United States Department of Labor
Employees' Compensation Appeals Board

J.B., Appellant	)	
and	)	**Docket No. 06-1579**
	)	**Issued: October 23, 2006**
U.S. POSTAL SERVICE, MAIN POST OFFICE, Sandy, UT, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On June 29, 2006 appellant filed a timely appeal of the Office of Workers' Compensation Programs' merit decision dated May 8, 2006 wherein the Office denied appellant's claim for compensation on the grounds that he did not establish fact of injury in the performance of duty. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d), the Board has jurisdiction over the merits of the claim.

ISSUE

The issue is whether appellant has established that he sustained a T11 fracture while in the performance of duty.

FACTUAL HISTORY

On March 7, 2006 appellant, then a 53-year-old custodian, filed an occupational disease claim alleging that as a result of pushing carrier cases across the tile floor he sustained a T11 fracture. He listed his date of awareness as March 1, 2003. In support of his claim, appellant submitted a March 3, 2006 medical status report wherein Dr. Mark D. Johnson, a Board-certified

family practitioner, listed appellant's diagnosis as upper back pain and old T11 compression fracture. Dr. Johnson indicated that appellant could work eight hours a day but that he should not use the floor stripping machine due to back strain.

By letter dated March 15, 2006, the Office requested that appellant submit further information. In response, appellant submitted a copy of a March 2, 2006 letter to the employing establishment wherein he stated:

> "In the years of 1999 [and] 2000 the station manager instructed us custodians at the [branch of the employing establishment] to push carrier cases across the tile on the main floor. This is the period of time that I received damage in my back. Since then I have been treated by four different chiropractors on the average of every 10 days to reallign (sic) my vertebra. It has been recently that they have used lifts starting in 2004.
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> "In 2001 the postmaster had two of us custodians push a flats case from the assorting mail area to the dock area to dismantle it and throw it in the trash. Before finishing this job I threw out my back and it took several chiropractor treatments to realign my back. That flat case weighed at least 500 pounds or more.
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> "In February 2004 the postmaster took the dumpster that the custodians was (sic) using for many years and relocated it from the dock area where the trash is dropped into the dumpster in the west side of the building where the custodian has to throw the trash above his head. This has caused more problems with my back and shoulders. There is a noticeable curvature in my back which has caused me numerous pain since."

In a March 17, 2006 letter, appellant stated that over a two- to three-day period, with the help of another custodian, he pushed carrier cases that weighed over 500 pounds. He stated that he first noted his pain in 2001 and went to a chiropractor for treatment. Appellant noted that he strained his shoulder shoveling heavy snow in 1991, but that he was never treated for arthritis, sciatica or other back injury.

By letter dated March 22, 2006, the employing establishment controverted the claim. In an accompanying March 8, 2006 statement, appellant's supervisor, Terry Allen, indicated that appellant informed him that he injured his back sometime in 1999 or 2000 while working for the employing establishment. He stated that appellant had been instructed to rearrange the carrier cases with another custodian, Fred Kunz, and that he hurt his back at that time. Appellant also noted that Mr. Kunz injured his rotator cuff at the same time. When asked if he had reported the incident, he first told the supervisor that he had not and then he said that his former supervisor, Dave Dibble, allegedly told him that he was too busy to handle a claim at that time. Appellant also told Mr. Allen that he had his back x-rayed in 2003 and that no damage was discovered. He indicated that his most recent examination, however, indicated an old compression fracture. Appellant told the supervisor that his physician informed him that this was caused by pushing a heavy weight. Mr. Allen further alleged that they did not have cases that weighed 500 pounds.

Finally, he indicated that in January 2006 appellant attempted to be placed on light duty but was turned down and that afterwards appellant filed this claim.

In support of Mr. Allen's statement, the employing establishment submitted a March 8, 2006 statement by Mr. Kunz wherein he stated that he did have an accident involving his rotator cuff in 2002, but that it happened on a job that he was doing by himself and did not involve appellant or carrier cases. The Office also submitted a March 8, 2006 note from Mr. Dibble wherein he stated that he did not recall appellant coming to him with a complaint of being hurt. He stated, "As long as I was in management, I have no recollection of an incident or denial of filling out a claim." In addition, the employing establishment submitted a note of a telephone conversation wherein Mr. Allen spoke to the postmaster who stated that it was his impression that Mr. Kunz did the work of moving the carrier case, not appellant. He also noted that appellant did not report injuring his back at this time or any other time while he was working at his branch of the employing establishment. Finally, the employing establishment submitted a note by Nerces Terzian wherein he said that appellant told him that, prior to his career at the employing establishment, appellant had been in a car accident and that he had pain in his neck since that time.

In an April 21, 2006 statement, Mr. Allen said that appellant was not involved in moving the cases, rather he merely plugged in the electrical cords while Mr. Kunz did the moving. He noted that this occurred sometime in 1999 or 2000. Mr. Allen further stated that he would guess that the weight of the flats case was a couple hundred pounds -- not 500 pounds as alleged by appellant.

