

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

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**K.J., Appellant**

**and**

**U.S. POSTAL SERVICE, POST OFFICE,  
Jersey City, NJ, Employer**

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**Docket No. 08-1193  
Issued: October 23, 2008**

*Appearances:*

*Thomas R. Uliase, Esq., for the appellant*

*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

ALEC J. KOROMILAS, Chief Judge

DAVID S. GERSON, Judge

JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On March 10, 2008 appellant filed a timely appeal from an Office of Workers' Compensation Programs' decisions dated July 16 and October 3, 2007. Under 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 lung condition caused by traumatic exposure in the performance of duty.

**FACTUAL HISTORY**

Appellant, a 50-year-old vehicle operator assistant, filed a Form CA-1 claim for benefits on January 15, 2006, alleging that she sustained stress and sarcoidosis on January 24, 2005. The employing establishment controverted the claim on the form, stating that its records indicated that she did not report her injury or seek medical attention at the time of the alleged injury.

In a statement dated January 15, 2006, received by the Office on May 5, 2006, appellant stated:

“On January 24, 2005, I reported to work.... I was sitting at one of the computers where I was [working.] [A] custodian came out of the manager’s office sweeping the floor. [T]he dirt and soot was in the air. I asked him not to sweep. [H]e refused. I left the office [hoping] the dust would settle. [T]he dust filled my nasal passages ... and lungs. I was in pain. The custodian left [and] I returned to my work station but I was in pain when I breathed. I looked at the side of my desk. [T]he custodian left a pile of dust ... by the side of my desk. I cleaned it up because I could not find the custodian.”

Appellant alleged that the dust accumulated at her worksite on a regular basis; by the end of her eight-hour shift there typically would be a pile of soot and dust in her work area. She asserted that the heating system is rarely cleaned and that she needed to put in a work order to clean and strip the floor because it had piled up so deeply and had embedded into the floor. Appellant stated that she told her supervisor that she had a very painful, work-related respiratory condition caused by the dust and soot which was constantly accumulating in her work area. She asserted, however, that he did not fill out the proper form with the employing establishment’s superintendent.

By letter dated August 18, 2006, the Office advised appellant that she needed to submit additional factual and medical evidence in support of her claim. It stated that she had 30 days to submit the requested information.

In a statement dated September 26, 2006, appellant stated that she experienced constant exposure to dust and fumes while working for the employing establishment from 1982 to 2005. She indicated that she retired from the employing establishment on December 30, 2005.

In an undated e-mail, received by the Office on December 4, 2006, the employing establishment’s manager Dian Turner stated that management’s personnel and attendance records indicated that appellant was not at work on January 24, 2005, the date of the alleged accident. Ms. Turner stated that appellant also was not at work the week before or for three months after the date of the alleged accident.

By decision dated December 8, 2006, the Office denied appellant’s claim, finding that she failed to establish fact of injury.

On December 20, 2006 appellant requested a hearing, which was held on September 27, 2007. At the hearing, her attorney stated that appellant had a history of exposure to dust and fumes while working at the employing establishment. Counsel was given the option to change the claim from one based on traumatic injury to one based on an occupational condition. However, he stated that he would continue pursuing a claim for traumatic injury but would change the date of exposure from January 24, 2005 to “sometime in 2004.” Counsel stated that he had struggled with appellant to pinpoint the time period where her exposure took place; she ultimately produced paperwork indicating the exact date of exposure. He reiterated the allegation appellant made in her January 2006 statement that her lung condition was caused by maintenance workers sweeping up dust at her worksite. Counsel also stated that appellant had

a previous, accepted claim for a lung condition which occurred in March 2003. He stated that she received compensation for a period of disability, then returned to work at a different location.

By decision dated July 16, 2007, an Office hearing representative affirmed the December 8, 2006 Office decision. He stated that appellant initially filed a claim for traumatic injury based on exposure to toxic fumes, alleging that January 24, 2005 was the date of exposure. The hearing representative noted, however, that appellant attempted to change the date of injury after the employing establishment indicated that she was not at work on the alleged date of exposure. He noted that neither appellant nor her attorney were able to ascertain the exact date of alleged injury.

