

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

M.P., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
New York, NY, Employer**

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**Docket No. 14-542
Issued: June 17, 2014**

Appearances:

Alan J. Shapiro, Esq., for the appellant

Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Alternate Judge

MICHAEL E. GROOM, Alternate Judge

JAMES A. HAYNES, Alternate Judge

JURISDICTION

On January 13, 2014 appellant, through her attorney, filed a timely appeal from a December 17, 2013 merit decision of the Office of Workers' Compensation Programs (OWCP). 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.

ISSUES

The issues are: (1) whether appellant established that she sustained a traumatic right shoulder injury on November 19, 2012; and (2) whether she established an occupational right shoulder condition in the performance of duty.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On April 8, 2013 appellant, a 58-year-old equipment operator, filed a Form CA-1 traumatic injury claim, alleging that she tore her right rotator cuff on November 13, 2012 while pushing heavy equipment with mail.

By letter dated April 17, 2013, the employing establishment controverted the claim. It noted that appellant did not file her claim within 30 days of the date of her alleged injury. The employing establishment noted that she had submitted a Form CA-2 claim of occupational disease, but on being informed that she would not be entitled to continuation of pay, she withdrew the CA-2 form and submitted a CA-1 form.

In an April 12, 2013 report, Dr. Afshan Khan, a specialist in neurology, stated that he treated appellant that day for right arthropathy. A magnetic resonance imaging (MRI) scan showed that she had a complete tear of the supraspinatus muscle. Dr. Khan stated that the MRI scan also showed a partial tear of the subscapular muscle.

By letter dated April 18, 2013, OWCP advised appellant that she needed to submit additional factual and medical evidence in support of her claim. It stated that the evidence submitted was not sufficient to establish that she actually experienced the November 13, 2012 incident alleged to have caused her injury. OWCP advised appellant that she did not provide a sufficiently detailed description of her work-related injury, including the equipment she was pushing, the weight of the equipment, how she was pushing it or how she injured herself.

OWCP also informed appellant that the employing establishment controverted her claim, as she did not report the alleged November 13, 2012 injury until April 8, 2013 or seek medical care until April 12, 2013. It further advised that the employing establishment was challenging her claim because she initially submitted a CA-2 form but then changed her claim to a CA-1 form in order to receive continuation of pay. OWCP asked appellant to explain why she waited until April 8, 2013 to report an injury which occurred on November 13, 2012 and delayed receiving medical care until April 12, 2013.

In a handwritten letter dated May 3, 2013, appellant informed OWCP that the actual date of injury was November 19, 2012, not November 13, 2012.

By decision dated May 30, 2013, OWCP denied appellant's claim. It found that she establish the incident of November 13, 2012.

By letter dated June 5, 2013, appellant's attorney requested an oral hearing, which was held on October 29, 2013.

In a form report dated July 17, 2013, Dr. Raz Winiarsky, a specialist in orthopedic surgery, stated that appellant had complaints of right shoulder pain, low back pain and cervical radiculitis. He advised that she had sustained a repetitive motion, overuse injury caused by lifting 10-pound hooks eight hours a day for 26 years. Dr. Winiarsky diagnosed right rotator cuff tear and cervical and lumbar disc disease. He opined that appellant's right shoulder, neck and back injuries were causally related to the repetitive overuse injury.

Appellant also submitted an unsigned, undated attending physician's form report. It listed a date of injury as November 19, 2012, diagnosed a tendon tear and stated that the history of injury was "injured pushing equipment." The form listed the date of first examination as May 22, 2013 and a box was checked indicating that the condition was caused or aggravated by an employment activity.

