

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of MARY F. MALONE and U.S. POSTAL SERVICE,  
POST OFFICE, Hauppauge, NY

*Docket No. 99-1868; Submitted on the Record;  
Issued September 13, 2000*

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DECISION and ORDER

Before MICHAEL J. WALSH, A. PETER KANJORSKI,  
PRISCILLA ANNE SCHWAB

The issue is whether appellant has established that she sustained an injury in the performance of duty in November 1994, causally related to factors of her federal employment.

On October 21, 1997 appellant, then a 43-year-old clerk, filed a notice of traumatic injury and claim for continuation of pay/compensation (Form CA-1), alleging she sustained a herniated disc in November 1994 when she slipped on ice. Appellant did not stop work at that time. However, appellant was on light duty from December 18 to 30, 1996 and on January 4, 1997 appellant stopped work completely.

In a November 6, 1997 statement, the postmaster advised that appellant indicated that in September 1996 she was experiencing pain in her shoulder and that her doctor suggested she be on light duty. The postmaster indicated that he would need medical documentation as well as a note requesting light duty. Appellant provided a doctor's note requesting light duty on December 18, 1996. Appellant continued light duty until January 4, 1997 and, thereafter, did not return to work. The postmaster indicated appellant's family resided in Pennsylvania and appellant was attempting to transfer to a Pennsylvania Post Office. However, her attempts to secure a position were unsuccessful.

Accompanying her claim appellant submitted progress notes from Dr. Daniele J. Kenny, Board-certified in family practice, dated September 24, 1996 through March 20, 1997, a magnetic resonance imaging (MRI) scan dated August 29, 1997, a letter from Dr. Shafi Ahmad, a Board-certified psychiatrist and neurologist, dated September 1, 1997, a note from Ajay V. Berdia, Board-certified neurologist, dated October 15, 1997 and a note from Dr. Ahmad dated October 17, 1997. The progress notes from Dr. Kenny document appellant's chronic problems with her right shoulder, noting appellant was still symptomatic with pain in her neck and radiation to the right shoulder with occasional numbness in her arms. He diagnosed appellant with rotator cuff tendonitis impingement, chronic cervical sprain, with a possibility of a herniated disc. The MRI report revealed a herniation of the C5-6 disc, a small herniation of the

C6-7 with a bulging C2-3 disc and mild posterior bulging of the C3-4 disc. Dr. Ahmad's letter dated September 1, 1997 indicated that appellant suffered a complete mental breakdown and had been on sick leave since January 1997. He recommended that this leave be extended through October 1997. He indicated it was necessary for appellant to undergo long-term psychiatric treatment. Dr. Ahmad's note dated October 17, 1997 indicated that appellant suffered from severe anxiety as well as pain in the neck and shoulder due to a herniated disc and a torn tendon in the shoulder. He recommended appellant not return to work before December 15, 1997. The note from Dr. Berdia indicated appellant was given a soft neck collar for support.

By letter dated January 17, 1998, the Office of Workers' Compensation Programs requested a comprehensive report from appellant's physician, Dr. Kenny. The Office specifically requested a complete medical history, dates of examination, a detailed description of findings and the physician's opinion supported by a medical explanation as to how the reported incident caused or aggravated the claimed injury.

Appellant subsequently submitted a narrative statement, statements from a union representative and a coworker and various medical records. Appellant's narrative statement dated February 17, 1998 indicated that she reported her injury to an employing establishment's supervisor. The statement from the union representative dated November 2, 1997 indicated that appellant informed him in December 1994 that she fell in the parking lot of the employing establishment, but did not indicate when the incident occurred. The statement from the coworker, Ms. Mary Cuozza, dated February 18, 1998 indicated that appellant complained about neck and shoulder pain at the end of 1994 and that appellant noted she fell in the employing establishment parking lot. Ms. Cuozza did not mention a date of the incident.

