United States Department of Labor
Employees' Compensation Appeals Board

D.P., Appellant	)	
and	)	**Docket No. 08-1903**
	)	**Issued: April 15, 2009**
U.S. POSTAL SERVICE, POST OFFICE, Los Angeles, CA, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On June 27, 2008 appellant filed a timely appeal from the Office of Workers' Compensation Programs' merit decision dated March 20, 2008 denying her traumatic injury claim. 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 that she sustained an injury on September 21, 2007 in the performance of duty.

FACTUAL HISTORY

On September 21, 2007 appellant, then a 39-year-old letter carrier, filed a traumatic injury claim alleging that she sustained injuries to her left wrist, arm, shoulder and neck that day when her supervisor assaulted her on the workroom floor. She indicated that her supervisor "grabbed to take an ink pen from the left shirt pocket. A struggle ensued. She began to jerk me back and forth to get my pen from my pocket." On the claim form, the employing establishment

stated that appellant grabbed the supervisor's arm. She stopped work on September 22, 2007 and has not returned.

In a September 21, 2007 report, appellant advised that she sustained injury after struggling with Misty Berry, her supervisor, for her pen. When Ms. Berry reached for appellant's pen from her shirt pocket she grabbed Ms. Berry's arm. Appellant indicated that they struggled for the pen and that Ms. Berry assaulted her. The accident report noted that appellant was diagnosed with a neck strain when she was examined by a physician at U.S. Health Works that day. In a September 21, 2007 report, Dr. Glenn Ault, a Board-certified colon and rectal surgeon with U.S. Health Works, diagnosed cervical strain. He noted that appellant wore a brace on her left wrist due to an April 30, 2007 injury. Dr. Ault reported a history of injury as appellant being assaulted by a supervisor at work. Appellant was grabbed by her supervisor, who was trying to take a pen from her pocket and they twisted/grabbed for a few moments. Dr. Ault noted that, although appellant stated that her supervisor tried to grab a pen from her pocket, it was unclear as to how appellant's neck, arm, wrist were injured due to trauma.

In a September 21, 2007 investigative memorandum, Supervisor Gerald N. Padilla listed his findings: "a/supervisor (acting supervisor) Ms. Berry reached out to pull an ink pen from [appellant's] shirt pocket. Witnesses E. Villegas[, a union steward,] and J[ose] Martinez [, a carrier,] said [appellant] then reached out and grabbed A/supervisor's Ms. Berry's arm to keep her from taking the pen. [Appellant] had just been denied to change her reporting time by Ms. Berry and she did not immediately report the injury until she left work. Employee states that she was assaulted by Ms. Berry but witness's state otherwise."

In a September 22, 2007 investigative interview, Ms. Berry stated that on September 21, 2007 she had reached into appellant's pocket to get a pen but denied being involved in a physical altercation. When she reached for appellant's pen, appellant flinched back said "Misty" and covered her chest. Ms. Berry denied touching appellant. She stated that when appellant flinched back, appellant grabbed her left hand with both of her hands. Ms. Berry denied gaining possession of appellant's pen and stated carrier Martinez handed her his pen. She indicated that she had been friends with appellant for years and that they normally share things.

In a September 22, 2007 statement, Mr. Villegas stated that appellant had just been denied a change in schedule by Ms. Berry. As he was approaching Ms. Berry's desk, he saw Ms. Berry reach into appellant's upper left shirt pocket and attempt to grab something. Appellant pulled away and said "don't do that." Mr. Villegas indicated that it appeared to him that Ms. Berry's hand remained as she continued to grab at something. Appellant again said "don't do that" and she took Ms. Berry's hand out of her pocket. Mr. Villegas stated that Ms. Berry then asked for a pen and Mr. Martinez, who was seated in front of Ms. Berry and witnessed the event, offered Ms. Berry a pen. He indicated that Ms. Berry had started searching for a pen in her drawer.

In a September 24, 2007 statement, Mr. Martinez stated that he was standing by Ms. Berry's desk on September 21, 2007 and saw appellant approach Ms. Berry for some kind of paper work. As Ms. Berry reached for appellant's pen, without looking, she grabbed appellant's left top pocket. Mr. Martinez stated that appellant pulled away and said, "You are hurting me." He indicated that he then walked away to get something from the breakroom.

By letter dated October 10, 2007, the Office advised appellant that the evidence received was insufficient to establish her claim. It requested a comprehensive medical report from a treating physician which provided a reasoned explanation as to how the September 21, 2007 incidents contributed to her claimed injury.

In a September 24, 2007 report, Dr. Jin Xiao, a physician Board-certified in occupational medicine with Kaiser Permanente, noted that appellant was previously seen for chronic neck and shoulder pain. Appellant noted that she got into a verbal altercation with her supervisor regarding her work assignment on September 21, 2007. She alleged that her supervisor attempted to get a pen from the pocket of her shirt but she refused and held her pen. They went back and forth a few times. Appellant claimed that she started to have severe pain in her neck radiating to her left shoulder and arm. Dr. Xiao noted that appellant first reported a verbal altercation with her supervisor which then became somewhat physical per her history. He advised that altercations could cause someone to have physical discomfort or pain, particularly neck pain. Dr. Xiao opined that "unless proof of the incident did not occur, appellant probably suffered from exacerbation of chronic neck pain and sustained mild cervical strain due to this incident." He opined that appellant was temporary totally disabled for two days followed by light duty with work restrictions. On January 29, 2008 Dr. Xiao advised that appellant's cervical strain had resolved with no residuals.

