

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DENISE SELSKY and U.S. POSTAL SERVICE,
POST OFFICE, Tampa, FL

*Docket No. 99-1336; Submitted on the Record;
Issued July 7, 2000*

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issue is whether appellant sustained an injury in the performance of duty on January 24, 1998.

On January 27, 1998 appellant, then a 38-year-old letter carrier, filed a notice of traumatic injury alleging that she injured her neck, right shoulder and lower back on January 24, 1998 when she bent down to lift flats off the floor in the course of her federal employment. She also noted that her injury stemmed from reading over her shoulder and prolonged standing. Appellant stopped working on January 26, 1998.

Appellant subsequently submitted a January 26, 1998 report from Dr. E. Yemi Owl, diagnosing a history of neck and back injury and a history of aggravating the neck and back injury.

On February 5, 1998 the Office of Workers' Compensation Programs advised appellant of the evidence needed to establish her claim, including a physician's opinion supported by a medical explanation as to how the reported work incident caused or aggravated the claimed injury.

Appellant subsequently submitted a January 29, 1998 report from Dr. Edward N. Feldman, appellant's treating physician and a Board-certified orthopedic surgeon. He reviewed the history of appellant's injury on January 24, 1998. Dr. Feldman noted that appellant was sorting letters and flats on that date when she experienced sudden pain in her neck and shooting pain in her right upper and lower back. He stated that the intensity of the symptoms increased by January 26, 1998 and that she developed a shooting pain into her right leg and numbness in the right arm and hand. Dr. Feldman noted that appellant could not work due to the pain. He then reviewed appellant's medical history and conducted an orthopedic examination. In examining the cervical spine and upper extremities, Dr. Feldman found tenderness with spasm of the paracervical muscles. He also noted that rotation, extension, flexion and lateral bending

produced discomfort. Dr. Feldman's hyperextension and hyperflexion compression tests were positive and he noted that the greater occipital nerves were tender to palpation. He noted a positive Tinel's and Phalen's test, bilaterally and stated that there was pinpoint tenderness under the right scapula. Dr. Feldman's examination of the thoracic spine showed tenderness to palpation of the parathoracic muscles. On examination of the lumbar spine and lower extremities, he found a spasm with tenderness to palpation of the paralumbar muscles. Dr. Feldman noted that rotation, extension, flexion and lateral bending produced discomfort. He found trigger points over the junction of L2-3 and L4-5. Dr. Feldman noted that straight leg raising was positive at 80 degrees bilaterally and found patchy hypoesthesia along the right lower extremity. He diagnosed acute cervical sprain, cervical radiculopathy, peripheral nerve entrapment, acute thoracic sprain, acute lumbosacral sprain and a herniated lumbar disc, L5-S1. Dr. Feldman opined that the objective findings and subjective complaints were causally related to the work accident of January 24, 1998. He stated that appellant had clinical signs consistent with the injury.

On February 18, 1998 Dr. Feldman diagnosed acute cervical sprain and cervical radiculopathy.

By decision dated March 11, 1998, the Office denied appellant's claim because she failed to establish fact of injury. In this regard, the Office found that appellant failed to submit an affirmative opinion from a physician supporting his conclusion with sound reasoning which supported that appellant sustained a work-related injury on January 24, 1998.

On April 10, 1998 appellant requested an oral hearing, which was held on November 18, 1998.

Prior to the hearing, appellant submitted an April 9, 1998 report from Dr. Feldman diagnosing a herniated lumbar disc, L5-S1.

On November 18, 1998 Dr. Feldman noted that appellant experienced a permanent aggravation of her back condition due to a March 12, 1996 work incident. He further stated that appellant injured herself again on January 24, 1998 when she lifted a tub of mail. Dr. Feldman stated that appellant sustained a herniated disc at L5-S1, which was confirmed by magnetic resonance imaging scan. He stated that this was a permanent, job-related condition.

On June 4, 1998 Dr. Feldman reviewed appellant's complaints and stated that her physical examination was unchanged since the previous visit. He diagnosed chronic cervical sprain, chronic thoracic sprain, chronic lumbar sprain, a herniated lumbar disc L5-S1, fibromyalgia and a job-related stress disorder. Dr. Feldman opined that the objective and subjective complaints were causally related to the work incident of January 24, 1998.

By decision dated February 3, 1999, the Office hearing representative denied appellant's claim because the record was devoid of any medical opinion evidence explaining how appellant's present condition related to the January 24, 1998 work incident.

The Board finds that this case is not in posture for decision.

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 factual evidence to establish that he or she actually experienced the employment incident at the time, place and in the manner alleged.¹ Second, the employee must submit sufficient evidence, generally only in the form of medical evidence, to establish that the employment incident caused a personal injury.² In this case, appellant alleged that she injured her neck, right shoulder and back on January 24, 1998 when she bent down to lift flats off the floor in the course of her federal employment.

However, proceedings under the Federal Employees’ Compensation Act are not adversary in nature, nor is the Office a disinterested arbiter. While the claimant has the burden to establish entitlement to compensation, the Office shares responsibility in the development of the evidence to see that justice is done.³ In the instant case, Dr. Feldman, appellant’s treating physician and a Board-certified orthopedic surgeon, submitted reports dated January 29, November 18 and June 4, 1998 relating appellant’s acute cervical sprain, cervical radiculopathy, peripheral nerve entrapment, acute thoracic sprain, acute lumbar sprain, herniated disc at L5-S1, fibromyalgia and job-related stress disorder to the January 24, 1998 work incident. He, however, failed to provide an adequate rationale for his conclusion inasmuch as he did not explain how the January 24, 1998 work incidents caused or aggravated appellant’s conditions. Dr. Feldman’s opinion, therefore, is insufficient to meet appellant’s burden of proof.⁴

Dr. Feldman’s opinion, however, does constitute substantial, uncontradicted medical evidence in support of appellant’s claim and raises an uncontroverted inference of causal relationship between her employment on January 24, 1998 and his subsequently diagnosed injuries. The evidence is sufficient to require further development of the case record by the Office.⁵

Therefore, upon remand, the Office should create a statement of accepted facts and questions to be answered and refer appellant, together with the relevant case records, to an appropriate specialist, for a reasoned opinion as to whether appellant sustained an injury on January 24, 1998, causally related to her federal employment.

¹ *John J. Carlone*, 41 ECAB 354 (1989).

² *Id.* For a definition of the term “injury,” see 20 C.F.R. § 10.5(a)(14).

³ *William J. Cantrell*, 34 ECAB 1223 (1983).

⁴ *Carolyn F. Allen*, 47 ECAB240 (1995).

⁵ *John J. Carlone*, *supra* note 1; *Horace Langhorne*, 29 ECAB 820 (1978).

Accordingly, the decision of the Office of Workers' Compensation Programs dated February 3, 1999 is hereby set aside and the case is remanded for further development in accordance with this decision and order of the Board.

Dated, Washington, D.C.
July 7, 2000

Michael J. Walsh
Chairman

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member