



physician, whose name is illegible, indicated that appellant had a herniated disc at L5-S1 and that he may require surgery. He further submitted a June 23, 2003 certification of health care provider wherein Dr. Evan D. O'Brien, a Board-certified orthopedic surgeon, indicated that appellant had L5-S1 moderate degenerative disc disease and paracentral disc herniation which commenced on March 19, 2003 and that he was "out of work for now" but that he estimated that appellant would be able to return to work on July 17, 2003.

By letter dated September 11, 2003, the Office requested that appellant answer questions and submit further information. On September 23, 2003 he responded by indicating that he did not file a claim within 30 days because "the section was short of people" and that he "thought that the problem only needed rest and that it would fix itself." Appellant indicated that he had been in a management position before and saw the need to cover the schedule. He noted that there were no witnesses to the injury. Appellant stated that he worked for another two and one-half months until he "just couldn't perform my job any longer."

Appellant also submitted further medical information. In a report of an initial consultation on June 19, 2003, Dr. O'Brien indicated that appellant had a history of low back pain and left-sided leg pain for three months. He noted that appellant was shoveling snow three months prior and felt a shift in his back without pain and that, shortly thereafter, he began to experience left leg pain. In an August 8, 2003 operative report, Dr. O'Brien indicated that appellant had a transforaminal epidural steroid injection and intraoperative interpretation of fluoroscopic lumbar imaging. In a September 10, 2003 attending physician's report, Dr. O'Brien indicated that appellant had sustained a posterior disc herniation at L5-S1 and as a result thereof was totally disabled commencing June 19, 2003. He checked the box indicating that he believed that this condition was caused by appellant's employment, but neglected to provide any further explanation.

Additional medical reports include a magnetic resonance imaging (MRI) scan of appellant's lumbar spine on June 11, 2003 which was interpreted by Dr. Steven L. Gilbert, a Board-certified radiologist, as showing a moderate central and left paracentral disc herniation causing stenosis with compression of the ventral aspect of the cord at L5-S1 with underlying diffuse mild congenital spinal stenosis. In a September 10, 2003 duty status report, Dr. Larry H. Kaliner, an osteopath, indicated that appellant sustained a lumbar disc herniation at L5-S1 while pulling equipment from a truck in March 2003. In a September 23, 2003 note, Dr. Gary N. Goldstein, a Board-certified plastic surgeon, indicated that he saw appellant for a surgical consultation. Appellant submitted an October 31, 2003 note by Dr. Jeffrey S. Yablon, a Board-certified neurosurgeon, wherein he indicated that appellant was to remain off work while he is receiving therapy. Finally, he submitted medical reports with regard to a prior claim in 1993.

By decision dated November 21, 2003, the Office denied appellant's claim as it found that the factual and medical evidence was insufficient to establish that he sustained an injury on March 20, 2003.

On December 26, 2003 appellant requested a review of the written record. By decision dated March 31, 2004, the hearing representative affirmed the Office's November 21, 2003 decision denying appellant's claim. The hearing representative reasoned that appellant had not established a factual basis or a medical basis for his claim.

## LEGAL PRECEDENT

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, including the fact that the individual is an "employee of the United States" within the meaning of the Act; that the claim was filed within the applicable time limitation; that an injury was sustained while 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>2</sup> These are the essential elements of each and every compensation claim regardless of whether the claim is predicated on a traumatic injury or an occupational disease.<sup>3</sup>

To determine whether an employee has sustained a traumatic injury in the performance of duty, "fact of injury" must first be established.<sup>4</sup> 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.<sup>5</sup> An injury does not have to be confirmed by eyewitnesses in order to establish that an employee sustained an injury in the performance of duty as alleged, but the employee's statements must be consistent with surrounding facts and circumstances and his subsequent course of action. Such circumstances as late notification of injury, lack of confirmation of injury, continuing to work without apparent difficulty following the alleged injury and failure to obtain medical treatment may cast sufficient doubt on an employee's statements in determining whether he has established a *prima facie* case. The employee has the burden of establishing the occurrence of the alleged injury at the time, place and in the manner alleged by a preponderance of the reliable, probative and substantial evidence. An employee has not met his burden when there are such inconsistencies in the evidence as to cast serious doubt upon the validity of the claim.<sup>6</sup> 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.<sup>7</sup> The medical evidence required to establish causal relationship is usually rationalized medical evidence.<sup>8</sup>

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<sup>1</sup> 5 U.S.C. §§ 8101-8193.

<sup>2</sup> *Joe D. Cameron*, 41 ECAB 153 (1989); *Elaine Pendleton*, 40 ECAB 1143 (1989).

<sup>3</sup> *See Irene St. John*, 50 ECAB 521 (1999); *Michael E. Smith*, 50 ECAB 313 (1999); *Elaine Pendleton*, *supra* note 2.

<sup>4</sup> *Neal C. Evins*, 48 ECAB 242 (1996).

<sup>5</sup> *Michael W. Hicks*, 50 ECAB 325, 328 (1999).

<sup>6</sup> *Merton J. Sills*, 39 ECAB 572 (1988); *Vint Renfro*, 6 ECAB 477 (1954).

<sup>7</sup> 5 U.S.C. § 8101(5); 20 C.F.R. § 10.5(ee) (1999) (defining injury).

<sup>8</sup> *Michael E. Smith*, *supra* note 3.

**ANALYSIS**

In the instant case, appellant has failed to establish that he sustained an injury in the performance of duty on March 20, 2003 as alleged. The Board finds that he has not established that he actually experienced the event at the time, place and in the manner alleged. There were no witnesses to appellant's accident. Although this alone is not fatal to his claim, there is evidence which would tend to cast serious doubt upon the validity of the claim. In this regard, the Board finds that appellant continued to work without apparent difficulty following the alleged incident until he sought medical attention three months after the alleged incident; he did not file a claim for compensation until almost five months after the alleged incident; and his statement that he did not want to stop working because the employing establishment was short of staff does not adequately explain this lengthy delay. Finally, Dr. O'Brien's June 19, 2003 report, which is the most contemporaneous report of record, indicated that appellant hurt himself shoveling snow. This history of injury is inconsistent with the description of injury provided by appellant. The Board finds that the totality of these circumstances cast sufficient doubt on whether appellant sustained an injury on March 20, 2003 as alleged.

**CONCLUSION**

Appellant has failed to establish that he sustained an injury in the performance of duty on March 20, 2003, as alleged.

**ORDER**

**IT IS HEREBY ORDERED THAT** the decisions of the Office of Workers' Compensation Programs dated March 31, 2004 and November 21, 2003 are affirmed.

Issued: October 20, 2004  
Washington, DC

David S. Gerson  
Alternate Member

Willie T.C. Thomas  
Alternate Member

A. Peter Kanjorski  
Alternate Member