

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of OHMER A. BOWLES, JR. and U.S. POSTAL SERVICE,
GENERAL MAIL FACILITY, Capitol Heights, MD

*Docket No. 03-120; Submitted on the Record;
Issued December 22, 2003*

DECISION and ORDER

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

The issue is whether appellant has established that he sustained an injury on November 3, 2001 in the performance of duty.

On November 9, 2001 appellant, then a 53-year-old expeditor, filed a claim for traumatic injury on November 3, 2001 at 8:00 a.m. alleging that he had "lower back pain from pulling [mail containers] weighing as much as 900 to 1,000 pounds onto a weigh scale." Appellant claimed that this resulted in a "burning sensation and pain in middle of my back down to right buttocks." Appellant indicated "No witnesses other than my leave slip ... stating that lower pain in back and left immediately. But report on my return to work November 6, 2001." Appellant stopped work on November 9, 2001 and was treated by Dr. G. Hudson Drakes, a Board-certified physiatrist, on November 12, 2001.¹ On November 14, 2001 appellant underwent a magnetic resonance imaging (MRI) scan, which revealed a compromised L5 nerve root sleeve, which was noted as being consistent with his complaints.

By letter dated November 23, 2001, the employing establishment controverted appellant's claim arguing that appellant's "disability was not caused by a traumatic injury." The employing establishment safety specialist related that she had interviewed appellant and "he stated that he had not had a traumatic injury. His back began to hurt due to constantly pulling these containers."

In a January 4, 2002 letter, the Office of Workers' Compensation Programs advised appellant that further information was needed including rationalized medical evidence detailing the history of injury and an opinion on causal relation.

¹ Appellant's family practitioner, Dr. Victor E. Herry, noted on a November 6, 2001 prescription pad "Please evaluate and provide necessary therapy or treatment for above patient with low back pain and right hip pain secondary to work injury."

In support appellant submitted a January 14, 2002 medical evaluation from Dr. Drakes, that noted that appellant had low back complaints of stiffness and he diagnosed “lumbosacral radiculitis secondary to recent work related,” and “imposed lumbosacral facet inflamed.” Dr. Drakes saw appellant again on January 21, 2002 and noted appellant’s complaints of pain and right L5-S1 radiculopathy.

By decision dated February 5, 2002, the Office rejected appellant’s claim finding that there was no supportive factual or medical evidence to demonstrate that his back condition was causally related to his alleged employment injury of November 3, 2001.

Appellant requested a review of the written record and claimed that he had not received the January 4, 2002 letter requesting further information. In support he submitted further information and medical evidence.

A November 12, 2001 narrative report from Dr. Drakes, received by the Office after its February 5, 2002 decision noted as history that appellant presented that date with complaints of back pain, which occurred on November 3, 2001 and that he described an incident occurring at work, which involved him pushing and pulling containers on wheels in excess of 1,000 pounds. Dr. Drakes noted that appellant described a subsequent burning sensation in his lower back that radiated into his buttocks and subsequent pain and numbness in his buttocks, with mild right leg paresthesias, which were worse with standing or sitting for long periods. Dr. Drakes also noted that lifting was quite painful for appellant, that his lumbosacral spine was tender at full flexion and painful with lateral bending and that he had remarkable tenderness over the facet joints with palpation, which was marked at the lumbosacral facet joint. He indicated that appellant had exquisite pain with transitioning from sitting to standing, that straight leg raising was equivocal, but that motor testing was normal and he noted moderate spasm in the lumbosacral paraspinal muscles at that time. Dr. Drakes diagnosed: “Rule out lumbosacral radiculopathy, rule out a new herniated disc at the L4-5 level, ... history of prior laminectomy, ... clear evidence of lumbosacral facet disease, clear clinical evidence of lumbosacral sprain/strain syndrome that is acute,” and he indicated that he could not rule out lumbosacral spinal stenosis.

Also submitted was a November 26, 2001 electromyogram (EMG) and nerve conduction study report from Dr. Drakes, which demonstrated “subacute and chronic right L5 radiculopathy and a chronic S1 radiculopathy on the right.”

A November 26, 2001 narrative report from Dr. Drakes, noted that an MRI scan of appellant’s lumbar spine suggested new disc disease at L5-S1 with a far left lateral disc protrusion causing stenosis of the left neural foramen and several other disc bulges in the lumbosacral spine. He diagnosed subacute and chronic right L5 radiculopathy and chronic S1 radiculopathy on the right.

In a February 8, 2002 follow-up evaluation Dr. Drakes noted that appellant complained of increasing back pain and pain from sitting for even short periods of time and he diagnosed lumbosacral radiculopathy and lumbosacral facet disease.

