

his office and went home. He took leave for the entire day on November 30, 2001 and sought medical attention. Appellant returned to light duty in late December 2001 but could not perform his duties due to lumbar pain. He took annual leave for all of January 2002 and retired from federal employment effective February 1, 2002. Appellant then relocated to Kansas. He had applied for retirement prior to the claimed November 29, 2001 injury.

In a June 18, 2004 letter, the Office advised appellant of the medical and factual evidence needed to establish his claim, including witness statements or similar corroboration of the November 29, 2001 incident. It noted that appellant had not yet submitted medical evidence diagnosing a specific injury. The employing establishment indicated that notes made by appellant's supervisor were destroyed following appellant's retirement in accordance with retention procedures. Appellant was afforded 30 days to submit such evidence.

By decision dated July 21, 2004, the Office denied appellant's claim on the grounds that fact of injury was not established. It found that appellant submitted insufficient evidence to establish that the November 29, 2001 incident occurred at the time, place and in the manner alleged. The Office further found that appellant did not submit medical evidence diagnosing an injury related to the claimed incident.

In a letter postmarked August 11, 2004, appellant requested an oral hearing before a representative of the Office's Branch of Hearings and Review. He later requested a telephonic hearing, held March 9, 2005. Appellant reiterated that he injured his back on November 29, 2001 when he fell while carrying a box of books. He asserted that he notified his supervisor of the injury on November 30, 2001 but did not file a claim as he was too sore to walk up three flights of stairs to the personnel office to obtain a claim form. Appellant submitted additional evidence after the hearing.

In a November 30, 2001 report, Dr. Shishir Shah, an attending osteopathic physician Board-certified in family practice, noted that appellant developed back pain 12 days prior after doing heavy lifting in his garden. On examination, he found paraspinal lumbar spasms from L1 to L5 with "some midline tenderness over the L4 area where he sustained a prior fracture. November 30, 2001 x-rays showed an L1 compression fracture of indeterminate age and degenerative arthritis at L5-S1. In undated forms, Dr. Shah advised appellant that x-rays revealed an L1 compression fracture. He submitted periodic reports through December 21, 2001 noting improvement in appellant's gait and symptoms.

Appellant submitted reports from March 19, 2002 to July 27, 2004 from Dr. Evan J. Swanson, an attending Board-certified family practitioner, who noted that appellant sustained an L1 compression fracture in October 1995. He listed a history of an L4 compression fracture in November 2001 when appellant fell while carrying a box of books at the employing establishment. Dr. Swanson obtained October 10, 2002 x-rays showing a stable L1 compression fracture with degenerative spurring. In a November 11, 2002 report, Dr. Swanson noted that appellant sustained an L1 compression fracture approximately one year before. He opined that appellant aggravated his lumbar pain by driving 150 miles a day as a private-sector bank courier.

Appellant's lumbar pain increased from February 2003 to July 2004 due to progressive spinal stenosis acquired in a "fall several years ago."¹

In an October 22, 2003 report, Dr. James McAtee, an attending Board-certified orthopedic surgeon, noted appellant's two-year history of low back pain following an L1 compression fracture sustained at the employing establishment when he fell on a cement sidewalk. Dr. McAtee opined that appellant's symptoms were caused by degenerative arthritis at L5-S1 and spinal stenosis from L3 to L5.

The employing establishment responded to the hearing transcript in an April 18, 2005 letter. It stated that leave records showed that appellant worked for two hours on November 30, 2001, contradicting his assertion that he took sick leave for the entire day. Appellant also earned two hours of credit time on December 6 and 7, 2001, contrary to his assertion that he had difficulty working due to severe back pain.

The employing establishment provided an August 27, 2004 email from Richard Bull, one of appellant's coworkers. Mr. Bull recalled watching appellant use a table saw and drill press at his home in January 2002. Appellant then loaded the table saw into Mr. Bull's vehicle. Mr. Bull stated that a coworker once told him that on an unspecified date, appellant was absent from work due to back pain. In an April 15, 2006 email, William Dunkerly, appellant's supervisor at the time of the claimed injury, stated that on an unspecified date, he had instructed appellant to divide the publications for delivery into 10-pound piles to comply with appellant's lifting restrictions. He recalled that appellant complained on an unspecified occasion that his back hurt when delivering publications. Mr. Dunkerly did not refer to a November 29, 2001 incident.²

By decision dated and finalized June 16, 2005, the Office hearing representative affirmed the Office's denial of appellant's claim. The hearing representative found that the record contained inconsistent, conflicting accounts of how appellant injured his lumbar spine. The hearing representative further found that appellant submitted insufficient factual evidence to establish that the November 29, 2001 incident occurred at the time, place and in the manner alleged. The hearing representative noted that contemporaneous medical records were insufficient to have put appellant's supervisor on notice that he had sustained an occupational injury.

