# United States Department of Labor
# Employees' Compensation Appeals Board

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| **RICHARD GATES, Appellant** | ) | |
| **and** | ) | **Docket No. 04-2073** |
| | ) | **Issued: February 14, 2005** |
| **U.S. POSTAL SERVICE, POST OFFICE, Memphis, TN, Employer** | ) | |

*Appearances:*
*Richard Gates, pro se*
*Office of Solicitor,* for the Director

*Case Submitted on the Record*

## DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Member
MICHAEL E. GROOM, Alternate Member
A. PETER KANJORSKI, Alternate Member

### ***JURISDICTION***

On August 19, 2004 appellant filed a timely appeal from the Office of Workers' Compensation Programs' merit decision dated December 10, 2003, which denied modification of a November 1, 2002 decision that found that he 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 August 10, 2002.

### ***FACTUAL HISTORY***

On August 22, 2002 appellant, then a 53-year-old mail handler, filed a traumatic injury claim (Form CA-1) alleging that on August 10, 2002 he sustained back pain while lifting mail in

the performance of duty.[1] Appellant's notice of injury did not indicate that he stopped work although appellant's supervisor stated that appellant requested sick leave "the next night."

By letter dated October 9, 2002, the Office advised appellant that additional factual and medical evidence was needed. By letter dated October 15, 2002, the employing establishment controverted the claim.

Appellant submitted disability certificates, duty status reports and progress notes dating from August 14 to October 8, 2002 from Dr. William L. Faulkner, Board-certified in internal medicine, who indicated that appellant was disabled and had back pain.

By decision dated November 1, 2002, 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 he was lifting at work on August 10, 2002, as alleged. However, the Office found that the medical evidence did not establish that a condition had been diagnosed in connection with the incident.

In a November 18, 2002 disability certificate, Dr. Faulkner advised that appellant had continued pain in the neck and low back area and recommended an orthopedic evaluation. In a progress note dated December 10, 2002, Dr. Faulkner diagnosed lumbar pain and neck strain, and advised that appellant was off work from August 10 to December 11, 2002. He indicated that appellant could return to limited duty of no lifting over 25 pounds.

By letter dated December 12, 2002, appellant requested reconsideration. He also indicated that there might be confusion regarding his previous case.

By decision dated March 18, 2003, the Office denied modification of the November 1, 2002 decision.

By letter dated September 13, 2003, appellant requested reconsideration and submitted return to work slips, an August 28, 2003 discharge instruction sheet from Methodist Health Care and a July 18, 2003 prescription for a "[M]iami J Collar'' issued by Dr. Laverne R. Lovell, a Board-certified neurological surgeon.

He also submitted a June 23, 2003 report from Dr. John J. Lochemes, an orthopedist, who diagnosed radiculopathy and possible myelopathy from a 1998 injury. On June 26, 2003 Dr. Lochemes opined that appellant had mild degenerative changes at several disc levels, C5-6, C6-7, C7-T1 and advised that there was mild relative right intervertebral foraminal stenosis and questionable stenosis on the left at C5.

In a July 18, 2003 report, Dr. Lovell advised that appellant returned for a follow-up after undergoing a right C6-7 nerve block. He noted C6-7 spondylosis bilaterally with right sided disc

[1] Appellant alleged that he had a prior neck claim for a November 6, 1998 injury, which was accepted by the Office. No. 060715957.

bulge and foraminal stenosis and opined that appellant should proceed with a C6-7 anterior cervical discectomy with iliac crest bone graft fusion.

Appellant subsequently submitted a September 29, 2003 cervical diagnostic report which was read by Dr. Richard G. Bates, a Board-certified diagnostic radiologist, who advised that although there was some anterior spur formation at the C5, C6 and C7 levels, there were no acute findings.

By decision dated December 10, 2003, the Office denied modification of the November 1, 2002 decision. The Office found that appellant had not submitted rationalized medical opinion evidence supporting any connection between the claimed conditions and the accepted work incident.

## ***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 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, in the form of rationalized medical opinion, to establish that the employment incident caused a personal injury.[7]

## ***ANALYSIS***

The Office accepted that appellant established that the August 10, 2002 lifting incident occurred as alleged. The Board finds, that the medical evidence is insufficient to establish that the employment incident caused an injury. The medical reports of record do not establish that appellant's lifting incident on August 10, 2002 caused a personal injury. The medical evidence

[2] 5 U.S.C. §§ 8101-8193.

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

[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*.

contains no rationale or explanation of the mechanism of injury. Appellant provided reports from Drs. Faulkner, Lovell, Lochemes and Bates. However, the doctors did not provide a specific opinion addressing whether any diagnosed condition was caused or aggravated by the lifting incident on August 10, 2002. Dr. Faulkner provided several disability certificates, duty status reports and progress notes in which he indicated that appellant was disabled and had back pain. However, he did not offer any opinion on causal relationship. For example, the physician did not offer any explanation regarding why the lifting incident at work would have caused or aggravated a particular condition. Further, he did not appear to be aware of the previous neck condition in which appellant alleged that he had a November 6, 1998 injury such that he was able to differentiate appellant's complaints and relate them to either injury. Further, Dr. Lovell and Dr. Lochemes noted the 1998 injury, but did not appear to be aware of the August 10, 2002 lifting incident. They did not offer any opinion on causal relationship. Appellant also submitted a diagnostic report from Dr. Bates, however, this report did not address causal relationship. Because the medical reports submitted by appellant do not address how the August 10, 2002 lifting incident caused or aggravated a specific injury, these reports are of limited probative value[8] and are insufficient to establish that the August 10, 2002 employment incident caused or aggravated a specific injury.

Appellant also provided notes from a nurse. However, section 8101(2) of the Act provides that the term "physician" includes surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors and osteopathic practitioners within the scope of their practice as defined by the applicable state law.[9] Only medical evidence from a physician as defined by the Act will be accorded probative value.[10] Health care providers such as nurses and physical therapists are not physicians under the Act.[11] Thus, their reports do not constitute medical evidence.

Because appellant has not submitted medical evidence explaining how the August 10, 2002 incident caused or aggravated his claimed condition, he has not met his burden of proof in establishing his claim.[12]

## ***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.

[8] *See Linda I. Sprague*, 48 ECAB 386, 389-90 (1997).

[9] 5 U.S.C. § 8101(2).

[10] *See 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).

[11] *See Vicky L. Hannis*, 48 ECAB 538, 540 (1997); *Jan A. White*, 34 ECAB 515, 518 (1983).

[12] On appeal, appellant alleges that his claim should be considered as a recurrence of disability attributable to a prior claim. However, there is no Office decision before the Board that purports to adjudicate a claim for a recurrence of disability. Consequently, the Board has no jurisdiction over any such matter. *See* 20 C.F.R. § 501.2(c).

## ORDER

**IT IS HEREBY ORDERED THAT** the December 10, 2003 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: February 14, 2005
Washington, DC

Colleen Duffy Kiko
Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member