U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JULIA KELLY and U.S. POSTAL SERVICE,
POST OFFICE, Waycross, Ga.

Docket No. 96-1582; Submitted on the Record;
Issued April 23, 1998

DECISION and ORDER

Before GEORGE E. RIVERS, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issue is whether appellant sustained a herniated nucleus pulposus at C5-6 in the performance of duty.

The Board has duly reviewed the case record on appeal and finds that this case is not in posture for a determination of whether appellant sustained an injury in the performance of duty. Further development of the medical evidence is required.

An employee seeking benefits under the Federal Employees' Compensation Act [1] has the burden of proof to establish the essential elements of her claim.[2] When an employee claims that she sustained an injury in the performance of duty, she must submit sufficient evidence to establish that she experienced a specific event, incident or exposure occurring at the time, place and in the manner alleged. She must also establish that such event, incident or exposure caused an injury.[3]

In order to determine whether an employee actually sustained an injury in the performance of duty, the Office of Workers' Compensation Programs 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

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[1] 5 U.S.C. § 8101 *et seq.*

[2] *See Margaret A. Donnelley*, 15 ECAB 40 (1963).

[3] *See generally John J. Carlone*, 41 ECAB 354 (1989); *see also* 5 U.S.C. § 8101(5) ("injury" defined); 20 C.F.R. §§ 10.5(a)(15), 10.5(a)(16) ("traumatic injury" and "occupational disease or illness" defined).

alleged to have occurred. The second component is whether the employment incident caused a personal injury and generally can be established only by medical evidence.[4]

On October 5, 1993 appellant filed both a claim for occupational disease, Form CA-2 and a notice of traumatic injury, Form CA-1. On the claim for occupational disease, she stated that while working on the belt she felt something pull in the back of her neck and her shoulders felt sore. She added that she had found out a few days before that she had a "tumor" or cyst on her right shoulder and that she asked her supervisor to take her off the belt, as she thought her work there might have been irritating her tumor. Appellant indicated that September 10, 1993 was the first day she became aware of her condition and realized it was caused or aggravated by her employment. She additionally noted that she first received medical attention for her pain on September 13, 1993 from Dr. R.B. Carswell, a chiropractor. On the traumatic injury claim form, appellant also stated that on September 10, 1993 she felt something pull in the back of her neck while she was working on the "belt." She again added that she had a tumor on her right shoulder and that she told her supervisor that she thought her work had irritated the tumor, but that her physicians later told her that the pain was unrelated to her tumor.[5] On the Form CA-2 appellant stated that she first sought medical treatment on October 6, 1993 from Dr. Edward Perkins.

The employing establishment controverted the claim on the grounds that there was a very questionable causal relationship between appellant's neck condition and her employment duties. The employing establishment submitted a statement from supervisor J.B. Carter in which he stated that appellant had been having neck problems for two to three weeks and had to hold her head to one side. He added that he had discussed this condition with her a couple of times, as he was worried that her continued working would aggravate her condition. Mr. Carter stated that appellant informed him that she wanted to continue to work and that she had a cyst on her neck, that was causing her pain. He noted that appellant came to him, because her doctors were encouraging her to file a workers' compensation claim. She indicated to him that she had not hurt herself at work and that she didn't want to file a claim for fear of ruining her job. Based on this statement, the employing establishment asserted that appellant's employment was not the primary cause of her alleged condition.

In response to the Office's request for additional information, appellant submitted a narrative statement, in which she explained that on September 10, 1993 she was "throwing mail" off the belt and into large wire containers, pushing carts of mail on to the ramp, raising them and dumping them out, when she felt something pull in the back of her neck with a burning sensation. She stated that she knew something was wrong and told her supervisor, Jake Carter, that she might have irritated her tumor and asked him to keep her off the belt that day. Her pain increased over the next two days and on Monday September 13, 1993 she sought treatment from Dr. Carswell. Several days later, on September 16, 1993, the pain became so unbearable that she went to the emergency room. After her tumor was removed, on October 19, 1993, appellant's

[4] *John J. Carlone*, *supra* note 3.

[5] Appellant's subsequently had small lesions removed from the back of her neck and her right shoulder. Her shoulder "tumor" was determined to be a small disc of scar tissue and her neck "tumor" was determined to be a slightly enlarged lymph node.

physician told her that the tumor turned out to be a small lymph node and that it had no relationship to the neck pain she was feeling. Appellant added that while she was in a car accident in 1980 she had never had any problems from it and that she had had no additional accidents.

An injury does not have to be confirmed by eyewitnesses in order to establish 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 her subsequent course of action. 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 sufficient doubt on an employee's statements in determining whether he or she has established a *prima facie* case. The employee has the burden of establishing the occurrence of the alleged injury at the time, place and in the manner alleged, by a preponderance of the reliable, probative and substantial evidence. An employee has not met this burden when there are such inconsistencies in the evidence as to cast serious doubt upon the validity of the claim.[6]

In the present case, the Office found that the delayed notification and the apparent inconsistencies in appellant's statement of facts raised sufficient doubt to find that appellant had not established that the alleged incident occurred. While there was delayed notification of the September 10, 1993 injury and some apparent initial inconsistencies regarding appellant's early statement to her supervisor, that she had not injured herself on the job, appellant explained both the delay in notification and her statement that she had not injured herself at work stating that at the time her neck pain first occurred, she believed it was related to the small nodes or tumors on the back of her neck and on her right shoulder and it was not until after she sought medical attention, that she understood that the two conditions were unrelated. In addition, her assertion that she felt a pull in her neck on September 10, 1993 and sought medical attention shortly thereafter is corroborated by the September 13, 1993 report of Dr. Carswell and the emergency room treatment notes dated September 16, 1993. In his September 13, 1993 report, Dr. Carswell stated that he treated appellant on that day for neck pain which she told him had occurred at work. On her Form CA-2 appellant listed September 13, 1993 as the date she first sought medical attention for her condition. Finally, while the emergency room notes, dated September 16, 1993, do not indicate that appellant hurt her neck at work, they do document that appellant was experiencing severe neck pain of two to three days duration, which is consistent with the date appellant first sought medical treatment for her neck pain. The Board finds that the evidence of record is sufficient to establish an incident as alleged on September 10, 1993.

