

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

D.G., Appellant

and

**U.S. POSTAL SERVICE, MORGAN
PROCESSING & DELIVERY CENTER,
New York, NY, Employer**

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**Docket No. 10-1667
Issued: May 13, 2011**

Appearances:
Thomas R. Uliase, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

RICHARD J. DASCHBACH, Chief Judge
ALEC J. KOROMILAS, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On June 8, 2010 appellant, through his attorney, filed a timely appeal from an Office of Workers' Compensation Programs' merit decision dated February 17, 2010 denying his claim for an August 3, 2007 injury. Pursuant to the Federal Employees' Compensation Act¹ and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the claim.

ISSUE

The issue is whether appellant established that he sustained an injury on August 3, 2007 causally related to his modified duties.

FACTUAL HISTORY

On April 6, 2009 appellant, then a 46-year-old mail processor, filed a traumatic injury claim asserting that he sustained a low back injury on August 3, 2007 while lifting a tray of mail.

¹ 5 U.S.C. § 8101 *et seq.*

He stated that the injury occurred at 2:30 a.m. and he could not move for about 10 minutes until the pain subsided. Appellant stopped work on August 3, 2007 and did not return. In a July 1, 2009 letter, the employing establishment contested the claim as attendance records indicated that he did not work on August 3, 2007. In an undated statement, appellant indicated that when he lifted the tray of mail on August 3, 2007 he experienced a sharp pain in his low back and right leg and could not continue working. He stated that a coworker assisted him to his car and he was unable to contact his supervisor until later that morning.²

In an August 21, 2007 report, Dr. Mark Filippone, a Board-certified physiatrist, indicated that appellant had a work injury in 1997, but no claim was filed as he got better. He noted the March 11, 2002 work injury and advised that appellant was out of work for about nine months. Dr. Filippone stated that there was no other history of trauma or injury. He noted that appellant had been working on a full-time, limited-duty basis with a five-pound weight limit since about 2005. Dr. Filippone noted that appellant was last able to work on August 2, 2007 and that he was seen on August 7, 2007 at an emergency room because of increased pain when sitting, bilateral low back pain with radiation and weak hips. A March 28, 2002 magnetic resonance imaging (MRI) scan showed L5-S1 degenerative changes and subligamentous disc herniation at L5-S1, eccentric to the right. Dr. Filippone listed findings and noted an impression of low back derangement, cervicgia with radiculitis, internal derangement of the right shoulder and right knee internal derangement. In this report and in an August 21, 2007 attending physician's report, he opined that appellant was totally disabled since August 2, 2007 and that his conditions were work related.³ In a September 27, 2007 report, Dr. Filippone noted that electromyogram (EMG) and nerve conduction studies performed on that date showed bilateral L5-S1 radiculopathy, worse on the right, which he opined was due to the work injury. An October 1, 2007 MRI scan showed L5-S1 disc herniation. Physical therapy notes were also submitted.

In a November 22, 2007 report, Dr. Filippone reiterated the history of work injuries as set forth in his August 21, 2007 report and noted the results of the recent testing. He opined that appellant remained totally disabled. Dr. Filippone indicated that the March 28, 2002 MRI scan study showed degenerative changes at L5-S1 and disc herniation at L5-S1 on the right and the October 1, 2007 MRI scan study showed a large herniation at L5-S1 with straightening of the normal lordotic curve spine suggestive of muscle spasm and lumbar myalgia. He stated that the results of the lumbar MRI scan studies from 2002 and 2007 showed a "material worsening" of

² Appellant has an accepted lumbosacral strain for a March 11, 2002 injury in claim File No. xxxxxx804. On August 7, 2007 he claimed a recurrence of disability beginning August 3, 2007 in claim number xxxxxx804. The claimed recurrence occurred "while turning to lift my next tray of mail I felt a sharp pain on my right lower back." The form listed appellant's work hours from 11:00 p.m. to 7:30 a.m. with the injury occurring at 2:30 a.m. Appellant stopped work at 2:30 a.m. on August 3, 2007. The Office initially accepted a recurrence beginning August 3, 2007 but, on March 23, 2009, it rescinded its acceptance. In a February 17, 2010 decision, an Office hearing representative affirmed the March 23, 2009 decision. Appellant appealed the February 17, 2010 decision, which is proceeding separately under (Docket No. 10-1666). As the present claim File Nos. xxxxxx800 and xxxxxx804 both involve the same part of the body, the Office, upon return of the case record, should ensure that these files are doubled under Office procedures. Federal (FECA) Procedure Manual, Part 2 -- Claims, *File Maintenance and Management*, Chapter 2.400.8(c)(1) (February 2000).

