



April 26, 2005. In a Form CA-1 dated April 26, 2005, he explained that about a month earlier he climbed onto a VACIS (vehicle and cargo inspection system) and felt pain in his lower back. Appellant assumed he had pulled a muscle. On April 26, 2005 he climbed on a container and felt excruciating pain in his lower back, which radiated down his right leg. Appellant also reported numbness in his right foot. He explained that his condition had gradually worsened since the initial injury.

Dr. David C. Chang, a Board-certified orthopedic surgeon, examined appellant on April 27, 2005. He reported that appellant injured himself at the end of March 2005 when climbing on an x-ray machine. Appellant claimed to have felt a twinge in his lower back. He also stated that he reported the incident to his supervisor, Ramon V. Rodriguez. Dr. Chang reported that appellant initially noted pain in his lower back, but within the past few weeks, pain developed in the right buttock and hamstring. Currently, there was pain radiating into the right calf. Dr. Chang diagnosed lumbar sprain and lumbar radiculopathy.

A May 3, 2005 lumbar magnetic resonance imaging (MRI) scan revealed a disc bulge at L4-5 with facet osterarthrosis, causing mild central canal stenosis. There was also a right paracentral disc extrusion at L5-S1, causing significant central canal and right lateral recess stenosis. Appellant also obtained MRI scans of the cervical and thoracic spine, which revealed multilevel degenerative disc protrusions, a discoid osteophyte complex and stenosis.

Dr. Chang next saw appellant on May 4, 2005 and again on May 16, 2005. During the May 16, 2005 examination, appellant informed Dr. Chang that some of the information he initially reported was incorrect. Specifically, the date of injury was not March 2005 as originally reported, but “nearer to April 19, 2005.” Dr. Chang also reported that appellant had started seeing a chiropractor just prior to his injury. In a June 2, 2005 attending physician’s report (Form CA-20), Dr. Chang again identified April 19, 2005 as the date of injury and reported that appellant felt a twinge in his back while climbing an x-ray machine. He attributed appellant’s injury to awkward positioning while climbing an x-ray machine. Dr. Chang noted that he had discharged appellant from treatment on May 16, 2005. At that time, appellant was advised that he could immediately return to light work. Dr. Chang anticipated that appellant would be able to resume his regular duties as of July 1, 2005.

The Office inquired about the multiple claims appellant filed with differing dates of injury. Appellant informed the Office that he sustained only one back injury, which occurred April 19, 2005 while he was bending over to attach straps to a VACIS machine. The Office subsequently concluded that appellant had filed duplicate claims. On April 27, 2006 the Office accepted appellant’s claim for lumbar sprain and lumbar radiculopathy, with an April 19, 2005 date of injury.

When the Office received a request for payment for appellant’s thoracic and cervical MRI scans it questioned the necessity of the procedure given that appellant’s accepted injury was limited to the lumbar spine. During a June 1, 2006 telephone conversation with the Office, appellant denied having a cervical condition. Upon further investigation, the Office learned that Dr. Jonathan Sadai, an allergist, had ordered the May 3, 2005 MRI scans of the cervical, thoracic and lumbar spine. Dr. Sadai provided a copy of his April 1, 2005 progress notes which revealed that appellant was climbing a truck and on the way down he fell on his back and hit his upper

back and lower back. He noted tenderness in the cervical and lower thoracic spine. Dr. Sadai's diagnostic impression was "injury to cervical spine, entire spine," and he recommended obtaining MRI scans of the cervical, thoracic and lumbar spine.

During a June 5, 2006 teleconference, appellant advised the Office that he had also fallen while stepping off the VACIS truck. His right leg reportedly gave out while he was going down the truck stairs. This caused appellant to fall backwards.

The Office requested clarification from Dr. Sadai regarding the reported cervical condition and the date of the alleged injury. The Office explained that neither appellant nor Dr. Chang made mention of any cervical condition. Additionally, the Office pointed out that Dr. Sadai's April 1, 2005 progress notes referenced an injury that ostensibly occurred more than two weeks prior to the accepted injury of April 19, 1995.

On June 6, 2006 the Office received another progress note from Dr. Sadai with entries for April 1 and 25, 2005. The April 25, 2005 entry was identical to what had previously been identified as treatment for a back condition on April 1, 2005. The April 1, 2005 entry was amended to reflect only the administering of an "allergy injection" that day. No explanation was offered for the noted change.

On June 7, 2006 the Office advised appellant that it proposed to rescind acceptance of his claim because of discrepancies in the record that called into question whether the April 19, 2005 injury occurred as alleged.

Appellant's counsel's submitted a written response on June 27, 2006, which took exception to the claims examiner's investigation. Appellant also submitted a June 13, 2006 letter from Dr. Sadai, who explained that he ordered cervical and thoracic studies because of possible neck involvement and referred appellant to Dr. Chang, an orthopedic specialist, for further evaluation. Dr. Sadai stated that appellant did not have any prior injuries.

By decision dated August 17, 2006, the Office rescinded acceptance of appellant's claim. Appellant subsequently requested a review of the written record.

