United States Department of Labor
Employees' Compensation Appeals Board

R.R., Appellant	)	
and	)	**Docket No. 11-919**
	)	**Issued: December 19, 2011**
U.S. POSTAL SERVICE, POST OFFICE, Amityville, NY, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On March 2, 2011 appellant filed a timely appeal from a merit decision of the Office of Workers' Compensation Programs (OWCP) dated February 2, 2011. Pursuant to the Federal Employees' Compensation Act[1] (FECA) and 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 that she sustained a neck injury on April 29, 2010 in the performance of duty at the time, place and in the manner alleged.

FACTUAL HISTORY

On May 3, 2010 appellant, a 57-year-old mail clerk, filed a Form CA-1 claim for traumatic injury alleging that she experienced pain in her neck on April 29, 2010 while retrieving parcels of mail from a bulk mail container. The employing establishment controverted the claim.

[1] 5 U.S.C. § 8101 *et seq.*

Appellant's supervisor, Magaly Alvarez, asserted that appellant did not report the alleged work incident until Monday, May 3, 2010 and was unable to specify the time, place or manner in which the incident occurred.

In an April 30, 2010 report, Dr. Gary Spero, a chiropractor, stated that appellant had injured herself at work on April 29, 2010. He diagnosed cervical disc syndrome and brachial neuritis and advised that she was unable to perform her work until further notice due to the severity and multiplicity of her condition.

In a statement received by OWCP on May 5, 2010, Postmaster Debbie Gordon asserted that appellant telephoned the employing establishment at approximately 12:30 p.m. on May 3, 2010 to advise that she had injured her back at work. She noted that appellant was unable to state with certainty how and when the incident happened. Ms. Gordon had previously spoken to appellant in the late morning or early afternoon of Friday, April 30, 2010. Appellant called that day and stated that her back was hurting and that she was going to see her chiropractor; she never mentioned, however, that she had sustained the injury at work.

Dr. Spero submitted reports dated April 30 to July 2, 2010. He listed that appellant sustained a neck injury on April 29, 2010 and checked a box indicating that her injury corresponded with her description of how the April 29, 2010 work incident occurred.

In a May 17, 2010 report, Dr. Spero again indicated that appellant had injured herself at work on April 29, 2010. Appellant was lifting heavy mail trays and buckets from an overhead position when she felt a pulling in her neck. The next day, she experienced severe neck pain and stiffness with burning pain into her right arm. On examination, Dr. Spero found decreased cervical ranges of motion, which he measured at 30 percent of normal, a positive cervical compression test, provoking increased neck pain and arm pain on the right, and hypoesthesia on the right at C5 and C6. He recommended that appellant undergo x-ray testing and a magnetic resonance imaging (MRI) scan. Dr. Spero diagnosed cervical subluxation, cervical disc syndrome and cervical brachial neuritis. He reiterated that appellant was unable to perform any work duties at that time and projected that she could resume limited work starting on June 1, 2010.

In a report dated June 23, 2010, Dr. Charles B. Goodwin, Board-certified in orthopedic surgery, stated that appellant had complaints of four herniated discs. He related that she felt a pop in her neck and was injured at work on April 29, 2010 after she lifted heavy equipment. Dr. Goodwin noted that appellant's work required her to lift heavy trays overhead. He stated that appellant had a history of sciatica dating back 15 years that radiated into her right arm. Appellant underwent x-ray testing of the cervical spine which showed disc space narrowing at C5-6. She also underwent an MRI scan on June 2, 2010 which indicated posterior disc bulging at C2-3, C5-6, C6-7, and T1-T2, in addition to anterior cervical subluxation at C4-5 with posterior disc bulge. Dr. Goodwin diagnosed severe right cervical radiculopathy.

By memorandum dated July 1, 2010, the employing establishment noted that it had investigated appellant and determined that her neck injury did not result from the alleged April 29, 2010 work incident. Although appellant asserted on her Form CA-1 that she injured a disc in her neck while picking up parcels, Ms. Gordon related that appellant had called on May 3,

2010 to report that she was not coming to work and would take sick leave for a bad back. Appellant had provided an equivocal response when Ms. Gordon asked her to describe how or when she injured her back. On May 5, 2010 Ms. Gordon sent a supervisor to appellant's residence and obtained a written statement regarding the injury. In the statement, appellant indicated that on Thursday April 29, 2010 she felt a tingle in her neck while taking parcels and trays from an overhead bulk mail container. She did not report the incident on that date because she felt okay until late Friday, April 30, 2010, when she returned to her chiropractor to seek treatment. Appellant stated that she had been previously getting treatment for a pinched nerve, which worsened due to lifting heavy parcels and engaging in heavy sorting with her right arm.[2] The employing establishment's investigation also showed that she was a member of a running club who had participated in several long distance races prior to her alleged April 29, 2010 work incident.[3] The most recent of these races took place on April 25, 2010, four days prior to appellant's injury, when she ran in the Central Park, New York City half marathon, a distance of 13.1 miles. The investigation revealed that she had an account with Facebook. Appellant stated in her April 25, 2010 Facebook entry, "finished more ½ in central park, the worst day ever glad to be done and finally warm now lazy." In her April 27, 2010 entry, two days before her alleged work incident, she stated, "Shouldn't be driving but I can't stay in anymore. macy's, kohls here I come."[4]

