

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

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<b>DEBORA A. PALUMBO, Appellant</b>	)	
	)	
<b>and</b>	)	<b>Docket No. 05-516</b>
	)	<b>Issued: June 13, 2005</b>
<b>U.S. POSTAL SERVICE, POST OFFICE,</b>	)	
<b>Lakehurst, NJ, Employer</b>	)	
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*Appearances:*  
*Jeffrey P. Zeelander, Esq.,* for the appellant  
*Office of Solicitor,* for the Director

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:  
ALEC J. KOROMILAS, Chairman  
COLLEEN DUFFY KIKO, Member  
DAVID S. GERSON, Alternate Member

**JURISDICTION**

On January 3, 2005 appellant filed a timely appeal of the June 10, 2004 merit decision of the Office of Workers' Compensation Programs, which denied her traumatic injury claim. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d), the Board has jurisdiction over the merits of the claim.

**ISSUE**

The issue is whether appellant sustained an injury in the performance of duty on November 23, 2003.

**FACTUAL HISTORY**

On December 22, 2003 appellant, then a 40-year-old clerk, filed a traumatic injury claim for low back pain that allegedly arose in the performance of duty on November 23, 2003. She stopped working on December 2, 2003. Appellant stated that, on Sunday, November 23, 2003 she worked a total of six hours breaking down the mail. This consisted of pushing and pulling full cages from the platform into the facility. While emptying the cages appellant reportedly bent

over constantly and lifted heavy tubs of mail and as a result, her back started hurting. The following morning appellant spoke with her supervisor, George Fox Jr., who was dissatisfied with the amount of work she performed the previous day. Appellant stated that she told Mr. Fox she had worked six hours and did as much work as she could and that she had hurt her back. She explained that she did not fill out a claim form at the time because she thought her condition would improve. However, as the days went on appellant's condition reportedly worsened and she reached a point where she could not work due to the pain in her back. She claimed that she could not walk, bend or pick up anything without experiencing extreme pain.

The employing establishment challenged the claim noting that appellant did not stop working until nine days after her alleged injury and she waited approximately one month before reporting the injury. Also, Mr. Fox, appellant's supervisor, denied that she informed him of the injury on November 24, 2003 when he questioned her about her previous days of poor performance. The employing establishment further noted that appellant had a history of disciplinary actions and at the time she filed her claim she was facing a 14-day suspension and possible removal from service.

The Lakehurst postmaster, Martin P. Garbarino, stated that appellant worked over a week without any mention of an injury. He also noted that appellant failed to mention her alleged injury when she called in sick from December 2 to 22, 2003. Additionally, Postmaster Garbarino indicated that during a December 17, 2003 telephone conversation with appellant regarding her absence, she did not relate to him that she had injured herself on the job.

Terry Higgins, a coworker, stated that she and appellant were the only employees working at the Lakehurst postal facility on Sunday, November 23, 2003. She reportedly spoke with appellant on several occasions that day and observed her working and singing. Ms. Higgins indicated that appellant appeared to be happy and she never once mentioned an injury.

Another coworker, Adrienne Aumack, indicated that she was working along side appellant on Monday, November 24, 2003 when Mr. Fox called her over to his desk. When appellant returned, she complained that Mr. Fox said she did not do enough work on Sunday and appellant said she "told [Mr. Fox] that [she] did the best that [she] could." Ms. Aumack further indicated that she continued to work along side appellant the remainder of the day and the following week and appellant performed her complete job, including dumping mail, lifting, bending, pushing and pulling, without ever mentioning any back injury or pain.

On January 12, 2004 the Office requested additional factual and medical information.<sup>1</sup> The Office was particularly interested in obtaining clarification regarding the alleged incident of November 23, 2003 and when appellant notified the employing establishment about her claimed injury.

While appellant did not provide additional factual information, she did submit a January 13, 2004 report from Dr. Peter C. Vitanzo Jr., a Board-certified family practitioner, who diagnosed lumbar degenerative disc disease, spondylosis at L4-5 and L5-S1, stenosis at L4-5 and

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<sup>1</sup> Appellant did not initially submit any medical evidence with her December 22, 2003 claim.

right lower extremity radiculopathy.<sup>2</sup> He attributed appellant's condition to an unspecified November 23, 2003 employment incident.

In a decision dated February 12, 2004, the Office denied appellant's claim because she failed to establish that she sustained an injury as alleged.

On March 4, 2004 appellant requested an examination of the written record and on March 5, 2004 she provided a statement in response to the Office's January 12, 2004 request for additional information. Appellant indicated that her injury occurred on the workroom floor when she was bent over picking up a box that weighed 20 to 30 pounds. She said she felt a pinch in her lower back and she then placed the box down on a skid. Appellant explained that as she walked the pain in her lower back extended down her right leg. She continued to work the rest of the day doing what she could and she reportedly told her supervisor about the injury the next morning on November 24, 2003.

