United States Department of Labor
Employees' Compensation Appeals Board

MICHAEL M. GAINES, Appellant	)	
and	)	**Docket No. 05-1765**
	)	**Issued: November 28, 2005**
U.S. POSTAL SERVICE, POST OFFICE, Bradenton, FL, Employer	)	

Appearances:
Levin V. Perez, for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On August 24, 2005 appellant filed a timely appeal from the Office of Workers' Compensation Programs' April 4 and July 28, 2005 merit decisions denying his traumatic injury claim. 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 to establish that he sustained an injury in the performance of duty on March 10, 2004.

FACTUAL HISTORY

On March 11, 2004 appellant, then a 55-year-old mail carrier, filed a traumatic injury claim alleging that he sustained injury to his neck, shoulders and chest at work on March 10, 2004. Regarding the cause of the injury, he stated, "Repetitious use of seat belt, hand

brake and door -- increased street time twisting and turning head and shoulder." Appellant stopped work on March 11, 2004.[1]

In a narrative report dated March 11, 2004, Dr. Omar Inaty, an attending chiropractor, indicated that he saw appellant on that date. He reported that on March 10, 2004 appellant sustained injury due to putting his seat belt on and off, opening and closing the door to his vehicle, engaging in twisting "quite a bit all day," and doing "more deliveries than usual." Dr. Inaty diagnosed cervical sprain/strain with possible right radiculopathy and dorsal muscle spasms due to the March 10, 2004 injury.[2] In a form report dated March 11, 2004, Dr. Inaty noted that appellant reported injuring himself on March 10, 2004 due to "repeat[ed] use of seat belt, hand brake, and door." He diagnosed cervical radiculitis and cervicothoracic spasms due to the March 10, 2004 injury. In another form report dated March 11, 2004, Dr. Inaty stated that appellant reported that he developed neck, right shoulder and chest pain after "overdoing it" at work on unspecified date or dates. He diagnosed cervical myospasms and possible radiculitis due to the reported employment activity.[3]

The Office requested that appellant submit additional factual and medical evidence in support of his claim. In an undated statement received by the Office on April 19, 2004, appellant indicated that at about 2:10 p.m. on March 10, 2004 he lifted a tray of mail weighing 25 to 30 pounds from the back of his vehicle and felt a pop or snap in his neck, shoulder and upper back on right when he turned and twisted his upper body to the left during the lifting process. He indicated that he did not feel any discomfort at that time, but experienced pain and a tingling sensation in his right arm and shoulder after he clocked out at 4:00 p.m.

By decision dated April 28, 2004, the Office denied appellant's claim that he sustained an injury in the performance of duty on March 10, 2004. The Office accepted the March 10, 2004 incident but found that appellant did not submit sufficient medical evidence to show that he sustained a medical condition. It noted that the reports of Dr. Inaty did not constitute probative medical evidence.

In a disability note dated April 27, 2004, Dr. Michael W. Meriwether, an attending Board-certified neurosurgeon, indicated that appellant was totally incapacitated from April 27, 2004 until a "pending" date and stated that he was "off work until reevaluation." In a form report dated May 13, 2004, Dr. Meriwether indicated that appellant was "off work pending reevaluation (surgical consultation). He listed the date of injury as March 10, 2004.[4]

[1] It appears that appellant previously sustained injury at work in June 2000 when a palm tree hit his neck and back and caused him to fall forward, but the record contains only brief references to this apparent injury.

[2] The record contains the findings of x-ray testing obtained by Dr. Inaty on March 17, 2004 which showed cervical spondylosis at C3-4 and C5-6 without acute osseus abnormality.

[3] In an April 13, 2004 report, Dr. Inaty indicated that appellant reported that his March 10, 2004 injury was due to "repeat[ed] use of seat belt, hand brake, lifting and door."

[4] In another report dated May 13, 2004, Dr. Meriwether indicated that April 29, 2004 magnetic resonance imaging (MRI) testing showed spondylosis at C3-4 and C5-6.

In a report dated April 22, 2004, Dr. Walter Afield, an attending physician Board-certified in physical medicine and rehabilitation, indicated that appellant sustained chronic pain due to his March 10, 2004 injury. Dr. Afield stated that appellant might be able to work on May 1, 2004 depending on whether he had any neurological limitations.