Also that date Dr. Drakes completed a Form CA-17, which noted appellant’s history of pulling equipment on November 3, 2001 noted clinical findings of back pain with radiation and

diagnosed lumbosacral radiculopathy. He indicated that appellant should lift no more than 25 pounds, should bend/stoop intermittently from 2 to 6 hours per day, should twist intermittently no more than 2 hours per day and should perform fine manipulation intermittently from 4 to 6 hours per day.

In a February 12, 2002 letter, Dr. Drakes noted that appellant described a burning sensation in his lower back, radiating to his buttock and he opined that appellant's pain symptomatology radiating into his buttocks, was strongly suggestive of L5-S1 radiculopathy and he noted upon examination that appellant had tenderness in the lumbosacral facet joints and moderate spasm in the lumbosacral paraspinal muscles. Dr. Drakes noted that electrodiagnostic testing revealed chronic right L5 radiculopathy and some chronic S1 radiculopathy on the right and that a November 14, 2001 MRI scan demonstrated a small residual left lateral disc protrusion, which narrowed the left neural foramen. He further noted that there was enough clinical evidence in what had been documented so far to draw a clear relationship between appellant's complaints and the workplace injury described.

On April 15, 2002 the Office received a January 25, 2002 Form CA-20 attending physician's report from Dr. Drakes, which noted a diagnosis for appellant of lumbosacral radiculopathy, indicated that he could resume light work on January 22, 2002 and regular work on April 22, 2002 and noted that appellant "should avoid manipulating heavy containers unassisted." The physician indicated by a "yes" checkmark that the diagnosed condition was related to the history given.

The hearing representative reviewed the written record and by decision dated August 1, 2002 he modified the February 5, 2002 decision, finding that appellant had not established fact of injury and affirmed as modified. The hearing representative found that appellant neither established that an employment incident occurred as alleged nor that a medical condition was sustained therefrom. The hearing representative also found that since appellant did not submit a report from his family physician, who first referred him to Dr. Drakes, he had not established that an injury occurred as alleged.²

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

An employee seeking benefits under the Federal Employees' Compensation Act³ has the burden of establishing the essential elements of his claim.⁴ When a claim for compensation is predicated upon a traumatic injury, the employee must establish the fact of injury by proof of an accident or fortuitous event having relative definiteness with respect to time, place and

² On November 12, 2001 appellant's family physician referred him to Dr. Drakes.

³ 5 U.S.C. §§ 8101-8193.

⁴ See *Margaret A. Donnelley*, 15 ECAB 40 (1963).

circumstances and having occurred in the performance of duty and by proof that such accident or fortuitous event caused an “injury” as defined in the Act and its regulations.⁵

To establish that an injury occurred as alleged, the injury need not be confirmed by eyewitnesses, but the employee’s statements must be consistent with the surrounding facts and circumstances and his subsequent course of action. In determining whether a *prima facie* case has been established, such circumstances as late notification of injury, lack of confirmation of injury and failure to obtain medical treatment may, if otherwise unexplained, cast sufficient doubt on a claimant’s statements. The employee has not met this burden when there are such inconsistencies in the evidence as to cast serious doubt on the validity of the claim.⁶ In this case, however, there are no such inconsistencies. Both the factual and medical evidence of record and appellant’s actions following the alleged event, consistently support that an incident involving appellant’s lower back occurred on November 3, 2001 as alleged. In this case, there was no late notification of injury,⁷ no lack of confirmation of injury⁸ and no failure to obtain medical treatment,⁹ to cast doubt on a claimant’s statements and his subsequent course of action was entirely appropriate. Accordingly, the evidence supports that an employment incident occurred as alleged. Therefore, the next consideration is whether the medical evidence submitted to the record established that an employment injury resulted from this incident. In this case, the medical evidence submitted to the record is detailed, contemporaneous and consistent and provides specific injury-related diagnoses, supported by opinions supporting causal relation with the employment incident.

