

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

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EMIL M. MORAD, JR., Appellant )  
and ) Docket No. 05-1226  
U.S. POSTAL SERVICE, POST OFFICE, ) Issued: September 30, 2005  
Cleveland, OH, Employer )  
Cleveland, OH, Employer )  
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)

*Appearances:*

*Alan J. Shapiro, Esq.*, for the appellant  
*Office of Solicitor*, for the Director

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:  
DAVID S. GERSON, Judge  
WILLIE T.C. THOMAS, Alternate Judge  
MICHAEL E. GROOM, Alternate Judge

**JURISDICTION**

On May 17, 2005 appellant, through his attorney, filed a timely appeal of the Office of Workers' Compensation Programs' merit decision dated May 2, 2005 finding that he had not established an injury on September 12, 2002 in the performance of duty. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

**ISSUE**

The issue is whether appellant has met his burden of proof in establishing that he sustained a herniated disc at C5-6 on September 12, 2002.

**FACTUAL HISTORY**

On September 16, 2002 appellant, then a 50-year-old automotive and truck mechanic, filed an occupational disease claim alleging that he developed a herniated disc at C5-6 due to his employment duties of overhead working and straining while working on vehicles. Appellant first became aware of his condition on September 12, 2002 and first attributed this condition to his employment duties on that date.

In a note dated September 14, 2002, Dr. Safaa Al Haddad, a Board-certified internist, diagnosed central disc prolapse of C5-6, hypertension, depression and coronary artery disease. On September 16, 2002 Dr. Al Haddad diagnosed herniated discs.

The Office requested additional factual and medical evidence by letter dated October 31, 2002. In a report dated September 23, 2002, Dr. Pete N. Poolos, Jr., a Board-certified neurosurgeon, stated that appellant could not recall any specific injury or when he developed pain between his shoulder blades and that appellant also reported numbness and tingling in the fingers of both hands. He noted that a magnetic resonance imaging (MRI) scan revealed a central disc protrusion at C5-6 which was not causing any compression of any significant degree of the spinal cord nor any significant degree of compression of any nerve root. Dr. Poolos stated that appellant's central disc herniation was asymptomatic and was not contributing to appellant's reported thoracic pain and that his hand numbness was more typical of carpal tunnel syndrome.

By decision dated December 19, 2002, the Office denied appellant's claim for failure to establish an employment-related injury as alleged.

Appellant, through his attorney, requested an oral hearing on January 15, 2003. He testified at the oral hearing, which was held on October 22, 2003 asserting that on September 12, 2002 he was changing the oil on a truck when the oil filter wrench broke and appellant lost his balance and flew backwards hitting his shoulder on the vehicle lift posts causing him to feel dizzy and lightheaded. The following morning appellant was unable to move due to pain in his neck, shoulders and arms. He telephoned Dr. Al Haddad who instructed him to report to the hospital where he underwent an MRI scan and received the diagnosed of herniated disc.

By decision dated December 18, 2003, the hearing representative affirmed the December 19, 2002 decision finding that appellant had failed to establish that the employment incident occurred as alleged.

Appellant through his attorney requested reconsideration of the December 18, 2003 decision on November 14, 2004. In a report dated August 26, 2004, Dr. Charles I. Choi, a Board-certified anesthesiologist, stated that he first examined appellant on February 14, 2003. He stated that appellant sustained neck pain in September 2002 while pulling down a wrench at work. Dr. Choi noted that appellant's MRI scan demonstrated a large central disc prolapse with left neuroforaminal encroachment at C5-6. He diagnosed herniated disc at the L5-6 level with radiation down to the neck, shoulder and arms.

Dr. Atef A. Eltomey, a Board-certified neurosurgeon, examined appellant on October 1, 2004 and noted that for the last several months appellant had experienced constant dull-aching pain localized to the interscapular area. He noted that appellant sustained a cervical strain in a motor vehicle accident on December 23, 1986 and that appellant reported that his neck pain resolved within six to eight months of the 1986 accident. On physical examination, Dr. Eltomey found generalized tenderness over the paracervical muscles and limited neck range of motion with no radicular symptoms. He noted that appellant's 2002 and 2004 MRI scans revealed disc

herniation at C5-6 as well as evidence of moderate degenerative changes and spondylosis. He stated:

“Based on the initial MRI scan on September 13, 2002 I feel that the patient has a preexisting condition of cervical spondylosis and mild degenerative disc disease at the C5-6 level, which has been aggravated by his work-related accident in August 2002, resulting in aggravation of the preexisting condition of cervical spondylosis and disc herniation at C5-6 and recurrent interscapular pain secondary to cervical myofibrosis.”

On November 3, 2004 Dr. Al Haddad stated that he had concluded that appellant’s current condition was an exacerbation of a previous work injury to his neck and shoulder that occurred in 2002.

Dr. Michael Banks, a Board-certified orthopedic surgeon, completed a note of November 19, 2004 and stated that appellant was apparently involved in a work-related injury with neck and arm pain on September 13, 2002 when he was pulling a wrench at work. He noted that appellant sustained an additional injury helping a friend move a refrigerator.

By decision dated May 2, 2005, the Office reviewed appellant’s claim on the merits and found that the evidence was not sufficient to establish that the injury occurred as alleged.

#### **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 timely filed within the applicable time limitation period of the Act, that an injury was sustained 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. These are the essential elements of each and every compensation claim regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.<sup>2</sup>

The Office’s regulations define a traumatic injury as a condition of the body caused by a specific event or incident, or series of events or incidents, within a single workday or shift. Such condition must be 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.<sup>3</sup> 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. 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. An employee has the burden of establishing the occurrence of an injury at the time, place and in the manner alleged, by the preponderance of the

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<sup>1</sup> 5 U.S.C. §§ 8101-8193.