In a report dated May 21, 2004, Dr. Philip Talley, an attending Board-certified neurosurgeon, listed the date of injury as March 10, 2004 and indicated that appellant reported "he was lifting a bucket filled with mail and did a twisting motion and heard something 'pop' in his neck." Dr. Talley discussed appellant's degenerative cervical disease.

Appellant requested a hearing before an Office hearing representative which was held on February 18, 2005. He testified that on March 10, 2004 he lifted a tray of mail from the back of his vehicle with both arms to head height and felt a pop or snap in his neck and shoulder and upper back on right when he turned to set the tray down into a delivery tray in the vehicle. Appellant indicated that he did not advise his supervisor of the injury on March 10, 2004 because he did not experience much pain until he clocked out for the day. He reported the injury and filed a claim on March 11, 2004, but did not know whether it was due to "repetitive motion from using the seatbelt, setting the hand brake, on and off with the key, reaching over."

In a report dated January 10, 2005, Dr. David P. Kalin, an attending Board-certified orthopedic surgeon, indicated that appellant reported that he sustained a right shoulder injury at work in March 2004. Dr. Kalin listed numerous diagnoses, primarily cervical in nature, and indicated that they were related to a June 2000 injury. In a report dated February 10, 2004, Dr. Kalin noted that appellant reported that on March 10, 2004 he lifted a tray weighing about 25 to 30 pounds to head height and felt a pop or snap in his neck, right upper back and shoulder when he turned and twisted his upper body to the left. He again listed numerous diagnoses, primarily cervical in nature, and indicated that they were related to the June 2000 injury.

By decision dated and finalized April 4, 2005, the Office hearing representative affirmed the April 28, 2004 decision, as modified, to reflect that appellant's claim was now denied on the grounds that he did not establish any employment incident on March 10, 2004. The hearing representative indicated that there were such inconsistencies in the record as to cast doubt on the validity of appellant's claim.

Appellant requested reconsideration of his claim, contending that he sustained injury on March 10, 2004 when he lifted a tray of mail weighing 25 to 30 pounds from the back of his vehicle with both arms to head height and felt a pop or snap in his neck, shoulder and upper back on right when he twisted and turned his upper body to the right. He also submitted several medical reports which had previously been of record.

By decision dated July 28, 2005, the Office denied medication of the April 4, 2005 decision.[5]

[5] Although the cover letter for the July 28, 2005 decision indicated that the Office was not conducting a merit review, the main text of the decision shows that the Office did in fact conduct a merit review.

LEGAL PRECEDENT

An employee who claims benefits under the Federal Employees' Compensation Act[6] has the burden of establishing the occurrence of an injury at the time, place and in the manner alleged, by a preponderance of the reliable, probative and substantial evidence.[7] An injury does not have to be confirmed by eyewitnesses in order to establish the fact that an employee sustained an injury in the performance of duty, but the employee's statements must be consistent with the surrounding facts and circumstances and his or her subsequent course of action.[8] An employee has not met his or her burden of proof of establishing the occurrence of an injury when there are such inconsistencies in the evidence as to cast serious doubt upon the validity of the claim.[9] 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, if otherwise unexplained, cast sufficient doubt on an employee's statements in determining whether a *prima facie* case has been established.[10] However, an employee's statement alleging that an injury occurred at a given time and in a given manner is of great probative value and will stand unless refuted by strong or persuasive evidence.[11]

An employee also has the burden to show that any disability and specific condition are causally related to an accepted employment incident.[12] The employee must submit evidence, in the form of medical evidence, to establish that the employment incident caused a personal injury.[13] The term injury as defined by the Act, refers to some physical or mental condition caused by either trauma or by continued or repeated exposure to, or contact with, certain factors, elements or conditions.[14]

ANALYSIS

Appellant alleged that he sustained injury to his neck, right shoulder and upper back at work on March 10, 2004. The Office denied his claim on the grounds that he did not establish an employment incident on that date. The Board finds that appellant established an employment incident on March 10, 2004 when he lifted a tray of mail weighing 25 to 30 pounds from the back of his vehicle. He lifted with both arms to head height and experienced a pop or snap in his

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[6] 5 U.S.C. §§ 8101-8193.