The Office received an undated statement from Mr. Rodriguez, appellant's supervisor at the time of the alleged back injury. Mr. Rodriguez was the supervisor on duty on April 26, 2005 and appellant was assigned to his team. At about 4:40 p.m., appellant informed Mr. Rodriguez that he had hurt his back and was in a lot of pain. Mr. Rodriguez asked about the circumstance of the injury and appellant responded that about a month or so prior he climbed on the VACIS truck and pulled a muscle, but did not tell anyone at the time. According to Mr. Rodriguez, appellant further stated that, on April 26, 2005, while examining a container, he felt the pain again, but worse than before. He advised appellant to seek medical attention and submit a Form CA-1, which he did. Mr. Rodriguez also stated that, in the two years prior to the April 26, 2005 report of injury, appellant had not complained of back pains.

In a January 4, 2007 decision, the Office hearing representative affirmed the August 17, 2006 rescission of appellant's claim.

## LEGAL PRECEDENT

The Office may reopen a claim at any time on its own motion and may modify, rescind, decrease or increase compensation previously awarded, or award compensation previously denied.<sup>1</sup> Once the Office accepts a claim, it has the burden of justifying termination or modification of benefits.<sup>2</sup> This burden applies even where the Office later decides that it erroneously accepted a claim.<sup>3</sup> The Office must provide a clear rationale for rescinding acceptance of a claim.<sup>4</sup>

## ANALYSIS

The Office rescinded acceptance of the claim because of inconsistencies in the record that called into question whether appellant injured his back on April 19, 2005. It is the employee's burden to establish that his or her injury occurred at the time, place and in the manner alleged.<sup>5</sup> An injury does not have to be confirmed by an eyewitness to establish that it occurred in the performance of duty.<sup>6</sup> An employee's statement regarding the circumstances surrounding an injury is of great probative value and will be accepted unless refuted by persuasive evidence.<sup>7</sup> The employee statement must be consistent with the surrounding facts and circumstances as well as the employee's subsequent course of action.<sup>8</sup> An employee has not met his or her burden of proof where there are inconsistencies in the record that cast serious doubt on the validity of the claim.<sup>9</sup>

The timing of appellant's claimed back injury is uncertain. The record suggests three possible time frames when an injury may have occurred. The earliest occurrence would have been sometime in March 2005. Appellant referenced this date in his April 26, 2005 claim and provided similar information when he was initially examined by Dr. Chang on April 27, 2005. Appellant later claimed that the back injury occurred on April 19, 2005. Dr. Sadai's original April 1, 2005 progress notes tend to support the likelihood that appellant injured his back prior to April 19, 2005. However, the doctor later amended his progress notes to reflect that appellant was seen on April 1, 2005 only for an allergy shot. The April 26, 2005 claim form also suggests that appellant may have sustained an injury earlier that day when he "climbed up on a container." The statement from appellant's supervisor, Mr. Rodriguez, also contradicts appellant's allegation

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<sup>1</sup> 20 C.F.R. § 10.610 (2007); 5 U.S.C. § 8128(a) (2000).

<sup>2</sup> *Delphia Y. Jackson*, 55 ECAB 373, 376 (2004).

<sup>3</sup> *Id.*

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

<sup>5</sup> *Delphyne L. Glover*, 51 ECAB 146, 147-48 (1999).

<sup>6</sup> *Id.*

<sup>7</sup> *Michelle Kunzwiler*, 51 ECAB 334, 335 (2000).

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

that he was injured on August 19, 2005. Mr. Rodriguez indicated that appellant informed him on April 26, 2005 that he injured his back “about a month or so ago” when he climbed on the VACIS truck and pulled a muscle.

In addition to varying accounts of when his injury occurred, appellant initially omitted certain details of the alleged employment incident. The April 26 and May 6, 2005 claim forms suggest that appellant’s injury occurred while climbing on a VACIS truck. In an April 27, 2006 teleconference, appellant added that he was bending over attaching straps to a VACIS machine when the injury occurred. During a June 5, 2006 teleconference, appellant further advised that while stepping down off the VACIS truck his right leg gave out and he fell backwards. Noticeably absent from Dr. Chang’s reports is any reference to appellant falling off the back of the VACIS truck. It is also noteworthy that the history of injury reported by Dr. Sadai on either April 1 or 25, 2005 is markedly different than the history noted by Dr. Chang on August 27, 2005.

It may very well be that appellant is merely an inaccurate and incomplete historian. Appellant’s various omissions and misstatements regarding when and how his injury arose cast serious doubt on his claim to have injured his back in the performance of duty on April 19, 2005.<sup>10</sup> In both the August 17, 2006 and January 4, 2007 decisions, the Office clearly explained its reason for rescinding acceptance of appellant’s claim. The Board finds that the Office met its burden to rescind acceptance of appellant’s claim.

### **CONCLUSION**

The Board finds that the Office properly rescinded acceptance of appellant’s claim for lumbar strain and lumbar radiculopathy.

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<sup>10</sup> Dr. Sadai’s unexplained recordkeeping errors and/or omissions also gives cause for concern.

**ORDER**

**IT IS HEREBY ORDERED THAT** the January 4, 2007 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 18, 2007  
Washington, DC

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

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