<sup>2</sup> *Juanita Pitts*, 56 ECAB \_\_\_\_ (Docket No. 04-1527, issued October 28, 2004).

<sup>3</sup> 20 C.F.R. § 10.5(ee).

reliable, probative and substantial evidence. An injury does not have to be confirmed by eyewitnesses in order to establish the fact that the 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 subsequent course of action. An employee has not met his burden of proof where there are such inconsistencies in the evidence as to cast serious doubt upon the validity of the claim.<sup>4</sup>

The employee must also submit sufficient evidence, generally only in the form of medical evidence, to establish that the employment incident caused a personal injury. The medical evidence required to establish causal relationship is usually rationalized medical evidence. Rationalized medical opinion evidence is medical evidence which includes a physician's rationalized opinion on the issue of whether there is a causal relationship between the claimant's diagnosed condition and the implicated employment factors. The opinion of the physician must be based on a complete factual and medical background of the claimant, must be one of reasonable medical certainty and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.<sup>5</sup>

### ANALYSIS

Appellant filed an occupational disease claim on September 16, 2002 alleging that he developed a herniated disc due to his duties of working overhead and straining while working on vehicles. Dr. Poolos completed a report on September 23, 2002 and stated that appellant could not recall any specific injury or the time at which he first noted pain between his shoulder blades. He diagnosed herniated disc at C5-6, but did not provide an opinion that this condition was due to appellant's work duties. The Office denied appellant's claim on December 19, 2002 due the lack of medical evidence supporting a causal relationship between his diagnosed condition and his employment duties.

Appellant testified at his oral hearing on October 22, 2003 and alleged that his condition was not the result of his previously alleged employment duties over a period of time, but was instead attributable to a single work incident on September 12, 2002 during which a wrench broke while he was attempting to change an oil filter and appellant fell into support posts injuring his upper back.<sup>6</sup> Although appellant sought treatment for his back pain in September 2002, none of the contemporaneous medical evidence provided a history of injury consistent with appellant's later account of a traumatic injury. In fact, Dr. Poolos specifically noted that appellant could not recall any event as causing his condition or even when he began to experience the pain between his shoulders.

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<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> Although appellant initially filed his claim as an occupational disease, the Board has held that the Office should develop a claim based on the facts before it. *Larry D. Dunkin*, 56 ECAB \_\_ (Docket No. 04-1949, issued December 22, 2004). As appellant later amended his claim to indicate that he attributed his injury to a specific injury during a single work shift, the Board finds that the Office properly addressed his claim as a traumatic injury in its December 18, 2003 and May 2, 2005 decisions.

In support of his request for reconsideration of his claim for a traumatic injury on September 12, 2002, appellant submitted a report dated August 26, 2004 from Dr. Choi noting that at the time of his first examination on February 24, 2003 appellant reported that he sustained neck pain in September 2002 while pulling on a wrench at work. This report made over a year after the alleged traumatic incident is not sufficient to substantiate appellant's allegation. Dr. Choi merely mentioned appellant's actions of pulling on a wrench at work, not the incident related by appellant of falling into a support post with his back with sufficient force to render him lightheaded.

Appellant also submitted a report dated October 1, 2004, two full years after his alleged employment incident from Dr. Eltomey which merely noted that appellant sustained a work-related accident in August 2002. This report does not support that appellant sustained a traumatic injury on September 12, 2002.

Dr. Al Haddad stated on November 3, 2004 that appellant's current condition was due to a work injury occurring in 2002. Appellant first sought treatment from him in September 2002 and this physician should be in the optimum position for reporting a history of injury consistent with appellant's current allegations. However, Dr. Al Haddad failed to provide the month of appellant's alleged work injury, much less any specific information regarding whether that injury was due to a traumatic incident. The Board finds that this report is not sufficient to support appellant's claim for a traumatic employment incident occurring on September 12, 2002.

On November 19, 2004 Dr. Banks indicated that appellant sustained a work-related injury on September 13, 2002 while pulling on a wrench. His report was similarly completed more than two years after the alleged employment incident. Dr. Banks did not provide the details regarding how appellant's employment incident occurred and indicated that this incident occurred on September 13, 2002 rather than September 12, 2002 as alleged by appellant. His report does not provide sufficient detail to substantiate appellant's claim that he sustained a traumatic incident on September 12, 2002.

As appellant filed a claim initially attributing his condition to work duties over a period of several days and provided most contemporaneous treating physician, Dr. Poolos with a similar history, the Board finds that the reports of physician's dated more than one year after the alleged employment incident and including various dates and descriptions of appellant's alleged employment incidents, are not sufficient to establish that the employing incident occurred as alleged. For these reasons, the Board finds that the Office properly denied appellant's claim for a traumatic injury arising from an employment incident on September 12, 2002.

### **CONCLUSION**

The Board finds that there are sufficient discrepancies in appellant's history of injuries to the Office and the histories reported to his physicians to cast doubt as to whether an employment incident on September 12, 2002 occurred as alleged. Therefore the Board finds that the Office properly denied appellant's claim for a traumatic injury.

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated May 2, 2005 is affirmed.

Issued: September 30, 2005  
Washington, DC

David S. Gerson, Judge  
Employees' Compensation Appeals Board

Willie T.C. Thomas, Alternate Judge  
Employees' Compensation Appeals Board

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