [appellant] had some back problems prior to the month of March 1998. That is clearly evidenced by Dr. Ziemba’s records dating back well prior to March 1998. It is equally clear that according to these records and the documentation, there was no disc herniation on the right at L4-5 prior to sometime in March 1998. It is also highly likely but not absolutely certain from Dr. Ziemba’s records, that he not only treated her neck but also treated her low back, albeit infrequently and not regularly for quite some time. That included an entry on March 11, 1998, one day prior to the 12<sup>th</sup>. One day earlier than that, March 10, 1998, she was complaining of lower back pain and he treated her with an adjustment.

“The real question for me is whether anything that happened at the [employing establishment] on or about March 12, 1998, in the early morning hours prior to 9[:00] a.m. either accelerated, precipitated or aggravated what is clearly a preexisting low back condition here. What [appellant] says happened on that morning is unquestionably capable of herniating a preexisting abnormal lumbar disc problem. The real concern here is the roughly 10-day delay in alleging that it was the specific events of March 12, 1998 that caused the acceleration or aggravation. The strongest evidence in the record (which is supportive of [appellant’s] claim and suggests a causal relationship) is the entry by Dr. Ziemba on March 16, 1998, wherein he notes that [appellant] told him that her pain began last week after lifting buckets of flats at work and she awoke the next day with her leg numb. Even though she had reported to work on Saturday, March 21, [1998] making no mention that her situation was the result of any on-the-job injury and did not actually report this until March 22, [1998], Dr. Ziemba’s report is fairly definite to me (specifically when one considers that stretching over a cage, lifting heavy items, can unquestionably aggravate a preexisting back condition). Based on my review of this information, I am going to conclude that the events of March 12, 1998 did accelerate or aggravate a preexisting back condition).”

On February 8, 1999 appellant requested reconsideration and submitted a statement by her union steward which corroborates her claim that employees were working excessive hours during the time of her injury. Letitia Gutjahn stated that she was “acting 204-B on March 21, 1998” and “was indeed notified by [appellant] that she was not feeling well and wished to return home for the remainder of the day.” On January 13, 1999 Dr. Ziemba stated that appellant’s preexisting lower back pain did not preclude her disc injury, but actually strengthened the possibility of having a disc injury from a bending, lifting movement, that appellant did not report her injury but attempted to treat herself conservatively and that, after being diagnosed with a disc injury, she had no choice but to file an injury claim. Dr. Gerber stated in an August 22, 1998 letter that he initially saw appellant on February 19, 1998, when she did not complain of lower

extremity radiculitis and on March 23, 1998 she complained of one and a half weeks of back pain. He opined that her injury was most likely secondary to her work.

By decision dated August 2, 1999, the Office again denied modification, noting that the only new evidence submitted was Dr. Ziembra's January 13, 1999 report. The Office found that because no subluxation of the spine has been demonstrated by x-ray to exist, Dr. Ziembra's opinion as a chiropractor was of no probative value in establishing causal relationship.

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

An employee seeking benefits under the Federal Employees' Compensation Act<sup>1</sup> has the burden of establishing the essential elements of his or her claim,<sup>2</sup> including the fact that the individual is an "employee of the United States" within the meaning of the Act,<sup>3</sup> that the claim was timely filed within the applicable time limitation period of the Act,<sup>4</sup> 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 the employment injury.<sup>5</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>6</sup> However, proceedings under the Act are not adversarial in nature, nor is the Office a disinterested arbiter. While the claimant has the burden to establish entitlement to compensation, the Office shares responsibility in the development of the evidence to see that justice is done.<sup>7</sup>

In order to determine whether an injury was sustained 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. The second component is whether the employment incident caused a personal injury and generally can only be established by medical evidence.<sup>8</sup> An employee may establish that an injury occurred in the performance of duty as alleged but fail to establish that his or her disability and/or specific condition for which compensation is claimed are causally related to the injury.<sup>9</sup>

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<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

<sup>2</sup> *Louise F. Garnett*, 47 ECAB 639, 643 (1996); *Daniel R. Hickman*, 34 ECAB 1220 (1983).

<sup>3</sup> *See James A. Lynch*, 32 ECAB 216 (1980); *see also* 5 U.S.C. § 8101(1).

<sup>4</sup> 5 U.S.C. § 8122.

<sup>5</sup> *Louise F. Garnett*, *supra* note 2.

<sup>6</sup> *See Delores C. Ellyett*, 41 ECAB 992 (1990); *Victor J. Woodhams*, 41 ECAB 345 (1989).

<sup>7</sup> *William J. Cantrell*, 34 ECAB 1223 (1983).

<sup>8</sup> *Id.*; *Linda S. Christian*, 46 ECAB 598 (1995).

<sup>9</sup> *Louise F. Garnett*, *supra* note 2.

In this case, appellant met the criteria of the first component, *i.e.*, that an actual incident occurred. The Office, in its decision of May 29, 1998, determined that “some sort of incident did occur at work on March 12, 19[98].”

In support of establishing a causal relationship, appellant submitted medical evidence from Drs. Cohen, Afshar and Ziembra. The opinion of Dr. Ziembra cannot be given the weight of a physician’s opinion because he is a chiropractor and his report is not based on a diagnosis of subluxation as demonstrated by x-ray to exist.<sup>10</sup>

Dr. Cohen concluded that the events of March 12, 1998 did accelerate or aggravate appellant’s preexisting back condition. He noted that what appellant related to him as happening on that date was unquestionably capable of herniating a preexisting abnormal lumbar problem. Similarly, Dr. Afshar opined that appellant’s lifting of the flats could have herniated her discs. Although these reports are not sufficiently rationalized to discharge appellant’s burden of proving that she sustained an injury as a result of the work accident on March 12, 1998, they raise an uncontroverted inference of causal relationship sufficient to require further development of the record by the Office.<sup>11</sup> The record in this case contains no contrary medical opinion.

Upon remand, the Office should further develop the medical evidence as necessary. After such further development of the case record as the Office deems necessary, a *de novo* decision shall be issued.

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<sup>10</sup> Chiropractors are defined as “physicians” under section 8102(2) of the Act “only to the extent that their reimbursable services are limited to treatment consisting of manual manipulation of the spine to correct subluxation of the spine as demonstrated by x-rays to exist and subject to the regulations by the Secretary.” 5 U.S.C. § 8101(2).

<sup>11</sup> *John J. Carlone*, 41 ECAB 354 (1989); *Horace Langhorne*, 29 ECAB 820 (1978).

The August 2, 1999 and December 22, 1998 decisions of the Office of Workers' Compensation Programs are hereby set aside and the case is remanded for further development in accordance with this decision.

Dated, Washington, DC  
May 9, 2001

David S. Gerson  
Member

A. Peter Kanjorski  
Alternate Member

Priscilla Anne Schwab  
Alternate Member