

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

P.T., Appellant

and

**DEPARTMENT OF THE TREASURY,
BUREAU OF PRINTING & ENGRAVING,
Fort Worth, TX, Employer**

**Docket No. 09-728
Issued: December 11, 2009**

Appearances:

*Ditty S. John, Esq., for the appellant
Office of Solicitor, for the Director*

Case Submitted on the Record

DECISION AND ORDER

Before:

DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On January 21, 2009 appellant filed a timely appeal from an October 22, 2008 decision of the Office of Workers' Compensation Programs which affirmed a March 3, 2008 decision denying her claim. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits in this case.

ISSUE

The issue is whether appellant met her burden of proof to establish that she sustained an injury in the performance of duty on October 16, 2007.

FACTUAL HISTORY

On December 14, 2007 appellant, then a 59-year-old secretary, filed a traumatic injury claim alleging that on October 16, 2007 she received a flu shot in an employing establishment sponsored program. She had complications as a result of the flu shot which caused injury to her left arm, lower abdomen, heart, right foot and toes resulting in several surgeries. Appellant stopped work on October 19, 2007.

Appellant submitted an e-mail from the employing establishment related to administration of flu vaccines. Employees were advised that flu shots were available and listed the schedule under which they would be administered at the employing establishment health unit. A leaflet concerning the flu vaccine was also received, together with a patient acknowledgement regarding the flu vaccine and clinical notes pertaining to the injection to appellant's left deltoid. The Office also received an injection record for allergies.

An October 19, 2007 treatment note from Dr. Randall Perkins, a Board-certified family practitioner, noted that appellant received a flu shot on October 16, 2007. Appellant was seen on October 17, 2007 for a 102 degree fever, aching, nausea and a severe right headache.

By letter dated January 7, 2008, the Office informed appellant of the evidence needed to support her claim. It requested that she submit additional evidence within 30 days.

The Office received medical records from the Medical Center of Arlington dated October 21 2007 to January 2, 2008. Appellant was hospitalized on October 22, 2007, underwent several medical procedures and was placed in intensive care. In an October 21, 2007 report, Dr. Maamoun Abou-Qamar, a Board-certified physiatrist and treating physician, advised that appellant was "admitted for sepsis, after having a flu shot in her left arm. Patient ended up having more than one organ failure including the lung and ended up intubated." Appellant was found to have necrotizing fasciitis and underwent surgery. Dr. Abou-Qamar diagnosed septic shock, respiratory failure, acute renal failure-resolved, necrotizing fasciitis status post intubation and post cholecystectomy, fever, leukocytosis, tachycardia, hypotension, elevated liver function tests, acalculous cholecystectomy, open wound, metabolic acidosis, rhabdomyolysis, systemic inflammatory response syndrome, mitral regurgitation, tricuspid regurgitation and mild concentric left ventricular hypertrophy. In a separate report of October 21, 2007, he noted that appellant was "in her usual state of health until five days ago when she had her flu shot at work and the next day started having pain in the site of shot. It started radiating to the shoulder and elbow. Patient's pain got worse and then after a day from that, started having fever, chills, and rigor."

In an October 22, 2007 report, Dr. Jason Harrison, a Board-certified surgeon, noted that "appellant was admitted with sepsis after cellulitis likely related to a flu shot." In a separate October 22, 2007 report, he indicated that appellant "received a flu-shot in the left upper deltoid. The patient had normal tenderness after the procedure. This became worse. The patient presented herself to [the medical center] and within a few hours the patient was septic and in need of immediate attention." Dr. Harrison noted findings which included massive necrotizing fasciitis of the left upper arm, shoulder and back. In an October 23, 2007 report, he noted that the left deltoid and upper arm areas were better but that appellant was developing blanching erythema and indurations along the left flank and back. Dr. Harrison performed an incision and drainage of the flank, with the incision being greater than 30 centimeters. On November 6, 2007 he noted that appellant underwent a laparoscopic cholecystectomy with intraoperative cholangiogram and a laparoscopic liver biopsy. Dr. Harrison noted that, during appellant's hospitalization in intensive care since October 21, 2007, she developed abnormal liver function studies due to her medications.

