United States Department of Labor
Employees' Compensation Appeals Board

M.H., Appellant	)	
and	)	**Docket No. 09-315**
	)	**Issued: September 1, 2009**
U.S. POSTAL SERVICE, POST OFFICE, Rochester, NY, 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
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On November 13, 2008 appellant file a timely appeal of the Office of Workers' Compensation Programs' decisions dated March 13 and October 27, 2008, denying his claim for compensation. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this claim.

ISSUE

The issue is whether appellant met his burden of proof in establishing that he sustained a traumatic injury in the performance of duty.

FACTUAL HISTORY

On December 11, 2007 appellant, then a 49-year-old casual mail handler, filed a traumatic injury claim alleging that he sustained injury to his lower back and dislocated discs on his right side between September 2 through 7, 2007 after lifting heavy sacks of mail and throwing them on a conveyor belt. He noted that he continued working until September 8, 2007 when he could not get out of bed. Appellant stopped work on September 9, 2007 and returned

on September 14, 2007. Appellant's supervisor, Robert Hoffarth, received notice of the injury on January 25, 2008. He checked a box "no" indicating that appellant was not injured in the performance of duty.

Appellant submitted work restriction forms from his treating physician, Dr. Geoffrey Markowski, Board-certified in family medicine. On September 10, 2007 Dr. Markowski indicated that appellant had missed work between September 9 and 11, 2007 "due to illness." On September 20, 2007 he noted that appellant was unable to work due to back pain from September 8 to 24, 2007. Dr. Markowski advised that he could return to work on September 24, 2007 but could not lift over 30 pounds, bend or twist for 30 days.

In a letter dated February 1, 2008, Cathy Taylor-Schultz, an employing establishment health and resource employee, controverted the claim. She stated that appellant was out of work from September 8 to 13, 2007. Upon returning to work on September 14, 2007, appellant informed Mr. Hoffarth that he missed work because of a back strain that occurred at home. Ms. Taylor-Schultz stated that Mr. Hoffarth sent appellant to the employing establishment's health unit to give the nurse his medical documentation. She also indicated that the employing establishment did not receive appellant's Form CA-1 until January 15, 2008. Ms. Taylor-Schultz further indicated that the supervisor's portion of the form was blank. She also noted that appellant's CA-1 form did not provide a specific date of injury, but instead indicated that the incident occurred sometime between September 2 through 7, 2007. An undated statement from Mr. Hoffarth noted that appellant reported for work on September 14, 2007. He stated that appellant informed him that he missed several days of work because of a back strain acquired doing chores on his day off. Mr. Hoffarth noted that appellant had medical documentation excusing his absence and releasing him back to work. He also noticed the medical documentation mentioned restrictions. Mr. Hoffarth further noted that appellant appeared to be in pain. He stated that appellant told him he had to return to work because he needed the money. Mr. Hoffarth advised that appellant go to the medical unit at the employing establishment. Following his appointment, appellant informed Mr. Hoffarth that he was being sent home as he needed additional paperwork from his physician.

A September 14, 2007 nurse's note from the employing establishment's medical unit, with an illegible signature, noted that appellant was brought in by his supervisor. It also noted that appellant stated that he had to come back to work because he had no medical insurance. The note indicated that he had low back pain and right leg pain. It also noted that appellant did not state that this was a work-related condition. The note indicated that his medical documentation was not adequate as no nature of illness was listed. It advised that appellant see his own physician for better medical documentation.

On February 5, 2008 the Office advised appellant of the factual and medical evidence necessary to establish his claim. In particular, it requested a detailed description of how the injury occurred and statements from any witnesses of the incident.

Appellant submitted a February 8, 2008 statement. He contended that he never stated his injury happened at home. Appellant reiterated that he sustained an injury at work, while lifting and throwing sacks of mail onto a conveyor belt and could hardly get out of bed on September 8, 2007 due to pain. He noted treatment from physicians and physical therapy.

Appellant did not file a claim immediately because he did not know who to contact. He also asserted that this was the only back injury he ever had. In an undated statement, appellant noted that he had been out of work since September 8, 2007. He addressed treatment by his chiropractor and physical therapy.

By decision dated March 13, 2008, the Office denied appellant's claim for compensation finding the evidence insufficient to establish that he actually experienced the employment incident as alleged. It also found that the medical evidence failed to establish a work-related injury in connection with the reported incident.

The Office subsequently received reports from Dr. Frederick Cohen, a Board-certified internist. On January 10, 2008 Dr. Cohen noted appellant's complaint of back pain and numbness in his legs. He indicated that appellant's condition started on September 7, 2007 after throwing heavy sacks in tubs at work. Dr. Cohen diagnosed lumbar disc degeneration and lumbar spinal stenosis. In a February 5, 2008 myelogram report, he noted that testing of appellant's lumbosacral spine revealed multilevel degenerative changes with disc space narrowing and osteophytic spurring. Dr. Cohen diagnosed congenitally shallow canal, severe central canal stenosis at L2-3, lateral recess encroachment at that level bilaterally as well as right greater than left at L3-4 and left greater than right at L4-5.

A February 5, 2008 computerized tomography scan of appellant's lumbar spine by Dr. Seth Zeidman, a Board-certified neurosurgeon, revealed severe central canal stenosis at L2-3 with biforaminal encroachment and strategic foraminal spur on the left at L5-S1. On February 14, 2008 Dr. Zeidman noted that appellant was injured at work on September 7, 2007 while throwing heavy sacks in tubs. He diagnosed lumbar disc degeneration and lumbar spinal stenosis. Dr. Zeidman also recommended surgery.