[7] *William Sircovitch*, 38 ECAB 756, 761 (1987); *John G. Schaberg*, 30 ECAB 389, 393 (1979).

[8] *Charles B. Ward*, 38 ECAB 667, 670-71 (1987); *Joseph Albert Fournier, Jr.*, 35 ECAB 1175, 1179 (1984).

[9] *Tia L. Love*, 40 ECAB 586, 590 (1989); *Merton J. Sills*, 39 ECAB 572, 575 (1988).

[10] *Samuel J. Chiarella*, 38 ECAB 363, 366 (1987); *Henry W.B. Stanford*, 36 ECAB 160, 165 (1984).

[11] *Robert A. Gregory*, 40 ECAB 478, 483 (1989); *Thelma S. Buffington*, 34 ECAB 104, 109 (1982).

[12] *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

[13] *John J. Carlone*, 41 ECAB 354, 356-57 (1989); *see* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Fact of Injury*, Chapter 2.803.2a (June 1995).

[14] *Elaine Pendleton, supra* note 12; 20 C.F.R. § 10.5(a)(14).

neck, shoulder and upper back on the right when he twisted and turned his upper body to the left. The Board notes that there are no such inconsistencies in the evidence as to cast serious doubt upon the validity of appellant's claim.

Appellant initially reported to some physicians that he thought he injured himself on March 10, 2004 due to such activities as putting his seatbelt on and off and opening and closing the door to his vehicle. He later explained that because he did not experience pain until a delay of several hours, he initially was not sure what work duties on March 10, 2004 caused his problems. Appellant explained that he realized that the above-described incident involving the lifting of a mail tray and twisting his body was the most likely cause of his claimed injury and consistently described this incident in numerous statements to physicians of record from April 2004 onwards. The Board further notes that on March 11, 2004, one day after the claimed injury, appellant reported the injury to his supervisor, filed a claim, and sought medical care. There is no strong or persuasive evidence to refute appellant's account of the March 10, 2004 lifting and twisting incident.

The Board finds, however, that appellant has not submitted sufficient medical evidence to establish that he sustained injury due to the accepted March 10, 2004 employment incident. Appellant submitted several reports, including three reports dated March 11, 2004, in which Dr. Inaty, an attending chiropractor, described his medical condition. Dr. Inaty diagnosed cervical sprain/strain with possible right radiculopathy, cervicothoracic spasms, and dorsal muscle spasms due to the March 10, 2004 injury. Although Dr. Inaty obtained x-ray testing on March 17, 2004, he did not provide a diagnosis that appellant had a spinal subluxation as demonstrated by x-rays to exist. Under section 8101(2) of the Act, chiropractors are only considered physicians, and their reports considered medical evidence, to the extent that they treat spinal subluxations as demonstrated by x-ray to exist.[15] Therefore, Dr. Inaty's reports do not constitute probative medical evidence and do not establish appellant's claim.

Appellant submitted numerous medical reports from other attending physicians, including Dr. Talley, a Board-certified neurosurgeon, and Dr. Kalin, a Board-certified orthopedic surgeon. Some of these reports contained a description of the accepted March 10, 2004 employment incident, but none of the reports provided a physician's opinion that appellant sustained injury due to the incident. The lack of an explanation of causal relationship is fatal to the claim.

CONCLUSION

The Board finds that appellant did not meet his burden of proof to establish that he sustained an injury in the performance of duty on March 10, 2004. Appellant established the existence of an employment incident on March 10, 2004 in the form of lifting a mail tray and

[15] 5 U.S.C. § 8101(2). *See Jack B. Wood*, 40 ECAB 95, 109 (1988).

twisting his upper body, but he did not meet his burden of proof to submit medical evidence establishing that he sustained injury due to the incident.

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' July 28 and April 4, 2005 decisions are affirmed as modified to reflect that appellant established a March 10, 2004 employment incident but did not submit medical evidence showing that he sustained injury due to the incident.

Issued: November 28, 2005
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board