Medical evidence submitted in support of the claim included an x-ray report by Dr. Jordan A. Kimball, a neuroradiologist, indicating that there was a "[s]light anterior left wedge compression deformity of T11, indeterminate in age, but more likely old than new." Appellant also submitted medical reports by Dr. Johnson dated from February 27 to April 21, 2006. Dr. Johnson indicated that appellant presented to his office on February 27, 2006 complaining of pain in his right hand whenever he is required to operate a specific floor scrubber. He referred appellant to Dr. Kathy Alderson, a neurologist. In a March 20, 2006 report, Dr. Alderson noted in the history that appellant told her that at age 17 he was in an automobile accident when he said that his C7 "froze." Appellant also told Dr. Alderson that in about 2003 he had a fracture at T11 and that he has been in pain from the back to the lateral thigh for which he sees a chiropractor. She noted that he was now complaining of right hand pain.

By decision dated May 8, 2006, the Office denied appellant's claim for the reason that he failed to establish that the event occurred as alleged. Further, the Office found that the medical evidence failed to provide a diagnosis related to the claimed events or employment factors.

LEGAL PRECEDENT

An employee seeking benefits under the Federal Employees' Compensation Act[1] has the burden of establishing that the essential elements of his or her claim, including the fact that the

[1] 5 U.S.C. §§ 8101-8193.

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.[2] 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.[3]

To establish that an injury was sustained in the performance of duty in an occupational disease claim, a claimant must submit the following: (1) medical evidence establishing the presence or existence of the disease or condition for which compensation is claimed; (2) a factual statement identifying employment factors alleged to have caused or contributed to the presence or occurrence of the disease or condition; and (3) medical evidence establishing that the diagnosed condition is causally related to the employment factors identified by the claimant.[4]

To establish that an injury occurred as alleged, the injury need not be confirmed by eyewitnesses, but the employee's statement must be consistent with the surrounding facts and circumstances and his or her subsequent course of action. In determining whether a *prima facie* case has been established, such circumstances as late notification of injury, lack of confirmation of injury and failure to obtain medical treatment may, if otherwise unexplained, cast sufficient doubt on a claimant's statements. The employee has not met this burden when there exist such inconsistencies in the evidence as to cast serious doubt on the validity of the claim.[5]

ANALYSIS

Appellant alleged that he sustained a T11 fracture while pushing carrier cases across the tiled floor for the employing establishment. The Office denied his claim on the basis that he failed to establish the employment factors alleged to have caused or contributed to a T11 fracture.

The Board finds that appellant has not established that he actually experienced the employment factors in the manner alleged. Initially, the Board notes that there are discrepancies as to when these alleged factors or employment happened. Appellant listed his date of awareness on his claim form as March 1, 2003. This does not agree with his statement of May 2, 2006 wherein appellant indicated that in 1999 and 2000 he was instructed to push carrier cases across the tile on the main floor and that in 2001 he worked with another custodian to push a flats case and dismantle it. In addition, there is some question as to whether appellant properly stated his medical history. Although he stated in his March 17, 2006 letter that he never was treated for arthritis, sciatica or other back injury, there are two references in the record to a prior automobile accident. Nerces Terzian stated that appellant informed him that he had been in a car accident prior to starting at the employing establishment and that he had pain in his neck since that time.

[2] *Joe D. Cameron*, 41 ECAB 153 (1989); *Elaine Pendleton*, 40 ECAB 1143 (1989).

[3] *Victor J. Woodhams*, 41 ECAB 345 (1989).

[4] *Solomen Polen*, 51 ECAB 441 (2000); *see also Michael E. Smith*, 50 ECAB 313 (1999).

[5] *Betty J. Smith*, 54 ECAB 174 (2002).

Furthermore, Dr. Alderson states that appellant told her of an automobile accident that occurred when he was 17 and at which time his C7 "froze." Furthermore, there are no medical records that appellant saw a physician at the time of his alleged injury; the first notation of the T11 fracture occurs in 2006. Appellant did not officially report the claim until after he had his request for light duty denied. Furthermore, appellant informed his supervisor that he was injured at the same time as his coworker, Mr. Kunz, who suffered from a rotator cuff tear. However, Mr. Kunz indicated that he sustained the rotator cuff injury in 2002 while he was working on a job by himself that did not involve appellant or carrier cases. With regard to reporting the incident, the employing establishment states that appellant said that he told his supervisor but that his supervisor, Mr. Dibble, told him that he was too busy to file a claim. However, Mr. Dibble indicates in his March 8, 2006 note that he had no recollection of appellant telling him that he had been hurt. Appellant alleged that the weight of the case he pushed was at least 500 pounds, an assertion contradicted by the employing establishment.

The Board finds that appellant's assertion that he sustained a T11 fracture while pushing carrier cases across the tiled floor is unsubstantiated. Because appellant has not established the factual aspect of his claim, it is not necessary for the Board to consider the medical evidence of record.[6]

CONCLUSION

The Board finds that appellant has not established that he sustained a T11 fracture in the performance of duty.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated May 8, 2006 is affirmed.

Issued: October 23, 2006
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board

[6] *See e.g., Alvin V. Gadd,* 57 ECAB ___ (Docket No. 05-1996, issued October 25, 2005).