

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

C.S., Appellant)

and)

U.S. POSTAL SERVICE, PROCESSING &)
DISTRIBUTION CENTER, Milwaukee, WI,)
Employer)

**Docket No. 07-2318
Issued: March 12, 2008**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On September 11, 2007 appellant filed a timely appeal from the November 3, 2006 and August 27, 2007 decisions of the Office of Workers' Compensation Programs denying his claim. 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 established that he sustained an injury in the performance of duty on or about May 5, 2003, as alleged.

FACTUAL HISTORY

On September 30, 2005 appellant, then a 49-year-old mail handler, filed an occupational disease claim (Form CA-2), alleging that he had a chronic back condition that he related to his federal employment on May 5, 2003. He noted that he had not worked since May 5, 2003 because of his condition and that he had injured his back in the course of his work on

October 31, 1998. Appellant stated that he had disc displacement, degeneration and desiccation. The employing establishment controverted appellant's claim, noting that he had not worked since May 3, 2003 and that he did not notify his supervisor of his injury until October 4, 2005.

On November 7, 2005 the Office requested that appellant provide additional factual and medical information related to his claim.

On December 5, 2005 appellant provided an August 22, 2005 note from Dr. David Stein, a Board-certified anesthesiologist and pain specialist, who began treating appellant on February 1, 2005 for low back pain caused by disc displacement and disc degeneration. In a treatment report dated November 23, 2005, Dr. Stein stated that appellant had a history of lower back pain and lower extremity pain starting in 1998. Appellant reported that the pain began after heavy lifting. He reported receiving prior chiropractic treatment and epidural steroid injections for back pain. A magnetic resonance imaging (MRI) scan conducted on February 4, 2005 showed a disc bulge at L4-5 and a paracentral protrusion at L5-S1 that was producing a mass effect on the dural sac exiting the right S1 nerve root. On April 4, 2005 Dr. Stein performed a posterolateral disc decompression at L5-S1.

By decision dated January 3, 2006, the Office denied appellant's claim on the grounds that he had not established "that the event(s) occurred as alleged."

On January 27, 2006 appellant requested an oral hearing. He submitted an employee statement dated September 30, 2005 indicating that his condition started on May 5, 2003. Appellant stated that his duties, including repetitive lifting for six hours a day, six days a week on the workroom floor, caused his lumbosacral strain with vertebral subluxation.

At the oral hearing, held September 14, 2006, appellant stated that he sustained an employment-related spinal subluxation in 1998 and had permanent restrictions against lifting more than 25 pounds. During a tour in May 2003, he was repeatedly bending over and reaching into a plastic hamper to lift out tubs of mail for sorting. At the end of the tour, appellant felt pain in his lower back radiating down his legs. After being incapacitated at home for two days, he reported his injury to the injury compensation office, which forwarded claim forms. Appellant completed the paperwork and mailed it to his supervisor, but never received any correspondence in return. An MRI scan done shortly after the 2003 incident showed a disc protrusion. Appellant was treated conservatively for a few months with epidural shots. He underwent surgeries in August 2003 and February 2005.

In conjunction with the hearing, appellant submitted several medical records relating to his claim. A May 16, 2003 MRI scan revealed moderate degenerative disc changes and right paracentral focal protrusion at L5-S1 and mild degenerative disc changes in the other lumbar discs. On September 11, 2003 Dr. Richard Cattey certified that appellant was under his care from August 25 to September 11, 2003. He released appellant to regular duty on September 13, 2003. In a note dated September 24, 2005, Dr. John Cafaro, a family physician, stated that appellant was off of work from June to December 2004 because of an ongoing back problem.

On February 1, 2005 Dr. Stein stated that appellant had a history of low back and lower left extremity pain beginning in 1998 that was caused by heavy lifting. He reported that appellant had a blood clot in his leg following a laparoscopic surgery that disabled him commencing September 2004. Appellant was on anticoagulant medication because of his history of deep vein thrombosis. He also had a prior history of muscle spasms. Based on Dr. Stein's review of appellant's 2003 MRI scan and the physical examination findings, he concluded that a disc was the likely cause of appellant's current lower back pain. He ordered an MRI scan, conducted February 4, 2005, which showed that the right paracentral disc protrusion at L5-S1 and the generalized bulge at L4-5 had become more prominent since 2003. It also showed mild bulges at L2-3 and L3-4.

