United States Department of Labor
Employees' Compensation Appeals Board

L.S., Appellant	)	
and	)	**Docket No. 10-919**
	)	**Issued: December 2, 2010**
DEPARTMENT OF VETERANS AFFAIRS, VETERANS HEALTH ADMINSTRATION, Montrose, NY, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On February 18, 2010 appellant, through her attorney, filed a timely appeal from a December 30, 2009 merit decision of the Office of Workers' Compensation Programs. Pursuant to 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 established an injury in the performance of duty on May 21, 2009.

FACTUAL HISTORY

On May 21, 2009 appellant, then a 43-year-old food service worker, filed a traumatic injury claim (Form CA-1) alleging that she sustained a neck and right arm injury from "pushing food cart into elevator" that day. A comment from the employing establishment on the claim form stated there had been "different stories about what happened" and appellant told her supervisor she was going to a physician to get some medication, without indicating she had

sustained a new injury. In a June 3, 2009 statement, appellant indicated she had started to pull the food cart from the elevator when her right hand went numb and she experienced pain from her hand through her arm, shoulder and neck.

In a form report (Form CA-16) dated May 21, 2009, a physician,[1] indicated that appellant had a prior injury to her right shoulder and had another work injury.[2] The physician diagnosed unspecified joint disorder (ICD-9 code 719.98) and checked a box "yes" the condition was caused or aggravated by employment. In a note dated June 1, 2009 Dr. O. Vaou, a neurologist, stated that appellant had limited use of her right upper extremity due to reflex sympathetic dystrophy. The record also contains a work capacity evaluation (Form OWCP-5c) dated May 21, 2009 from a nurse practitioner. In an OWCP-5c form dated July 6, 2009, a physician diagnosed complex regional pain syndrome affecting the right arm.[3]

By decision dated July 9, 2009, the Office denied the claim for compensation. It found that appellant did not submit sufficient factual or medical evidence to establish the claim.

Appellant requested a telephonic hearing before an Office hearing representative, which was held on October 13, 2009. At the hearing, she initially discussed her May 1, 2008 injury, which also involved pushing a food cart. Appellant stated that the elevator started to move up and then it jerked her back into the elevator. As to the May 21, 2009 incident, she stated it was "the same thing, the elevator went up again and this time the jolt went in my hand and my hand just gave out." Appellant believed she had mentioned the involvement of the elevator with respect to the current claim and that she told her supervisor.

The employing establishment submitted a November 1, 2009 statement from a supervisor indicating that on May 21, 2009 appellant stated that she was going to the health unit for some pain medication. The supervisor asked her if it was for a work injury and she replied it was not a work injury. Another supervisor stated that he asked appellant if she had an accident and she stated she was just checking on her medication as she felt a little funny.

The record contains an employing establishment health unit report dated May 21, 2009 from Dr Malati Kollali, a Board-certified internist, who stated that appellant reported she was pushing a food cart that morning and felt "shocking volts" shoot from her right hand up her arm into her neck. Dr. Kollali diagnosed probable cervical spine radiculopathy.

By decision dated December 30, 2009, an Office hearing representative affirmed the July 9, 2009 decision. The hearing representative found there were inconsistencies in appellant's

[1] The signature is illegible. A properly executed CA-16 form creates a contractual obligation, which does not involve the employee directly, to pay for medical care in accord with the terms of the form. *See Elaine M. Kreymborg*, 41 ECAB 256, 259 (1989). The CA-16 form issued to appellant authorized examination using nonsurgical diagnostic studies, as there was doubt whether the condition was employment related. The Office has not adjudicated the issue of reimbursement.

[2] The record indicates appellant has a claim for injury on May 1, 2008 under Office File No. xxxxxx232.

[3] Again, the signature is illegible.

factual statements, as to the May 21, 2009 incident and the medical evidence was of limited probative value.

LEGAL PRECEDENT

The Federal Employees' Compensation Act provides for the payment of compensation for "the disability or death of an employee resulting from personal injury sustained while in the performance of duty."[4] The phrase "sustained while in the performance of duty" in the Act is regarded as the equivalent of the commonly found requisite in workers' compensation law of "arising out of an in the course of employment."[5] An employee seeking benefits under the Act has the burden of establishing that she sustained an injury while in the performance of duty.[6] In order to determine whether an employee actually sustained an 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 which must be considered in conjunction with one another. The first component to be established is that the employee actually experienced the employment incident which is alleged to have occurred. The second component is whether the employment incident caused a personal injury and generally this can be established only by medical evidence.[7]

