United States Department of Labor
Employees' Compensation Appeals Board

W.B., Appellant	)	
and	)	**Docket No. 06-686**
	)	**Issued: September 19, 2006**
U.S. POSTAL SERVICE, POST OFFICE, Southbury, CT, Employer	)	

Appearances:
W.B., pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On February 2, 2006 appellant filed a timely appeal from the Office of Workers' Compensation Programs' decision dated December 21, 2005, which 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 a traumatic injury in the performance of duty on February 20, 2003.

FACTUAL HISTORY

On June 16, 2003 appellant, then a 45-year-old rural letter carrier trainee, filed a traumatic injury claim alleging that on February 26, 2003 he was lifting a mail tray in the back of a long life vehicle (LLV) and injured his middle back while in the performance of duty. Appellant did not stop work. The employing establishment controverted the claim.

In a separate statement dated June 16, 2003, Donald Miressi, the supervisor of customer service, alleged that on June 14, 2003 he discussed appellant's future employment with the postal service and explained that he offered him the opportunity to resign in good standing rather than

be terminated for poor performance. Mr. Miressi explained that after this conversation, appellant advised him of sustaining an injury in February 2003. Appellant explained that the reason he did not initially report his injury was because he was on probation and feared the loss of his job. In a June 6, 2003 statement, Tracey L. Palmer, appellant's trainer, indicated that appellant did not report any injuries in February 2003.

On June 25, 2003 the Office received treatment notes from a physician's assistant. By letter dated June 26, 2003, the Office requested additional information.

In a July 19, 2003 statement, appellant explained his reasons for the delay in filing his claim. He did not initially file his claim within 30 days because he was afraid of losing his job and dealt with the pain until it gradually got worse. Appellant alleged that when he was told that he was being terminated, he "decided to report and seek medical attention." Appellant also alleged that only two people had "immediate knowledge," however, he was unable to obtain their statements.

By decision dated August 5, 2003, 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 show that the claimed event occurred as alleged. However, it found that there was no medical evidence supporting that the accepted employment incident caused a diagnosed condition.

On January 16, 2004 appellant requested reconsideration.

In a November 24, 2003 report, Dr. James J. Yue, an attending Board-certified orthopedic surgeon, advised that appellant related that on February 26, 2003 he was working and lifted a 75-pound box of mail and strained his back. He conducted a physical examination and noted that his examination of the back did not reveal any severe gross deformities. Dr. Yue indicated that "because his pain has been going on now for nine months, I would like to go ahead to rule out any kind of pathologic process and see the patient back in the office following this test." In a December 15, 2003 report, Dr. Yue noted that appellant had a very mild disc bulge at the T11-12 region with some endplate changes and advised that this might be "consistent with his lower interscapular pain" and noted that there were other areas of discogenic changes in the mid-thoracic spine, which might explain some of appellant's pain radiating into the left side. He noted that "other reasons for his chronic pain may be a chronic bursitis in the undersurface of the scapula with the scapulothoraic interface" and opined that most of appellant's complaints were arising from the discogenic area in his mid-thoracic spine region. Dr. Yue diagnosed spondylosis, thoracic disc area, mid-thoracic and lower thoracic region with nonneurogenic symptoms.

By decision dated April 21, 2004, the Office modified the August 5, 2003 decision to reflect that appellant's claim was denied for failure to establish a causal relationship between his medical condition and work.

In an August 4, 2004 report, Dr. Yue explained that appellant related that he was lifting a 75-pound box of mail when he felt a pull in his lower back. He indicated that "[appellant] had a clearly defined incident, which was directly related to the production of his lower back pain and noted that [I] do feel that his mid-thoracic lower back pain was a result of his lifting injury at work."

On September 10, 2004 appellant requested reconsideration.

By decision dated December 6, 2004, the Office denied modification of the April 21, 2004 decision. The Office found that the medical evidence was insufficient to establish that the claimed medical condition was caused by the lifting incident of February 26, 2003.

On November 7, 2005 appellant requested reconsideration.

In an October 21, 2005 report, Dr. Yue opined that appellant had "a lifting injury while at work and felt a pain in his lower back." He noted that his pain was secondary to thoracic disc disruption at T11-12 that was evidenced by the magnetic resonance imaging (MRI) scan of his thoracic spine. Dr. Yue opined that he believed that "the lifting injury was the causative factor in the production of his present symptomatology as well as the objective findings and diagnosis."

