

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

F.H., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Beaufort, NC, Employer**

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**Docket No. 10-1359
Issued: April 18, 2011**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On April 20, 2010 appellant filed a timely appeal of a January 25, 2010 merit decision of the Office of Workers' Compensation Programs denying her claim for an employment injury. Pursuant to the Federal Employees' Compensation Act,¹ and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to consider the merits of the 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 August 29, 2006, as alleged.

On appeal, appellant contends that her doctors told her that she injured her back and stated that she told them the date of onset. She noted that she continued to work until she could no longer stand the pain and surgery was her only option.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On July 24, 2009 appellant, then a 48-year-old rural mail carrier, filed a claim for traumatic injury alleging that, on August 29, 2006, while picking up a heavy box from the bottom of a hamper, she felt a pain in her back. She alleged that, as a result, she sustained bulging discs on the bottom of her back. On the claim form, Jane D. Ellis, appellant's supervisor, disputed appellant's version of the facts, noting that there was reasonable doubt that an on-the-job injury occurred. She indicated that appellant left work on December 8, 2008 due to a nonwork-related mental condition, that she exhausted all her leave, and that no injury was reported until almost three years after the alleged injury. Furthermore, in a supervisor's statement dated July 27, 2009, Ms. Ellis stated that appellant left work suddenly on December 8, 2008 after receiving word that her son passed away unexpectedly. She noted that appellant has been off work since that date. Ms. Ellis indicated that she reviewed the employee files and found no record that appellant ever reported a job-related back injury and further noted that appellant had taken time off work intermittently for nonwork-related back problems. She further noted that appellant's retired supervisor indicated that appellant never reported a lifting accident to him. Ms. Ellis noted that, due to appellant's current nonjob-related mental condition, appellant had exhausted all her sick and annual leave as well as donated leave.

By letter dated August 6, 2009, the Office asked appellant to submit further information. It noted that the evidence was insufficient in that it did not establish that she actually experienced the incident or employment factor alleged to have caused the injury. The Office also noted that there was no diagnosis of a medical condition arising out of the alleged employment incident. In response to this letter, appellant submitted reports by a nurse practitioner, including an August 30, 2006 note wherein she indicated that appellant complained of pulling a muscle in her back while lifting a 45-pound box at work "yesterday." She also submitted the results of a magnetic resonance imaging (MRI) scan conducted on October 1, 2007 which was interpreted as showing multilevel disc degenerative disease in the upper lumbar spine as well as L3-4. The MRI scan also showed an asymmetric narrowing of the right neural foramina at L3-4 with nerve root impingement.

By decision dated September 11, 2009, the Office denied appellant's claim for compensation as she had not established fact of injury.

On November 25, 2009 appellant requested reconsideration.

Appellant continued to submit evidence, including a September 17, 2009 note from Dr. Stephen J. Dalrymple, a Board-certified neurosurgeon, indicating that appellant, a mail carrier, injured her back three years ago lifting something heavy. Dr. Dalrymple noted that appellant had a bulging at L2-3 and L3-4 and to a lesser degree at L4-5, for which she had surgery on August 24, 2009. He noted that appellant would be out of work approximately three months post operation.

Appellant also submitted progress notes by Dr. Angelo Tellis, a Board-certified physiatrist, indicating that he treated appellant from January 29, 2008 to September 11, 2009 for, *inter alia*, low back pain. In his initial consultation dated January 29, 2008, Dr. Tellis noted, when discussing the history of appellant's illness, that appellant stated that she lifted a package

on the job two years ago and felt a sharp pain in her back. He also noted chronic pain in the neck and shoulders with numbness/pain in her hands.

By decision dated January 25, 2010, the Office denied modification of its September 11, 2009 decision.

LEGAL PRECEDENT

An employee who claims benefits under the Act² has the burden of establishing the essential elements of his 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.³ 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.⁴

To determine whether a federal employee has sustained a traumatic injury in the performance of duty it must first be determined whether a fact of injury has been established.⁵ First, the employee must submit sufficient evidence to establish that he or she actually experienced the employment incident at the time, place and in the manner alleged.⁶ Second, the employee must submit sufficient evidence, generally only in the form of medical evidence, to establish that the employment incident caused a personal injury.⁷

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, but the employee’s statements must be consistent with the surrounding facts and circumstances and his or her subsequent course of action.⁸ An employee has not met his or 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.⁹ 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.¹⁰

² *Id.*

³ C.S., Docket No. 08-1585 (issued March 3, 2009).

⁴ S.P., 59 ECAB 184 (2007).

⁵ B.F., Docket No. 09-60 (issued March 17, 2009).

⁶ D.B., 58 ECAB 464 (2007).

⁷ D.G., 59 ECAB 734 (2008); C.B., Docket No. 08-1583 (issued December 9, 2008).

