

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

T.D., Appellant

and

**DEPARTMENT OF VETERANS AFFAIRS,
MODESTO CLINIC, Modesto, CA, Employer**

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**Docket No. 12-103
Issued: June 6, 2012**

Appearances:

*Alan J. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director*

Case Submitted on the Record

DECISION AND ORDER

Before:

COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On October 24, 2011 appellant, through his attorney, timely appealed the September 28, 2011 merit decision of the Office of Workers' Compensation Programs (OWCP), which denied her traumatic injury claim. Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 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 sustained an injury in the performance of duty on May 8, 2008.

¹ 5 U.S.C. §§ 8101-8193.

FACTUAL HISTORY

This case was previously before the Board.² Appellant, a 69-year-old vocational nurse, filed a traumatic injury claim (Form CA-1) alleging that she injured her right shoulder on May 8, 2008. She claimed an assault by a coworker who shoved and pushed her shoulder into appellant's right shoulder. OWCP initially found that the May 8, 2008 incident occurred as alleged, but appellant failed to establish that she sustained an injury as a result of the employment incident. In a March 16, 2009 decision, the Branch of Hearings & Review affirmed the denial for a different reason. The hearing representative found that the May 8, 2008 assault was the result of personal animosity and thus, did not arise out of the course of employment. While appellant established that she sustained an injury, the hearing representative concluded that her condition did not arise out of the performance of duty.³

On appeal, the Board found that the origin of the May 8, 2008 bumping incident involved workplace issues, not personal, out-of-the-workplace issues.⁴ While an employment-related bumping incident occurred on May 8, 2008 the Board found that appellant failed to establish that she sustained an injury as a result of the accepted incident. The Board noted that appellant's treating physician, Dr. Harris, failed to explain how the May 8, 2008 incident caused the diagnosed right shoulder contusion, cervicalgia and cervical spine strain. The Board's December 17, 2009 decision is incorporated herein by reference.

On April 27, 2010 appellant's counsel requested reconsideration. He submitted treatment records from Dr. Harris dating to December 2006. At that time, Dr. Harris diagnosed head contusion, neck sprain/strain and cervicalgia due to a December 1, 2006 workplace injury.⁵ He continued to treat appellant for her cervicalgia, neck strain and related right shoulder complaints through April 7, 2008. A month prior to the May 8, 2008 employment incident, appellant was taking medication and undergoing physical therapy as a result of her December 1, 2006 employment injury.

Counsel also submitted a May 8, 2008 cervical magnetic resonance imaging (MRI) scan that revealed multilevel disc desiccation, most prominent at the C5-6 level with some encroachment on the neural foramina.⁶ An August 22, 2008 electromyography (EMG) of the

² Docket No. 09-1311 (issued December 17, 2009).

³ The hearing representative did not specify the type of injury appellant sustained. However, she referenced a May 8, 2008 report from Dr. Mattice F. Harris Jr., a Board-certified family practitioner, who diagnosed cervicalgia and cervical spine strain. Dr. Harris noted that appellant reported having been assaulted at work earlier that day when another worker "intentionally ran into her." As a result, appellant had some increased neck pain from a previous injury. Dr. Harris recommended physical therapy to address appellant's cervical spine and shoulder pain. He provided the same diagnosis on May 9, 2008. When Dr. Harris saw appellant on May 29, 2008 he diagnosed right shoulder contusion and cervical spine strain. He previously treated her for a December 1, 2006 employment injury, which OWCP accepted for neck sprain and facial contusion.

⁴ The Board found that the animosity between appellant and her coworker stemmed from a prior workplace incident when she alerted management of alleged misconduct involving her coworker.

⁵ A bookcase reportedly fell on appellant's head.

⁶ Counsel resubmitted copies of appellant's physical therapy records from May 20 and June 13, 2008. The Board

right upper extremity was normal. There was no evidence of entrapment neuropathy or cervical radiculopathy. However, it was noted that approximately 15 percent of patients with a cervical radiculopathy will have normal electrodiagnostic studies.

OWCP received treatment records from Dr. Harris dated January 1 to April 30, 2009. Dr. Harris diagnosed neck pain (cervicalgia), which he attributed to appellant's December 1, 2006 employment injury. On April 30, 2009 he advised that she was seen regarding her December 1, 2006 injury. Dr. Harris diagnosed cervical spine strain/pain and left arm radicular pain, secondary to her cervical spine strain.

By decision dated September 28, 2011, OWCP reviewed the claim on the merits and found that appellant failed to establish that she sustained an injury as a result of the May 8, 2008 employment incident. Consequently, it denied modification of the prior decision.