By decision dated December 21, 2005, the Office denied modification of its December 6, 2004 decision. The Office found that appellant had not provided sufficient evidence to support that he sustained a diagnosed medical condition as a result of a specific work incident on February 26, 2003.

LEGAL PRECEDENT

An employee seeking benefits under the Federal Employees' Compensation Act[1] 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 and that an injury was sustained in the performance of duty. These are the essential elements of each compensation claim, regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.[2]

To determine whether a federal employee has sustained a traumatic injury in the performance of duty, it first must be determined whether the fact of injury has been established. There are two components involved in establishing the fact of injury. First, the employee must submit sufficient evidence to establish that he actually experienced the employment incident at the time, place and in the manner alleged.[3] In some traumatic injury cases, this component can

[1] 5 U.S.C. §§ 8101-8193.

[2] *Elizabeth H. Kramm* (*Leonard O. Kramm*), 57 ECAB ___ (Docket No. 05-715, issued October 6, 2005).

[3] *Julie B. Hawkins*, 38 ECAB 393, 396 (1987); *see* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Fact of Injury*, Chapter 2.803.2a (June 1995).

be established by an employee's uncontroverted statement on the Form CA-1.[4] An alleged work incident does not have to be confirmed by eyewitnesses in order to establish that an employee sustained an injury in the performance of duty, but the employee's statement must be consistent with the surrounding facts and circumstances and his subsequent course of action.[5] A consistent history of the injury as reported on medical reports to the claimant's supervisor and on the notice of injury can also be evidence of the occurrence of the incident.[6] 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.[7] Although 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,[8] an employee has not met this burden when there are inconsistencies in the evidence such as to cast serious doubt upon the validity of the claim.[9]

ANALYSIS

In the instant case, the Office found that appellant established that he was lifting mail on February 26, 2003, as alleged. However, the Board finds that he has not established the incident. The evidence in this case casts serious doubt on appellant's claim that he injured his middle back in the performance of duty. Appellant stated on his claim form that he injured himself on February 26, 2003, but he did not report the injury until June 16, 2003. Appellant's supervisor noted that appellant reported an injury only after being advised on June 14, 2003 that his performance was poor and that he could be terminated. In addition, his trainer, Ms. Palmer, indicated that appellant did not report any injuries to her during his February 2003 training. There is no evidence in the record that appellant sought medical treatment prior to filing his claim.[10] The Board notes that the first time that appellant saw a physician was November 24, 2003, almost nine months later. At that time, appellant told his physician, Dr. Yue, that he injured himself lifting a 75-pound box of mail on February 26, 2003. On his claim form, he indicated that he lifted a mail tray in the back of an LLV. This does not explain how he worked from that time without any apparent distress. These inconsistencies cast serious doubt on

[4] *John J. Carlone*, 41 ECAB 354 (1989).

[5] *Rex A. Lenk*, 35 ECAB 253, 255 (1983).

[6] *Id*. at 255-56.

[7] *Dorothy M. Kelsey*, 32 ECAB 998 (1981).

[8] *Id.*

[9] *Joseph A. Fournier*, 35 ECAB 1175 (1984).

[10] The Board notes a June 25, 2003 visit with a physician's assistant. 5 U.S.C. § 8101(2) 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. Only medical evidence from a physician as defined by the Act will be accorded probative value. Health care providers such as nurses, acupuncturists, physician's assistants and physical therapists are not physicians under the Act. Thus, their opinions on causal relationship do not constitute rationalized medical opinions and have no weight or probative value. *See Jan A. White*, 34 ECAB 515, 518 (1983).

appellant's claim. The Office requested that appellant explain these discrepancies and inconsistencies. He explained that he was afraid of losing his job and decided to file a claim when he was told he could be terminated. The Board finds that the evidence casts too much uncertainty on this claim. The Board finds that appellant has failed to establish by a preponderance of the reliable probative and substantial evidence that he sustained the February 26, 2003 incident at the time, place and in the manner alleged.

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. The evidence is insufficient to establish that the incident occurred as alleged.

ORDER

IT IS HEREBY ORDERED THAT the December 21, 2005 decision of the Office of Workers' Compensation Programs is affirmed, as modified.

Issued: September 19, 2006
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

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