The various medical records submitted included progress notes from November 29, 1994 to March 14, 1997, a cervical spine x-ray dated June 25, 1996, medical reports from Dr. Leon Finkelstein, a Board-certified orthopedic surgeon, dated August 5 and December 16, 1996, notes from Dr. Kenny dated September 24, 1996 to March 20, 1997, an MRI report dated August 29, 1997, office notes from Dr. Ranjan Sachdev, a Board-certified orthopedic surgeon, dated November 13 through December 15, 1997 and a medical note from Dr. Ahmad dated March 12, 1998 and a medical report and progress notes dated October 31, 1997 and February 9, 1998 from Dr. Barry J. Pollack, a neurosurgeon. The various progress notes<sup>1</sup> indicated shoulder pain and stiffness, but did not mention the etiology of the pain. The earliest treatment notes from November 29, 1994 list right shoulder pain of "uncertain etiology." The cervical spine x-ray dated June 25, 1996 noted mild degenerative changes at the C5-6 level. The medical report from Dr. Finkelstein dated August 5, 1996 diagnosed appellant with chronic cervical and shoulder sprain. He stated that appellant presented with complaints of injuring her upper back and right shoulder at work two years ago. Dr. Finkelstein noted that appellant reported slipping on some ice. His December 16, 1996 report indicated that appellant required physical therapy for the right shoulder. Dr. Kenny's notes dated September 24, 1996 through March 20, 1997 document appellant's persistent pain. Dr. Pollack's report dated February 9, 1998 indicated appellant's pain persisted in her neck and right shoulder but did not mention the etiology of the injury. Dr. Pollack's notes of October 31, 1997 and February 9, 1998 indicated that appellant had a

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<sup>1</sup> The physician's signature on the progress notes is illegible.

herniated cervical disc and that appellant may require surgery. The MRI of the right shoulder dated August 29, 1997 indicated a full thickness tear of the supraspinatus tendon. Dr. Sachdev's notes from December 15, 1997 indicated that appellant had a fall approximately three years ago and had persistent complaints of right shoulder and cervical neck pain. Dr. Ahmad's report dated March 12, 1998 indicated that appellant was diagnosed with post-traumatic stress disorder and was being treated for injuries to her neck and shoulder due to a fall in the parking lot of her place of employment. He indicated appellant was unable to report her injury timely because she feared retaliation from her supervisor.

In a decision dated April 22, 1998, the Office denied appellant's claim as the evidence was not sufficient to establish that appellant sustained the alleged injury in November 1994 as required by the Federal Employees' Compensation Act.<sup>2</sup> The Office found that the initial evidence of file was insufficient to establish that appellant actually experienced the accident, event, or employment factor at the time, place and in the manner alleged.

Appellant requested a hearing before an Office hearing representative. The hearing was held on November 18, 1998.

Subsequent to the hearing, the employing establishment submitted photographs depicting appellant with the postmaster at a Christmas party.

Thereafter, appellant submitted a narrative statement as well as additional medical records. The narrative statement dated February 6, 1999 disputed the statement made by the employing establishment and indicated that she notified her supervisor of the incident but failed to pursue a claim at that time because she was fearful of the postmaster and potential retaliation by management. The medical records included a report from Dr. Berdia, a neurologist, dated November 23, 1997, which related a history of a fall on ice at work about two and one half years earlier and indicated in an addendum that appellant's fall two and one half years ago could be the cause of her symptoms.

Dr. Charles J. Court, a pain management specialist, prepared December 1 and December 23, 1998 reports, noted a history of appellant's injuries, indicated appellant sustained a cervical disc herniation and rotator cuff repair and opined that the injuries were work related. Dr. Pollack's note dated December 1, 1998 diagnosed appellant with a spurring and disc degeneration at C6, which was asymptomatic until appellant's fall in November 1994. He indicated that fall was the primary cause of appellant's condition.

By decision dated February 17, 1999, the hearing representative affirmed the Office's April 22, 1998 decision.

The Board finds that appellant has failed to establish that she sustained an injury in the performance of duty, causally related to factors of her federal employment.

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<sup>2</sup> 5 U.S.C. §§ 8101-8193.

