U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of HAZEL McLEAN and U.S. POSTAL SERVICE,
MORGAN POST OFFICE, New York, NY

Docket No. 02-2227; Submitted on the Record;
Issued March 7, 2003

DECISION and ORDER

Before DAVID S. GERSON, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issue is whether appellant has established that she sustained an injury in the performance of duty.

On September 27, 1999 appellant, then a 41-year-old clerk, filed a traumatic injury claim alleging that on September 24, 1999 she experienced chest, back, knee and joint pain, and stress while lifting cases of mail out of a baby carriage. She stated that her entire body went into a spasm causing severe pain. Appellant stopped work on the date of injury. In a statement dated September 27, 1999, Kenneth Moore, appellant's coworker, stated that "I … was instructed by Supervisor Rebecca Fields, third floor D.B.C.S. to take [appellant] to the Morgan Medical Unit on September 24, 1999. [Appellant] appeared to be in severe pain."

By letter dated October 27, 1999, the Office of Workers' Compensation Programs advised the employing establishment's medical unit to submit evidence in response to appellant's claim. By letter of the same date, the Office advised appellant to submit factual and medical evidence supportive of her claim.

In an October 25, 1999 letter, James A. Connolly, an employing establishment human resources manager, controverted appellant's claim on the grounds that her traumatic injury and recurrence claims were filed after her limited-duty status ceased, she submitted medical documentation from different physicians, she claimed a new illness, her statements contained inconsistencies and the medical documentation did not address causal relation. Mr. Connolly noted that Ms. Fields' September 27, 1999 statement provided that appellant performed her work while seated, that she did not stand, push or pull the mail and that the mail was brought to her by a mailhandler. He further noted that a September 29, 1999 statement of J. Ford, an employing establishment supervisor, stated that he did not instruct appellant to remove mail from the baby carriage, that appellant did not discuss any problems with the lifting of heavy trays with him and that she was not required to perform any duties involving bending or lifting. Mr. Connolly stated that a September 29, 1999 statement of C. Alston, an employing establishment supervisor, revealed that on the date of injury appellant did not lift a tray of mail.

The Office received a September 24, 1999 disability certificate from Dr. Martin A. Ginsburg, an internist, indicating that appellant had been under his care for depression and stress since that date and that he did not know when appellant could return to work.

A September 27, 1999 duty status report of Dr. Sam Yoon, an internist and an employing establishment physician, indicated the date of injury as September 24, 1999, a diagnosis of cervical/thoracic intercostal and appellant's physical restrictions.

A September 27, 1999 disability certificate of Dr. Edward M. Weiland, a Board-certified neurologist, revealed that appellant had been treated for cervical/thoracic sprain/strain and intercostal muscle sprain, and that she was totally disabled for work.

In an October 4, 1999 attending physician's report, Dr. Weiland indicated the date of injury as September 23, 1999 and provided a history of paraspinous injuries, which included muscle spasm, anterior chest wall contusion and exacerbation of previous left patellar tendinitis. He indicated that these diagnoses were caused or aggravated by the employment activity by placing a checkmark in the box marked "yes."

In a November 4, 1999 response to the Office's October 27, 1999 letter, appellant stated that her injury was immediately reported to Ms. Fields, who filled out a Form 3956 and sent her to the nurse. She was released at 3:15 a.m. and Ms. Fields' tour had ended at 2:00 a.m. Appellant stated that her traumatic injury form was filled out on September 27, 1999 because she was in severe pain and she could not return to work until then to complete the form. She further stated that the Form 3956 contained Ms. Fields' signature, indicating that she was notified that her injury was work related. In describing how she sustained injury, appellant stated that Mr. Ford told her to get the mail and when she asked him to get it for her, he told her that she was no longer on limited duty and had to get it herself. Appellant stated that the mail was in a baby carriage and that she had to reach into the carriage to pull the tray of mail out. She noted that the tray weighed about 20 to 25 pounds. Appellant stated that she felt pain in her neck and back, and then her entire body went into a spasm. She stopped working when the pain became unbearable and asked Ms. Fields to send her to the nurse. Appellant provided the names of her treating physicians and indicated that she had previously filed a workers' compensation claim for a knee injury sustained on October 29, 1999.

In a November 24, 1999 letter, the Office advised appellant to submit additional evidence explaining how her back condition changed as a result of the incident she described. The Office also advised appellant that her condition of depression had not been accepted.

Appellant submitted an undated attending physician's report of Dr. Scott Gray, a Board-certified orthopedic surgeon, indicating that on September 23, 1999 she sustained an injury while lifting a heavy tray. He diagnosed cervical radiculopathy and placed a checkmark in the box marked "yes" indicating that appellant's condition was caused or aggravated by the employment activity.