On February 15, 2005 Dr. Stein opined that appellant's lower back pain was likely caused by the L5-S1 disc protrusion because he had more pain with forward flexion than with extension. He recommended a lateral extradural disc decompression to resolve the pain. On April 4, 2005 Dr. Stein performed the surgery. On April 21, 2005 he reported that appellant had low back pain of 5 out of 10, radiating into his lower extremities. Dr. Stein opined that appellant's lower back was stable following decompression and that his lower extremity pain might be related to a recurrent blood clot. An ultrasound study, conducted on April 22, 2005, revealed that appellant's lower extremity findings were more consistent with a chronic clot in the left lesser saphenone vein than with a deep vein occlusion.

On September 14, 2005 Dr. Andrew C. Stopczynski, a chiropractor, stated that he had treated appellant intermittently for lower back pain since 1990, on April 14 and August 20, 2004. On March 10, 2005 he saw appellant following an insidious onset of moderate low back pain. Appellant was released after three sessions with only soreness in the right buttock reported. Dr. Stopczynski stated that, if appellant had not already been off of work, he would have been disabled from March 8 to 14, 2005 due to back and leg pain. On August 12, 2005 appellant reported that he had undergone a disc decompression surgery in April 2005, with several months of physical therapy afterwards. He was not satisfied with the surgery and therapy because of ongoing low back pain and the onset of upper back pain. Dr. Stopczynski submitted Family Medical Leave Act certification forms dated April 25, 2003 to January 3, 2006. He indicated that appellant had a chronic condition and was subject to episodes of incapacity, but was not currently incapacitated.

On August 22, 2005 Dr. Neil Pollack, a Board-certified osteopathic physician specializing in neurology and pain management, began treating appellant for low back pain and leg numbness. He diagnosed lumbar disc dysfunction and muscle spasm. Dr. Pollack prescribed stretching and exercise. On November 30, 2005 he released appellant to return to work on December 12, 2005 with permanent restrictions.

On October 13, 2006 the employing establishment commented on appellant's hearing testimony. Its records indicated that he was not at work on May 5, 2003 and that no supervisory report of injury was received around that time. The injury compensation office had no record of an injury being reported in 2003. The first record of contact related to the alleged injury was in 2005.

By decision dated November 3, 2006, the Office hearing representative affirmed the Office's denial of appellant's claim. Based on appellant's testimony, she reviewed his claim as a traumatic injury rather than occupational disease. The Office hearing representative found that appellant did not establish that the May 5, 2003 employment incident occurred, as alleged. She stated that the record did not support appellant's testimony that he notified the employing establishment of his traumatic injury in 2003. The Office hearing representative also noted that the medical records from 2003 made no mention of a traumatic injury in May 2003.

On December 18, 2006 appellant requested reconsideration and submitted new medical evidence. On November 27, 2006 Dr. Pollack stated that appellant injured his back in 1998 and then reinjured it in May 2003. He began treating appellant in 2005 and released him from care when he reached maximum medical improvement with permanent restrictions. On November 16, 2006 Dr. Stein stated that appellant had a history of lower back and left lower extremity pain caused by heavy lifting at work in 1998.

In a June 4, 2003 report, Dr. James Cain, a Board-certified orthopedic surgeon, evaluated appellant for low back pain radiating into his legs. He noted that appellant had experienced persistent and worsening back pain from the time of his 1998 work injury. Dr. Cain stated that appellant was developing bilateral leg pain and tingling, left greater than right, in the L5 distribution. On examination, he found a positive leg raise test on the left at 80 degrees and a negative test on the right. Dr. Cain reviewed appellant's MRI scan and noted degenerative changes from L3 to the sacrum, especially at L5-S1, where there were modic and plate changes. Appellant had a right-sided disc herniation at L5-S1 that was deflecting the S1 nerve root. At L4-5 he had moderate spinal stenosis, more prominently on the left. Dr. Cain diagnosed lumbar spinal stenosis at L4-5 with multilevel lumbar degenerative disc disease, most severely at L5-S1. He recommended epidural steroid injections to reduce appellant's nerve pain.

On June 10, 2003 Dr. Anil Dogra, a Board-certified anesthesiologist, reported that appellant's low back pain began in 1998 after he bent his back too much to pick something up. From that time, appellant experienced intermittent backaches and left lower extremity pain. Dr. Dogra reviewed appellant's MRI scan and noted the L5-S1 disc herniation. He stated that it was interesting that appellant's disc protrusion was on a different side than his left-side symptoms. Dr. Dogra administered a steroid injection.

