

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of CHARLES H. DONALDSON and U.S. POSTAL SERVICE,
CHARLESTON POST OFFICE, CHARLESTON, MO

*Docket No. 02-155; Submitted on the Record;
Issued June 4, 2002*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issues are: (1) whether appellant has established that he sustained a lumbar injury in the performance of duty on July 3, 2000 as alleged; and (2) whether the Office of Workers' Compensation Programs properly denied appellant's request for an oral hearing.

On July 5, 2000 appellant, then a 52-year-old rural mail carrier, filed a claim for a lumbar injury, which he attributed to reaching into the back seat of his postal vehicle to retrieve a "strap" of mail. When appellant moved the mail to the front seat, he described the immediate onset of right hip pain radiating into the right lower extremity to the ankle. He stopped work on July 5, 2000 and returned to work on August 15, 2000. In the witness portion of the claim form, Melinda Sevic stated that appellant "came in looking very pale and [she] could tell he was in pain by the look on his face and by the way he was walking." Appellant submitted medical evidence in support of his claim.

In a July 5, 2000 slip, Dr. Gregorio Rodriguez, an attending family practitioner, diagnosed "sciatica." In a July 15, 2000 form report, Dr. Rodriguez attributed the sciatica to the July 3, 2000 incident when appellant retrieved mail from the back seat of his postal vehicle.

A July 26, 2000 lumbar magnetic resonance imaging (MRI) scan showed a small right paracentral disc herniation at L4-5 "superimposed upon degenerative disc disease," with effacement of the right lateral recess clinically correlating appellant's "right L5 radiculopathy," an L5-S1 disc bulge and degenerative disc disease with facet hypertrophy.

In an August 16, 2000 report, Dr. Rodriguez stated that at 10:00 a.m., on July 3, 2000, appellant "turned around to pick up mail and felt low back pain radiating to his right foot." He held appellant off work through August 15, 2000 pending a neurosurgical consultation.

In a September 12, 2000 report, Dr. Maurice Smith, a Board-certified neurosurgeon of professorial rank, noted that appellant's "right-sided lumbar radicular pain" began on "July 3, 2000 when he was on the job and twisting around to obtain mail from the back of his mail truck

when he incurred pain in the right hip, buttock and leg.” Dr. Smith noted degenerative disc disease from L4-S1, with a right-sided L4-5 disc protrusion with possible nerve root compression. He administered an epidural injection. Dr. Smith opined that appellant’s right sciatica was, in part, “secondary to his L4-5 disc protrusion.” He recommended a weight loss and low back conditioning program.¹

In a November 15, 2000 report, Dr. Smith found “significant leg pain over his iliac crest as was documented on his last examination.” He opined that the “majority of his problem is coming from his myofascial pain syndrome,” as opposed to the L4-5 and L5-S1 herniated discs. Dr. Smith recommended trigger point injections.

In a March 27, 2001 report, Dr. Bernard C. Burns, an attending physiatrist and osteopath, related appellant’s account of the onset of lumbar and right leg pain “on July third when he reached in the back of his mail truck for a bag of mail. When he moved the bag forward he felt a burning sensation in the right hip, low back and down the right leg ... to the ankle.” Dr. Burns reviewed Dr. Smith’s reports, MRI results and physical therapy notes. On examination, Dr. Burns found lumbar spasm and restricted range of motion. He diagnosed “[m]ild degenerative disc disorder with intermittent radicular pain ...” and “[m]echanical lower back pain secondary to degenerative disc injury from extension and rotation injury.” Dr. Burns prescribed medication, physical therapy and administered a right L4-5 epidural injection. He held appellant off work for two days due to the trigger point injections. Dr. Burns prescribed physical therapy through May 2001.

In an April 25, 2001 report, Dr. Burns noted treating appellant for “degenerative disc with persistent right radicular pain pattern and mechanical lower back pain thought related to rotational extension mechanism injury from July 3, 2000.”

In a May 2, 2001 report, Dr. Burns limited lifting to 15 pounds.

In a May 3, 2001 letter, the Office advised appellant of the type of additional medical and factual evidence needed to establish his claim. The Office specifically requested that appellant submit a rationalized report from his attending physician explaining how and why reaching for the mail on July 3, 2000 would aggravate his underlying degenerative disc disease, or cause a new injury.

In a June 1, 2001 report, Dr. Burns diagnosed “degenerative disc disease with secondary mechanical lower back syndrome. Dr. Burns stated that the July 3, 2000 incident is “probably causally related to [appellant’s] current complaints.”

In a June 6, 2001 report, Dr. Burns noted a favorable response to the May 22, 2001 epidural injection, with good tolerance for regular-duty work. Dr. Burns noted improved range of motion and “very mild” paraspinous muscle tenderness.” He diagnosed “[d]egenerative disc with significant improvement” and “[r]esolution of the radicular pain pattern.”

¹ Dr. Smith’s September 12, 2000 physical therapy prescription for “myofascial pain syndrome” was approved by the Office. Appellant received physical therapy from October 5 to 26, 2000.

By decision dated June 27, 2001, the Office denied appellant's claim on the grounds that causal relationship was not established. The Office accepted that the July 3, 2000 incident took place at the time, place and in the manner alleged. However, the Office also found that "the medical evidence failed to state an acceptable diagnosis to support the lower back pain and how [appellant's] work factors caused or aggravated [his] medical condition."

Appellant disagreed with this decision and in an August 8, 2001 letter, postmarked August 11, 2001, requested an oral hearing before a representative of the Office's Branch of Hearings and Review. He submitted additional evidence.