By letter dated July 27, 2007, appellant's attorney requested reconsideration. He requested that the date of injury and exposure to dust and fumes be changed from January 24, 2005 to October 6, 2004.

In a report dated April 24, 2004, Dr. Clifton Howell, Board-certified in internal medicine, stated that appellant was being treated for sarcoidosis. He released her to return to work with restrictions of no exposure to dust, fumes or exhaust fumes. Dr. Howell stated that appellant's prognosis was fair.

In a May 26, 2005 report, Dr. Howell stated that he was treating appellant for sarcoidosis, depression, anxiety and memory loss. He advised that she had been stable until the previous year, when she was hospitalized for major depression. Dr. Howell related that appellant's conditions had progressed and stated that she was no longer able to work. He noted that she was experiencing memory lapses which interfered with her work performance.

In a May 2, 2007 form report, Dr. Howell indicated that he had been treating appellant for sarcoidosis since October 2004. He stated that appellant's symptoms first appeared on October 22, 2004 and stated that he had not treated her since May 2, 2005. Appellant also submitted several authorization of medical treatment slips from March 31, 2003 to April 15, 2005; an October 28, 2004 employing establishment medical information form and clock rings depicting her attendance at the employing establishment during October 2004.

In a July 15, 2007 statement, appellant indicated that she was exposed to dust, soot and fumes at her worksite on October 4, 2004, causing her to experience extreme pain and difficulty breathing.<sup>1</sup>

Appellant submitted a September 10, 2007 witness statement from her former coworker, Fred Wilbeck, who stated:

“As an employee at the [employing establishment], part of my employment was as a clerk in transportation. While there I worked with [appellant] in van control. As

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<sup>1</sup> Appellant made essentially the same allegations and depicted the same scenario regarding an unresponsive maintenance worker that she made in her January 2006 statement; the only difference between the first and second statements was that she changed the date of the alleged incident from January 24, 2005 to October 6, 2004 in her second statement.

part of our assignments, we were required to work in different areas of that department.

“Two of the areas of our assignment were at the two inbound gates at the truck entrance. What these are basically are modular trailers used as our office. Each office has sliding windows, used to speak to the drivers and an air conditioner that seldom worked. Neither office had any type of exhaust system to remove smoke or foul air that would enter from the exhaust of the tractor trailers. We would often have to clean our desks and office equipment from the dirt and soot that would accumulate.

“Due to the nature of our work, we would have to open the windows at the same time. Drivers would open the door to enter our office. In the winter, this would cause what little heat we had to go right out the open windows. We had baseboard heat, but it was never enough to keep the building warm in the winter.

“Another work area was in van control. Here we worked in the dispatch and control office. For many years, the central air for that building did not work and at times during the warm weather, it was very difficult to breathe. Often during the course of our workday, the tractors would be parked outside the windows. These windows would be opened to get air. With that air came the exhaust from the tractors.

“Twice while working in van control, I came to find out that the sewer main for three bathrooms ran through our office in the control room. How I came to find that out was that twice the sewer main ruptured and the raw sewage spilled into the office.

“Even though a light cleaning was performed, management requested the employees to go back to work in that office. For days after, some of the raw sewage was still on the floor under our desks. Many times while walking with [appellant] to the parking lot after work, she would have a hard time keeping up with me. She mentioned that she could not get her breath.”

In a September 10, 2007 witness statement, appellant’s former coworker, Mr. Wilbeck stated:

“[Appellant] and I worked at [the employing establishment] ... in conditions that were extremely hazardous and unbearable. Van control was in the corner of the building with no windows and only one door. Other employees smoked and leaving the room was the only way to get air. Dust would enter the room from the machines overhead and settle on the desks. When you blew your nose it would be black from the smoke and dust.”