Additional medical evidence included a December 1, 2003 note from Dr. Jack L. Vuyovich, a chiropractor, who indicated that appellant was under his care for the reduction of vertebral subluxation complex. He excused appellant from work during the period December 1 through 3, 2003. Appellant also submitted disability slips from Dr. Jean Wang, an internist, covering the period December 3 to 17, 2003. On December 17, 2003 Dr. Vitanzo diagnosed lumbar back pain and imposed restrictions of minimal twisting and bending, no lifting and carrying in excess of 10 pounds and no pushing and pulling in excess of 20 pounds. A December 5, 2003 x-ray of the lumbar spine was interpreted as normal and a December 19, 2003 magnetic resonance imaging (MRI) scan revealed spinal stenosis at L4-5 and L5-S1.

Dr. John A. Petrillo Jr., a Board-certified orthopedic surgeon, examined appellant on February 12, 2004 and diagnosed lumbar radiculopathy. He noted that appellant worked in the "[employing establishment] and hurt herself lifting a bundle of mail." However, Dr. Petrillo did not specify when appellant sustained her injury.

In a March 3, 2004 report, Dr. Vitanzo indicated that when he first examined appellant on December 17, 2003 for complaints of lumbar back pain and right lower extremity radicular symptoms she indicated that the symptoms had been present for "approximately 2 months." At the initial consultation appellant advised Dr. Vitanzo of her prior history of lumbar disc problems at the L5 level. She had been treated for this problem in the past and apparently had been doing well until the "current episode that began approximately two months prior." Dr. Vitanzo also noted that appellant could not relate any one specific event. However, she stated that her current position as a clerk required heavy lifting as well as bending and twisting on a daily basis and that she believed these activities aggravated her lumbar back condition. Dr. Vitanzo's assessment was lumbar back pain, which appeared to be due to a chronic disc herniation. He noted that appellant's December 19, 2003 lumbar MRI scan revealed degenerative disc disease at L4-5 and L5-S1 and he discussed these findings with appellant on her January 13, 2004 visit. Dr. Vitanzo diagnosed lumbar degenerative disc disease, lumbar spondylosis, lumbar spinal stenosis and right lower extremity radiculopathy. He indicated that with all the heavy lifting, bending and

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<sup>2</sup> Dr. Vitanzo noted that he first examined appellant on December 17, 2003.

twisting appellant did with her job, there was no doubt that her employment exacerbated her preexisting condition.

Postmaster Garbarino advised the Office that appellant had been removed from service effective February 26, 2004.<sup>3</sup> Mr. Fox, appellant's former supervisor, submitted an April 28, 2004 statement indicating that appellant lied when she said she informed him of her injury on November 24, 2003. He further stated that appellant never mentioned her injury prior to filing the claim on December 22, 2003, which occurred only after she was repeatedly disciplined for her irregular attendance.

In a letter to the hearing representative dated May 14, 2004, appellant again indicated that she told Mr. Fox about her back injury when the two spoke on the morning of November 24, 2003. Appellant also indicated that between November 24 and December 1, 2003, she worked 5 days for a total of 23.15 hours.

By decision dated June 10, 2004, the Office hearing representative affirmed the denial of appellant's claim based upon her failure to establish that she sustained an injury in the performance of duty on November 23, 2003.

### **LEGAL PRECEDENT**

To determine if an employee sustained a traumatic 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 that must be considered in conjunction with one another. The first component to be established is that the employee actually experienced the employment incident that is alleged to have occurred.<sup>4</sup> The second component is whether the employment incident caused a personal injury.<sup>5</sup> An employee may establish that an injury occurred in the performance of duty as alleged but fail to establish that the disability or specific condition for which compensation is being claimed is causally related to the injury.<sup>6</sup>

### **ANALYSIS**

Appellant alleged that she sustained a low back injury on November 23, 2003 while in the performance of duty. In her initial statement dated December 22, 2003 she indicated that she had worked six hours breaking down the mail, which involved pushing and pulling full cages and emptying the cages. Appellant claimed that she experienced back pain after constantly bending over and lifting heavy tubs of mail. She also claimed that she reported her back injury to

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<sup>3</sup> The employing establishment provided a copy of a January 15, 2004 notice of removal for failure to follow safety rules and regulations. The removal action was based in part on appellant's failure to immediately report her alleged injury of November 23, 2003. The notice also indicated that appellant had previously been disciplined on October 28, November 5 and December 17, 2003, for failure to be regular in attendance.