In a July 18, 2001 report, Dr. Burns noted increased paraspinous muscle tone and restricted lumbar motion. He diagnosed "[d]egenerative disc with disc bulge secondary to work-related injury," with "secondary mechanical back pain related to the disc injury from his work-related injury."

In an August 21, 2001 duty status report, Dr. Burns held appellant "off work three months for worsened back condition."

By decision dated August 30, 2001, the Office denied appellant's August 11, 2001 request for a hearing on the grounds that it was untimely filed more than 30 days following issuance of the June 27, 2001 decision. The Office conducted a limited review of appellant's request and the supporting July 18 and August 21, 2001 medical reports and determined that the issue in the case could be addressed equally well on reconsideration, by submitting new, relevant evidence establishing causal relationship.²

On appeal, in a November 13, 2001 letter, appellant asserts that the employing establishment let his case "lay dormant long enough that [the Office] closed the case" and that the Office did not fully consider Dr. Burns' reports diagnosing "two slipped or protruding" lumbar discs and a "pinched nerve."

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

To determine whether an employee has sustained a traumatic injury in the performance of duty, it must first be determined whether a "fact of injury" has been established. First, the employee must submit sufficient evidence to establish that he or she actually experienced the employment incident at the time, place and in the manner alleged.³ Second, the employee must submit sufficient evidence to establish that the employment incident caused a personal injury.⁴ The question of whether an employment incident caused a personal injury generally can be

² In a September 9, 2001 letter, appellant noted that he would submit additional reports from Dr. Burns as they became available. He also requested that the Office advise him as to "what else has to be done to get this decision reconsidered." The Office responded by a September 21, 2001 letter, advising appellant to review the appeal rights appended to the June 27, 2001 decision.

³ See *John J. Carlone*, 41 ECAB 354 (1989).

⁴ *Id.*

established only by medical evidence.⁵ There is no necessity to show special exposure or unusual conditions of employment in the factors producing disability.⁶

In this case, the Office accepted that the July 3, 2000 lifting and twisting incident occurred as alleged. Dr. Rodriguez, an attending family practitioner, Dr. Smith, an attending Board-certified orthopedic surgeon of professorial rank, and Dr. Burns, an attending physiatrist, all provided accurate, detailed descriptions of the July 3, 2000 incident in their reports.

Also, each physician attributed appellant's condition, in part, to the July 3, 2000 incident. In a July 15, 2000 report, Dr. Rodriguez diagnosed right sciatica precipitated by turning "around to pick up mail on July 3, 2000." In September 12 and November 15, 2000 reports, Dr. Smith attributed the onset of right sciatica to the July 3, 2000 incident, which aggravated an L4-5 disc protrusion and caused a myofascial pain syndrome.

In a March 27, 2001 report, Dr. Burns diagnosed "[m]echanical low back pain secondary to degenerative disc injury from" the July 3, 2000 "extension and rotation injury," with preexisting degenerative disc disease "with intermittent radicular pain." Dr. Burns opined in an April 25, 2001 report that appellant's right radicular pain and "mechanical lower back pain" were "related to rotational extension mechanism from July 3, 2000." In a June 1, 2001 report, Dr. Burns again supported a causal relationship between appellant's "degenerative disc disease with secondary mechanical lower back syndrome" to the July 3, 2000 incident.

Thus, appellant's physicians attributed appellant's right sciatica, aggravation of preexisting degenerative disc disease, a degenerative disc injury and a lumbar myofascial pain syndrome to the accepted July 3, 2000 incident. Although the medical evidence is not sufficiently rationalized to meet appellant's burden of proof in establishing his claim, it constitutes probative, uncontroverted supporting evidence that is sufficient to require further development of the evidence.⁷ Therefore, the case must be remanded to the Office.

Upon remand of the case, the Office shall refer appellant, the medical record and a statement of accepted facts to an appropriate specialist or specialists, to obtain rationalized medical opinion regarding whether the accepted July 3, 2000 incident caused or aggravated appellant's sciatica, radiculitis, myofascial pain syndrome, degenerative disc disease, or bulging L4-5 and L5-S1 discs. Following this and any other development deemed necessary, the Office shall issue an appropriate decision in the case.

Regarding the second issue, the Board finds that the Office properly denied appellant's request for an oral hearing as untimely.

Section 8124(b) of the Federal Employees' Compensation Act, concerning a claimant's entitlement to a hearing before an Office representative, states: "Before review under section 8128(a) of this title, a claimant not satisfied with a decision of the Secretary ... is entitled, on

⁵ See *Carlone*, *supra* note 3.

⁶ *Mary Joan Coppolino*, 43 ECAB 988 (1992).

⁷ See *Carlone*, *supra* note 3.

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 The Office’s procedures, which require the Office to exercise its discretion to grant or deny a hearing when a hearing request is untimely or made after reconsideration under section 8128(a), are a proper interpretation of the Act and Board precedent.⁹

In this case, appellant filed his request for an oral hearing on August 11, 2001, more than 30 days after issuance of the Office’s June 27, 2001 decision. The Office’s August 30, 2001 decision was, therefore, correct in finding that appellant’s hearing request was untimely filed. The Office then properly exercised its discretion by conducting a limited review of appellant’s request and the appended evidence and determined that the issue could be addressed equally well through the submission of a valid request for reconsideration. Therefore, the Board finds that the Office’s denial of appellant’s request for an oral hearing was proper under the law and facts of the case.

The decision of the Office of Workers’ Compensation Programs dated June 27, 2001 is hereby set aside and the case remanded to the Office for further development consistent with this decision. The August 30, 2001 decision of the Office is hereby affirmed.

Dated, Washington, DC
June 4, 2002

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member

⁸ 5 U.S.C. § 8124(b)(1).

⁹ *Henry Moreno*, 39 ECAB 475 (1988).