

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

S.M., Appellant)

and)

U.S. POSTAL SERVICE, POST OFFICE,)
New York City, NY, Employer)

**Docket No. 08-1091
Issued: December 17, 2008**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

DAVID S. GERSON, Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On March 4, 2008 appellant filed a timely appeal from a December 11, 2007 merit decision of an Office of Workers' Compensation Programs' hearing representative who affirmed a July 23, 2007 decision finding that appellant did not sustain an injury in the performance of duty. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2), the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant met her burden of proof in establishing that she sustained a traumatic injury on May 23, 2007.

FACTUAL HISTORY

On May 30, 2007 appellant, then a 40-year-old transportation security screener, filed a May 23, 2007 traumatic injury claim. She alleged that, despite advising her supervisor that she had a 25-pound weight restriction and that provisions were made to assist her with taking equipment off a truck, she moved items that weighed more than 25 pounds. Appellant

experienced severe muscle spasms in her neck, shoulders and the right wrist area. She stopped work on May 24, 2007. The employing establishment controverted the claim.

In a May 25, 2007 report, a Dr. Manuel Talavera advised that he treated appellant for injuries related to a February 17, 2007 motor vehicle accident.¹ Appellant presented to his office on May 22, 2007 with neck pain described as a “constant sharp pain with burning sensation by the base of my neck.” Dr. Talavera diagnosed cervicobrachial syndrome, thoracic pain, sciatic neuritis and spasm of muscles. He opined that appellant’s injuries were the direct result of her February 17, 2007 motor vehicle accident.

In a letter dated June 11, 2007, Faye Maldonado, a human resource management specialist, controverted the claim as it was not filed the claim until 7 days after the alleged incident and that appellant did not seek medical attention until 12 days after the incident. She contended that the medical evidence did not show a causal relationship between her condition and appellant’s federal employment.

In a letter dated June 18, 2007, the Office advised appellant that the evidence was insufficient to establish that she actually experienced the alleged incident of May 23, 2007. It requested that she provide a statement explaining why she did not report the injury to her supervisor for seven days and why she delayed seeking medical attention. Appellant was also advised to provide a detailed report from a physician which contained the dates of examination and treatment, a history of injury, a detailed description of any findings, the results of all x-rays and laboratory tests, a diagnosis and the physician’s opinion as to how the reported work incident caused the claimed injury. The Office explained that a physician’s opinion was crucial to her claim and provided 30 days within which to submit the requested information.

The Office received a May 30, 2007 report from Dr. Talavera, who noted that appellant was off work due to a previous injury and had a 25-pound weight restriction. Dr. Talavera indicated that appellant “was instructed by her supervisors to do her collection assignment even though that would be outside her restrictions.” He advised that appellant expressed her concerns but performed her required duties. Thereafter, appellant experienced muscle spasms and fatigue from the waist up as well as headaches and pain radiating into her shoulders and upper extremities. Dr. Talavera diagnosed cervicobrachial syndrome, sciatic neuritis, cervical sprain/strain, thoracic sprain/strain, lumbar sprain/strain and spasm of muscles. He opined that appellant’s injuries were a direct result of exceeding her 25-pound weight restriction on May 23, 2007. In a June 7, 2007 disability certificate, Dr. Talavera advised that appellant was disabled and unable to work until June 13, 2007.

The Office also received progress notes dated June 25 to July 2, 2007 from an individual whose signature is illegible.

By decision dated July 23, 2007, the Office denied appellant’s claim on the grounds that she did not establish an injury as alleged. It found that the evidence was insufficient to show that the claimed event occurred as alleged.

¹ The record reflects that appellant has a separate claim for neck, head, shoulder, hip, thigh, back, knee and leg conditions sustained in a February 17, 2007 motor vehicle accident under claim No. xxxxxx994.

On August 16, 2007 appellant requested a review of the written record.

The Office received progress notes dated July 9 to November 14, 2007, which detailed appellant's course of treatment for her back and neck pain. While some of the reports appear to be from Dr. Talavera, it is unclear who signed other reports. It also received copies of previously received reports.

In a September 6, 2007 report, Dr. James M. Liguori, a Board-certified neurologist, provided range of motion findings and noted that appellant was injured at work on May 23, 2007. Appellant related that "she was lifting bins that weigh upwards of 100 pounds, while at work, injuring her neck and lower back." Dr. Liguori noted that appellant was receiving physical therapy and chiropractic care. He diagnosed cervical and lumbosacral radiculopathy and recommended diagnostic studies of the cervical and lumbar spine. Dr. Liguori saw appellant on October 1, 2007 and recommended additional studies and physical therapy.

By decision dated December 11, 2007, the Office hearing representative affirmed the July 23, 2007 decision, finding that appellant did not submit a factual statement to support her claim.

LEGAL PRECEDENT

An employee seeking benefits under the Federal Employees' Compensation Act² 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 timely filed within the applicable time limitation period of the Act³ and that an injury was sustained in the performance of duty.⁴ These are the essential elements of each compensation claim, regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.⁵

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. An 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.⁶ 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

² 5 U.S.C. §§ 8101-8193.

³ *Joe D. Cameron*, 41 ECAB 153 (1989).

⁴ *James E. Chadden, Sr.*, 40 ECAB 312 (1988).

⁵ *Delores C. Ellyett*, 41 ECAB 992 (1990).

