United States Department of Labor
Employees' Compensation Appeals Board

B.S., Appellant	)	
and	)	**Docket No. 08-929**
	)	**Issued: September 5, 2008**
DEPARTMENT OF THE ARMY, ARMY CORPS OF ENGINEERS, Winfield, MO, Employer	)	

Appearances:
Alan J. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On February 11, 2008 appellant, through his attorney, filed a timely appeal from June 12, 2007 and January 18, 2008 merit decisions of the Office of Workers' Compensation Programs denying his traumatic injury 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 on April 25, 2007 in the performance of duty.

FACTUAL HISTORY

On April 25, 2007 appellant, then a 55-year-old electronic integrated systems mechanic, filed a claim alleging that he sustained a back injury on that date when the front wheels of a cart he was driving lifted 8 to 12 inches off the ground and then came back down. He stopped work on April 26, 2007.

In a statement dated April 26, 2007, H. Kenneth Allensworth related that he stepped onto the back of a scooter driven by appellant. John Branson was already standing on the back of the scooter. He stated, "The combined weight caused the front wheel to rise off the ground approximately 8 to 12 inches. When this happened, [Mr. Branson] and I both stepped off the scooter. The front wheel came back to the ground. It did not hit the ground very hard. In fact, the scooter did not even bounce." Mr. Allensworth maintained that appellant did not indicate at that time that he had hurt his back and continued to perform work climbing up and down a ladder and squatting in a small area for over three hours. Appellant subsequently related that his back had not felt well since the scooter bounced. In an April 26, 2007 statement, Mr. Branson noted that when Mr. Allensworth stepped onto the back of the scooter the front wheel rose off the ground 8 to 12 inches. The scooter came back down without bouncing when they stepped off. Appellant worked until after lunch and then reported that his back was injured because of the cart lifting off the ground.

On April 26, 2007 Dr. Bradley J. Massey, an osteopath, described appellant's complaints of back pain after he experienced a jarring while sitting in a cart at work. He diagnosed lumbar radiculopathy and referred him to a neurosurgeon.

On May 8, 2007 the Office requested additional factual and medical information. It noted that he had filed a claim for an injury occurring on February 5, 2007, assigned file number 11-2038883.[1]

On May 8, 2007 Dr. Paul Santiago, a neurosurgeon, noted that appellant had a history of back and neck problems aggravated by recent injuries at work. He stated, "The last event to occur involved a motor vehicle accident. [Appellant] was driving a cart with two passengers in the back. The cart tipped up and the passengers on the back jumped off resulting in [appellant] slamming back down [on] the pavement. Since then he has had severe low back pain." Dr. Santiago noted that an April 11, 2005 magnetic resonance imaging (MRI) scan study revealed moderate stenosis at L3-4 and advanced degenerative disc disease at L5-S1. He diagnosed lumbar degenerative disc disease and spinal stenosis and recommended additional diagnostic studies.

On May 31, 2007 Dr. Massey discussed his treatment of appellant for lumbar pain after a February 2007 employment injury. He evaluated appellant on April 13, 2007 for numbness in his left lower extremity and diagnosed lumbar radiculopathy. Dr. Massey treated him on April 26, 2007 for continued symptoms and again diagnosed lumbar radiculopathy and found that he was disabled from work. He stated, "[Appellant] related that a small 'cart' tipped on its back wheels and then fell to the ground while he was seated in the front seat. After this specific incident, he developed increased numbness and pain in the lower extremities." Dr. Massey opined that because of appellant's degenerative disc disease, the February and April 2007 incidents "will aggravate the condition."

[1] The Office accepted that on February 5, 2007 appellant sustained low back strain and lumbar radiculopathy while squatting to reconnect a pump motor. He stopped work on February 5, 2007 and returned to work with restrictions on March 2, 2007.

On June 7, 2007 appellant provided a history of his back injuries beginning in 1996 or 1997 and medical treatment received. He indicated that the injury occurred as described on the claim form.