In a November 9, 2007 report, Dr. Frank Jon Senkowsky, a Board-certified surgeon, opined that appellant was a “59-year-old lady who was apparently in good state of health until five days prior to admission, on October 21[, 2007] when she had a flu shot. She apparently developed left shoulder and arm pain and was admitted with necrotizing fasciitis.” Appellant underwent several surgeries as well as a cholecystectomy for apparent acalculous cholecystitis. Dr. Senkowsky advised that appellant had some black toes and had dry gangrene following prolonged pressor use for treatment of sepsis. He noted that the dry gangrene was not particularly painful and there was no obvious infection but that she might ultimately need toe amputations. In a November 13, 2007 report, Dr. Harrison indicated that he performed a complicated closure of open wounds of the left upper extremity after appellant developed acalculous cholecystitis following her laparoscopic cholecystectomy and liver biopsy.

In a November 24, 2007 corrected report, Dr. Abou-Qamar noted that appellant was admitted on October 21, 2007 for “cellulitis after a flu shot, being necrotizing fasciitis, underwent extensive debridement and open wound by Dr. Harrison.” He advised that appellant went into septic shock and acute respiratory failure, acute renal failure, and was intubated. Dr. Abou-Qamar diagnosed necrotizing fasciitis, open wound, debridement and critical care myopathy and tachycardia. In a January 2, 2008 report, Dr. Senkowsky opined that appellant developed necrotizing fasciitis from a flu shot. He noted performing a transmetatarsal amputation on the right foot. The Office also received nurses’ notes and discharge papers dated December 15, 2007.

By decision dated March 3, 2008, the Office denied the claim for compensation. It found that appellant did not establish that she was injured in the performance of duty. The Office found that her participation in obtaining a flu vaccination was purely voluntarily, of personal benefit and had no bearing on her course of employment.

On March 27, 2008 appellant requested a telephonic hearing, which was held on July 11, 2008. She contended that her condition arose in the performance of duty. Appellant alleged that the necrotizing fasciitis (flesh eating bacteria) entered the injection site at the time the flu shot was administered. After receiving the flu shot, she was not feeling well, the next day. By Sunday, appellant had to go to the emergency room and was unable to remember anything for over two weeks. She was placed in intensive care and her vital organs stopped functioning. Appellant indicated that she had received flu shots for 15 years and never had any prior adverse reactions. She had to have five toes amputated and the tips of two toes on her left foot. Appellant had scars all down the left side of her body and lower abdomen and no longer had complete use of her arms. She believed that obtaining the flu shot through an agency sponsored health preventative program was in the performance of her duties. In a letter dated August 5, 2008, appellant reiterated that her claim should be accepted.

By decision dated October 22, 2008, an Office hearing representative affirmed the March 3, 2008 decision as modified. The Office hearing representative found that the evidence supported that the claimed events occurred. However, there was no medical evidence that provided a diagnosis which could be connected to the events.

LEGAL PRECEDENT

An employee seeking benefits under the Federal Employees' Compensation Act¹ 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 Act² and that an injury was sustained in the performance of duty.³ These are the essential elements of each compensation claim, regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.⁴

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. The second component is whether the employment incident caused a personal injury and generally this can be established only by medical evidence.⁵ 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.⁶ 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.⁷

ANALYSIS

Appellant alleged that she sustained multiple injuries to her left arm, lower abdomen, heart, right foot and toes and was forced to undergo several surgeries after receiving the flu shot as part of a voluntary program while in the performance of duty. The hearing representative properly found that appellant was in the performance of duty when the October 16, 2007 incident, the inoculation, occurred. This finding is consistent with Office procedures which state

¹ 5 U.S.C. §§ 8101-8193.

² *Joe D. Cameron*, 41 ECAB 153 (1989).