At the hearing, counsel stated that appellant was not familiar with workers' compensation law and made a bad choice when she found out that she could not receive continuation of pay. This explained her decision to file a traumatic injury claim, rather than an occupational disease. This caused confusion and was the basis to deny the claim, when the essence of appellant's claim was a work-related incident. Counsel stated that whether or not the claim was occupational or traumatic was subject to interpretation but that something happened at work. Appellant stated that her work duties entailed lifting equipment with mail on it and lifting hooks weighing from 8 to 10 pounds three times a day. She initially thought she sustained an occupational disease and that her managers and her supervisor told her to file such as claim; however, the union changed it to a traumatic injury. When questioned at the hearing if appellant was no longer claiming that a traumatic injury occurred on November 19, 2012, she stated, "No. Yes. Well...."

By decision dated December 17, 2013, an OWCP hearing representative affirmed the May 30, 2013 decision. Appellant found that she failed to establish the November 13 or 19, 2012 incident at work. With regard to her subsequent assertion that her right shoulder condition was an occupational disease, the hearing representative found that the medical evidence was not sufficient to establish that she sustained a right shoulder condition due to her work duties as an equipment operator. The hearing representative found no occupational disease.

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under FECA² has the burden of establishing that 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 FECA, that the claim was timely filed within the applicable time limitation period of FECA, 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 and every compensation claim regardless of whether the claim is predicated upon 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. 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.⁵ Second, the employee must

² *Id.*

³ *Joe D. Cameron*, 41 ECAB 153 (1989); *Elaine Pendleton*, 40 ECAB 1143 (1989).

⁴ *Victor J. Woodhams*, 41 ECAB 345 (1989).

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

submit sufficient evidence, generally only in the form of medical evidence, to establish that the employment incident caused a personal injury.⁶

OWCP cannot accept fact of injury if there are such inconsistencies in the evidence as to seriously question whether the specific event or incident occurred at the time, place and in the manner alleged or whether the alleged injury was in the performance of duty,⁷ nor can it find fact of injury if the evidence fails to establish that the employee sustained an “injury” within the meaning of FECA. 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, as alleged, but the employee’s statements must be consistent with surrounding facts and circumstances and his or her subsequent course of action.⁸ 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 cast doubt on an employee’s statements in determining whether he or she has established his or her claim.⁹

ANALYSIS -- ISSUE 1

The Board finds that appellant has not established fact of injury on November 13 or 19, 2012 due to inconsistencies in the evidence that cast serious doubt as to whether the specific incident occurred at the time, place and in the manner alleged. Appellant did not establish that an incident occurred on November 19, 2012 in which she tore her right rotator cuff while lifting heavy equipment. She initially stated on her April 8, 2013 CA-1 form that she injured her right shoulder on November 13, 2012 while engaged in lifting heavy equipment. In an April 18, 2013 letter, OWCP advised appellant that she did not provide a sufficiently detailed description of her work-related injury, including what kind of equipment she was pushing, the weight of the equipment, how she was pushing it and exactly how she injured herself. Further, appellant did not report the alleged November 13, 2012 incident until April 8, 2013 or seek medical care until April 12, 2013. The employing establishment also noted that she initially submitted a Form CA-2 but then changed her claim to a Form CA-1 in order to receive continuation of pay.¹⁰ Appellant stated on May 3, 2013 that the actual date of injury was November 19, 2012 not November 13, 2012.

The evidence of record provides various accounts of injury. This contradictory evidence creates uncertainty as to the time, place and in the manner in which appellant was injured. Appellant alleged that she injured her right shoulder during a November 13, 2012 work incident,

⁶ *Id.* For a definition of the term “injury,” see 20 C.F.R. §10.5(e).

⁷ *Pendleton*, *supra* note 3.

⁸ See *Gene A. McCracken*, Docket No. 93-2227 (issued March 9, 1995); *Joseph H. Surgener*, 42 ECAB 541, 547 (1991).

⁹ See *Constance G. Patterson*, 42 ECAB 206 (1989).