<sup>4</sup> *Elaine Pendleton*, 40 ECAB 1143 (1989).

<sup>5</sup> *John J. Carlone*, 41 ECAB 354 (1989).

<sup>6</sup> *Shirley A. Temple*, 48 ECAB 404, 407 (1997).

Mr. Fox the following morning, Monday, November 24, 2003. In a supplemental statement dated March 5, 2004, appellant provided a somewhat different account of her November 23, 2003 back injury. She indicated that her injury occurred on the workroom floor when she was bent over picking up a box that weighed 20 to 30 pounds. Appellant reportedly felt a pinch in her lower back and she then placed the box down on a skid. She also indicated that the pain in her lower back radiated down her right leg as she walked. According to appellant, she continued to work the rest of the day doing what she could and she reported the incident to Mr. Fox the next morning.

Mr. Fox indicated that appellant did not report a back injury to him on November 24, 2003 and that it was not until she filed her claim on December 22, 2003 that he was notified of the alleged November 23, 2003 injury. Additionally, Postmaster Garbarino, stated that appellant did not mention her alleged injury when she called in sick beginning December 2, 2003. He also spoke with appellant by telephone on December 17, 2003 regarding her absence and at no time during their conversation did appellant mention that she sustained an employment-related back injury.

Ms. Higgins also worked on Sunday, November 23, 2003. She and appellant were reportedly the only two employees working that day. Ms. Higgins spoke with appellant on several occasions that day and observed her working and singing. Appellant appeared to be happy and Ms. Higgins indicated that she never once mentioned an injury. When Ms. Aumack worked along side appellant on November 24, 2003, appellant did not mention her alleged back injury. Additionally, Ms. Aumack observed appellant performing her complete job duties on November 2, 2003 and for several days that week without appellant ever mentioning any back injury or pain.

An injury does not have to be confirmed by eyewitnesses in order to establish that the employee sustained an injury in the performance of duty, but the employee's statements must be consistent with the surrounding facts and circumstances and her subsequent course of action. An employee has not met her burden of proof when there are such inconsistencies in the evidence as to cast serious doubt upon the validity of the claim.<sup>7</sup>

Although appellant claimed to have informed Mr. Fox of her injury on November 24, 2003 Mr. Fox denied the allegation. Appellant also apparently did not disclose her injury to either Ms. Higgins or Ms. Aumack, both of whom observed her performing at least part of her duties without incident on November 23 and 24, 2003, respectively. Appellant continued to perform her regular duties without any apparent difficulties through December 1, 2003. She also failed to disclose her alleged injury when she initially requested sick leave beginning December 2, 2003 and during her December 17, 2003 telephone conversation with the postmaster regarding her extended absence. The credible evidence of record indicates that appellant first advised the employing establishment of her alleged November 23, 2003 injury on December 22, 2003 when she filed her traumatic injury claim.

Appellant's delay in reporting the alleged November 23, 2003 injury and her continued performance of her regular duties for more than a week following the alleged injury cast serious

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<sup>7</sup> *Delphyne L. Glover*, 51 ECAB 146-48 (1999).

doubts upon the validity of her claim. Additionally, the medical evidence does not support appellant's allegation that she sustained an employment-related injury on November 23, 2003. While Dr. Vitanzo identified December 23, 2003 as the date of injury in his January 13, 2004 report, he did not describe how appellant was allegedly injured. In his March 4, 2004 report, Dr. Vitanzo did not mention an injury arising on November 23, 2003 but instead reported that appellant's current symptoms predated the initial December 17, 2003 examination by approximately two months. Dr. Vitanzo further noted that appellant reportedly could not identify any one specific event as the cause of her current condition. Dr. Petrillo also did not identify November 23, 2003 as the date of the alleged injury. In his February 12, 2004 report, he noted only that appellant worked in the "[employing establishment] and hurt herself lifting a bundle of mail."

While it is evident that appellant has preexisting lumbar degenerative disc disease and it is undisputed that she worked on November 23, 2003 there is insufficient evidence to establish that appellant sustained an injury in the performance of duty on November 23, 2003. Dr. Vitanzo found that appellant's preexisting condition was exacerbated by her employment; however, unlike appellant he did not attribute her current condition to a November 23, 2003 employment incident. Accordingly, neither the factual evidence nor medical evidence establishes that appellant sustained an injury in the performance of duty on November 23, 2003.

#### **CONCLUSION**

The Board finds that appellant failed to establish that she sustained an injury in the performance of duty on November 23, 2003.

**ORDER**

**IT IS HEREBY ORDERED THAT** the June 10, 2004 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 13, 2005  
Washington, DC

Alec J. Koromilas  
Chairman

Colleen Duffy Kiko  
Member

David S. Gerson  
Alternate Member