³ *James E. Chadden Sr.*, 40 ECAB 312 (1988).

⁴ *Delores C. Ellyet*, 41 ECAB 992 (1990).

⁵ *See John J. Carlone*, 41 ECAB 354, 357 (1989).

⁶ *Id.* For a definition of the term "traumatic injury," see 20 C.F.R. § 10.5(ee).

⁷ *D.E.*, 58 ECAB ____ (Docket No. 07-27, issued April 6, 2007).

that deleterious effects such as injury while undergoing periodic medical examination, reaction to agency-sponsored inoculation or disease contracted from instrumentation are compensable.⁸

The hearing representative, however, denied appellant's claim for compensation on the grounds that the medical evidence was not sufficient to establish that appellant's claimed conditions were causally related to the October 16, 2007 incident. However, the Board notes that the medical evidence submitted by appellant generally supports that she became ill and had to be hospitalized following administration of the shot.

The records reveal that appellant developed numerous conditions immediately after receiving the flu shot. On October 21, 2007 Dr. Abou-Qamar indicated that appellant was "admitted for sepsis, after having a flu shot in her left arm." He noted that she was found to have necrotizing fasciitis and had to undergo surgery. In separate reports also dated October 21 and November 24, 2007, Dr. Abou-Qamar noted that appellant was "in her usual state of health until five days ago when she had her flu shot at work and the next day started having pain in the site of shot. It started radiating to the shoulder and elbow. Patient's pain got worse and then after a day from that, started having fever, chills, and rigor." He advised that appellant was admitted on October 21, 2007 for cellulitis after a flu shot, being necrotizing fasciitis.

On October 22, 2007 Dr. Harrison noted that "appellant was admitted with sepsis after cellulitis likely related to a flu shot." He explained that appellant received a flu shot and later became septic and in need of immediate attention. Dr. Harrison determined that appellant had massive necrotizing fasciitis of the left upper arm, shoulder and back. In reports dated November 9, 2007 and January 2, 2008, Dr. Senkowsky noted that appellant was a "59-year-old lady who was apparently in good state of health until five days prior to admission, on October 21[, 2007] when she had a flu shot." He opined that appellant developed necrotizing fasciitis from a flu shot.

Although these reports are not sufficiently rationalized to meet appellant's burden of proof in establishing her claim, they stand uncontroverted in the record and are sufficient to require further development of the case.⁹ Further development, in a case involving an alleged reaction to an agency-sponsored inoculation, is also contemplated by Office procedures which provide that, "following appropriate development, all cases of this type should be referred to a [d]istrict [m]edical [a]dviser for an opinion on whether the condition claimed was causally related to the agency medical service."¹⁰

Proceedings under the Act are not adversarial in nature nor is the Office a disinterested arbiter. While appellant has the burden to establish entitlement to compensation, the Office shares responsibility in the development of the evidence. It has the obligation to see that justice is done.¹¹

⁸ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Performance of Duty*, Chapter 2.804.19(a) (March 1994).

⁹ *John J. Carlone, supra* note 5; *Horace Langhorne*, 29 ECAB 820 (1978).

¹⁰ *Supra* note 8 at 2.804.19(e).

¹¹ *John W. Butler*, 39 ECAB 852 (1988).

The Board will remand the case to the Office for referral of the evidence to an Office medical adviser and for an opinion regarding whether any of conditions that became manifest after the October 16, 2007 inoculation are causally related to the inoculation shot. Following this and any other further development as it deems necessary, the Office should issue a *de novo* decision.¹²

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the October 22, 2008 decision of the Office of Workers' Compensation Programs is set aside and remanded for further development in accordance with this decision of the Board.

Issued: December 11, 2009
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

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

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

¹² In view of the further development directed by the Board it is not necessary to address contentions on appeal by appellant's counsel. Appellant also submitted additional evidence on appeal. However, the Board may not consider new evidence for the first time on appeal. See 20 C.F.R. § 501.2(c).