

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

T.L., Appellant

and

**DEPARTMENT OF THE DEFENSE, DEFENSE
AGENCIES, Fort Eustis, VA, Employer**

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**Docket No. 13-538
Issued: May 14, 2013**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Alternate Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On January 2, 2013 appellant filed a timely appeal from a December 12, 2012 decision of the Office of Workers' Compensation Programs (OWCP) which denied her traumatic injury claim. Pursuant to the Federal Employees' Compensation Act¹ (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 sustained an injury to her left upper back while in the performance of duty on May 9, 2011.

FACTUAL HISTORY

This case was previously before the Board.² In a decision dated April 11, 2012, the Board set aside OWCP's August 3, 2011 decision denying appellant's traumatic injury claim and

¹ 5 U.S.C. § 8101 *et seq.*

² Docket No. 11-1979 (issued April 11, 2012).

remanded the case for further development of the medical evidence. The facts contained in that prior decision are incorporated by reference. The relevant facts are set forth.

On May 9, 2011 appellant, then a 56-year-old military pay technician, filed a traumatic injury claim alleging that she experienced pain on the left side of her body when she opened the service window of the finance office and the metal roll-up service window fell off the wall and struck the left side of the body. She provided medical records from her treating physician, Dr. Tammy Beavers, a Board-certified family practitioner, who diagnosed upper back pain and disorders of soft tissue.

OWCP referred the case to its medical adviser to determine whether a definitive diagnosis of an injury-related condition had been provided. In a July 15, 2011 report, the medical adviser related that appellant was apparently hit by something heavy and complained of upper back pain. He reviewed her history and noted that x-ray reports were not available. The medical adviser recommended that appellant's case be referred to a second opinion examiner to determine if any objective findings were present to support a diagnosed condition. If no objective findings were present, he advised that OWCP deny her claim because pain was not considered a definitive diagnosis.

By decision dated August 3, 2011, OWCP accepted that the May 9, 2011 incident occurred as alleged but denied appellant's claim finding insufficient medical evidence to establish that she sustained a diagnosed medical condition as a result of the accepted incident.

In an April 11, 2012 decision, the Board set aside the August 3, 2011 OWCP decision, finding that the medical adviser's report was insufficient to support the denial of her claim as his opinion was based on an incomplete record. The case was remanded to OWCP to secure a medical report based upon an accurate medical record and to address all of the medical issues relevant to her claim.

In a May 9, 2012 report, Dr. Beavers stated that appellant's injury to her upper back could also be documented by trapezius spasm (333.83) and upper back pain (724.1). She reported that these conditions were present with the soft tissue swelling appellant had after the injury.

In an August 20, 2012 letter, OWCP advised appellant to submit a medical report from her attending physician which included dates of examination and treatment, history of injury, results of diagnostic tests, a definitive diagnosis, and a medical opinion explaining how the May 9, 2011 employment incident caused her medical conditions.

By decision dated December 12, 2012, OWCP denied appellant's claim finding insufficient medical evidence to establish that she sustained a diagnosed condition causally related to the May 9, 2011 employment incident.

LEGAL PRECEDENT

An employee seeking benefits under FECA³ has the burden of proof to establish the essential elements of his or her claim by the weight of the reliable, probative, and substantial evidence⁴ including that he or she sustained an injury in the performance of duty and that any specific condition or disability for work for which he or she claims compensation is causally related to that employment injury.⁵

To determine whether a federal employee has sustained a traumatic injury in the performance of duty, it first must be determined whether “fact of injury” has been established.⁶ There are two components involved in establishing the fact of injury. 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.⁷ Second, the employee must submit evidence, generally only in the form of probative medical evidence, to establish that the employment incident caused a personal injury.⁸ An employee may establish that the employment incident occurred as alleged but fail to show that his or her disability or condition relates to the employment incident.⁹

Whether an employee sustained an injury in the performance of duty requires the submission of rationalized medical opinion evidence.¹⁰ The opinion of the physician must be based on a complete factual and medical background of the employee, must be one of reasonable medical certainty, and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the employee.¹¹ The weight of the medical evidence is determined by its reliability, its probative value, its convincing quality, the care of analysis manifested and the medical rationale expressed in support of the physician’s opinion.¹²

ANALYSIS

The Board finds that this case is not in posture for a decision.