An employee seeking benefits under the Federal Employees' Compensation Act[8] has the burden of establishing that she sustained an injury while in the performance of duty.[9] In order to determine whether an employee actually sustained an 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 which must be considered in conjunction with one another. The first component is whether the employee actually experienced the employment incident which is alleged to have occurred. The second component is whether the employment incident caused a personal injury and generally this can be established only by medical evidence.[10]

With respect to the first component of fact of injury, the employee has the burden of establishing the occurrence of an injury at the time, place and in the manner alleged, by a preponderance of the reliable, probative and substantial evidence.[11] An injury does not have to be confirmed by eyewitnesses in order to establish the fact that an employee sustained an injury

[4] 5 U.S.C. § 8102(a).

[5] *Valerie C. Boward*, 50 ECAB 126 (1998).

[6] *Melinda C. Epperly*, 45 ECAB 196, 198 (1993); *see also* 20 C.F.R. § 10.115.

[7] *See John J. Carlone*, 41 ECAB 354, 357 (1989).

[8] 5 U.S.C. §§ 8101-8193.

[9] *Melinda C. Epperly*, 45 ECAB 196, 198 (1993); *see also* 20 C.F.R. § 10.115.

[10] *See John J. Carlone*, 41 ECAB 354, 357 (1989).

[11] *William Sircovitch*, 38 ECAB 756, 761 (1987); *John G. Schaberg*, 30 ECAB 389, 393 (1979).

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.[12]

As to the second component, the Office's procedures recognize that a claim may be accepted without a medical report when the condition is a minor one which can be identified on visual inspection.[13] In clear-cut traumatic injury claims, such as a fall resulting in a broken arm, a physician's affirmative statement is sufficient and no rationalized opinion on causal relationship is needed. In all other traumatic injury claims, a rationalized medical opinion supporting causal relationship is required.[14]

Rationalized medical opinion evidence is medical evidence that includes a physician's rationalized opinion on the issue of whether there is a causal relationship between a diagnosed condition and the identified employment factor. The opinion of the physician must be based on a complete factual and medical background, must be of reasonable medical certainty and supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant. The weight of medical evidence is determined by its reliability, its probative value, its convincing quality, the care of the analysis manifested and the medical rationale expressed in support of the physician's opinion.[15]

ANALYSIS

With respect to whether the factual evidence is sufficient to establish the May 21, 2009 employment incident as alleged by appellant; the Board notes that she did not provide a detailed factual statement regarding the incident.[16] The June 3, 2009 statement was brief and indicated that she was pulling a cart from the elevator when she experienced numbness and pain. At the October 13, 2009 hearing, appellant reported that there was movement of the elevator itself that may have contributed to the injury. As to why she had not mentioned this earlier, she stated that she thought she had mentioned it and had told her supervisor. The record does not contain any prior statement regarding the elevator itself and the supervisors advised that appellant did not relate any details regarding an employment incident on May 21, 2009. Rather, she noted she was going to the health unit to check on her medication.

The Board accordingly finds that appellant has not established the factual element of her claim. Appellant did not provide a detailed description of the incident or any explanation as to the failure to provide a consistent description of the incident. It was not promptly reported to her supervisors and was unwitnessed. The Board finds that appellant did not establish the May 21,

[12] *Charles B. Ward*, 38 ECAB 667, 670-71 (1987); *Joseph Albert Fournier, Jr.*, 35 ECAB 1175, 1179 (1984).

[13] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Causal Relationship*, Chapter 2.805.3(d) (June 1995).

[14] *Id.*

[15] *Jennifer Atkerson*, 55 ECAB 317, 319 (2004).

[16] *See Paul Foster*, 56 ECAB 208 (2004) (where appellant failed to submit a detailed account of an employment incident and failed to establish the factual element of his claim).

2009 incident, as alleged. To meet her burden of proof she must also submit rationalized medical evidence on causal relationship between a diagnosed condition and the employment incident. The medical evidence of record does not contain a rationalized medical opinion on causal relationship. There is a checkmark "yes" in a May 21, 2009 form report, which is of little probative value without additional explanation.[17] It is not clear what history was provided to the physician and no medical rationale was offered.

Since appellant did not submit the necessary factual and medical evidence to meet her burden of proof, the Board finds the Office properly denied her claim for compensation.

CONCLUSION

The Board finds that appellant did not meet her burden of proof to establish an injury in the performance of duty on May 21, 2009.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated December 30, 2009 is affirmed.

Issued: December 2, 2010
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

[17] *See Barbara J. Williams*, 40 ECAB 649, 656 (1989).