⁶ *Charles B. Ward*, 38 ECAB 667 (1987).

consistent with surrounding facts and circumstances and his or her subsequent course of action. 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 a *prima facie* case.⁷ However, 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.⁸

The second component is whether the employment incident caused a personal injury and generally this can be established only by medical evidence.⁹ The employee must also submit sufficient evidence, generally only in the form of medical evidence, to establish that the employment incident caused a personal injury.¹⁰ The medical evidence required to establish causal relationship is usually rationalized medical evidence. Rationalized medical opinion evidence is medical evidence which includes a physician's rationalized opinion on the issue of whether there is a causal relationship between the claimant's diagnosed condition and the implicated employment factors. The opinion of the physician must be based on a complete factual and medical background of the claimant, 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 claimant.¹¹

ANALYSIS

The Office found that appellant did not establish that she experienced the claimed May 23, 2007 employment incident, as alleged.

Appellant alleged that she experienced muscle spasms in her neck shoulders and right wrist area on that day after taking equipment off the back of a truck. The employing establishment controverted the claim because she did not file a claim until 7 days after the alleged injury or seek medical attention for 12 days. However, the Board finds that appellant provided a timely claim for injury within one week of the May 23, 2007 incident. There are no inconsistencies concerning her description of injury on that date. Further, Dr. Talavera's May 25, 2007 report, contradicts the contention that appellant delayed in seeking medical attention for 12 days after the incident. Rather, appellant was treated two days following the incident. The employing establishment did not dispute that she, as part of her duties, removed items

⁷ *Merton J. Sills*, 39 ECAB 572, 575 (1988).

⁸ *Thelma S. Buffington*, 34 ECAB 104 (1982).

⁹ *See John J. Carlone*, 41 ECAB 354, 357 (1989).

¹⁰ *Id.* For a definition of the term "traumatic injury," see 20 C.F.R. § 10.5(ee).

¹¹ *Id.*

from a truck on May 23, 2007. The Board finds that the first component of fact of injury, the claimed incident -- lifting equipment, occurred as alleged.¹²

However, the medical evidence is insufficient to establish that the employment incident caused an injury. The medical reports of record do not establish that any lifting of equipment caused a personal injury on May 23, 2007. The medical evidence contains no firm diagnosis, no rationale¹³ and no explanation of the mechanism of injury regarding the May 23, 2007 employment incident.

On May 25, 2007 Dr. Talavera diagnosed cervicobrachial syndrome, sciatic neuritis, cervical sprain/strain, thoracic sprain/strain, lumbar sprain/strain and spasm of muscles. He opined, however, that these conditions were related to her February 17, 2007 motor vehicle incident. This report did not address the May 23, 2007 employment incident. In a May 30, 2007 report, Dr. Talavera indicated that appellant was out of work due a previous injury and had a 25-pound weight restriction. He stated that appellant related to him that she “was instructed by her supervisors to do her collection assignment even though that would be outside her restrictions.” Dr. Talavera repeated the diagnosis contained in his May 25, 2007 report and opined that appellant’s injuries were a direct result of lifting more than her 25-pound weight restriction on May 23, 2007. However, he did not provide sufficient explanation in support of his conclusion, particularly in light of his report of May 25, 2007 indicating that appellant’s symptoms and diagnoses were related to a February 17, 2007 motor vehicle accident. Dr. Talavera did not fully address the history of her preexisting condition or explain how lifting required on May 23, 2007 would cause or contribute to her disability or diagnosed conditions. Without any reasoning to support his conclusion, this report is insufficient to establish appellant’s claim.¹⁴ For example, Dr. Talavera did not explain the reasons why any particular employment activity on May 23, 2007 would cause or aggravate a diagnosed condition. His June 7, 2007 disability certificate did not provide an opinion addressing whether any diagnosed condition was caused or aggravated by the May 23, 2007 incident.

In a September 6, 2007 report, Dr. James M. Liguori, a Board-certified neurologist, provided range of motion findings and noted that appellant related that she was injured at work on May 23, 2007. He indicated that she related that “she was lifting bins that weigh upwards of 100 pounds, while at work, injuring her neck and lower back.” However, Dr. Liguori related the history provided by appellant without any explanation of causal relationship. To the extent that this may be considered an opinion on causal relationship, he did not provide medical rationale addressing how lifting items at work on May 23, 2007 would cause or aggravate the diagnosed medical conditions.

Other medical reports submitted by appellant did not address causal relationship between diagnosed medical conditions and the May 23, 2007 incident.

¹² See *George Randolph Taylor*, 6 ECAB 986, 988 (1954) (where the Board found that a medical opinion not fortified by medical rationale is of little probative value).

¹³ It is not established, however, that any lifting performed that day exceeded appellant’s physical limitations.

¹⁴ *Id.*

As the medical evidence does not provide sufficient medical reasoning explaining how the May 23, 2007 lifting incident caused or aggravated a low back injury, appellant has not met her burden of proof to establish her claim.¹⁵

CONCLUSION

The Board finds that appellant has not met her burden of proof in establishing that she sustained an injury on May 23, 2007, as alleged.

ORDER

IT IS HEREBY ORDERED THAT the December 11 and July 23, 2007 decisions of the Office of Workers' Compensation Programs are affirmed, as modified.

Issued: December 17, 2008
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

¹⁵ The Board notes that appellant subsequently submitted additional evidence to support her claim. The Board's jurisdiction, however, is limited to reviewing the evidence that was before the Office at the time of its final decision. The Board therefore has no jurisdiction to review any evidence submitted to the record after the Office's December 11, 2007 decision. 5 U.S.C. § 501.2(c). This decision does not preclude appellant from seeking to have the Office consider such evidence pursuant to a reconsideration request filed with the Office.