LEGAL PRECEDENT

A claimant seeking benefits under FECA has the burden of establishing the essential elements of her claim by the weight of the reliable, probative and substantial evidence, including that an injury was sustained in the performance of duty as alleged and that any specific condition or disability claimed is causally related to the employment injury.⁷

To determine if an employee sustained a traumatic injury in the performance of duty, OWCP begins with an analysis of whether "fact of injury" has been established. Generally, fact of injury consists of two components that must be considered in conjunction with one another. The first component is whether the employee actually experienced the employment incident that is alleged to have occurred.⁸ The second component is whether the employment incident caused a personal injury.⁹

ANALYSIS

As the Board previously found appellant was bumped at work in the performance of duty on May 8, 2008. Appellant claimed that this employment incident resulted in an injury to her right shoulder. The record indicates that she had been under Dr. Harris' care for an employment-related cervical injury that occurred on December 1, 2006. When he examined appellant on May 8, 2008, Dr. Harris diagnosed cervicalgia and cervical spine strain, which was the same diagnosis he provided a month earlier. Appellant reportedly informed him that the incident with her coworker resulted in some increased neck pain from a previous injury. Dr. Harris did not

previously found these records of no probative value, noting that a physical therapist was not a "physician," as that term is defined under FECA. Counsel also resubmitted copies of Dr. Harris' treatment records from May 8 to August 28, 2008.

⁷ 20 C.F.R. § 10.115(e), (f) (2011); see *Jacquelyn L. Oliver*, 48 ECAB 232, 235-36 (1996).

⁸ *Elaine Pendleton*, 40 ECAB 1143 (1989).

⁹ *John J. Carlone*, 41 ECAB 354 (1989). Causal relationship is a medical question, which generally requires rationalized medical opinion evidence to resolve the issue. See *Robert G. Morris*, 48 ECAB 238 (1996).

diagnose a specific right shoulder injury nor did he indicate that the May 8, 2008 incident either aggravated or exacerbated her preexisting cervical condition. His May 8, 2008 physical therapy referral noted “[C]-spine [and] shoulder pain.” However, pain is a symptom, not a specific medical diagnosis. Dr. Harris’ first reference to a specific right shoulder injury was not until his May 29, 2008 follow-up examination when he diagnosed right shoulder contusion. He also diagnosed cervical spine strain at that time. Although the May 29, 2008 form report identified May 8, 2008 as the date of injury, Dr. Harris did not explain how appellant’s right shoulder contusion and cervical strain were causally related to the accepted bumping incident. It is also noteworthy that there was no reported evidence of a right shoulder contusion when he examined her on May 8 and 9, 2008. There was no mention of this contusion when Dr. Harris saw appellant on June 19, 2008 or thereafter.

In July and August 2008, Dr. Harris continued to treat appellant for her cervicgia and cervical spine strain. His follow-up treatment notes for August 13, 2008 included a history of neck and right shoulder pain post injury on May 8, 2008 when she reportedly collided with another employee at work. Dr. Harris again diagnosed cervicgia and neck sprain and strain. An August 16, 2008 addendum noted an additional diagnosis of right shoulder pain. He also ordered a right shoulder x-ray. Dr. Harris’ August 28, 2008 follow-up treatment notes included, *inter alia*, the previously diagnosed cervicgia and neck sprain and strain, but there was no mention of a right shoulder x-ray having been obtained. Physical examination of the right upper extremity revealed no misalignment or tenderness, full range of motion and normal stability, strength and tone.

The above-noted medical evidence was part of the record when the claim was previously before the Board. As the Board indicated at the time, Dr. Harris did not provide a rationalized medical opinion explaining how the diagnosed conditions were causally related to the May 8, 2008 bumping incident, particularly in light of appellant’s preexisting cervical condition. The medical evidence submitted since then similarly fails to establish a causal relationship. The May 8, 2008 cervical MRI scan and the August 22, 2008 EMG do not address causal relationship. Dr. Harris’ treatment records covering the period January 1 to April 30, 2009 attributed appellant’s ongoing cervical complaints to her December 1, 2006 employment injury.

While appellant has established that the May 8, 2008 bumping incident occurred in the performance of duty, to fully satisfy her burden of proof on “fact of injury” she must submit competent medical evidence demonstrating that the May 8, 2008 employment incident caused a personal injury.¹⁰ The record in the instant case does not establish that appellant sustained a right should injury as claimed nor does it establish that her preexisting cervical condition was exacerbated by the May 8, 2008 employment incident. Absent a specific injury-related diagnosis, appellant has failed to establish the second component of “fact of injury.” Accordingly, OWCP properly denied her traumatic injury claim.

¹⁰ *John J. Carlone, id.*

CONCLUSION

Appellant did not establish that she sustained an injury in the performance of duty on May 8, 2008.

ORDER

IT IS HEREBY ORDERED THAT the September 28, 2011 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 6, 2012
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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