

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of CHRISTOPHE M. RUGGIERI and U.S. POSTAL SERVICE,
POST OFFICE, Phoenix, AZ

*Docket No. 99-1073; Submitted on the Record;
Issued October 4, 2000*

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issue is whether appellant sustained an injury in the performance of duty on September 18, 1997.

On October 8, 1997 appellant, then a 46-year-old mail processor clerk, filed a notice of traumatic injury and claim for compensation alleging that on September 18, 1997 he was “on the OCR feeding mail and experienced dizziness, nausea, headaches and [neck pain].” Appellant indicated that he took sick leave for the rest of the day on September 18, 1997. He was then off work from September 21 to October 8, 1997, when he returned to light duty.¹

In a physician's note dated September 24, 1997, Dr. Robert P. Luberto, an osteopath, requested that appellant be excused from work for two weeks due to cervical strain and radiculopathy. He advised that appellant would undergo physical therapy and could return to work on October 8, 1997.

On October 15, 1997 the employing establishment submitted the following statement regarding appellant's alleged injury:

“On September 18, [appellant] approached his supervisor and stated that he must go home because he was not feeling well. When questioned he said that he was nauseous and did not know if he had eaten something bad or had the flu. When [appellant] returned to work and when asked by his supervisor how he was feeling, he stated that he was feeling much better. [Appellant] said nothing of

¹ On June 15, 1995 appellant filed a notice of occupational disease and claim for compensation alleging that he sustained a repetitive motion injury to the neck, shoulders, arms and hands as a result of the physical requirements of his federal employment. The Office of Workers' Compensation Programs accepted the claim for a cervical subluxation at C5-C7. Concurrent conditions identified as not related to the injury were osteoarthritis and spondylosis.

experiencing an injury while at work. On September 21 and 22 he phoned in requesting sick leave, again saying nothing about possibly being injured while at work. On September 25, when scheduled to return to work after his days off [appellant] stated that he would be seeing his [d]octor because he felt he was injured on September 18 at work.”

In an attending physician’s report dated October 18, 1997, Dr. Luberto diagnosed cervical and thoracic strain with associated somatic dysfunction. He check marked a box on the Form (CA-20) indicating that the diagnosed condition was caused or aggravated by an employment activity. The date of injury was listed as September 18, 1997.² Dr. Luberto noted that appellant could perform light duty.

In a letter dated October 21, 1997, the Office advised appellant of the factual and medical evidence required to establish his claim.

In an October 27, 1997 report, Dr. Luberto related that appellant sustained an injury at work on September 18, 1997 when a large tray fell from his grasp. He noted that appellant presented with complaints of cervical pain, upper trapexius and thoracic discomfort. Dr. Luberto also noted that appellant previously sustained on overuse injury in the same region approximately two to three years prior, when he was working on a machine at work that required some lifting and pulling from the left towards the right. With regard to the issue of causal relationship of the September 18, 1997 injury, he stated:

“[Appellant] has had two previous visits with me for this problem but did not file anything as a workman’s compensation injury and is now stating that this is now a work[-]related injury. The original workup included some consideration of cervical radiculopathy. [Appellant] has attended physical therapy for the past month or so and has been on light duty since and has showed improvement.”

Dr. Luberto diagnosed cervical strain, thoracic strain and trapezius strain with associated somatic dysfunction and radicular symptoms.

In a decision dated November 28, 1997, the Office denied compensation on the grounds that appellant failed to establish fact of injury.

The Board finds that appellant has failed to establish that he sustained an injury in the performance of duty on September 18, 1997.³

² In a duty status report dated October 17, 1997, Dr. Luberto described the injury as “lifting, twisting, upper left extremities/shoulder.” He stated that appellant’s condition was “due to [history of] injury [3 years] ago, reagravation possible.”

³ Appellant submitted additional medical evidence after the Office decision. However, the Board does not have jurisdiction to review evidence that was not before the Office at the time it issued its final decision. 20 C.F.R. § 501.2(c).

An employee seeking benefits under the Federal Employees' compensation Act⁴ 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 and that the claim was timely filed within the applicable time limitation period of the Act.⁵ An individual seeking disability compensation must also establish that an injury was sustained at the time, place and in the manner alleged,⁶ that the injury was sustained in the performance of duty and that the disabling condition for which compensation is claimed was caused or aggravated by the individual's employment.⁷

In a traumatic injury case, the employee must establish by the weight of reliable, probative and substantial evidence the occurrence of an injury in the performance of duty at the time, place and in the manner alleged and that the injury resulted from a specific event or incident.⁸ The Office cannot accept fact of injury if there are such inconsistencies in the evidence as to cast doubt as to whether the specific event or incident occurred at the time, place and in the manner alleged⁹ or if the evidence establishes that the specific event or incident to which the employee attributes the injury was not in the performance of duty.¹⁰

In the instant case, the Board finds that there is insufficient evidence to establish that appellant sustained an injury on September 18, 1997 as alleged. Although appellant left work on September 18, 1997 complaining of nausea, he did not mention that he might have injured his left arm or shoulder. Appellant waited until September 24, 1997 to suggest to the employing establishment that he might have sustained an aggravation of a prior work injury while feeding mail into a mail sorting machine. The record further indicates that appellant waited one month before suggesting to his treating physician, Dr. Luberto, that he might have sustained a work injury on September 18, 1997. In his October 18, 1997 report, Dr. Luberto advised that appellant was "now stating" that his injury was work related, indicating that appellant might have suggested to him initially that he was injured in a nonwork-related activity. Moreover, the description of injury provided by Dr. Luberto is entirely different than the description of injury provided by appellant on his CA-1 claim form. Appellant conversely stated that he was feeding mail into an "OCR" when he experienced nausea and neck pain.

The Board finds that there are inconsistencies in the record that cast serious doubt as to whether appellant injured himself on September 18, 1997 at the time, place and in the manner

⁴ 5 U.S.C. 8101-8193.

⁵ *Joe D. Cameron*, 41 ECAB 153 (1989); *Elaine Pendleton*, 40 ECAB 1143 (1989).

⁶ *Robert A. Gregory*, 40 ECAB 478 (1989).

⁷ *Steven R. Piper*, 39 ECAB 312 (1987).

⁸ *See Joshua Fink*, 35 ECAB 822 (1984).

⁹ *Robert A. Gregory*, *supra* note 6.

¹⁰ *Elaine Pendleton*, *supra* note 5.

alleged. Consequently, the Board concludes that appellant has failed to carry his burden of proof to establish fact of injury.

The decision of the Office of Workers' Compensation Programs dated November 28, 1997 is hereby affirmed.

Dated, Washington, D.C.
October 4, 2000

Michael J. Walsh
Chairman

Willie T.C. Thomas
Member

Michael E. Groom
Alternate Member