

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of SUSAN HERMES and DEPARTMENT OF THE NAVY,  
MARE ISLAND NAVAL STATION, Vallejo, Calif.

*Docket No. 96-1223; Submitted on the Record;  
Issued November 13, 1998*

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DECISION and ORDER

Before MICHAEL J. WALSH, MICHAEL E. GROOM,  
BRADLEY T. KNOTT

The issue is whether appellant has met her burden of proof in establishing that she sustained an injury in the performance of duty on October 6, 1995, as alleged.

On October 10, 1995 appellant, then a 48-year-old health technician, filed a traumatic injury claim (Form CA-1) alleging that on October 6, 1995 she experienced a pull in her lower back and between her shoulders with a burning pain in the lower back into the hips and both legs, and between her shoulders and in her right arm, when due to nasal congestion from heavy smoke from a fire in the area, she turned to get a Kleenex from the back seat of her car. On the reverse side of the form, appellant's supervisor stated that "[appellant] was observed by me to be in pain and wearing neck brace prior to alleged injury on October 6, 1995. She currently works four hours per day due to physical limitations and is four hours per day leave without pay on advice of her PMD." The employment establishment controverted continuation of pay indicating "[p]reexisting condition." And stated that appellant stopped work on October 10, 1995.

In support of her claim appellant submitted an October 16, 1995 attending physician's report completed by Dr. W. Bradford DeLong, a Board-certified neurological surgeon, specializing in spinal neurosurgery, who provided a history of injury, reported his findings of internal disc disruption with protrusion at L3-4 and C5-6, C6-7 levels, chronic ligamentous sprain, and fibromyalgia syndrome and stated that appellant's condition was probably a temporary aggravation from preexisting condition; and an employing establishment health unit record with an October 10, 1995 entry reviewed by Dr. Peter Vondippe, noting appellant's chief complaint of lower and upper back pain, numbness and tingling in both legs down to the knee, pain between shoulder blades, right arm, elbow and wrist, beginning October 6, 1995 when she turned to get a Kleenex and noting that appellant had been treated by a pain management doctor and will see him that day.

On December 4, 1995 the record was updated to include a November 2, 1995 medical certificate by Dr. Arthur B. Schuller, a Board-certified neurologist, who diagnosed myofascial

pain and stated that appellant was temporarily and totally disabled as of November 2, 1995 and expected to be able to return to work on December 15, 1995. On December 8, 1995 the record was updated with a December 5, 1995 statement by appellant. She gave a history of injury and stated that she was advised to go to the dispensary which she did and there was advised to see her pain management doctor due to radiating pain down her legs. Thereafter, she saw Dr. DeLong who referred her to Dr. Schuller.

By letter dated December 12, 1995, the Office requested factual and medical information from appellant. Specifically, a physician's detailed narrative report which included a complete history of injury, diagnosis due to the October 6, 1995 injury, examination findings, and an opinion with medical rationale on the relationship of the diagnosed condition(s) to appellant reaching to get a Kleenex on October 6, 1995. The Office further directed that the physician's report should answer if the October 6, 1995 injury aggravated a preexisting condition, how did the injury affect the normal progression of the preexisting condition(s); if disability increased due to the October 6, 1995 injury how the injury led to the increased disability, as appellant was only working four hours per day due to a preexisting lumbar condition; and has appellant's condition returned to what would have been the normal course of the condition, absent the work injury?

On December 21, 1995 the record was updated with a November 29, 1995 patient progress record from Kaiser Permanente completed by a nurse who indicated that appellant underwent acupuncture.

On January 19, 1995 the record was updated with a January 10, 1996 report by Dr. Schuller. He stated that he initially saw appellant on November 2, 1995 for complaints of exacerbation of symptoms she had previously associated with reaching into the back set of her car to get a Kleenex. Dr. Schuller went on to say,

“Following this, her symptoms increased in intensity, making her unable to continue in her light duty, four hours per day, job because of pain. Her symptoms were predominantly low back pain, which was greater than lower extremity pain, which was approximately equal to her neck and headache, shoulder and right arm pain.”

He further stated that “She had been working four hours per day for approximately two years prior to this incident.” Dr. Schuller noted that appellant had been seeing a chiropractor every seven to ten days and obtaining acupuncture every three to four weeks, as well as taking pool therapy and wearing a collar and corset periodically to help manage her symptoms. Dr. Schuller discussed appellant's prior medical history and noted that a magnetic resonance imaging (MRI) of the lumbar spine revealed degenerative disc disease at L3-4 with moderate central stenosis secondary to a bulge. He stated appellant indicated that she had been diagnosed with fibromyalgia. When Dr. Schuller saw appellant on December 11, 1995 he recommended physical therapy and exercise and that appellant be off work until February 1, 1996 to allow time to manage the intensity of her symptoms. Dr. Schuller saw appellant again on January 10, 1996 when she indicated she was approximately 25 percent better on good days and he expected that she would return to work on February 1, 1996 at her previous 4 hours per day, light duty. Dr. Schuller stated “It seems that her painful symptoms, which had been previously described as

part of her fibromyalgia syndrome, were exacerbated by the stretching involved in reaching into the back seat of her car for the Kleenex on October 6, 1995.” In response to the Office’s question concerning how did the October 6, 1995 injury affect the normal progression of appellant’s preexisting condition Dr. Schuller stated, “I do not know. Other than reporting her description that the activities of October 6, 1995 significantly increased her usual symptoms in their intensity over what they had been for several weeks or months prior to October 6, 1995, I do not know what would have happened to her symptoms without this exacerbation.” Concerning how the October 6, 1995 injury increased disability Dr. Schuller stated “[Appellant’s] disability is associated with pain. It is because of this that she cannot work now, or work full time prior to October 6, 1995. The disability was increased because her pain was increased.” With regard to whether appellant’s condition had returned to what would have been the normal course of the condition, absent the work injury, Dr. Schuller stated “[Appellant] describes herself as being approximately 25 percent of her prework injury status. She is very gradually improving, and plans to return to work on February 1, 1996.”