By decision dated June 12, 2007, the Office denied appellant's claim on the grounds that he failed to establish that the April 25, 2007 incident occurred as alleged. It noted that he had not submitted a detailed factual statement as requested.

In a report dated June 5, 2007, received by the Office on June 18, 2007, Dr. Santiago diagnosed cervical spondylosis without myelopathy, degenerative disc disease at L3-4, L4-5 and L5-S1 and spinal stenosis at L3-4 and L4-5.[2] He discussed the option of a spinal fusion. Dr. Santigo found that appellant should remain off work until July 1, 2007.

On June 18, 2007 appellant, through his attorney, requested an oral hearing. At the hearing, held on October 30, 2007, he described the cart rising off the ground and then coming back down. Appellant experienced pain and numbness in both legs after the incident.

On August 22, 2007 Dr. David S. Raskas, a Board-certified orthopedic surgeon, diagnosed lumbar degenerative disc disease and recommended a discography. In a letter to appellant's attorney of the same date, Dr. Raskas stated that based on the history provided, "it is apparent that the April 25, 2007 incident aggravated [appellant's] condition. While he was having symptoms in his left leg, he is now having symptoms in both legs."

On September 6, 2007 Dr. Massey diagnosed lumbar strain due to appellant's February 2007 work injury. He stated:

> "[Appellant] related that "a small 'cart' tipped on its back wheels and then fell to the ground while he was seated in the front seat. After this specific incident, he developed increased numbness and pain in the lower extremities. These two incidents can cause compressive forces on the intravertebral disc causing the symptoms that [he] has been experiencing. [Appellant] also tells me that prior to the cart incident on April 25[, 2007] he was being required to bend often at the waist which I had instructed [him] not to do and had put this in his work restrictions."

On September 18, 2007 Dr. Massey opined that appellant was unable to work pending evaluation by Dr. Raskas. In a September 20, 2007 form report, he provided a history of injuries in February and April 2007. Dr. Massey diagnosed lumbar radiculopathy and checked "yes" that the condition was caused or aggravated by an employment activity. He found that appellant was totally disabled from February 5, 2007 through July 1, 2008.[3]

[2] Dr. Santiago signed the report on June 25, 2007.

[3] On December 11, 2007 the Office received comments from Mr. Branson and Mr. Allensworth regarding the hearing. Mr. Branson noted that appellant performed work outside of his light-duty restrictions by choice and reiterated that the scooter did not slam or bounce back to the ground. Mr. Allensworth maintained that the cart could only rise off the ground 10 inches and again noted that he did not appear injured after the incident.

By decision dated January 18, 2008, the hearing representative affirmed the June 12, 2007, modified to find that appellant established that on April 25, 2007 the front wheels of a cart that he was driving rose 8 to 12 inches off the ground when a passenger stepped on the back and came back to the ground when the passengers got off. She found that he did not establish that the cart bounced or slammed back on the ground. The hearing representative determined that the medical evidence was insufficient to establish that appellant sustained an injury due to the accepted employment incident. She considered the evidence from file number 11-2038883 relevant to the April 2007 incident in reaching her determination.[4]

LEGAL PRECEDENT

An employee seeking benefits under the Federal Employees' Compensation Act[5] 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.[6] 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.[7]

To determine whether an employee sustained a traumatic injury in the performance of duty, the Office must determine whether "fact of injury" is established. First, an employee has the burden of demonstrating the occurrence of an injury at the time, place and in the manner alleged, by a preponderance of the reliable, probative and substantial evidence.[8] Second, the employee must submit sufficient evidence, generally only in the form of medical evidence, to establish a causal relationship between the employment incident and the alleged disability and/or condition for which compensation is claimed.[9] An employee may establish that the employment incident occurred as alleged, but fail to show that his or her disability and/or condition relates to the employment incident.[10]

In order to determine whether an employee actually sustained an 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 which must be considered in

[4] The Board has the case record for file number 11-2038883 and has also considered the evidence from that file which is relevant to the April 25, 2007 work injury and was before the Office at the time of its January 18, 2007 decision.