In October 29 and December 19, 2005 letters, appellant requested reconsideration. He asserted that Dr. Shah confused a 1995 lumbar fracture he sustained while gardening with the November 29, 2001 injury. Appellant submitted additional evidence regarding the 1995 injury. October 18 and 30, 1995 x-rays showed an L1 compression fracture of indeterminate age. He noted that appellant fell on October 18, 1995. A December 1, 2005 chart note indicates that appellant was in a motor vehicle accident. Appellant was followed for chronic low back pain through December 1996.

¹ A February 10, 2003 lumbar magnetic resonance imaging (MRI) scan showed degenerative disc disease throughout the lumbar spine, an old compression deformity at L1 and disc bulges from L3 to S1.

² In an April 26, 2005 letter, appellant asserted that Mr. Dunkerly refused to corroborate the November 29, 2001 incident as part of a pattern of overstepping his authority.

In a June 28, 2005 report, Dr. Swanson related appellant's account of back pain related to a November 30, 2001 work injury "where he was carrying a box of books and fell backward landing on his buttocks with the box resting on his thighs," sustaining an L4 compression fracture. Dr. Swanson also noted a prior L1 compression fracture. Dr. Swanson diagnosed acquired spinal stenosis and facet joint arthropathy.

By decision dated March 14, 2006, the Office denied modification on the grounds that the evidence submitted was insufficient to warrant modification of the prior decisions. The Office found that appellant had not submitted sufficient evidence to resolve the significant inconsistencies as to how and when the claimed lumbar injury occurred.

LEGAL PRECEDENT

An employee seeking benefits under the Federal Employees' Compensation Act³ 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 filed within the applicable time limitation; that an injury was sustained while 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.⁴ These are the essential elements of each and every compensation claim regardless of whether the claim is predicated on a traumatic injury or an occupational disease.⁵

In order to determine whether an employee sustained a traumatic injury in the performance of duty, the Office begins with an analysis of whether "fact of injury" has been established. Generally, fact of injury consists of two components that must be considered in conjunction with one another. First, the employee must submit sufficient evidence to establish that he or she actually experienced the employment incident that is alleged to have occurred.⁶ Second, the employee must submit sufficient evidence, generally only in the form of medical evidence, to establish that the employment incident caused a personal injury.⁷

³ 5 U.S.C. §§ 8101-8193.

⁴ *Joe D. Cameron*, 41 ECAB 153 (1989).

⁵ *See Irene St. John*, 50 ECAB 521 (1999); *Michael E. Smith*, 50 ECAB 313 (1999).

⁶ *Gary J. Watling*, 52 ECAB 278 (2001).

⁷ *Deborah L. Beatty*, 54 ECAB 340 (2003).

ANALYSIS

Appellant claimed that he sustained an L1 fracture in the performance of duty on November 29, 2001 when he fell carrying a heavy box of books. The Office denied the claim on the grounds that appellant submitted insufficient evidence to establish that the November 29, 2001 incident occurred as alleged.

The factual evidence of record does not corroborate appellant's account of events. Mr. Dunkerly, appellant's supervisor, stated in an April 15, 2006 email that appellant once complained of back pain while delivering publications. But Mr. Dunkerly did not recall a November 29, 2001 incident. Mr. Bull, one of appellant's coworkers, stated in an August 27, 2004 email that he had been told that appellant was once absent from work due to back pain. Mr. Bull did not recall a November 29, 2001 incident. He did remember that appellant was able to load a table saw into a vehicle in January 2002. The employing establishment noted that leave records contradicted appellant's assertion that he was off work entirely on November 30, 2001 and did not return to work until late December 2001.

The lack of factual corroboration is compounded by a conflicting medical record. Dr. Shah, an attending osteopathic physician Board-certified in family practice, stated in November 30, 2001 reports that appellant sustained an L1 compression fracture 12 days before while gardening. He did not mention a November 29, 2001 workplace incident. Dr. Shah also diagnosed an old L4 compression fracture.

Dr. Swanson, an attending Board-certified family practitioner, initially opined that appellant sustained an L4 compression fracture in November 2001 and an L4 fracture in 1995. This is contrary to Dr. Shah's findings of a November 2001 fracture at L1 and an older fracture at L4. Dr. Swanson then changed his account to comport with that of Dr. Shah. He reiterated appellant's account of falling while carrying a box of books in November 2001, but did not provide any independent corroboration of the alleged incident. Dr. Swanson noted, however, that, in November 2002, appellant was able to drive 150 miles a day as a bank courier.

The Board finds that the record contains divergent accounts of how and when appellant injured his back, none of which sufficiently corroborate appellant's version of a November 29, 2001 traumatic incident. Therefore, due to the conflicting evidence regarding the time, place and manner in which the alleged incident occurred, appellant has not established his claim.⁸

CONCLUSION

The Board finds that appellant has not established that he sustained a lumbar injury in the performance of duty due to inconsistencies in the evidence regarding the occurrence of the alleged incident.

⁸ See *Caroline Thomas*, 51 ECAB 451, 455 (2000).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated March 14, 2006 is affirmed.

Issued: July 17, 2007
Washington, DC

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

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

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