On May 4, 2007 Dr. Stein completed a "Practitioner's Report on Accident of Industrial Disease in Lieu of Testimony." He referred to his medical reports for the work history and diagnosis sections of the report. By checking a box, Dr. Stein indicated that appellant's employment caused his disability starting on October 31, 1998 and May 5, 2003. He indicated that appellant had permanent disability as a result of his employment injury. Dr. Stein stated that appellant had a five percent total disability for the disc decompression at L5-S1 done on April 4, 2005.

By decision dated August 27, 2007, the Office denied modification of the hearing representative's November 3, 2006 decision. The Office found that the medical evidence was insufficient to establish the claim as it was not adequately rationalized or probative.

LEGAL PRECEDENT

An employee seeking benefits under the Federal Employees' Compensation Act¹ 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; and that any disability or specific condition for which compensation is claimed is causally related to the employment injury.²

In order to determine whether an employee sustained a traumatic injury in the performance of duty, the Office must first determine whether "fact of injury" has been established. "Fact of injury" consists of two components that must be considered in conjunction with one another. The first component is whether the employee actually experienced the employment incident that is alleged to have occurred. The second component of "fact of injury" is whether the incident caused a personal injury and, generally, this can be established only by medical evidence.³

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. 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. 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 cast doubt on an employee's statements in determining whether he has established a *prima facie* case. The employee has the burden of establishing the occurrence of the alleged injury at the time, place and in the manner alleged, by a preponderance of the reliable, probative and substantive evidence.⁴ An employee has not met this burden when there are such inconsistencies in the evidence as to cast serious doubt upon the validity of the claim.⁵ However, 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.⁶

When determining whether an employment incident caused the claimant's diagnosed condition, the Office generally relies on the rationalized medical opinion of a physician.⁷ To be

¹ 5 U.S.C. §§ 8101-8193.

² *Caroline Thomas*, 51 ECAB 451 (2000); *Elaine Pendleton*, 40 ECAB 1143 (1989).

³ *Ellen L. Noble*, 55 ECAB 530 (2004).

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

⁵ *Louise F. Garnett*, 47 ECAB 639 (1996).

⁶ *Constance G. Patterson*, 41 ECAB 206 (1989).

⁷ *Conrad Hightower*, 54 ECAB 796 (2003); *Leslie C. Moore*, 52 ECAB 132 (2000).

rationalized, the opinion must be based on a complete factual and medical background of the claimant⁸ and must be one of reasonable medical certainty,⁹ explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.¹⁰

ANALYSIS

The Office did not accept that an employment incident occurred in May 2003 or that appellant sustained a traumatic injury as a result of the alleged incident.¹¹ Therefore, the issues are whether appellant has established the employment incident as alleged and whether he sustained a compensable injury as a result of that incident.

On appellant's September 30, 2005 claim form he provided no details about the incidents or factors of his employment that allegedly caused his low back condition. He stated only that he had originally injured his back in 1998 and that he had not worked since May 5, 2003 because of his condition. Prior to appellant's September 14, 2006 oral hearing, he submitted a September 30, 2005 employee statement indicating that he developed a lumbosacral strain with vertebral subluxation because of repetitive lifting for six hours per day, six days per week. He stated that his condition began on May 5, 2003.

At his hearing, appellant stated that he reinjured his back during a work tour in May 2003, while bending over to lift tubs of mail out of a plastic hamper. He was working by himself. At the end of his tour, appellant realized that he must have done something to his back because he felt pain in his lower back radiating down into his legs. He was incapacitated for two days, after which he contacted the employing establishment's injury compensation office and requested paperwork to file a claim. Appellant mailed the completed forms to his supervisor, but never received confirmation that they had been received.

The employing establishment controverted appellant's statement of events. Appellant's supervisor noted that appellant stopped working on May 3, 2003, two days before the injury allegedly occurred. The supervisor further stated that he was not informed of the alleged injury until October 4, 2005. The employing establishment reported that the injury compensation office had no record of contact with appellant in 2003 and that there was no supervisory report of the injury in its records, indicating that that appellant's supervisor had not been notified, as appellant claimed.

⁸ *Tomas Martinez*, 54 ECAB 623 (2003); *Gary J. Watling*, 52 ECAB 278 (2001).

⁹ *John W. Montoya*, 54 ECAB 306 (2003).