By letter dated July 12, 2010, OWCP 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 July 15, 2010 statement, appellant reiterated that her neck injury resulted from an incident at work which occurred on April 29, 2010. She was removing heavy trays overhead from a bulk mail container when she heard a pop in the back of her neck and immediately experienced pain. The pain became progressively worse and appellant called in sick at work on April 30 and May 1, 2010. She sought treatment from her chiropractor, Dr. Spero, to ameliorate her neck pain and told him that the pain stemmed from the April 29, 2010 work incident. Appellant stated that she reported the incident to her supervisor, Mr. Alvarez, who immediately came to her residence to complete the injury-related paperwork.

Appellant rebutted the employing establishment's July 1, 2010 investigative memorandum. She denied competing in a marathon or in any physical activity on any of the dates indicated in the report. Appellant experienced difficulty driving her vehicle for the previous two and a half months because it caused pain in her arm.

In a July 7, 2010 report received by OWCP on July 26. 2010, Dr. Alan Mechanic, Board-certified in neurosurgery, stated that appellant injured her neck while lifting a heavy object

[2] A copy of this undated statement is attached to the report.

[3] On March 13, 2010 appellant participated in a 15 kilometer (9.3 mile) road race; on March 21, 2010 she ran in the Central Park Half Marathon in New York City, a 13 mile road race; on March 21, 2010 she participated in a 10 kilometer (6.1 mile) run; on April 10, 2010 appellant participated in a 3 mile race. The report supports these references with copies of the official list of runners who participated in these races.

[4] The report supports these references with copies of appellant's Facebook entries, which she made online.

overhead and experienced a pop in the back of her neck, in addition to neck, shoulder and right arm pain which radiated to the fingers of the right hand. Appellant experienced this pain on a daily basis. Dr. Mechanic advised that she had been unable to return to work since that time. He reviewed the results of a June 3, 2010 cervical MRI scan and opined that appellant had a herniated disc at C5-6.

In a report dated July 23, 2010, Dr. John M. Stamatos, Board-certified in pain management and anesthesiology, stated that he was treating appellant for cervical radiculopathy. Appellant had been in excellent health until she injured her neck while lifting a palate over the top of her head at work. Dr. Stamatos stated that her neck pain radiated down to her arm and into the fingers of right arm, which also went numb on occasion.

In a July 27, 2010 memorandum, the employing establishment reiterated its contentions and referenced additional information pertaining to appellant. It had taken photographs which depicted her participation in races which occurred on March 21 and April 25, 2010, in addition to a videotape of appellant running in a race on June 24, 2010.

By decision dated August 18, 2010, OWCP denied the claim, finding that appellant had failed to meet her burden to establish fact of injury.

By letter dated September 13, 2010, appellant requested a review of the written record.

In a statement dated September 17, 2010, received by OWCP on October 12, 2010, appellant reiterated her allegations. She stated that her job required her to remove heavy trays, parcels and large bags of mail which caused her to injure her neck on April 29, 2010 and that she did not experience excruciating neck pain until later in the day. Appellant called in sick on Friday, April 30, 2010 and Saturday, May 1, 2010 so that she could rest her right arm. She denied telling the employing establishment that she was experiencing back problems when she called in sick on these dates, given that the April 29, 2010 work incident was related to upper disc problems. Appellant stated that she had been scheduled for a chiropractor visit on April 30, 2010, at which time she discovered that the pop she experienced on April 29, 2010 was a herniated or bulged disc that impinged on the nerve.

By decision dated February 2, 2011, an OWCP hearing representative affirmed the August 18, 2010 decision.

LEGAL PRECEDENT

An employee seeking benefits under FECA[5] 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 FECA, that the claim was timely filed within the applicable time limitation period of FECA, 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.[6] These are the essential elements of each and every

[5] 5 U.S.C. § 8101 *et seq*.

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

compensation claim regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.[7]

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.[8] Second, the employee must submit sufficient evidence, generally only in the form of medical evidence, to establish that the employment incident caused a personal injury.[9]

OWCP 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,[10] nor can OWCP find fact of injury if the evidence fails to establish that the employee sustained an "injury" within the meaning of FECA. 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 circumstances and her subsequent course of action.[11] 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 case doubt on an employee's statements in determining whether he or she has established his or her claim.[12]

ANALYSIS

The Board finds that 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.