On April 7, 2008 appellant requested a telephone hearing. At the August 12, 2008 hearing, he stated that on September 2, 2007 he was throwing sacks of mail when he injured his back. Although appellant continued working for the rest of the week, but could not get out of bed on September 8, 2007. He stated that he never indicated that his injury was sustained at home. An Office hearing representative advised that appellant submit treatment notes from the time of the injury. Appellant submitted an undated form diagnosing L5-S1 radiculopathy. He also submitted a work restriction form already of record.

By decision dated October 27, 2008, an Office hearing representative affirmed the March 13, 2008 decision finding that the evidence failed to support that the incident occurred at the time, place and in the manner alleged.

LEGAL PRECEDENT

An employee seeking benefits under the Federal Employees' Compensation Act[1] has the burden of establishing the essential elements of his 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

[1] 5 U.S.C. §§ 8101-8193.

duty as alleged and that any disability and/or specific condition for which compensation is claimed are causally related to the employment injury. 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.[2]

To determine whether a federal employee has sustained a traumatic injury in the performance of duty it must first be determined whether a "fact of injury" has been established. First, the employee must submit sufficient evidence to establish that he or she actually experienced the employment incident at the time, place and in the manner alleged. 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.[3]

An injury does not have to be confirmed by eyewitnesses in order to establish the fact that an employee sustained an injury while in the performance of duty. However, the employee's statements must be consistent with the surrounding facts and circumstances and his or her subsequent course of action. 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 or she has established a *prima facie* claim for compensation. 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 and persuasive evidence.[4]

ANALYSIS

The record reflects that appellant is a casual mail handler who claimed a lower back injury and dislocated discs on his right side after lifting heavy sacks of mail and throwing them on a conveyor belt September 2 through 7, 2007. The Office found that he had not established that the claimed work incident occurred as alleged. The Board finds that appellant has not met his burden of proof to establish that the claimed injury occurred as alleged.

Appellant alleges that he injured his back at work lifting heavy sacks of mail and throwing them onto a conveyor belt. However, the evidence contains inconsistencies that cast doubt about this incident as the cause of the injury. On appellant's claim form, Mr. Hoffarth, checked a box "no" indicating that appellant was not injured in the performance of duty. In an undated statement, he indicated that, upon appellant's return to work on September 14, 2007, appellant stated that he had missed work because of a back strain he sustained doing chores on his day off. Also, the September 14, 2007 nurse's note indicated that appellant did not state that his low back pain was work related. It further noted that his medical documentation was inadequate as it did not state the nature of his illness. Dr. Markowski's work restriction dated September 10, 2007 generally noted that appellant had missed work between September 9 and 11, 2007 "due to illness" and his September 20, 2007 work restriction only advised that he could

[2] *S.P.*, 59 ECAB ___ (Docket No. 07-1584, issued November 15, 2007); *Joe D. Cameron*, 41 ECAB 153 (1989).

[3] *Id*.

[4] *M.H.*, 59 ECAB ___ (Docket No. 08-120, issued April 17, 2008); *Louise F. Garnett*, 47 ECAB 639 (1996).

not work due to back pain. As noted, an employee's statement must be consistent with the surrounding facts and circumstances in order to establish a *prima facie* claim for compensation.[5]

On August 12, 2008 appellant denied stating that his back condition was caused at home and was not work related. The reports from Drs. Cohen and Zeidman, dated January 10 and February 14, 2008 respectively, indicated that he sustained an injury at work while throwing heavy sacks in tubs. However, the evidence describing a work-related injury is dated after December 11, 2007, the date when appellant filed his traumatic injury claim approximately four months after the alleged injury occurred. The factual evidence most contemporaneous with the claimed September 7, 2007 incident indicates that his back condition was sustained on his day off, while the contemporaneous medical evidence does not mention a history of lifting or throwing of sacks. Appellant provided no further evidence to support his assertion and did not clearly explain why he delayed filing his claim. He did not offer any explanation addressing these inconsistencies regarding his claim, as requested by the Office.

Furthermore, appellant's claim is inconsistent regarding the date the alleged injury was sustained. His claim form asserted that he sustained a traumatic injury from September 2 through 7, 2007.[6] At the August 12, 2008 oral hearing, appellant's representative noted in his opening statement that the alleged injury occurred on September 7, 2007. However, appellant subsequently testified that he was throwing sacks onto a conveyor on September 2, 2007 when he felt pain in his back. He further testified that he continued to work for the rest of the week until September 8, 2007 when he got out of bed and "could not move." Additionally, reports from Drs. Cohen and Zeidman noted that appellant was injured at work on September 7, 2007. Appellant failed to identify a consistent date of injury or explain why he provided various of dates of injury.

For these reasons, the Board finds that there are such inconsistencies that cast serious doubt on the validity of the claim. Appellant has not met his burden of proof in establishing that the September 2007 incident occurred as alleged.[7]

CONCLUSION

The Board finds that appellant has not met his burden of proof in establishing that he sustained a traumatic injury in the performance of duty.

[5] *See id*.

[6] The Board notes that appellant's alleged date of injury does not fall within the meaning of the term "traumatic injury" which is defined as a condition of the body caused by a specific event or incident, or a series of events or incidents, within a single workday or shift. 20 C.F.R. § 10.5(ee).

[7] As appellant did not establish that the employment incident occurred at the time, place and manner alleged, the Board need not consider the medical evidence. *See S.P.*, 59 ECAB ___ (Docket No. 07-1584, issued November 15, 2007).

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' decisions dated October 27 and March 13, 2008 are affirmed.

Issued: September 1, 2009
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