An employee seeking benefits under the Act has the burden of establishing 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 filed within the applicable time limitation 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 is 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 occupational disease.<sup>4</sup>

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.<sup>5</sup> In some traumatic injury cases this component can be established by an employee’s uncontroverted statement on the Form CA-1.<sup>6</sup> An alleged work incident does not have to be confirmed by eyewitnesses in order to establish that an employee sustained an injury in the performance of duty, but the employee’s statement must be consistent with the surrounding facts and circumstances and his subsequent course of action.<sup>7</sup> A consistent history of the injury as reported on medical reports to the claimant’s supervisor and on the notice of injury can also be evidence of the occurrence of the incident.<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, if otherwise unexplained, cast sufficient doubt on an employee’s statements in determining whether a *prima facie* case has been established.<sup>9</sup> Although an employee’s statement alleging that an injury occurred at a given time and in a given manner is of great probative value and will stand unless refuted by strong or persuasive evidence,<sup>10</sup> an employee has not met this burden when there are inconsistencies in the evidence such as to cast serious doubt upon the validity of the claim.<sup>11</sup>

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<sup>3</sup> *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

<sup>4</sup> *Daniel J. Overfield*, 42 ECAB 718, 721 (1991).

<sup>5</sup> *Elaine Pendleton*, *supra* note 3.

<sup>6</sup> *John J. Carlone*, 41 ECAB 354 (1989).

<sup>7</sup> *Rex A. Lenk*, 35 ECAB 253, 255 (1983).

<sup>8</sup> *Id.* at 255-56.

<sup>9</sup> *Dorothy M. Kelsey*, 32 ECAB 998 (1981).

<sup>10</sup> *Robert A. Gregory*, 40 ECAB 478 (1989).

<sup>11</sup> *Joseph A. Fournier*, 35 ECAB 1175 (1984).

The second component is whether the employment incident caused a personal injury and generally can be established only by medical evidence. To establish a causal relationship between the condition, as well as any attendant disability claimed and the employment event or incident, the employee must submit rationalized medical opinion evidence, based on a complete factual and medical background, supporting such a causal relationship.<sup>12</sup>

In the present case, appellant filed a claim in October 1997 alleging that she was injured when she fell on ice at the employing establishment in November 1994. However, appellant did not stop work at the time of the alleged injury, nor did she immediately seek medical treatment for the injury. While there are medical treatment notes beginning November 29, 1994 noting appellant's treatment for shoulder pain, these most contemporaneous records either do not address a history of injury or state that it was of uncertain etiology. The first mention of a fall at work seems to be in Dr. Finkelstein's August 5, 1996 report, which vaguely indicated that appellant fell on ice at work two years earlier.

There were no witnesses to the alleged injury and no contemporaneous statement from appellant's supervisor indicating she was informed of the incident. A coworker, Ms. Cuozza, provided a statement, which indicated she remembered appellant complaining of neck and shoulder pain around the end of 1994; however, she could not remember the date of the injury. There is also a similar statement from a union steward dated November 2, 1997. Appellant indicated that the delay in filing the claim was due to the fact that she was fearful of the postmaster and potential retaliation against her for filing the claim. However, the record does not corroborate such an assertion. Rather in a letter dated August 30, 1995, the postmaster gave appellant a favorable letter of recommendation. The lack of any mention of a work incident in November 1994 in the most contemporaneous evidence is not overcome by subsequent nonspecific statements regarding the claimed incident.<sup>13</sup> These circumstances of late notification, lack of confirmation and inconsistencies in the date of injury cast serious doubt on appellant's *prima facie* claim.

For these reasons, the Board finds that appellant has not established that the claimed incident occurred as alleged. Consequently, appellant has not met her burden of proof in establishing her claim.

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<sup>12</sup> See 20 C.F.R. § 10.110(a); *John M. Tornello*, 35 ECAB 234 (1983).

<sup>13</sup> The Board has consistently held that contemporaneous evidence is entitled to greater probative value than later evidence; see *Katherine A. Williamson*, 33 ECAB 1696 (1982); *Arthur N. Meyers*, 23 ECAB 111 (1971).

The decision of the Office of Workers' Compensation Programs dated February 17, 1999 is affirmed.

Dated, Washington, DC  
September 13, 2000

Michael J. Walsh  
Chairman

A. Peter Kanjorski  
Alternate Member

Priscilla Anne Schwab  
Alternate Member