

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

D.O., Appellant)	
)	
and)	
)	Docket No. 08-2003
)	Issued: March 23, 2009
U.S. POSTAL SERVICE, POST OFFICE, Union, NJ, Employer)	
)	
)	

Appearances:
James D. Muirhead, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

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

JURISDICTION

On July 14, 2008 appellant, through counsel, filed a timely appeal of the Office of Workers' Compensation Programs' merit decisions dated August 14, 2007 and April 24, 2008, finding that she did not sustain an injury in the performance of duty. 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 has established that she sustained an injury while in the performance of duty.

FACTUAL HISTORY

On November 9, 2005 appellant, then a 57-year-old distribution clerk, filed a claim for an occupational disease, file number xxxxxx456.¹ In September 2005, she first became aware of

¹ In 2003, appellant developed carpal tunnel syndrome for which she filed a claim file number xxxxxx934. The Office accepted the claim as employment related.

severe bilateral shoulder impingement syndrome and tendinitis with neck pain. On November 9, 2005 appellant first realized that her conditions were caused by sorting mail overhead on a repetitive basis.

By letter dated December 26, 2006, the Office advised appellant that the evidence submitted was insufficient to establish her claim. It requested additional factual and medical evidence. The Office requested a detailed description of the employment-related activities that she believed contributed to her condition and how long she performed such activities. It also requested a rationalized medical report from an attending physician which described her symptoms, results of examination and tests, diagnosis, treatment provided, the effect of treatment and opinion with medical reasons on whether the activities in her federal employment contributed to her condition. Appellant was afforded 30 days to submit the requested evidence. She did not respond.

By decision dated February 8, 2007, the Office denied appellant's claim. Appellant failed to submit factual and medical evidence establishing that she sustained an injury while in the performance of duty.

By letter dated March 1, 2007, appellant, through counsel, requested reconsideration. In a February 26, 2007 statement, she related that she worked as a distribution clerk from October 31, 1981 through September 22, 2005 when she retired on disability. Appellant described her work duties, noting that she sorted letters for 62 carriers which required her to repeatedly move her arms over her head. She moved her head and arms at the same time, up and down and side to side very quickly and repetitively because the cases were very big and tall. Appellant sorted flats such as magazines and books. She also sorted parcels in different sizes, shapes and weights and sometimes heavy boxes, which had to be lifted repetitively from the conveyor and pitched into hampers, one for each carrier. Appellant pulled letters and flats from cases and pushed carts, which were very heavy at times. Following bilateral carpal tunnel surgery between 2004 and 2005, she returned to work and was restricted to lifting light weight. Appellant experienced pain in her shoulder a few years prior to her hand surgery which became more intense following surgery. Her current pain was so strong that she could not lift her arms at her sides or lift them over her shoulders with more than two or three pounds in her hands. At night, appellant could not sleep on her side or remain in the same position for more than 15 minutes without feeling pain in her arms and shoulders.

A description of appellant's distribution clerk position required the separation of mail in accordance with established schemes, including incoming or outgoing mail or both. The position also required making primary and one or more secondary distributions of incoming mail by delivery point (for example, classified or contract station or branch or other delivery unit, general delivery, lockboxes, rural or star route or city carrier route) based on a knowledge of the distribution scheme established for that office. It also required a primary and one or more secondary distributions of outgoing mail for dispatch (for example, by city, state, region, train, highway or railway post office or airmail flight) based on a knowledge of the distribution scheme prescribed by the Postal Transportation Service. The position could require the maintenance of records pertaining to mails, examination of balances in advance deposit accounts, facing and cancellation of mail, tying mail and inserting facing slips, opening and dumping pouches and

sacks, operating cancelling machines, recording and billing mail (for example, cash on delivery, registered) requiring special service and rendering service at public windows.