³ 5 U.S.C. §§ 8101-8193.

⁴ *J.P.*, 59 ECAB 178 (2007); *Joseph M. Whelan*, 20 ECAB 55, 58 (1968).

⁵ *G.T.*, 59 ECAB 447 (2008); *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

⁶ *S.P.*, 59 ECAB 184 (2007); *Alvin V. Gadd*, 57 ECAB 172 (2005).

⁷ *Bonnie A. Contreras*, 57 ECAB 364 (2006); *Edward C. Lawrence*, 19 ECAB 442 (1968).

⁸ *David Apgar*, 57 ECAB 137 (2005); *John J. Carlone*, 41 ECAB 354 (1989).

⁹ *T.H.*, 59 ECAB 388 (2008); *see also Roma A. Mortenson-Kindschi*, 57 ECAB 418 (2006).

¹⁰ *See J.Z.*, 58 ECAB 529 (2007); *Paul E. Thams*, 56 ECAB 503 (2005).

¹¹ *I.J.*, 59 ECAB 408 (2008); *Victor J. Woodhams*, 41 ECAB 465 (2005).

¹² *James Mack*, 43 ECAB 321 (1991).

Proceedings under FECA are not adversarial in nature, and OWCP is not a disinterested arbiter.¹³ While the claimant has the responsibility to establish entitlement to compensation, OWCP shares responsibility in the development of the evidence. It has the obligation to see that justice is done.¹⁴ Once OWCP undertakes to develop the medical evidence further, it has the responsibility to do so in a proper manner.¹⁵ In this case, it undertook the development of medical evidence when it referred appellant to the district medical adviser for evaluation. Accordingly, OWCP had an obligation to secure a report that was based upon an accurate medical record and that addressed the relevant issue.

In the prior decision, the Board found that the medical adviser's report was insufficient to support OWCP's August 3, 2011 denial decision and remanded the case for further development of the medical evidence. The medical adviser noted that x-rays were not available and he recommended that the case be referred to a second opinion physician to determine whether appellant had a diagnosed condition.

On remand, appellant submitted a report from her treating physician, Dr. Beavers. OWCP requested in a letter dated August 20, 2012 that appellant provide a medical report from her treating physician which provided a specific diagnoses and an opinion explaining how the condition was causally related to the May 9, 2011 employment incident. The Board finds that the August 20, 2012 developmental letter to appellant did not fulfill OWCP's obligation to assist in the development of medical evidence as directed by the Board on the prior appeal. OWCP did not develop the medical evidence by referral to a second opinion physician or obtain x-ray evidence for review.¹⁶ On remand, it should refer appellant to a second opinion physician for examination and evaluation, including x-ray evaluation. After such further development as deemed necessary, OWCP should issue a merit decision on appellant's claim.

CONCLUSION

The Board finds that the case is not in posture for a decision as to whether appellant sustained an injury to her left upper back on May 9, 2011.

¹³ *Vanessa Young*, 55 ECAB 575 (2004).

¹⁴ *Richard E. Simpson*, 55 ECAB 490 (2004).

¹⁵ *Peter C. Belkind*, 56 ECAB 580 (2005); *Melvin James*, 55 ECAB 406 (2004).

¹⁶ *See S.B.*, Docket No. 11-1332 (issued September 12, 2012).

ORDER

IT IS HEREBY ORDERED THAT the December 12, 2012 decision of the Office of Workers' Compensation Programs is set aside and remanded for further development consistent with the provisions of this decision.

Issued: May 14, 2013
Washington, DC

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

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

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