The question, therefore, becomes whether the duties she performed at work caused or aggravated the conditions for which she seeks compensation.

Causal relationship is a medical issue,[7] and the medical evidence required to establish causal relationship, generally, is rationalized medical opinion evidence. Rationalized medical

[6] *Merton J. Sills*, 39 ECAB 572 (1988).

[7] *Mary J. Briggs*, 37 ECAB 578 (1986).

opinion evidence is medical evidence that includes a physician's rationalized opinion on whether there is a causal relationship between the claimant's diagnosed condition and the established incident or factor of employment. The opinion of the physician must be based on a complete factual and medical background of the claimant,[8] must be one of reasonable medical certainty[9] and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the established incidents or factors of employment.[10]

In an October 6, 1993 duty status report, Form CA-17 and attending physician's reports, Forms CA-20, dated October 6 and 13, 1993, Dr. Edward Perkins, a Board-certified family practitioner and attending physician, stated that appellant had developed pain in her neck and shoulder while "throwing mail" and diagnosed muscle spasms. The physician indicated by check marks that appellant's condition was causally related to her employment and that she had no evidence of any concurrent or preexisting injury, disorder or impairment. In a follow-up letter dated November 4, 1993, Dr. Perkins stated that appellant's neck pain was unrelated to the small lipomas which had been removed from her neck.

After the Office rejected appellant's claim in a decision dated December 10, 1993,[11] appellant submitted an August 2, 1994 report from Dr. Calvin H. Hudson, a Board-certified neurological surgeon, who stated that appellant presented with headaches, neck pain and numbness in her left arm and noted the history of appellant's injury as having occurred on September 10, 1993, after pushing some heavy carts at work. He noted that approximately eight days later, some nodes were removed from appellant's neck, but that her symptoms continued. Dr. Hudson concluded that appellant had probably sustained a cervical strain, but recommended magnetic resonance imaging (MRI) to rule out more serious injury. An MRI performed on October 4, 1994 revealed the presence of a herniated nucleus pulposus at C5-6. In a follow-up report dated November 2, 1994, Dr. Hudson stated that it was "certainly possible" that appellant's ruptured disc was the cause of her current symptoms and that it was his opinion that her current symptoms emanated from her on-the-job injury and not from the tumor that she had removed from her neck. He added, however, that the MRI was not sufficiently diagnostic and that a cervical myelogram and computerized tomography scan would be needed to delineate her entire problem. In a decision dated December 14, 1994, the Office denied modification of its prior decision.

Following the Office's December 14, 1994 denial, appellant submitted, among other evidence, the results of her November 14, 1994 cervical myelogram revealing, a bulging disc at C5-6, left. In a letter of the same date, Dr. Hudson noted that the results of the myelogram were similar to those of the MRI, revealing a ruptured disc at C5-6. He stated that he "felt that this

[8] *William Nimitz, Jr.*, 30 ECAB 567, 570 (1979).

[9] *See Morris Scanlon*, 11 ECAB 384, 385 (1960).

[10] *See William E. Enright*, 31 ECAB 426, 430 (1980).

[11] Appellant requested an oral hearing following this decision. In a decision dated May 4, 1994, the Office denied appellant's request for an oral hearing on the grounds that the request was untimely, and that the issues in the claim could be equally well resolved through reconsideration.

indeed was, probably, what was causing the neck pain" and concluded that if appellant felt she could not live with the pain, she could undergo anterior cervical fusion. Appellant underwent cervical fusion on March 6, 1995. In a decision dated February 2, 1996, the Office again denied appellant's request for modification of the prior decision.

The medical record in this case lacks a well-reasoned narrative from a physician relating appellant's ruptured C5-6 disc to the duties she performed as a postal worker. Nonetheless, the Board finds that the medical reports submitted by appellant, taken as a whole, raise an uncontroverted inference of causal relationship sufficient to require further development of the case record by the Office.[12] Additionally, the Board notes that in this case the record contains no medical opinion contrary to appellant's claim and further notes that the Office did not seek advice from an Office medical adviser or refer the case to an Office referral physician for a second opinion. The Board will set aside the Office's February 2, 1996 decision and remand the case for further development of the medical evidence. Following such further development as may be necessary, the Office shall issue an appropriate final decision on appellant's claim.[13]

The February 2, 1996 decision of the Office of Workers' Compensation Programs is set aside and the case remanded for further action consistent with this opinion.

Dated, Washington, D.C.
April 23, 1998

George E. Rivers
Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member

[12] *See John J. Carlone, supra* note 3 (finding that the medical evidence was not sufficient to discharge appellant's burden of proof but remanding the case for further development of the medical evidence given the uncontroverted inference of causal relationship raised).

[13] Board's jurisdiction to consider and decide appeals from final decisions of the Office extends only to those final decisions issued within one year prior to the filing of the appeal. *Oel Noel Lovell*, 42 ECAB 537 (1991); 20 C.F.R. §§ 501.2(c), 501.3(d)(2). As appellant filed her appeal with the Board on May 1, 1996, the Office's December 10, 1993, and May 4 and December 14, 1994 decisions are not properly before the Board.