An unsigned prescription dated August 8, 2005 stated that appellant sustained right shoulder tendinitis from overuse. In a September 9, 2005 report, Dr. Natalio Damien, Jr., a Board-certified radiologist, stated that a magnetic resonance imaging (MRI) scan of appellant's right shoulder demonstrated Grade 1 impingement syndrome with moderate tendinopathy and/or tendinitis of the supraspinatus tendon and a small partial tear near the insertion site. In a November 16, 2005 MRI scan report regarding appellant's left shoulder, Dr. Damien stated that she sustained Grade 1 shoulder impingement syndrome with mild tendinopathy/tendinitis of the supraspinatus tendon. An October 25, 2005 treatment note from appellant's physical therapist described the treatment of her cervical spine and right shoulder conditions. A March 30, 2006 report of Dr. Joseph T. Barmakian, a Board-certified orthopedic surgeon, reviewed a history of appellant's bilateral carpal tunnel syndrome and shoulder problems and medical treatment. Dr. Barmakian diagnosed bilateral carpal tunnel syndrome and bilateral shoulder impingement syndrome, right worse than the left, with some positive findings consistent with impingement. He stated that appellant was status post surgery to the left wrist followed by a revision left carpal tunnel release. Appellant also displayed signs of recurrent right carpal tunnel syndrome and was status post right carpal tunnel release. Dr. Barmakian opined that the diagnosed conditions were due to work-related repetitive trauma. He found that appellant was unable to perform work duties, which included any repetitive type activities with the hands and lifting and performing overhead activities with either shoulder.

By letter dated June 28, 2007, the Office requested that the employing establishment comment on the evidence submitted by appellant.

In a July 6, 2007 letter, an employing establishment injury compensation specialist stated that as of September 1, 2005 appellant was working in a limited-duty position which involved lifting no more than five pounds, five hours per day. Appellant was not required to lift heavy parcels or push heavy carts. It was noted that she did not work from February 9 through June 6, 2004 as she was receiving compensation benefits following her right carpal tunnel surgery. Appellant returned to limited-duty work on June 7, 2004 which involved lifting, pulling and pushing no more than five pounds, eight hours per day. On June 15, 2004 she worked six hours per day and on August 10, 2004 she worked four hours per day in the limited-duty position. The compensation specialist stated that appellant worked in this position until January 18, 2005 when she stopped to undergo left carpal tunnel surgery. On May 17, 2005 appellant again returned to limited-duty work which required lifting no more than five pounds, five hours per day. She worked in this position until September 23, 2005. It was noted that Dr. Barmakian treated appellant's left carpal tunnel syndrome beginning on February 24, 2005 and her shoulders on May 9, 2005 and January 12, 2006. Appellant retired on disability during this period and had not worked since September 23, 2005.

By decision dated August 14, 2007, the Office affirmed the February 8, 2007 decision. It found that the factual evidence failed to establish the employment factors alleged by appellant. The medical evidence was also insufficient to establish that she sustained an injury causally related to factors of her employment.

By letter dated October 12, 2007, appellant, through counsel, requested reconsideration. In a November 25, 2007 letter, she further described her work duties. Appellant noted that she was only five feet tall and the cases she had to fill were more than six feet tall. To sort mail, she extended her arms high above her head and sometimes even jumped to reach the cases. Appellant contended that her shoulder injuries were caused by overuse of her arm muscles during the course of many years beginning with her employment at the employing establishment in 1981. She manually sorted each letter rapidly and one at a time for 15 years, sometimes 10 hours per day, six days per week. The movement had to be very quick because appellant was sorting First Class mail, which could not be delayed. She stopped work from 2003 to 2005 due to injuries to her arms.

In a November 27, 2007 report, Dr. Shan Nagendra, a neurologist, stated that appellant's shoulder injury was caused by her repetitive work duties. Appellant submitted medical evidence regarding her bilateral carpal tunnel syndrome, including disability certificates from a physician whose signature is illegible. Dr. Barmakian and Dr. Ariel Quinones, a Board-certified family practitioner, advised that appellant was totally disabled for work during the period December 21 through 27, 2004, February 7 through May 16, 2005 and August 8 through 22, 2005 due to her bilateral carpal tunnel syndrome. Dr. Quinones opined that she was no longer able to return to work in her full capacity but she could work with restrictions.

