United States Department of Labor
Employees' Compensation Appeals Board

R.C., Appellant	)	
and	)	**Docket No. 10-617**
	)	**Issued: November 9, 2010**
U.S. POSTAL SERVICE, PROCESSING & DISTRIBUTION CENTER, Teterboro, NJ, 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
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On January 4, 2010 appellant filed a timely appeal from a December 9, 2009 merit decision 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 sustained an injury while in the performance of duty on March 7, 2009.

FACTUAL HISTORY

On March 12, 2009 appellant, then a 49-year-old mail handler, filed a traumatic injury claim alleging that he sustained an injury at about 5:20 a.m. on March 7, 2009 when the driver of the forklift truck ran into him while he was pushing a postcon of empty buckets. He stated that he was knocked backwards and sustained injury to his neck, shoulders, elbows and back. On the witness portion of the claim form, as well as in a separate March 9, 2009 statement,

Robert A. Cox stated, "on the morning of March 7, 2009 at or about 4:30 a.m., I saw Wally Norrell hit a postcon … that [appellant] was holding onto near the conveyor belt on 100#2." In his March 9, 2009 statement, Mr. Cox indicated that appellant continued to work and did not say he was hurt or feeling any pain. The employing establishment advised appellant was on light duty for a nonwork-related injury. It also controverted the claim.

In a March 10, 2009 statement, appellant stated that at approximately 5:40 a.m. on March 7, 2009 he was pushing a postcon of empty buckets when he was struck head-on by a forklift and knocked backwards. He stated that the incident triggered a relapse of pain and physical damage for which he was already undergoing treatment. Appellant stated that he did not immediately report the incident because he did not want to get the driver in trouble. He stated that he was in a lot of pain over the weekend and that now his job performance was affected.

In a March 11, 2009 statement, Wallace Norrell, the forklift operator, stated:

> "On Saturday March 7, 2009 between 3:15 a.m. and 4:15 a.m., [I] was asked to drop a stack of flat tubs. When I turn the corner I blew my horn. When I saw the postcon, I blew my horn again. I could not see who was behind the postcon. It was a white wall. I pull to the right to get out of the way. I slow down and come to a stop. The postcon was pushed into the forklift. I saw it was [appellant] when he came from behind the postcon. I ask him if he was ok and he said yes. I ask him twice and he said yes both times. I blew the horn two times like I always do."

In a March 17, 2009 letter, the Office advised appellant that the information he had submitted was insufficient to establish that he sustained an injury as alleged. It requested additional factual and medical evidence from appellant.

The Office received numerous documents, including medical reports and claim of appellant's other work-related and nonwork-related accidents, as well as a copy of the accident and incident reports of the March 7, 2009 incident.

In a March 7, 2009 treatment note, Dr. Jea Choi, a Board-certified internist, noted that appellant was previously involved in a car accident in 2008 and was just involved in an accident on the job involving a forklift. An assessment of neck pain and shoulder pain were provided. In an April 6, 2009 duty status report, Dr. Choi noted that appellant was hit by forklift and advised that the diagnosis due to injury was exacerbation of diagnosis codes 724.1 and 724.6.

In an April 7, 2009 statement, appellant indicated that he had requested the postal inspector to see if video surveillance could be viewed. He also noted that Mr. Norrell has a history of driving careless and falling asleep while driving.

By decision dated April 20, 2009, the Office denied appellant's claim finding that he had not established that he sustained an injury as alleged.

On April 27, 2009 appellant's attorney disagreed with the Office's decision and requested a telephonic hearing, which was held August 13, 2009. At the hearing, appellant described the

March 7, 2009 incident and the medical care he received. He indicated that he was unsure of the exact time when the incident occurred but he knew it was after lunch break. Appellant also stated that he was out of work from July through November 2008 because of a hit and run accident on July 25, 2008. No additional evidence was submitted.

By decision dated December 9, 2009, an Office hearing representative affirmed the denial of appellant's claim. The hearing representative found that there were too many inconsistencies in the evidence regarding the claimed incident.