¹⁰ The evidence submitted by an employing establishment on the basis of their records will prevail over the assertions from the claimant unless such assertions are supported by documentary evidence. See generally *Sue A. Sedgwick*, 45 ECAB 211, 218 n.4 (1993); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Computation of Compensation*, Chapter 2.900(b)(3) (September 1990).

but did not provide notification to the employing establishment until April 8, 2013, five months after the alleged incident. She delayed receiving any medical care for the alleged injury until April 12, 2013.¹¹

The Board noted that the evidence cast doubt on appellant's assertion that she injured her right shoulder while moving heavy equipment in November 2012. OWCP requested that she submit additional factual and medical evidence explaining how she injured her right shoulder on the date in question. Appellant failed to submit consistent evidence as to the time of the incident at work. Therefore, given the inconsistencies in the evidence regarding how she sustained her injury, the Board finds that there is insufficient evidence to establish that she sustained a traumatic incident as alleged.¹²

LEGAL PRECEDENT -- ISSUE 2

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 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.¹³

Appellant has the burden of establishing by the weight of the substantial, reliable and probative evidence, a causal relationship between her claimed right shoulder condition and her federal employment. This burden includes providing medical evidence from a physician who concludes that the disabling condition is causally related to employment factors and supports that conclusion with sound medical reasoning.¹⁴

¹¹ *Id.*

¹² See *Mary Joan Coppolino*, 43 ECAB 988 (1992) (where the Board found that discrepancies and inconsistencies in appellant's statements describing the injury created serious doubts that the injury was sustained in the performance of duty).

¹³ *Id.*

¹⁴ See *Nicolea Bruso*, 33 ECAB 1138, 1140 (1982).

ANALYSIS -- ISSUE 2

The Board finds that appellant failed to submit sufficient medical evidence to establish that her claimed right shoulder condition was related to factors of her employment. For this reason, appellant has not discharged her burden of proof.

The July 17, 2013 report from Dr. Winiarsky indicated that appellant had a right rotator cuff tear causally related to repetitive work duties and overuse syndrome. This report, however, did not provide any rationalized medical opinion addressing how the claimed condition was causally related to her employment duties. The weight of medical opinion is determined by the opportunity for and thoroughness of examination, the accuracy and completeness of the physician's knowledge of the facts of the case, the medical history provided the care of analysis manifested and the medical rationale expressed in support of stated conclusions.¹⁵ Dr. Winiarsky did not sufficiently describe appellant's job duties or explain the medical process through which such duties were competent to cause the claimed condition. His report did not explain how her diagnosed condition resulted from factors of her employment.¹⁶ The record does not establish that Dr. Winiarsky had an accurate history of appellant's condition as he stated that she lifted 10-pound hooks for eight hours a day for the past 26 years. This was contradicted by her testimony that she lifted 10-pound hooks three times per day.

An award of compensation may not be based on surmise, conjecture or speculation. Neither the fact that appellant's conditions became apparent during a period of employment nor the belief that his conditions were caused, precipitated or aggravated by his employment is sufficient to establish causal relationship.¹⁷ Causal relationship must be established by rationalized medical opinion evidence and she failed to submit such evidence.

OWCP advised appellant of the evidence required to establish her claim; however, she failed to submit such evidence. Consequently, appellant has not met her burden of proof in establishing that her claimed right shoulder condition was causally related to her employment.

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

CONCLUSION

The Board finds that OWCP properly found that appellant failed to meet her burden of proof to establish that she sustained a right shoulder injury in the performance of duty on November 19, 2012. The Board finds that she has failed to meet her burden of proof to establish that her claimed right shoulder condition was sustained in the performance of duty.

¹⁵ See *Anna C. Leanza*, 48 ECAB 115 (1996).

¹⁶ *William C. Thomas*, 45 ECAB 591 (1994).

¹⁷ See *Anna C. Leanza*, *supra* note 15.

ORDER

IT IS HEREBY ORDERED THAT the December 17, 2013 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 17, 2014
Washington, DC

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

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

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