¹⁰ *Judy C. Rogers*, 54 ECAB 693 (2003).

¹¹ Though appellant filed a claim for an occupational disease, his description of the alleged injury makes it clear that his alleged injury, which was caused by events within a single workshift, should be evaluated as a traumatic injury claim. See *Larry D. Dunkin*, 56 ECAB 220 (2004) (claim filed on the form for occupational disease, CA-2, was properly considered a traumatic injury because the cause was confined to a single workday).

In a report dated June 4, 2003, Dr. Cain stated that appellant reported persistent and worsening back and leg pain from 1998 forward. He made no mention of a specific date on which the condition worsened. In a June 10, 2003 report, Dr. Dogra reported that appellant had experienced intermittent pain in his back and legs following an employment injury in 1998. Again, appellant did not reference an event on May 5, 2003.

The Board finds that appellant's statements are insufficient to establish that an employment incident occurred on or about May 5, 2003, as alleged. Appellant's initial descriptions of the May 2003 employment incident were vague and lacking in any detail as to the circumstances of his injury. At his oral hearing, he was unclear about the exact date of his injury, but provided details as to the circumstances surrounding the incident, including reporting the incident to the employing establishment. The Board notes that the employing establishment presented evidence that appellant could not have sustained an employment injury on May 5, 2003 because he did not work after May 3, 2003. Appellant stated that he reported his injury to the employing establishment's injury compensation office two days after it occurred, however, that office had no record of he contacting them about the injury until 2005. He stated that he mailed injury claim forms to his supervisor in 2003, but never received confirmation that they had been received. Appellant made no other efforts to contact his supervisor. The employing establishment stated that no notice of injury was received until October 2005. The medical evidence from near the time of the alleged employment incident is devoid of reference to any traumatic injury or work-related aggravation other than the 1998 employment injury. Because appellant's statements did not consistently describe the employment incident, were contradicted by the employing establishment and were not supported by the contemporaneous medical evidence, the Board finds that serious doubt has been cast on the validity of his claim.

Moreover, the contemporaneous medical evidence does not establish the occurrence of an employment incident on May 5, 2003. The May 16, 2003 MRI scan report, which revealed a protrusion at L5-S1 and degenerative disc changes in the lumbar area, did not provide a factual history or indicate whether the findings were caused by traumatic injury. On June 4, 2003 Dr. Cain, a Board-certified orthopedic surgeon, evaluated appellant for low back pain radiating into his legs. After reviewing appellant's MRI scan and performing a physical examination, he diagnosed lumbar spinal stenosis, L4-5 with multilevel lumbar degenerative disc disease, most severely at L5-S1. Although Dr. Cain noted that appellant had persistent and increasing back and leg pain, he made no findings related to the cause of his condition. He did not obtain any history of an injury on May 5, 2003. On June 10, 2003 Dr. Dogra, a Board certified anesthesiologist, reported that appellant's low back pain began in 1998 and appeared intermittently thereafter. He gave no opinion on the cause of appellant's spinal condition or any record of the alleged May 5, 2003 incident.

From February 1 to April 21, 2005, Dr. Stein, a Board-certified anesthesiologist, treated appellant for a disc protrusion. He stated that appellant's back problems began with an employment injury in 1998, but, he did not mention the alleged 2003 employment incident. In a report dated May 4, 2007, Dr. Stein indicated that appellant's condition was related to both the 1998 and alleged 2003 incidents. He provided no history of the 2003 event and no rationale as to how it caused or aggravated appellant's spinal condition. Dr. Pollack, a Board-certified osteopathic physician specializing in neurology and pain management, treated appellant for his back and leg pain from August to November 2005. Like Dr. Stein, he made no mention of the

alleged 2003 injury in his initial history or over the course of his treatment. On November 27, 2006 he stated that appellant reinjured his back in May 2003, but provided no details of the incident or how it impacted appellant's condition. Dr. Stopczynski, a chiropractor, treated appellant intermittently from 1990 to the present for his intermittent back pain. In his September 14, 2005 report, he did not discuss any period of treatment in 2003.

The Board finds that appellant has not met his burden of proof to establish the occurrence of an employment incident on or about May 5, 2003.

CONCLUSION

The Board finds that appellant has not established that he sustained an injury in the performance of duty on or about May 5, 2003, as alleged.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated August 27, 2007 and November 3, 2006 are affirmed.

Issued: March 12, 2008
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