³ In this attending physician's report and those dated September 27 and October 23, 2007, Dr. Filippone checked a box "yes" on the form report to indicate that appellant's condition was employment related.

appellant's condition. The Office received physical therapy notes as well as treatment notes and attending physician reports from Dr. Filippone, who continued to opine with an affirmative mark that the diagnosed lumbosacral radiculopathy was caused or aggravated by employment activity and that appellant was totally disabled commencing August 3, 2007.

In an August 7, 2007 report, Dr. Lynn D. Reyman, a Board-certified internist and emergency room physician, noted that appellant had moderate back pain that began five days earlier with "activities of daily living." She noted that he lifted and bent a lot at work, had a herniated disc based on a 2002 MRI scan and intermittent back problems depending on activity. Dr. Reyman diagnosed low back muscle spasm and history of herniated disc in lower spine.

In a March 21, 2008 report, Dr. Andrew Weiss, a Board-certified orthopedic surgeon and second opinion physician, noted the history of injury, reviewed a statement of accepted facts and the medical record and set forth his examination findings. He opined that the lumbosacral sprain causally related to the March 11, 2002 work injury had resolved by objective clinical criteria and there was no evidence of lumbosacral radiculopathy or evidence of herniated disc or spinal stenosis in the January 10, 2007 MRI scan films. Dr. Weiss found no positive objective findings related to either the March 11, 2002 work injury or the August 3, 2007 recurrence. He advised that appellant reached status quo ante as it related to the March 11, 2002 work injury and the August 3, 2007 recurrence. Dr. Weiss opined that there was no work-related disability and that appellant was able to work full time without restrictions. No further medical treatment or testing was necessary. Dr. Weiss also completed a March 21, 2008 work capacity evaluation indicating that appellant was able to perform his usual job with no limitations.

In a May 13, 2008 report, Dr. Steven P. Waldman, a Board-certified anesthesiologist, noted the March 11, 2002 work injury and listed an impression of L5-S1 radiculopathy based on the September 27, 2007 EMG. In a May 29, 2008 attending physician's report, he checked a box "yes" that appellant's lumbar radiculopathy was caused or aggravated by his work. Dr. Waldman stated that appellant was totally disabled since August 3, 2007. Copies of appellant's July 15 and 22, 2008 nerve block procedures for L5 and L5-S1 were provided.

Dr. Filippone continued to opine that appellant was totally disabled from his work-related injury. In an August 4, 2009 report, he noted that appellant was seen for injuries he sustained at work on August 3, 2007. Dr. Filippone referenced the April 6, 2009 traumatic injury claim and noted previously indicating, on August 21, 2007, that appellant's low back was injured at work. He indicated that appellant provided a narrative of his job description and a statement of how the nature of his work caused the injury. Dr. Filippone provided an impression of lumbosacral radiculitis. He opined that the abnormalities were the direct result of August 3, 2007 injuries that occurred at work and appellant remained totally disabled.

In an August 11, 2009 decision, the Office denied the claim for an August 3, 2007 injury finding that the evidence did not establish that the employment incident occurred, as alleged.

On August 20, 2009 appellant requested an oral hearing which was held on December 18, 2009. At the hearing, he testified that on August 3, 2007 he lifted a tray of mail then turned to his right and felt a sharp pain in his lower back. Appellant stated that the mail tray

did not weigh very much and it was the motion of lifting and twisting that caused his pain. He stated that he was unable to work without pain afterwards.

In treatment and attending physician reports, Dr. Filippone continued to opine that appellant was totally disabled from his lumbosacral radiculopathy which he opined, with an affirmative mark, was causally related to his work injury.

In a November 2, 2009 statement, Alvis Hightower, a coworker, stated that he noticed appellant was in pain on August 3, 2007 and wanted to go home. He stated that he helped him to his car as he could not make it on his own. In a November 5, 2009 statement, Vincent M. Caiazzo, a coworker, stated that on August 3, 2007 he was outside and saw appellant, who could hardly walk, being helped by Mr. Hightower. He stated that he ran to help them and they got appellant to his car. In a December 17, 2009 statement, Mark Harrison, a retired supervisor, stated he was appellant's supervisor on August 3, 2007 when he "sustained an injury related to a previous injury" at work.

By decision dated February 17, 2010, an Office hearing representative affirmed the Office's August 11, 2009 decision finding that the factual and medical evidence did not support that a low back injury was sustained, as alleged.

