

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

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**E.P., Appellant**

**and**

**U.S. POSTAL SERVICE, POST OFFICE,  
Cleveland Heights, OH, Employer**

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**Docket No. 10-2184  
Issued: June 15, 2011**

*Appearances:*

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

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

COLLEEN DUFFY KIKO, Judge  
MICHAEL E. GROOM, Alternate Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On August 24, 2010 appellant, through his representative, filed a timely appeal from the August 5, 2010 merit decision of the Office of Workers' Compensation Programs, which affirmed the denial of his claim for compensation benefits. Pursuant to the Federal Employees' Compensation Act<sup>1</sup> and 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 a low back injury in the performance of duty on December 14, 2009, as alleged.

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<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

## **FACTUAL HISTORY**

On January 2, 2010 appellant, then a 53-year-old letter carrier, filed a claim for workers' compensation benefits alleging that he injured his low back in the performance of duty on December 14, 2009 at 1:00 p.m.:

“I reached deep into the back of my LLV to retrieve mail for 2201 apartments when I felt a pull, and pinch, type of pain on my back right side. I continued on delivering my mail as I have felt discomfort before while delivering my route with no continued problems. However, on 12/15/09 at 0100 AM I could not take the pain that had begun. Went directly to emergency room where I was treated for lower lumbar strain.”

Appellant took two hours of scheduled annual leave on December 14, 2009. He had eight hours of scheduled annual leave the next three days. On December 16, 2009 at 2:04 a.m. appellant went into an urgent care center. A progress note described his chief complaint as back and right leg pain, which “started while getting out of a couch.” The physician stated: “No other injury. No lifting of heavy object.” Appellant received a diagnosis of lumbar strain and sciatica.

A December 30, 2009 progress note stated that appellant's pain started one week prior to his arrival. It described a gradual onset with an intermittent course since that time. A February 1, 2010 progress note stated that appellant provided a history of episodic low back pain for years “but pain flared up after lifting heavy object at work during December 2009.”

On February 5, 2010 appellant described what happened. He stated that he was reaching into the back of his postal truck on December 14, 2009 to pull one white tub out of the other when he felt a pull and some other pinch-like pain, “but at the time it didn't bother me, I guess.” The tubs weighed 20 to 25 pounds. Appellant completed his route. The following day he felt pain and made a medical appointment for December 16, 2009. Appellant had lumbar spasms before, but this pain was like nothing he had ever felt, so he went to the emergency room on December 16, 2009 at 2:04 a.m. He was bedridden for three weeks. Appellant stated that he had no similar disability or symptoms before the injury.

In a decision dated February 17, 2010, the Office denied appellant's claim for compensation benefits. It noted that the medical evidence provided more than one history of injury and the medical history most contemporaneous to the alleged incident gave a different account of injury than the one appellant gave on his claim form. The Office found it reasonable to assume that the initial report of the mechanism of injury was more accurate. It also noted that the only medical report giving a history of a work injury contained only a brief and general statement of opinion.

Appellant's medical records show a significant history of low back pain. In January 1999, he was noted to have low back pain syndrome: “Started with back pain in January. Pain in lower back. Not radiating.” In July 1999, appellant was noted to have a history of chronic low back pain. In December 2002, he complained of low back pain without radiation. Appellant alleged no injury. In April 2003, he complained of worsening back pain. Appellant stated that he had done nothing except work, where, as a carrier, he stood all morning and

walked all afternoon: “had this happen once reaching into a car, burning pain lower back, hurts with movement.” In September 2003, he complained of severe low back pain radiating down to the back of the right leg. Appellant denied any injury. He explained that his right hip pain would get sore after sitting a while and would improve after moving around. Appellant stated that he had right lumbar and gluteal pain on and off for a year. In May 2007, he complained of right-sided radiating low back pain “that began approximately one week ago while he was in Las Vegas.”

During a telephonic hearing, appellant testified that he did not report the injury to his supervisor because he had Ibuprofen and was off the rest of the week, so he was able to rest and take medication, as physicians normally advised. He stated that, when he requested family medical leave on December 19, 2009, he did not report that he had a work injury “because actually I didn’t know what it was from.” It was only on January 2, 2010 that appellant decided that his low back condition was a result of what happened at work on December 14, 2009. Appellant filed his claim on January 2, 2010 because “the injury I sustained I didn’t know what it was. I just knew what had happened to me and I knew I hadn’t done anything else ... it just got progressively worse and worse and worse....”

Addressing the emergency room note that his pain started when he was getting out of a couch, appellant stated that he did not sit on his couch, that he did not sit in the living room, so he did not know where that account came from. He made clear that it was an incorrect statement and that he did not think he ever told anybody that he hurt himself getting off a couch.

Asked why he waited to file his claim, appellant explained that he was in so much pain he could not sit up, much less go to work to fill out the paperwork.

In a decision dated August 5, 2010, the Office hearing representative affirmed the Office’s denial of compensation benefits. She found that numerous inconsistencies were sufficient to cast doubt as to whether the work incident occurred as alleged. The hearing representative noted that it was not until January 9, 2010 that the medical evidence gave a history of injury that was consistent with appellant’s claim.

### **LEGAL PRECEDENT**

The Act provides compensation for the disability of an employee resulting from personal injury sustained while in the performance of duty.<sup>2</sup> An employee seeking benefits under the Act has the burden of proof to establish the essential elements of his claim. When an employee claims that he sustained an injury in the performance of duty, he must submit sufficient evidence to establish that he experienced a specific event, incident or exposure occurring at the time, place and in the manner alleged. He must also establish that such event, incident or exposure caused an injury.<sup>3</sup>

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<sup>2</sup> 5 U.S.C. § 8102(a).