By decision dated February 6, 1996, the Office denied appellant’s claim finding that the evidence of record failed to establish that appellant’s condition was causally related to the October 6, 1995 incident.<sup>1</sup>

The Board finds that appellant has not met her burden of proof in establishing that she sustained an injury in the performance of duty on October 6, 1995, as alleged.

An employee seeking benefits under the Federal Employees’ Compensation Act has the burden of establishing 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 the Act, that the claim was filed within the applicable time limitations 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.”<sup>2</sup> These are the essential elements of each and every compensation claim regardless of whether the claim is predicated upon a traumatic injury or occupational disease.<sup>3</sup>

In order to determine whether an employee actually sustained an injury in the performance of duty, the Office 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 alleged to have occurred.<sup>4</sup> In the instant case, there is no dispute that the claimed incident occurred at the time, place and in the manner

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<sup>1</sup> The record indicates that on March 21, 1996 the Office received a February 21, 1996 report by Dr. Schuller and on March 26, 1996 a patient progress record was received. Appellant appealed to the Board on March 6, 1996.

<sup>2</sup> *Elaine Pendleton*, 40 ECAB 1143, 1154 (1989).

<sup>3</sup> *David J. Overfield*, 42 ECAB 718, 721 (1991).

<sup>4</sup> *Elaine Pendleton*, *supra* note 4.

alleged. However, the Office found that the medical evidence was insufficient to support that appellant sustained an injury as a result of the incident.

The second component of fact of injury is whether the employment incident caused a personal injury and generally can be established only by medical evidence. To establish a causal relationship between the condition, as well as any attendant disability, claimed and the employment event or incident, the employee must submit rationalized medical opinion evidence, based on a complete factual and medical background, supporting such a causal relationship.<sup>5</sup>

In this case, there is insufficient medical opinion evidence to support that appellant suffered an injury or that it resulted in a condition or disability causally related to any work factors. The October 16, 1995 attending physician's report by Dr. DeLong, a Board-certified neurological surgeon, provided a history of injury, diagnosed internal disc disruption at L3-4, C5-6, and C6-7 with protrusion and chronic ligamentous sprain and fibromyalgia syndrome, and checked "yes" to the question as to whether the October 6, 1995 incident caused or aggravated appellants condition. Dr. DeLong further stated that the October 6, 1995 incident probably caused a temporary aggravation of appellant's preexisting conditions. However, Dr. DeLong failed to provide rationale to support his opinion.<sup>6</sup> Dr. DeLong's October 16, 1995 report is insufficient to establish appellant's claim. An employing establishment health unit record reviewed by Dr. Vondippe included an October 10, 1995 entry which provided a history of injury, and noted appellant's complaints. The health unit record did not include a diagnosis nor did it include an opinion on a causal relationship between a diagnosed condition and the October 6, 1995 incident. The health unit record is insufficient to establish appellant's claim.

On a December 4, 1995 medical certificate Dr. Schuller, a Board-certified neurologist, diagnosed myofascial pain and noted a period of total disability. Dr. Schuller, failed to address the issue of causal relationship between appellant's diagnosed condition and the October 6, 1995 incident. The December 4, 1995 medical certificate is, therefore, insufficient to establish appellant's claim.

In a January 10, 1996 report, Dr. Schuller provided a history of injury, and described appellant's symptoms as low back pain, lower extremity pain, neck, shoulder, and right arm pain. Dr. Schuller referred to an MRI of the lumbar spine which indicated degenerative disc disease and moderate central stenosis secondary to a bulge and a previous diagnosis of fibromyalgia. Dr. Schuller also noted an exacerbation of symptoms. Dr. Schuller failed to provide a rationalized medical opinion causal relating appellant's conditions to the October 6, 1995 incident. Dr. Schuller also failed to differentiate between the effects of the October 6, 1995 incident from the progression of appellant's preexisting conditions. In fact, Dr. Schuller stated that he did not know how the October 6, 1995 incident affected the normal progression of any preexisting condition. Dr. Schuller's January 10, 1996 report is insufficient to establish

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<sup>5</sup> *Kathryn Haggerty*, 45 ECAB 383 (1994); *see* 20 C.F.R. §10.110(a).

<sup>6</sup> *Ruth S. Johnson*, 46 ECAB 237 (1994) (The Board has held that when a physician's opinion on causal relationship consists only of checking "yes" to a form question, that opinion has little probative value and is insufficient to establish causal relationship.) Appellant's burden included the necessity of furnishing an affirmative opinion from a physician who supports his conclusion with sound medical reasoning.

appellant's claim. The Office advised appellant in detail what type of evidence was needed to establish her claim, but such evidence has not been submitted. Therefore, the Board finds that appellant has failed to meet her burden of proof.

The decision of the Office of Workers' Compensation Programs dated February 6, 1996 is affirmed.<sup>7</sup>

Dated, Washington, D.C.  
November 13, 1998

Michael J. Walsh  
Chairman

Michael E. Groom  
Alternate Member

Bradley T. Knott  
Alternate Member

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<sup>7</sup> On appeal appellant's representative requested that appellant's appeals, docket numbers 94-1968 and 95-0781 be consolidated with this appeal. The appeals in 94-1968 and 95-781 were decided in a decision issued on July 17, 1996; therefore, appellants request is moot.