⁸ M.H., 59 ECAB 461 (2008); *George W. Glavis*, 5 ECAB 363, 365 (1953).

⁹ S.P., *supra* note 4; *Gus Mavroudis*, 9 ECAB 31, 33 (1956).

¹⁰ *Barbara R. Middleton*, 56 ECAB 634 (2005).

Causal relationship is a medical issue and the medical evidence generally required to establish causal relationship is rationalized medical opinion evidence. Rationalized medical opinion evidence is medical evidence which includes a physician's rationalized opinion on whether there is a causal relationship between the employee's diagnosed condition and the compensable employment factors. The opinion of the physician must be based on a complete factual and medical background of the employee, 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 employee.¹¹

ANALYSIS

Appellant alleged that she sustained a back injury on August 29, 2006 while she was lifting a heavy box out of the hamper and felt a pain in her back. The Office found that she failed to establish that the incident occurred. It noted that appellant did not file a claim until over two years after the August 29, 2006 alleged incident, that there were no witnesses to the incident and that she did not stop work until December 8, 2008 when she stopped work for personal reasons.

The Board finds that appellant failed to establish that the incident occurred as alleged. Although an employee's statement alleging that an injury occurred at a given time and in a given manner is of great probative value, the Board finds that her delay, of 2 years and 11 months, in filing the claim caused serious damage to the Office's ability to properly develop the claim and further cast doubts as to whether the incident occurred as alleged.

On July 24, 2009 appellant filed a claim for a traumatic back injury allegedly caused by lifting a box at work on August 29, 2006. In support of her claim, she relies on a report from a nurse practitioner dated August 30, 2006 in which appellant stated that she had pulled a muscle in her back lifting a box a day earlier. However, this single report is insufficient to meet appellant's burden of proof. There were no witnesses to this alleged incident. Further, appellant's supervisor, Ms. Ellis, and her retired unnamed supervisor, found no report or other evidence of a work-related injury on or about the claimed date. There is no evidence in the record that appellant reported this incident on or about that date. Pursuant to the statement by Ms. Ellis, appellant worked until December 8, 2008 until she stopped working for personal reasons. These circumstances cast serious doubt on the validity of the claim.¹²

The Board also finds that appellant has not established that she sustained an injury as she has not submitted medical evidence sufficient to support a diagnosed injury resulting from the alleged employment incident. Although the nurse practitioner's notes are sufficient to establish that appellant sought medical treatment contemporaneously with the established work incident, the Board finds that these reports are not sufficient to constitute competent medical evidence establishing a diagnosed condition causally related to appellant's accepted work incident. The Board has held that a nurse practitioner is not a physician under the Act and therefore any report from such individual does not constitute competent medical evidence which, in general, can only

¹¹ *I.J.*, 59 ECAB 408 (2008); *Victor J. Woodhams*, 41 ECAB 345, 354 (1989).

¹² *Joseph A. Fournier*, 35 ECAB 1175 (1984); *P.K.*, Docket No. 09-1953 (issued July 8, 2010).

be given by a qualified physician.¹³ Appellant also submitted progress notes from Dr. Tellis detailing her treatment of appellant from March 9 through September 11, 2009 for, *inter alia*, lower back pain. Although Dr. Tellis notes that appellant stated in the initial consultation on January 29, 2008 that she felt a sharp pain in her lower back while lifting a package on the job, he never connects this incident with appellant's current condition in a rationalized medical opinion. Appellant also submitted a September 17, 2009 note by Dr. Dalrymple indicating that appellant injured her back three years ago lifting something heavy. He noted that appellant had a bulging at L2-3 and L3-4 and to a lesser degree at L4-5, for which she had surgery on August 24, 2009. However, Dr. Dalrymple also did not provide a reasoned medical opinion linking the work incident to appellant's injury. Accordingly, there is no rationalized medical opinion establishing that appellant sustained an injury causally related to the alleged employment incident of August 29, 2006.

An award of compensation may not be based on surmise, conjecture or speculation. Neither the fact that appellant's claimed condition became apparent during a period of employment nor her belief that her condition was aggravated by her employment is sufficient to establish causal relationship.¹⁴ As appellant has not submitted medical evidence sufficient to show that she sustained an injury causally related to the alleged August 29, 2006 employment incident, the Board finds that appellant has not met her burden of proof.

CONCLUSION

The Board finds that appellant did not meet her burden of proof to establish that she sustained an injury in the performance of duty on August 29, 2006, as alleged.

¹³ 5 U.S.C. § 8102(2); *Sean O'Connell*, 56 ECAB 195 (2004).

¹⁴ *Sharon Yonak (Nicholas Yonak)*, 49 ECAB 250 (1997). *D.W.*, Docket No. 10-598 (issued October 6, 2010).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated January 25, 2010 is affirmed.

Issued: April 18, 2011
Washington, DC

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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