The medical history appellant gave to his treating physician consistently states that he injured his low back on November 3, 2001 while pulling a heavy container. The medical reports most contemporaneous to the incident were from Dr. Drakes and further supported appellant’s injury claim and they provided a diagnosis of lumbosacral radiculopathy. A November 12, 2001 report from Dr. Drakes, noted appellant’s medical presentation with back pain at that time and noted that he described a work incident involving him pushing and pulling heavy mail containers on wheels in excess of 1,000 pounds. Dr. Drakes reported appellant’s physical complaints of low back and right buttock pain, with mild right leg paresthesias, noted that his lumbosacral

⁵ See *Loretta Phillips*, 33 ECAB 1168, 1170 (1982); *Virgil M. Hilton*, 32 ECAB 447, 452 (1980); *Max Haber*, 19 ECAB 243, 247 (1967). Section 8101(1)(5) of 5 U.S.C. defines “injury” in relevant part as follows: “‘injury’ includes, in addition to injury by accident, a disease proximately caused by employment....” Section 10.5(a)(15) of 20 C.F.R. defines “traumatic injury” as follows: “[A] wound or other condition of the body caused by external force, including stress or strain, which is identifiable as to time and place of occurrence and member or function of the body affected. The injury must be caused by a specific event or incident or series of events or incidents within a single workday or work shift.”

⁶ *Carmen Dickerson*, 36 ECAB 409 (1985); *Joseph A. Fournier*, 35 ECAB 1175 (1984); see also *George W. Glavis*, 5 ECAB 363 (1953).

⁷ Appellant explained the course of events that lead to his November 6, 2001 accident report to Ms. Harris, his supervisor, as initially she was not there and he thought the pain would improve but on November 4, 2001 it worsened such that on his first day back at work, November 6, 2001, he reported it to Ms. Harris.

⁸ Supervisor Pinson signed appellant’s November 3, 2001 request for sick leave for the remainder of his shift.

⁹ Appellant was seen by his family physician on November 6, 2001, the date he reported the injury to his supervisor and was referred for follow-up to Dr. Drakes, a physiatrist.

spine was tender at full flexion and with lateral bending, with remarkable tenderness on palpation of the facet joints and noted contemporaneous objective evidence on injury, which included moderate muscular spasm in the paraspinal muscles. He diagnosed clear clinical evidence of lumbosacral sprain/strain that was acute at that time and noted that appellant also had clear evidence of lumbosacral facet disease. Dr. Drakes also noted that contemporaneous EMG and nerve conduction study reports obtained on November 26, 2001 objectively demonstrated subacute and chronic right L5 radiculopathy and S1 radiculopathy on the right. His November 26, 2001 narrative report regarding the November 14, 2001 MRI scan study results of appellant's lumbar spine was also consistent with the EMG testing results and appellant's complaints.

On January 25, 2002 Dr. Drakes noted appellant's date of injury as November 3, 2001, noted as history that he developed burning back pain radiating into his buttocks after an incident involving pushing and pulling containers in excess of 1,000 pounds and he diagnosed lumbosacral radiculopathy. He checked "yes" to the question of whether the condition found was caused or aggravated by an employment incident. Dr. Drakes implicated the pushing and pulling of heavy containers as the cause of appellant's condition and he described objective as well as subjective findings as including moderate spasm of the lumbosacral paraspinal muscles and the new phenomena revealed by MRI scan of residual tissue, postprevious laminectomy, now pressing against appellant's nerve root sleeve and narrowing the L5 neural foramen.

These above-mentioned reports are reasonably contemporaneous to the alleged injury, they contain a consistent history of injury and follow-up course of conduct and they provide not only subjective, but also objective findings of several conditions, which Dr. Drakes causally relates to the November 3, 2001 employment incident. Therefore, the Board finds that the contemporaneous and substantial evidence of record supports that appellant experienced an employment incident due to pushing and pulling equipment on November 3, 2001 as alleged and that the evidence of record also reveals that a medical condition involving the back and neurological system resulted from this incident. As early as November 12, 2001, nine days after the incident, Dr. Drakes was clearly diagnosing lumbosacral radiculopathy, lumbosacral radiculitis secondary to the work incident, subacute and chronic right L5-S1 radiculopathy and chronic S1 radiculopathy on the right, all based upon objective and subjective physical examination results and objective EMG and MRI scan testing results and all related to the November 3, 2001 employment incident. Therefore, the Board finds that appellant has met his burden of proof to establish that he sustained a medical condition, lumbosacral radiculopathy, causally related to his November 3, 2001 employment incident.

As appellant has met his burden of proof to establish that he experienced an employment incident as alleged and that a medical condition resulted from this incident, he has established that he sustained a compensable employment injury, lumbosacral radiculopathy. However, appellant's periods of disability due to this employment injury have not been clearly defined and, therefore, the case must be remanded to the Office for determination of the period or periods of employment injury-related disability causally related to the compensable employment injury, lumbosacral radiculopathy, sustained by appellant on November 3, 2001.

Consequently, the decisions of the Office of Workers' Compensation Programs dated August 1 and February 5, 2000 are hereby set aside and the case is remanded to the Office for further development in accordance with this decision and order of the Board.

Dated, Washington, DC
December 22, 2003

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member