In a September 12, 2007 report, Dr. Howell stated:

“I took care of [appellant] for more than 10 years. The patient has a history of sarcoidosis, depression and HIV positively in the past. [Appellant] was diagnosed

prior to October 2004 with sarcoidosis, which described to her primarily as an inflammation of the lungs, which was thought to be pneumonia. However, a biopsy as done prior to October 2004 showing sarcoidosis which is an infiltrative disease that can cause shortness of breath, cough and weight loss. [Appellant] during this time was visiting me in the office as outpatient after the diagnosis and she explained that her work was making her shortness of breath and wheezing worse. I tried to give her letters excusing her from duties in that area and tried to get her to move to another area and there were some attempts to be made from my point of view to have the patient accommodated for her work and her medical conditions.

“On October 6, 2004 the [appellant] stated [that] she had another exposure to the fumes and exhaust in the cars or trucks and that made her worse. At that time, she did come in for follow up and we did see her with these complaints in mind and documented what had happened to her. [Appellant] stated [that] the exposure made her more short of breath and basically she ... was unable to work. She was disabled at that point. During that time, [appellant] did attempt to go back to work several times. However, she was unable to do so and there were problems in terms of returning to work because she felt short of breath and there was no accommodation for her to go to another area.... [This] would have made her illness worse.

“The diagnosis of [appellant’s] condition is sarcoidosis, which is a firm diagnosis. The condition certainly was made worse by being in this environment as fumes and dust can exacerbate the pulmonary conditions of sarcoidosis.”

By decision dated October 3, 2007, the Office denied appellant’s request for modification.

### **LEGAL PRECEDENT**

An employee seeking benefits under the Federal Employees’ Compensation Act<sup>2</sup> has the burden of establishing that 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, that an injury was sustained 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.<sup>3</sup> These are the essential elements of each and every compensation claim regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.<sup>4</sup>

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. 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.<sup>5</sup> Second, the employee must

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<sup>2</sup> 5 U.S.C. § 8101 *et seq.*

<sup>3</sup> *Joe D. Cameron*, 41 ECAB 153 (1989); *Elaine Pendleton*, 40 ECAB 1143 (1989).

<sup>4</sup> *Victor J. Woodhams*, 41 ECAB 345 (1989).

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

submit sufficient evidence, generally only in the form of medical evidence, to establish that the employment incident caused a personal injury.<sup>6</sup>

The Office cannot accept fact of injury if there are such inconsistencies in the evidence as to seriously question whether the specific event or incident occurred at the time, place and in the manner alleged or whether the alleged injury was in the performance of duty.<sup>7</sup> Nor can the Office find fact of injury if the evidence fails to establish that the employee sustained an “injury” within the meaning of the Act. 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 statements must be consistent with surrounding facts and the circumstances and her subsequent course of action.<sup>8</sup> 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 his or her claim.<sup>9</sup>

### ANALYSIS

In this case, appellant has not established fact of injury because of inconsistencies in the evidence that cast serious doubt as to whether the specific event or incident occurred at the time, place and in the manner alleged. She stated in her CA-1 form and January 15, 2006 statement that she developed stress and a sarcoidosis condition caused by her working conditions on January 24, 2005. Appellant indicated in her January 15, 2006 statement that her lung condition was aggravated because a custodian failed to sweep and clean up dust and soot at her work area until it had accumulated to an unhealthy level. She further alleged that her condition was aggravated by a heating system which was rarely cleaned and emitted toxic fumes into the air. However, this statement was contradicted by the employing establishment, which indicated that its personnel records showed that appellant was not at work on January 24, 2005, the date of her alleged injury/exposure to dust and fumes nor was she at work the week before or three months after the date of the alleged exposure. Appellant can be reasonably imputed to have knowledge of when she sustained an injury that caused her to be medically released from work.<sup>10</sup> This contradictory evidence created an uncertainty as to the time, place and in the manner in which appellant sustained her alleged lung condition. Based on this contradictory evidence, the Office properly found in its December 8, 2006 decision that appellant failed to establish that she sustained an injury in the performance of duty on January 24, 2005.

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<sup>6</sup> *Id.* For a definition of the term “injury,” see 20 C.F.R. § 10.5(e).

<sup>7</sup> *Elaine Pendleton*, *supra* note 3.

