United States Department of Labor
Employees' Compensation Appeals Board

OWEN MONDAY, Appellant	)	
and	)	**Docket No. 04-1571**
	)	**Issued: November 3, 2004**
U.S. POSTAL SERVICE, POST OFFICE, Bangor, ME, Employer	)	

Appearances:
Owen Monday, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Member
DAVID S. GERSON, Alternate Member
WILLIE T.C. THOMAS, Alternate Member

JURISDICTION

On June 1, 2004 appellant filed a timely appeal from the Office of Workers' Compensation Programs' decision dated April 16, 2004 which found that appellant did not sustain an injury in the performance of duty. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2), the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant met his burden of proof in establishing that he sustained an injury in the performance of duty on December 24, 2000.

FACTUAL HISTORY

On January 26, 2001 appellant, then a 66-year-old mail handler, filed a traumatic injury claim (Form CA-1) alleging that on December 24, 2000 he injured his low back while lifting.

In a December 29, 2000 disability certificate, and a duty status report of the same date, Diane Reynolds, a physician's assistant, diagnosed back pain and advised that appellant remain off work for two days on December 29 and 30, 2000.

The claim was dormant until, on December 17, 2003, appellant filed a recurrence of disability claim, alleging that, on December 9, 2003, he sustained a recurrence of his December 24, 2000 employment injury. Appellant alleged that he sustained an injury to his low back in the same area as his original injury while lifting at work. Appellant stopped work on December 11, 2003.

In support of his claim, appellant submitted a treatment note dated December 12, 2003 from Corey Webb, a physician's assistant.

By letter dated March 8, 2004, the Office advised appellant that additional factual and medical evidence was needed. Appellant was advised that no diagnosis of a condition resulting from the injury was provided. He was also further advised that the only medical documentation submitted by appellant was from a physician's assistant, which was not considered a physician's opinion. Appellant was advised to provide a physician's opinion supported by a medical explanation as to how the reported work incident caused the claimed injury. The Office allotted appellant 30 days within which to submit the requested information.[1]

Appellant submitted an unsigned disability certificate, which requested that appellant be excused from work from December 11 to 15, 2003, due to back pain, and recommended a magnetic resonance image (MRI) scan. Appellant also forwarded lab results taken on March 1, 2004, undated physical examination findings and a December 12, 2003 examination from a physician's assistant, and a March 1, 2004 report from Mr. Webb, a physician's assistant. In a lumbar spine MRI scan report dated March 26, 2004, Dr. Daniel O' Brien, a Board-certified diagnostic radiologist, diagnosed degenerative changes in the disc spaces at L4-5, and L5-S1 with diffuse bulges. There was no significant spinal canal or foraminal narrowing, and no focal disc herniation evident.

By decision dated April 16, 2004, the Office denied appellant's claim on the grounds that he did not establish an injury as alleged. The Office found that the evidence was sufficient to establish that the events occurred as alleged. However, the medical evidence was insufficient to establish that appellant's condition was caused by employment duties. The Office noted that, as the original injury claim was denied, it was not necessary to consider the claim for a recurrence of disability.

LEGAL PRECEDENT

An employee seeking benefits under the Federal Employees' Compensation Act[2] has the burden of establishing the essential elements of his or her claim, including the fact that the individual is an "employee of the United States" within the meaning of the Act, that the claim was timely filed within the applicable time limitation period of the Act[3] and that an injury was

[1] The Office also indicated to appellant that a recurrence claim could not be considered, before information concerning his original injury was received.

[2] 5 U.S.C. §§ 8101-8193.

[3] *Joe D. Cameron*, 41 ECAB 153 (1989).

sustained in the performance of duty.[4] These are the essential elements of each compensation claim, regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.[5]

To determine whether a federal 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.[6] Second, the employee must submit sufficient evidence, generally only in the form of medical evidence, to establish that the employment incident caused a personal injury.[7]

ANALYSIS

In the instant case, the Office found that the evidence of file supported that the claimed events occurred.

However, the medical evidence is insufficient to establish the second component of fact of injury, that the employment incident caused an injury. The medical reports of record do not establish that the lifting incident caused a personal injury. The medical evidence contains no firm diagnosis, no rationale and no explanation of the mechanism of injury. Appellant provided an MRI scan report from Dr. O'Brien; however, the doctor did not provide a specific opinion addressing whether any diagnosed condition was caused or aggravated by the lifting at work on December 24, 2000.

Appellant also provided several reports from physician's assistants. However, these reports are of no probative value as a physician's assistant is not a physician under the Act.[8] Because a physician's assistant is not a physician under the Act, their opinions are not considered medical evidence.

Because appellant has not submitted medical evidence does not address how the December 24, 2000 lifting incident caused or aggravated a low back injury, he has not met his burden of proof in establishing his claim that he sustained a work-related injury. As such, it is not necessary to consider whether he has sustained a recurrence of disability.[9]

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[4] *James E. Chadden Sr.*, 40 ECAB 312 (1988).

[5] *Delores C. Ellyet*, 41 ECAB 992 (1990).

[6] *John J. Carlone*, 41 ECAB 354 (1989).

[7] *Id*.

[8] *See* 5 U.S.C. § 8101(2). This subsection defines the term "physician." *See also Charley V.B. Harley,* 2 ECAB 208, 211 (1949) (where the Board held that medical opinion, in general, can only be given by a qualified physician).

[9] Board precedent contemplates that a condition must be accepted as employment related before a recurrence of disability attributable to that condition may be claimed. *See, e.g., Robert H. St. Onge*, 43 ECAB 1169 (1992) (where an employee claims a recurrence of disability due to an accepted employment-related injury, he has the burden of establishing by the weight of the substantial, reliable and probative evidence that the subsequent disability for which he claims compensation is causally related to the accepted injury).

CONCLUSION

The Board finds that appellant has not met his burden of proof in establishing that he sustained an injury in the performance of duty.[10]

ORDER

IT IS HEREBY ORDERED THAT the April 16, 2004 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Issued: November 3, 2004
Washington, DC

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

[10] Following the issuance of the Office's April 16, 2004 decision, appellant submitted additional evidence. However, the Board may not consider this evidence as its review of the case is limited to the evidence of record which was before the Office at the time of its final decision. *See* 20 C.F.R. § 501.2(c).