LEGAL PRECEDENT

An employee seeking benefits under the Federal Employees' Compensation Act[1] 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.[2] 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.[3]

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.[4] 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.[5] 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.[6]

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 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.[7] An injury

[1] 5 U.S.C. §§ 8101-8193.

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

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

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

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

[6] *Id.*

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

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.[8] 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.[9] 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.[10] 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.[11]

ANALYSIS

The Office found that appellant did not establish the occurrence of the March 7, 2009 work incident. The Board finds, however, that the evidence is sufficient to establish that he experienced the incident at the time, place and in the manner alleged.

On March 12, 2009 appellant filed a claim alleging that on March 7, 2009 he sustained an injury to his neck, shoulder, elbows and back when the driver of a forklift ran into him while he was pushing a postcon of empty buckets. His account of the March 7, 2009 incident is largely confirmed by his statement and other witness statements, including that of the forklift driver. All parties agree that appellant was pushing a postcon, which was struck by the forklift. The forklift driver stated that the postcon was pushed into the forklift and appellant came from behind the postcon. Mr. Cox, the witness, stated that the forklift driver hit the postcon appellant was on. Although it remains unclear as to the exact time of the incident and who initiated the contact, it is clear that contact occurred with the postcon appellant was pushing and the forklift and these inconsistencies are not sufficient to impugn the validity of appellant's claim. Thus, the evidence establishes that the postcon that appellant was pushing struck the forklift on March 7, 2009, as alleged.[12] The issue, consequently, is whether the medical evidence establishes that he sustained an injury due to the contact with the forklift on March 7, 2009.

The Board finds that appellant has not established that the March 7, 2009 employment incident resulted in an injury. The determination of whether an employment incident caused an injury is generally established by medical evidence.[13] On March 7, 2009 Dr. Choi indicated that appellant was just involved in an accident on the job involving a forklift and provided an assessment of neck pain and shoulder pain. He did not, however, address the cause of

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

[9] *Id.*

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

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

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

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

appellant's pain or specifically relate such pain to the forklift incident. The Board has held that 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.[14] Furthermore, Dr. Choi diagnosed pain, which is a symptom, not a compensable diagnosis.[15] On April 6, 2009 he noted that appellant was hit by a forklift and opined that appellant suffered exacerbation of diagnosis codes 724.1 and 724.6 as a result of the injury. However, without a firm diagnosis supported by medical rationale and an opinion regarding causation, the report is of little probative value.[16] Consequently, Dr. Choi's reports are insufficient to meet appellant's burden of proof.

An award of compensation may not be based on surmise, conjecture, speculation or upon appellant's own belief that there is a causal relationship between his claimed condition and his employment.[17] Appellant must submit a physician's report in which the physician reviews those factors of employment identified by him as causing his condition and, taking these factors into consideration as well as findings upon examination and the medical history, explain how employment factors caused or aggravated any diagnosed condition and present medical rationale in support of his or her opinion.[18] He failed to submit such evidence and therefore failed to discharge his burden of proof.

CONCLUSION

The Board finds that appellant has not established that he sustained an injury on March 7, 2009 in the performance of duty causally related to factors of his federal employment.

[14] *A.D.*, 58 ECAB 149 (2006); *Conrad Hightower*, 54 ECAB 796 (2003).

[15] *C.F.*, 60 ECAB ___ (Docket No. 08-1102, issued October 10, 2008).

[16] *J.M.*, 58 ECAB 303 (2007); *Willie M. Miller*, 53 ECAB 697 (2002).

[17] *George H. Clark*, 56 ECAB 162 (2004); *Patricia J. Glenn*, 53 ECAB 159 (2001).

[18] *D.D.*, 57 ECAB 734 (2006); *Robert Broome*, 55 ECAB 339 (2004).

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs decision dated December 9, 2009 is affirmed as modified.

Issued: November 9, 2010
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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