By letter dated March 13, 2008, the employing establishment injury compensation specialist contested the accuracy of appellant's description of her work environment. The flat case appellant referred to was 6.25 feet tall but the top shelf was about 12 inches below. As a result, she was casing mail into a case that was 5.25 feet tall and there was no need for her to extend her arms high above her head or jump to reach the case, as alleged. Appellant first mentioned her right shoulder pain to Dr. Barmakian on May 5, 2005 while she was out of work following her left hand surgery. Despite her contention that she injured her neck and shoulder while working many years as a clerk, the first medical evidence received concerning her right shoulder was dated May 9, 2005. At that time, appellant had been out of work since February 24, 2005 due to her left hand surgery. The compensation specialist stated that when appellant first became aware of her shoulder and neck conditions on September 1, 2005, she had been working in a limited-duty position with a curtailed schedule for 15 months prior to the filing of her claim. Moreover, Dr. Barmakian's accompanying December 7, 2006 report established that appellant could return to full-duty work on August 23, 2005. However, appellant never returned to full-duty work and performed limited-duty work until September 23, 2005, when she stopped work and elected to receive disability retirement.

Dr. Barmakian's December 7, 2006 form report stated that October 3, 2003 was appellant's date of injury. He opined that her left carpal tunnel syndrome and bilateral shoulder impingement syndrome were caused by repetitive trauma at work.

By decision dated April 24, 2008, the Office denied modification of the August 14, 2007 decision. It found the factual and medical evidence were insufficient to establish appellant's claim.

LEGAL PRECEDENT

An employee seeking benefits under the Federal Employees' Compensation Act² has the burden of establishing the essential elements of 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 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 are causally related to the employment injury.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

To establish that an injury was sustained in the performance of duty in an occupational disease claim, a claimant must submit the following: (1) medical evidence establishing the presence or existence of the disease or condition for which compensation is claimed; (2) a factual statement identifying employment factors alleged to have caused or contributed to the presence or occurrence of the disease or condition; and (3) medical evidence establishing that the employment factors identified by the claimant were the proximate cause of the condition for which compensation is claimed or, stated differently, medical evidence establishing that the diagnosed condition is causally related to the employment factors identified by the claimant. The medical evidence required to establish a causal relationship is rationalized medical opinion 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.⁵ Neither the fact that appellant's condition became apparent during a period of employment nor her belief that the condition was caused by her employment is sufficient to establish a causal relationship.⁶

An employee who claims benefits under the Act⁷ 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.⁸ An injury does not have to be confirmed by eyewitnesses in order to establish the fact that an employee sustained an injury in the

² 5 U.S.C. §§ 8101-8193.

³ *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

⁴ *See Delores C. Ellyett*, 41 ECAB 992, 994 (1990); *Ruthie M. Evans*, 41 ECAB 416, 423-25 (1990).

⁵ *Victor J. Woodhams*, 41 ECAB 345, 351-52 (1989).

⁶ *Kathryn Haggerty*, 45 ECAB 383, 389 (1994).

⁷ 5 U.S.C. §§ 8101-8193.

⁸ *See V.F.*, 58 ECAB ___ (Docket No. 06-1497, January 30, 2007); *citing William Sircovitch*, 38 ECAB 756, 761 (1987); *John G. Schaberg*, 30 ECAB 389, 393 (1979).

performance of duty, but the employee's statements must be consistent with the surrounding facts and circumstances and his subsequent course of action.⁹ An employee has not met her burden of proof of establishing the occurrence of an injury when there are such inconsistencies in the evidence as to cast serious doubt upon the validity of the claim.¹⁰ 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.¹¹ 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.¹²

ANALYSIS

Appellant alleged that she sustained bilateral shoulder and neck injuries as a result of repetitively reaching above her head while sorting mail and pushing heavy carts as a distribution clerk at the employing establishment from October 31, 1981 through September 22, 2005. The Board finds that appellant has failed to establish that she sustained an injury in the performance of duty, as alleged. There are significant inconsistencies in the evidence which cast serious doubt upon the validity of her claim.