Appellant alleged on her May 3, 2010 CA-1 form that she felt pain in her neck while retrieving parcels of mail on April 29, 2010. In addition, Dr. Spero related in his April 30 and May 17, 2010 reports that appellant told him that her neck injury caused her April 29, 2010 work incident. He stated in his May 17, 2010 report that she was lifting heavy mail trays and containers from an overhead position when she felt a pulling in her neck. Drs. Mechanic, Goodwin and Stamatos also stated that appellant felt a pop in her neck while lifting a heavy object overhead during this incident. The description of the incident progresses from one recitation to another from pain, to pulling, to a pop. These statements are also contradicted by

[7] *Victor J. Woodhams*, 41 ECAB 345 (1989).

[8] *John J. Carlone*, 41 ECAB 354 (1989).

[9] *Id.* For a definition of the term "injury," *see* 20 C.F.R. § 10.5(e)(e).

[10] *Pendleton*, *supra* note 6.

[11] *See Joseph H. Surgener*, 42 ECAB 541, 547 (1991); *Gene A. McCracken*, Docket No. 93-2227 (issued March 9, 1995).

[12] *See Constance G. Patterson*, 42 ECAB 206 (1989).

the statements from Mr. Alvarez and Ms. Gordon. Mr. Alvarez stated that appellant called on April 30 and May 1, 2010 and stated that she was not coming to work and that she was taking sick leave for a bad back. Ms. Gordon provided a similar account in her May 5, 2010 statement. According to her, appellant stated that she had injured her back at work and that she was sorry she did not report her work incident previously. Ms. Gordon asserted that, due to her back pain, appellant stated that she was going to see her chiropractor. When appellant initially called in sick on April 30, 2010, however, she never stated that she had sustained the injury at work. Ms. Gordon also asserted that appellant was unable to state with certainty how and when any incident happened.[13] In her May 5, 2010 statement, however, appellant stated that on Thursday, April 29, 2010 she felt a tingle in her neck while taking parcels and trays from an overhead bulk mail container. She asserted that she did not report the incident on that date because the pain did not become severe until late Friday, April 30, 2010, when she returned to her chiropractor for a previously scheduled appointment. Appellant has also noted that she had previously received treatment for a pinched nerve, which worsened due to lifting heavy parcels and engaging in heavy sorting with her right arm. In a September 11, 2010 statement, she denied that she told the employing establishment that she was experiencing back pain on April 29 and 30, 2010, despite the fact that Mr. Alvarez and Ms. Gordon both asserted on several occasions that she did.

Based on the instant record, therefore, there are discrepancies in the accounts of injury appellant provided to different people. This contradictory evidence created an uncertainty as to the time, place and in the manner in which appellant sustained her alleged neck injury. Appellant allegedly injured her neck during the April 29, 2010 work incident, but according to her supervisors she did not provide notification to the employing establishment for four days, after initially advising that she had injured her back during the incident.[14] In addition, while not relevant to the issue of whether appellant injured her neck on April 29, 2010, appellant's credibility is further diminished because she denied running in several long distance races in March and April 2010, despite the fact that the employing establishment produced documentary evidence and a Facebook entry which indicated that she participated in several races during this period. Moreover, it is unclear if the physicians of record had an accurate history of the April 29, 2010 incident as they related differing accounts of how the neck injury allegedly occurred and did not indicate an awareness that appellant had initially complained of a back injury stemming from the alleged April 29, 2010 incident.[15] Furthermore, the form reports from Dr. Spero that support causal relationship with a checkmark are insufficient to establish the claim, as the Board has held that, without further explanation or rationale, a checked box is not sufficient to establish causation.[16]

[13] 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).

[14] *Id.*

[15] *See Geraldine H. Johnson*, 44 ECAB 745 (1993).

[16] *Debra S. King*, 44 ECAB 203 (1992); *Salvatore Dante Roscello*, 31 ECAB 247 (1979).

Appellant failed to submit to OWCP a corroborating witness statement in response to its request. This casts additional doubt on her assertion that she injured her neck while engaging in heavy overhead lifting of mail parcels on April 29, 2010. OWCP requested that appellant submit additional factual and medical evidence explaining how she injured her neck on the date in question. 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.[17]

For the reasons stated above, the Board finds that appellant did not meet her burden of proof to establish fact of injury. Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

CONCLUSION

The Board finds that OWCP properly found that appellant failed to meet her burden of proof to establish that she sustained a neck injury in the performance of duty on April 29, 2010.

ORDER

IT IS HEREBY ORDERED THAT the February 2, 2011 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: December 19, 2011
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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

[17] *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).