[5] 5 U.S.C. §§ 8101-8193.

[6] *Anthony P. Silva*, 55 ECAB 179 (2003).

[7] *See Ellen L. Noble*, 55 ECAB 530 (2004).

[8] *Delphyne L. Glover*, 51 ECAB 146 (1999).

[9] *Gary J. Watling*, 52 ECAB 278 (2001); *Shirley A. Temple*, 48 ECAB 404, 407 (1997).

[10] *Id.*

conjunction with one another. The first component to be established is that the employee actually experienced the employment incident which is alleged to have occurred.[11] An injury 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 statements must be consistent with the surrounding facts and circumstances and his or her subsequent course of action.[12] An employee has not met his or her burden of proof of establishing the occurrence of an injury when there are such inconsistencies in the evidence as to cast serious doubt upon the validity of the claim.[13] 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 doubt on an employee's statements in determining whether a *prima facie* case has been established.[14] However, an employee's statement regarding the occurrence of an employment incident is of great probative force and will stand unless refuted by strong or persuasive evidence.[15]

ANALYSIS

Appellant alleged that he sustained an injury to his back on April 25, 2007. The injury occurred when the front wheels of a cart he was driving rose 8 to 12 inches off the ground when a second passenger climbed on the back and then came back down when the passengers climbed off the back. Appellant filed a claim for compensation on that date and stopped work on April 26, 2007. 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.[16] The employing establishment did not challenge that the employment incident occurred but contended that the cart did not slam down or bounce on the ground. Coworkers also noted that appellant did not complain of back pain until later in the day. The record, however, contains no inconsistencies in the evidence sufficient to cast doubt on the validity of the claim.[17] The Board finds that appellant has established that the front wheels of a cart he was driving rose off the ground 8 to 12 inches and then came back down. The issue, consequently, is whether the medical evidence establishes that he sustained an injury as a result of this incident.

The Board finds that appellant has not established that the April 25, 2007 employment incident resulted in a back injury. The determination of whether an employment incident caused an injury is generally established by medical evidence.[18] On April 26, 2007 Dr. Massey noted

[11] *See Louise F. Garnett*, 47 ECAB 639 (1996).

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

[13] *Id*.

[14] *Linda S. Christian*, 46 ECAB 598 (1995).

[15] *Gregory J. Reser*, 57 ECAB 277 (2005).

[16] *Caroline Thomas*, 51 ECAB 451 (2000).

[17] *See Betty J. Smith*, *supra* note 12.

[18] *Lois E. Culver (Clair L. Culver)*, 53 ECAB 412 (2002).

that appellant experienced a jarring of his back while sitting in a cart. He diagnosed lumbar radiculopathy. Dr. Massey, however, did not specifically attribute the lumbar radiculopathy to appellant jarring his back while in the cart. Medical evidence that does not offer any opinion regarding the cause of an employee's condition is of diminished probative value on the issue of causal relationship.[19]

On May 31, 2007 Dr. Massey discussed appellant's history of work injuries in February and April 2007. He noted that appellant experienced increased pain and numbness of the lower extremities after a cart tipped on its back wheels and then fell to the ground. Dr. Massey diagnosed lumbar radiculopathy and related that "given his degenerative disc condition of the spine, both of the above described incidents will aggravate the condition." He did not, however, provide a rationalized explanation of how appellant's April 25, 2007 employment incident caused or aggravated the condition. Medical reports not containing rationale on causal relationship are entitled to little probative value and are generally insufficient to meet an employee's burden of proof.[20]

In a letter dated September 6, 2007, Dr. Massey diagnosed lumbar strain due to appellant's February 2007 work injury. He noted that following the April 2007 work incident appellant experienced increased lower extremity numbness and pain. Dr. Massey opined that the February and April 2007 incidents "can cause compressive forces on the intravertebral disc causing the symptoms that [he] has been experiencing."[21] His finding, however, that the April 2007 work incident "can cause compressive forces" on the disc causing appellant's symptoms is couched in speculative terms and thus of little probative value.[22]