By decision dated March 20, 2008, the Office denied appellant's claim finding that the September 21, 2007 incident did not occur in the manner alleged by appellant. It was not accepted that an assault occurred as alleged and the medical evidence did not contain an accurate description of the injury.

LEGAL PRECEDENT

An employee seeking benefits under the Federal Employees Compensation Act[1] 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, that an injury was sustained while 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.[2] These are the essential elements of each and every compensation claim regardless of whether the claim is predicated on a traumatic injury or an occupational disease.[3]

To determine whether an employee sustained a traumatic injury in the performance of duty, the Office must determine whether fact of injury is established. First, an employee has the burden of demonstrating the occurrence of an injury at the time, place and in the manner alleged, by a preponderance of the reliable, probative and substantial evidence.[4] Second, the employee

[1] 5 U.S.C. §§ 8101-8193.

[2] *Anthony P. Silva*, 55 ECAB 179 (2003).

[3] *See Ellen L. Noble*, 55 ECAB 530 (2004).

[4] *Delphyne L. Glover*, 51 ECAB 146 (1999).

must submit sufficient evidence, generally only in the form of medical evidence, to establish a causal relationship between the employment incident and the alleged disability and/or condition for which compensation is claimed.[5]

Verbal or physical altercations that occur because of disputes over work matters are covered as arising out of employment.[6] There is no provision in the Act authorizing denial of compensation because the employee was an aggressor or initiator or otherwise did something imputing culpability on his or her part.[7]

ANALYSIS

On September 21, 2007 there was physical contact between appellant and Ms. Berry. The evidence establishes that Ms. Berry reached into appellant's shirt pocket to get a pen. This was verified by Ms. Berry and the other witnesses present, Mr. Villegas and Mr. Martinez. The evidence supports that appellant grabbed Ms. Berry's arm or hand to keep her from taking the pen. The evidence supports that this physical contact arose from the employment in that appellant and Ms. Berry had just completed a discussion regarding appellant's work schedule. There is no evidence that any animosity or dispute giving rise to the physical contact was imported into the workplace from appellant's domestic or private life.[8] The Board finds that the incident in which Ms. Berry sought to take a pen from appellant's pocket arose in the course of employment. Appellant has established that she had physical contact with Ms. Berry. The Board will review the medical evidence to determine whether appellant established that she sustained an injury as a result of the employment incident. In a September 21, 2007 report, Dr. Ault diagnosed cervical strain but rendered no opinion on causation. Rather, he advised it was unclear as to how appellant's neck, arm or wrists were injured when her supervisor tried to grab a pen from her pocket. Dr. Xiao noted that appellant's description of a verbal altercation became physical when the supervisor attempted to get a pen from the pocket of appellant's shirt. While Dr. Xiao opined that appellant "probably" suffered exacerbation of chronic neck pain and sustained mild cervical strain due to this incident, his opinion is based in part on an inaccurate factual history as it has not been established that appellant and Ms. Berry struggled by going "back and forth a few times." His opinion is of diminished probative value.[9] Furthermore,

[5] *Gary J. Watling*, 52 ECAB 278 (2001); *Shirley A. Temple*, 48 ECAB 404, 407 (1997).

[6] *Allan B. Moses*, 42 ECAB 575 (1991).

[7] *Barry Himmelstein*, 42 ECAB 423 (1991); *Robert L. Williams*, 1 ECAB 80 (1948). Section 8102(a) provides that compensation is not payable if the injury was caused by willful misconduct or by the employee's intention to bring about the injury or death of himself or of another, but these affirmative defenses must be invoked by the Office in its original adjudication of a claim. *Latanya M. Cooper*, 51 ECAB 238 (1999).

[8] *See A.K.*, 58 ECAB ___ (Docket No. 06-626, issued October 17, 2006) (when animosity or a dispute which culminates in an assault is imported into the employment from a claimant's domestic or private life, the assault does not arise out of employment).

[9] *See M.W.*, 57 ECAB 710 (2006) (medical conclusions based on an inaccurate or incomplete factual history are of diminished probative value).

Dr. Xiao's opinion is also of limited probative value as he couched his opinion in speculative terms noting that appellant "probably" had a mild cervical strain due to the incident.[10]

No other medical evidence provides a reasoned explanation regarding how Ms. Berry's reaching into appellant's pocket on September 21, 2007 caused or aggravated a diagnosed medical condition. Consequently, the medical evidence is insufficient to establish that the September 21, 2007 work incident caused an injury.

CONCLUSION

The Board finds the evidence establishes that Ms. Berry had physical contact with appellant on September 21, 2007 when she reached into appellant's shirt pocket to get a pen. However, the medical evidence is insufficient to establish that this incident caused an injury.[11]

ORDER

IT IS HEREBY ORDERED THAT the March 20, 2008 decision of the Office of Workers' Compensation Programs is affirmed as modified.

Issued: April 15, 2009
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

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

[10] *See Leonard J. O'Keefe*, 14 ECAB 42, 48 (1962) (where the Board held that medical opinions which are speculative or equivocal in character have little probative value).

[11] Following the Office's March 20, 2008 decision, appellant submitted additional evidence to the Office. However, the Board may not consider such evidence as its review is limited to the evidence that was in the record at the time of the Office's decision. *See* 20 C.F.R. § 501.2(c).