<sup>8</sup> See *Gene A. McCracken*, Docket No. 93-2227 (issued March 9, 1995); *Joseph H. Surgener*, 42 ECAB 541, 547 (1991).

<sup>9</sup> See *Constance G. Patterson*, 42 ECAB 206 (1989).

<sup>10</sup> The evidence submitted by an employing establishment on the basis of their records will prevail over the assertions from the claimant unless such assertions are supported by documentary evidence. See generally *Sue A. Sedgwick*, 45 ECAB 211, 218 n.4 (1993); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Computation of Compensation*, Chapter 2.900(b)(3) (September 1990).

Following the December 8, 2006 decision, appellant requested a hearing, during which her attorney advised that she intended to change the date of her alleged traumatic exposure/injury to another date in 2004. However, she and her attorney were unable to ascertain a date on which the alleged exposure occurred. The Office hearing representative therefore properly affirmed the December 8, 2006 decision finding that she failed to establish fact of injury. Appellant requested reconsideration and submitted a July 15, 2007 statement alleging that she was exposed to dust, soot and fumes at her worksite on October 4, 2004, causing her to experience severe pain and difficulty breathing; reports from Dr. Howell indicating that she developed a sarcoidosis condition caused by exposure to dust and fumes emitted by trucks and cars at the employing establishment, beginning October 6, 2004; and statements from former coworkers indicating that the worksite was permeated by unhealthy air due to an inadequate ventilation system, buildup of dust and soot, exposure to truck fumes and proximity to a sewer main which ruptured and emitted raw sewage into the work area.

The Board finds that appellant failed to submit evidence which establishes that she sustained an injury in the performance of duty on October 6, 2004. The statements from appellant's former coworkers, while providing evidence of prolonged exposure to truck fumes and unhealthy air quality, did not contain evidence indicating that she sustained a traumatic injury on October 6, 2004 due to this exposure.<sup>11</sup> Thus, appellant failed to submit to the Office a corroborating witness statement in response to the Office's request. This casts additional doubt on appellant's assertion that she sustained a lung condition due to traumatic exposure on October 6, 2004. Dr. Howell indicated in his September 12, 2007 report that appellant was diagnosed with sarcoidosis, an inflammation of the lungs, prior to October 2004. He stated that appellant's condition was caused by exposure to fumes and exhaust at her worksite and that she was exposed to dust and fumes in cars or trucks on October 6, 2004. This assertion, however, was contradicted by Dr. Howell's May 2, 2007 form report, which stated that appellant's symptoms first appeared on October 22, 2004 and by her previous statements that her traumatic injury was caused by exposure to a faulty heating system and accumulated dust and soot -- which resulted from a custodian's negligence -- not vehicular fumes. The Office requested that appellant submit additional factual and medical evidence explaining how she sustained a lung condition on the dates in question.<sup>12</sup> Appellant failed to submit such evidence. Therefore, given the inconsistencies in the evidence regarding how she sustained her injury, the Board finds that there is insufficient evidence to establish that she sustained an injury in the performance of duty as alleged.<sup>13</sup> The July 16 and October 3, 2007 decisions are affirmed.

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<sup>11</sup> Furthermore, appellant twice indicated, in her January 2006 and July 2007 statements, that her lung condition was caused by a buildup of dust and soot at her worksite, in addition to fumes from a faulty heating system.

<sup>12</sup> The fact that appellant presented two different dates as the alleged date of traumatic exposure cast additional doubt on her assertions.

<sup>13</sup> See *Mary Joan Coppolino*, 43 ECAB 988 (1992) (where the Board found that discrepancies and inconsistencies in appellant's statements describing the injury created serious doubts that the injury was sustained in the performance of duty).

**CONCLUSION**

The Board finds that the Office properly found that appellant failed to meet her burden of proof to establish that she sustained a lung condition caused by traumatic exposure in the performance of duty.

**ORDER**

**IT IS HEREBY ORDERED THAT** the October 3 and July 16, 2007 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: October 23, 2008  
Washington, DC

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

David S. Gerson, Judge  
Employees' Compensation Appeals Board

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