In a September 20, 2007 form report, Dr. Massey provided a history of injuries in February and April 2007. He diagnosed lumbar radiculopathy and checked "yes" that the condition was caused or aggravated by an employment activity. Dr. Massey found that appellant was totally disabled from February 5, 2007 through July 1, 2008. The Board has held, however, that when a physician's opinion on causal relationship consists only of checking "yes" to a form question, without explanation or rationale, that opinion has little probative value and is insufficient to establish a claim.[23]

On May 8, 2007 Dr. Santiago noted that appellant experienced severe pain in his low back after passengers jumped off the back of a cart that he was driving and it slammed back down to the ground. He diagnosed lumbar degenerative disc disease and spinal stenosis and

[19] *Conard Hightower*, 54 ECAB 796 (2003).

[20] *Richard A. Neidert*, 57 ECAB 474 (2006); *Judith J. Montage*, 48 ECAB 292 (1997).

[21] Dr. Massey also indicated that appellant was working outside the restrictions he provided due to his February 2007 work injury; however, the issue at hand is whether appellant sustained an employment injury on April 25, 2007.

[22] *Rickey S. Storms*, 52 ECAB 349 (2001) (while the opinion of a physician supporting causal relationship need not be one of absolute medical certainty, the opinion must not be speculative or equivocal. The opinion should be expressed in terms of a reasonable degree of medical certainty).

[23] *Deborah L. Beatty*, 54 ECAB 340 (2003).

recommended additional diagnostic studies. Dr. Santiago did not specifically attribute the diagnosed conditions to the April 25, 2007 employment incident and thus his report is of little probative value on the issue of causal relationship.[24] Further, he relied upon an inaccurate history of injury, that of the cart driving by appellant on April 25, 2007 slamming back to the ground after the front wheels lifted. Medical conclusions based on an inaccurate or incomplete factual history are of diminished probative value.[25]

In a report dated June 5, 2007 Dr. Santiago diagnosed cervical spondylosis without myelopathy, degenerative disc disease at L3-4, L4-5 and L5-S1 and spinal stenosis at L3-4 and L4-5. He found that appellant should remain off work until July 1, 2007. As Dr. Santiago did not address causation, his report is of little probative value.[26]

On August 22, 2007 Dr. Raskas diagnosed lumbar degenerative disc disease and recommended a discography. He found that based on the history provided, "it is apparent that the April 25, 2007 incident aggravated [appellant's] condition. While he was having symptoms in his left leg, he is now having symptoms in both legs." The Board has held, however, that an opinion that a condition is causally related because the employee was asymptomatic before the injury is insufficient, without adequate supporting rationale, to establish causal relationship.[27]

Appellant has not submitted a sufficient medical opinion addressing how the April 25, 2007 incident caused or contributed to a diagnosed medical condition. He has failed to meet his burden of proof to establish that he sustained an injury as alleged.[28]

CONCLUSION

The Board finds that appellant has not established that he sustained an injury on April 25, 2007 in the performance of duty.

[24] *See Conard Hightower*, *supra* note 19.

[25] *M.W.*, 57 ECAB 710 (2006); *Joseph M. Popp*, 48 ECAB 624 (1997).

[26] *See Conrad Hightower*, *supra* note 19.

[27] *See Michael S. Mina*, 57 ECAB 379 (2006).

[28] The Board notes that the record in file number 11-203883 contains evidence subsequent to the Office's last merit decision; however, the Board has no jurisdiction to review evidence not before the Office at the time of its last merit decision. *See* 20 C.F.R. § 501.2(c). The Board thus only considered the evidence contained in the case record prior to the Office's last merit decision in reaching its determination.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated January 18, 2008 and June 12, 2007 are affirmed.

Issued: September 5, 2008
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

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