<sup>3</sup> *E.g., John J. Carlone*, 41 ECAB 354 (1989).

A person who claims benefits under the Act has the burden of establishing by a preponderance of the reliable, probative and substantial evidence the essential elements of his claim, including the fact that he sustained an injury at the time and in the place and manner alleged.<sup>4</sup> To establish that an injury occurred as alleged, the injury need not be confirmed by eyewitnesses, but the employee's statements must be consistent with the surrounding facts and circumstances and his subsequent course of action. In determining whether a *prima facie* case has been established, such circumstances as late notification of injury, lack of confirmation of injury and failure to obtain medical treatment may, if otherwise unexplained, cast sufficient doubt on a claimant's statements. The employee has not met this burden when there are such inconsistencies in the evidence as to cast serious doubt on the validity of the claim.<sup>5</sup>

### ANALYSIS

The Office denied workers' compensation benefits because inconsistencies cast doubt on whether the December 14, 2009 work incident occurred as alleged. Indeed, the account of what happened that day, as appellant described it on his January 2, 2010 claim form, did not match the earliest account he gave to his medical providers or at least the account his medical providers recorded. If the injury occurred as alleged, if he injured his low back while reaching deep into his postal truck to retrieve mail or to pull one white tub out of another, it is reasonable to expect him to convey something to that effect to the nurses and physicians who saw him shortly thereafter and to expect the nurses and physicians to record what he told them.

When appellant went to the emergency room on December 16, 2009 at 2:04 a.m. the history of injury he provided was not consistent with his claim for benefits. It mentioned nothing about work, nothing about reaching into a postal truck or nothing about white tubs. Instead, appellant was seen with complaints of back and right leg pain that "started while getting out of a couch." Further, the physician recorded "no other injury" and "no lifting of heavy object." This is the most contemporaneous record of what happened and it supports an injury occurring outside the course of appellant's federal employment. Testifying before the Office hearing representative, appellant had no explanation why, a day and a half after the alleged work injury, the medical record was attributing his most recent flair up to getting out of a couch.

Two weeks later, appellant was still providing no history of an employment injury. A progress note on December 30, 2009 noted a gradual onset of pain starting one week earlier. There was no mention of a sudden pull and pinch-type pain, no mention of postal trucks or white tubs or being bed-ridden for two weeks. Yet, only a few days later, appellant would certify under penalty of law that he felt a sudden pull and pinch-type pain when he reached deep into the back of his postal truck on December 14, 2009. He would identify not only the date and the mechanism of injury but also the time of day and the specific street address. How this came to appellant is unknown.

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<sup>4</sup> *Henry W.B. Stanford*, 36 ECAB 160 (1984); *Samuel L. Licker*, 4 ECAB 458 (1951).

<sup>5</sup> *Carmen Dickerson*, 36 ECAB 409 (1985); *Joseph A. Fournier*, 35 ECAB 1175 (1984). See also *George W. Glavis*, 5 ECAB 363 (1953).

Even after appellant filed his claim for benefits, the mechanism of injury was not quite settled. The emergency room had reported “no lifting of heavy object,” but a February 1, 2010 progress note stated that his pain flared up “after lifting heavy object at work during December 2009.” So the history of what happened in mid-December 2009 started as pain while getting out of a couch with no other injury and no lifting of a heavy object, changed to a pull and pinch-type pain from reaching deep into his postal truck for mail and then became pain after lifting a heavy object at work. In a few days’ time it would become pain from pulling a 20- to 25-pound white tub of mail out of another tub.

Appellant’s testimony presents a different type of inconsistency. He testified that he did not report the injury to his supervisor on December 14, 2009 “because actually I didn’t know what it was from.” It could be that appellant was unaware that he had injured his low back that day. It would explain why he did not report the injury to his supervisor, why he did not report the injury on December 19, 2009 when he requested family medical leave and why he waited to file a claim for compensation benefits. Appellant testified that he waited until January 2, 2010 because it was only then that he decided his low back condition was a result of what happened at work on December 14, 2009.

Appellant also testified that he waited to file his claim because he was in too much pain to go into the office and fill out the paperwork. This strongly suggests something quite different, that he was aware of the work-related nature of his injury but was prevented as a practical matter from traveling any sooner to work and filling out the necessary paperwork. The Board cannot reconcile these explanations. Neither explains the history of injury appellant provided at the emergency room.

The Board has carefully considered the evidence and testimony and finds that inconsistencies cast serious doubt on the validity of appellant’s claim. The record presents appellant with a long and significant history of episodic low back pain dating to at least January 1999 and with a history of severe low back pain radiating into his right leg dating to at least September 2003. The record shows that earlier in 2003 appellant recounted how he “had this happen once reaching into a car, burning pain lower back, hurts with movement.” So it is not inconceivable that he felt a pull and pinch-type of pain in his back right side while reaching deep into his postal truck on December 14, 2009 but the record simply does not support it.

The Board therefore finds that appellant has not met his burden of proof. The Board will affirm the Office’s August 5, 2010 decision affirming the denial of his claim for compensation benefits.

### **CONCLUSION**

The Board finds that appellant has not met his burden to establish that he sustained a low back injury in the performance of duty on December 14, 2009, as alleged.

**ORDER**

**IT IS HEREBY ORDERED THAT** the August 5, 2010 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 15, 2011  
Washington, DC

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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

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