Appellant alleged that, due to her height, she was required to sort mail manually by extending her arms high above her head and sometimes even jumping to reach the cases. She contended that she sorted each letter rapidly and one at a time for 15 years, sometimes 10 hours per day, six days per week. Appellant stated that the movement had to be very quick because she was sorting First Class mail, which could not be delayed. She contended that she also manually sorted flats such as, magazines and books and parcels in different sizes, shapes and weights and sometimes heavy boxes which had to be lifted repetitively from the conveyor and pitched into 62 hampers, one for each carrier. Appellant also pulled letters and flats from cases and pushed carts, which were very heavy at times.

However, the employing establishment controverted her claim and the accuracy of her statements describing her work. An injury compensation specialist described the case at which appellant worked, noting that there was no need for her to extend her arms high above her head or jump to reach the top of the case. The employing establishment further noted that, when she first became aware of her shoulder and neck conditions on September 1, 2005, she had been working in a limited-duty assignment with a curtailed schedule for 15 months prior to the filing of her claim. It related that appellant did not work from February 9 through June 6, 2004 and received compensation benefits following right carpal tunnel surgery. She returned to limited-duty work on June 7, 2004, which involved lifting, pulling and pushing no more than five

⁹ *Id.*; citing *Charles B. Ward*, 38 ECAB 667, 670-71 (1987); *Joseph Albert Fournier, Jr.*, 35 ECAB 1175, 1179 (1984).

¹⁰ *Id.*; citing *Tia L. Love*, 40 ECAB 586, 590 (1989); *Merton J. Sills*, 39 ECAB 572, 575 (1988).

¹¹ *Id.*; citing *Samuel J. Chiarella*, 38 ECAB 363, 366 (1987); *Henry W.B. Stanford*, 36 ECAB 160, 165 (1984).

¹² *Id.*; citing *Robert A. Gregory*, 40 ECAB 478, 483 (1989); *Thelma S. Buffington*, 34 ECAB 104, 109 (1982).

pounds, eight hours per day. Her work hours were subsequently reduced to six hours per day on June 15, 2004 and four hours per day on August 10, 2004. The employing establishment noted that appellant worked in the limited-duty position until January 18, 2005 when she stopped work to undergo left carpal tunnel surgery. On May 17, 2005 she returned to limited-duty work, which again involved lifting no more than five pounds, five hours per day until September 23, 2005 when she stopped work.

The medical evidence does not contain any description of the alleged employment factors. Although Dr. Barmakian stated in his March 30 and December 7, 2006 reports that appellant's bilateral carpal and shoulder impingement syndromes were caused by repetitive trauma at work, he did not specifically describe the nature of any repetitive work duties.

Although an employee's statement alleging that an injury occurred at a given time and in a given manner is of great probative value, there are sufficient inconsistencies regarding the onset of the claimed conditions to cast doubt upon the validity of her claim.¹³ In view of the inconsistency in the evidence regarding the employment factors that caused the claimed conditions, appellant has not established her claim. As appellant has not established the factual aspect of her claim, it is not necessary to address the medical evidence.¹⁴

CONCLUSION

The Board finds that appellant has failed to establish that she sustained an injury while in the performance of duty.

¹³ See cases cited *supra* note 10.

¹⁴ *Alvin V. Gadd*, 57 ECAB 172 (2005).

ORDER

IT IS HEREBY ORDERED THAT the April 24, 2008 and August 14, 2007 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: March 23, 2009
Washington, DC

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

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

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