U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of VANESSA A. WILSON and U.S. POSTAL SERVICE,
BERKELEY POST OFFICE, Berkeley, Calif.

Docket No. 96-2263; Submitted on the Record;
Issued September 3, 1998

DECISION and ORDER

Before GEORGE E. RIVERS, DAVID S. GERSON,
BRADLEY T. KNOTT

The issue is whether appellant has met her burden of proof in establishing that she sustained an occupational injury as alleged.

On July 6, 1995 appellant, then a 41-year-old general mechanic and janitor, filed a claim for an occupational injury for impingement of the right shoulder, de Quervain's syndrome of the right wrist and a neck condition. She related her condition to constant movement and pushing an industrial size mop and broom, vacuuming the lobby on a daily basis and emptying garbage receptacles. In a January 26, 1996 decision the Office of Workers' Compensation Programs rejected appellant's claim on the grounds that the evidence of record showed that she did not perform the duties which she claimed caused or aggravated her conditions. In an April 24, 1996 merit decision, the Office denied appellant's request for modification of the January 26, 1996 decision. In a May 28, 1996 decision, the Office denied appellant's request for reconsideration on the grounds that the evidence submitted in support of the request was cumulative and therefore insufficient to warrant review of the prior decision.[1]

The Board finds that appellant has not met her burden of proof in establishing that she sustained an employment-related occupational injury as alleged.

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[1] The Board notes that appellant filed an appeal on July 19, 1996 and submitted a third request for reconsideration in August 1996. In a September 9, 1996 decision, the Office denied appellant's request for reconsideration on the grounds that the evidence submitted in support of the request was irrelevant and immaterial and therefore insufficient to warrant review of the prior decisions. The Board and the Office may not have jurisdiction over the same issues in the same case concurrently. *Douglas E. Billings*, 41 ECAB 880 (1990). As the Office's September 9, 1996 decision concerned the same issue as raised on appeal, that decision is null and void. The Board cannot review any evidence submitted in support of that request for reconsideration because the scope of the Board's review is limited to the evidence that was before the Office at the time of its most recent final decision, which in this case would be the decision of May 28, 1996. 20 C.F.R. § 501.2(c).

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. 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 a *prima facie* case.[2] The employee has the burden of establishing the occurrence of the alleged injury at the time, place and 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 doubt upon the validity of the claim. However, her statement alleging that an injury occurred at a given time and manner is of great probative value and will stand unless refuted by substantial evidence.[3]

In her initial statement, appellant stated that as a general mechanic she moved and relocated relay and carrier cases. She indicated that as a relief custodian, she swept and mopped the floor, emptied large and small trash receptacles, vacuumed the lobby and cleaned and stocked the restrooms.

Several coworkers and supervisors disputed appellant's description of her work. In a June 12, 1995 statement, one coworker stated that when appellant was assigned the duty of moving collection or relay cases, he and another coworker were always assigned to help her. He indicated that on every occasion, appellant's reluctance to do physical labor left him to do the job. He stated that when he was assigned to clean the employing establishment he found through personal experience that appellant would fill trash cans but would leave the trash cans for someone else to empty. He noted that the day after or the weekend after appellant was assigned to clean the employing establishment, it was obvious that she did not mop or empty trash cans. In a July 13, 1995 statement, a maintenance supervisor stated that his employees who were assigned to work with appellant complained that she refused to mop, empty trash and vacuum, claiming that she was unable to work due to a previous injury. In a separate July 13, 1995 memorandum, a maintenance support clerk stated that she received complaints from coworkers who asked her to tell the supervisor not to send appellant with time on assignment because she would just stand around and talk to coworkers instead of helping. She related that a coworker stated he mopped the floor because appellant refused to do so and refused to empty trash cans or vacuum.

In an August 31, 1995 statement, appellant contended that the statements from her supervisor and coworkers were erroneous, libelous and a defamation of character. She reviewed the duties of a Saturday custodian, which included vacuuming, emptying trash cans, mopping the floor, and cleaning restrooms. She stated that she was the only Saturday custodian for the employing establishment and she performed all those duties. She indicated that on two occasions her manager came to the employing establishment on Saturday to supervise other work and should have observed her performing her duties. She reported that she began to get pain in

[2] *Morton J. Sills*, 39 ECAB 572 (1988).

[3] *Carmen Dickerson*, 36 ECAB 409 (1985).

her wrists as she lifted garbage bags from trash cans and vacuuming. She took medication but the pain became worse over time. She eventually requested light duty based on her physician's recommendation. The employing establishment denied the request because they could not accommodate appellant.

In a November 26, 1995 statement, a letter carrier stated that he never saw appellant mop a floor. He indicated that on several occasions he mopped the men's restroom and had seen management mop the swing room floor because they were so dirty. He commented that most of the employees emptied their own trash cans. He noted that he observed appellant, on many occasions, standing around doing nothing but talking and sitting in her car listening to her radio. In an undated statement, a station manager stated that he did not observe appellant use a mop, a vacuum cleaner or pick up any trash can larger than three gallons. He reported that he overheard appellant tell a coworker that she would not do anything that might aggravate her condition caused from a previous job.[4] In another undated statement, appellant's supervisor again stated that he had constant complaints from coworkers who stated that appellant did not do any work but only socialized. He noted that when he asked her about the complaints, she stated that she had a disability and could not perform the duties. He indicated that when he requested proof of the disability, she did not submit any evidence. In a November 9, 1995 statement, another coworker stated that when she cleaned stations, appellant did no heavy lifting, emptied nothing bigger than a secretary's trash can and did only a partial cleaning of restrooms.

Appellant has submitted some evidence that she performed the duties that she claimed were causally related to her condition. However, appellant's supervisor and coworkers have submitted numerous statements to establish that appellant regularly refused to mop, sweep or clean bathrooms or that such areas had to be cleaned after appellant claimed she had cleaned them. These statements contradict appellant's factual statements on the repeated performance of the work duties which she alleged caused her work conditions. These statements raised inconsistencies in appellant's statements to the point that the Board must conclude that she has not met her burden of proof in establishing that she sustained an occupational injury as alleged.

[4] In a November 12, 1995 statement, appellant indicated that she had worked as an encoder for another employer for a private contractor for the employing agency. She stated that while working in this position, she began to feel numbness, tingling and pain in her right wrist which became increasingly worse. She reported that she eventually received workers' compensation for the condition.

The decisions of the Office of Workers' Compensation Programs, dated May 28, April 24 and January 26, 1996, are hereby affirmed.

Dated, Washington, D.C.
September 3, 1998

George E. Rivers
Member

David S. Gerson
Member

Bradley T. Knott
Alternate Member