LEGAL PRECEDENT

An employee seeking benefits under the Act 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 timely filed within the applicable time limitation period of the Act, and that an injury⁴ was sustained in the performance of duty, as alleged, and that any disability or medical condition for which compensation is claimed is causally related to the employment injury.⁵ These are the essential elements of each compensation claim, regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.⁶

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. A fact of injury determination is based on two elements. 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,

⁴ The Office's regulations define a traumatic injury as a condition of the body caused by a specific event or incident, or series of events or incidents, within a single workday or shift. Such condition must be caused by external force, including stress or strain, which is identifiable as to time and place of occurrence and member or function of the body affected. 20 C.F.R. § 10.5(ee).

⁵ *Donald R. Greasier*, 57 ECAB 281 (2005).

⁶ *Id.* See also *Gary J. Watling*, 52 ECAB 357 (2001).

generally only in the form of medical evidence, to establish that the employment incident caused a personal injury.⁷

An injury does not have to be confirmed by eyewitnesses in order to establish the fact that an employee sustained an injury in the performance of duty, as alleged, but the employee's 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 case. 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.⁸

Causal relationship is a medical question that can generally be resolved only by rationalized medical opinion evidence.⁹ Rationalized medical evidence is medical evidence which includes a physician's rationalized medical opinion on the issue of whether there is a causal relationship between the claimant's diagnosed condition and the implicated employment factors.¹⁰ The opinion of the physician must be based on a complete factual and medical background of the claimant, must be one of reasonable medical certainty and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.¹¹ A claimant may establish that the employment incident occurred as alleged but fail to show that his or her disability or condition relates to the employment incident.¹²

ANALYSIS

The Office denied appellant's claim, finding that he did not establish that he sustained an employment-related injury on August 3, 2007, as alleged. It found that he failed to establish that the employment incident occurred at the time, place and in the manner alleged and failed to provide sufficient medical evidence to establish causal relationship. The Board finds that the evidence of record is sufficient to establish that the August 3, 2007 incident occurred, as alleged.

The Office found that appellant did not establish the factual component of his claim on the following grounds: the Board finds that he submitted sufficient factual information to establish by the preponderance of the evidence that he sustained an injury at the time, place and in the manner alleged.

⁷ *S.P.*, 59 ECAB 184 (2007).

⁸ *M.H.*, 59 ECAB 461 (2008).

⁹ *Jacqueline M. Nixon-Steward*, 52 ECAB 140 (2000).

¹⁰ *Donald W. Wenzel*, 56 ECAB 390 (2005).

¹¹ *Leslie C. Moore*, 52 ECAB 132 (2000); *Gary L. Fowler*, 45 ECAB 365 (1994).

¹² *N.S.*, 59 ECAB 422 (2008); *T.H.*, 59 ECAB 388 (2008).

In both his recurrence claim, filed September 7, 2007, and his traumatic injury claim, filed April 6, 2009, appellant stated his back pain occurred between 2:00 to 2:30 a.m. on the morning of August 3, 2007 while lifting a tray of mail and he stopped work thereafter. The record reflects that his work hours were from 11:00 p.m. to 7:30 a.m. and he related that the onset of his low back pain began in the early morning hours on August 3, 2007 while at work. Appellant explained in an undated statement received August 7, 2009 that his coworkers assisted him to his car and he was unable to contact his supervisor until later that morning. Witness statements from his coworkers, Mr. Caiazzo and Mr. Hightower, also support that appellant left work on August 3, 2007 and needed help getting to and into his car. While both coworkers and appellant's former supervisor did not appear to have any knowledge of an injury sustained on August 3, 2007, it is not necessary to have an injury confirmed by eyewitnesses in order to establish the fact that an employee sustained an injury in the performance of duty. The record further reflects appellant sought care from the emergency department on August 7, 2007 for moderate back pain which started five days prior and thereafter he sought care from Dr. Filippone, who indicated that appellant was last able to work on August 3, 2007.

An employee's statement alleging that an incident 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.¹³ The factual evidence of record is consistent in describing that appellant stopped work due to back pain beginning August 3, 2007. The Board finds that there is no strong or persuasive evidence refuting that appellant sustained the August 3, 2007 incident, as alleged. Consequently, the Board finds that he sustained the incident at work at the time, place and in the manner, as alleged.

CONCLUSION

The Board finds that appellant met his burden of proof to establish that he sustained a low back condition causally related to his August 3, 2007 employment incident.

¹³ *M.H., supra* note 8; *Bill H. Harris*, 41 ECAB 216 (1989).

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' decision dated February 17, 2010 is affirmed, as modified. The case is remanded to the Office for further action in conformance with this decision.

Issued: May 13, 2011
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

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