Appellant also submitted Dr. Weiland's September 28, 1999 report, indicating that on September 23, 1999 she abruptly developed upper torso paravertebral muscle pain and spasm, and anterior chest wall pain while attempting to open a file cabinet weighing approximately 15 to

20 pounds at work. Dr. Weiland noted appellant's complaints of neck and mid-thoracic paravertebral muscle pain and spasm, and anterior chest wall pain. He further noted appellant's medical and work history, and his findings on neurological examination. Dr. Weiland diagnosed cervical sprain/strain, thoracic sprain/strain, intercostals muscle sprain/strain, muscle spasm, bilateral subacromial tendinitis and bilateral trapezius muscle sprain/strain. He opined that, if the history received was accurate, appellant's neurologic complaints, impairments and disability were causally related to the September 23, 1999 injury.

In a December 8, 1999 addendum, Dr. Weiland indicated that the history of appellant's injury as reported in his September 27, 1999 report was inaccurate. He indicated that, as reported by appellant on her claim form, she developed upper torso paraveterbral muscle pain and spasm, and anterior chest wall pain upon lifting heavy cases of mail out of a baby carriage. Dr. Weiland further indicated that the date of injury was September 24, 1999 rather than September 23, 1999.

By decision dated December 16, 1999, the Office found the evidence of record insufficient to establish that appellant sustained an injury in the performance of duty. The Office found that appellant failed to establish that she sustained an injury at the time, place and in the manner alleged. The Office found the medical evidence of record insufficient to establish that appellant sustained a diagnosed condition causally related to the incident.

The Office received a December 7, 1999 letter from Dr. Weiland in response to its November 24, 1999 letter. He stated that, based on the history provided by appellant, she injured her neck and upper back while attempting to lift an object weighing approximately 20 pounds at work and her injuries were directly related to a job responsibility she was performing on September 24, 1999.

The Office also received Dr. Weiland's November 9, 1999 report indicating appellant's complaints of persistent neck, bilateral shoulder and mid-thoracic pain and muscle spasm. He noted appellant's medical treatment, her disability for work and his findings on neurological examination. He diagnosed cervical sprain/strain, thoracic sprain/strain and intercostals muscle sprain/strain.

Dr. Gray's October 18, 1999 report revealed a history of appellant's injury and medical treatment, and his findings on physical examination. He ruled out herniated nucleus pulposus of the cervical spine and diagnosed cervical radiculopathy. Dr. Gray stated that, if the noted information was true, the incident described was a competent producing cause of the injury. His January 3, 2000 treatment notes revealed that appellant remained totally disabled. Dr. Gray's November 15 and December 13, 1999, and January 1, 2002 treatment notes provided his findings on physical examination and appellant's medical treatment. A November 12, 1999 report provided results of appellant's current perception threshold evaluation of the upper extremities.

In a December 15, 2000 letter, appellant, through her representative, requested reconsideration of the Office's decision. In a February 26, 2001 decision, the Office denied modification of the December 16, 1999 decision.

By letter dated January 30, 2002, appellant, through her representative, requested reconsideration accompanied by an Office hearing representative's decision regarding another claimant and medical evidence concerning her October 29, 1998 injury. She submitted a narrative statement indicating that prior to September 24, 1999 she was frequently asked to work outside the physical limitations set forth by her physician. Appellant stated that on September 24, 1999 she was harassed by Mr. Ford and given a direct order to get a tray of mail and work. She noted that she told Mr. Ford that she was on limited duty and requested that he assist her in getting a tray of mail from the baby carriage. Mr. Ford refused and while lifting a tray of mail out of the carriage she began to feel pain in her chest. Appellant continued to work when the pain later intensified. She explained that as the pain became unbearable she went to Supervisor Fields, who asked Mr. Moore to assist her to the employing establishment medical unit.

Appellant also submitted Dr. Gray's August 20, 2001 report, which noted that on September 24, 1999 she was following an order to remove trays of mail from a baby carriage. Mr. Gray stated that, as appellant lifted the tray of mail weighing approximately 20 pounds out of the carriage, she began to experience pain in her neck, shoulders and upper back. He stated that subsequently appellant's neck, back and chest went into spasm. Mr. Gray noted that she was unable to walk or stand due to aggravation of an existing on-the-job injury to her left knee and had to be assisted by a coworker, who took her to the employing establishment medical unit. He noted that he and Drs. Weiland, Ginsburg and Yoon requested a light-duty assignment for appellant prior to September 24, 1999. Dr. Gray addressed appellant's physical restrictions. He stated that he treated appellant on September 27, 1999, noted his findings on physical examination, including paravertebral muscle pain, severe muscle spasm and anterior chest wall pain. He also noted his findings on examination of appellant's left knee. Dr. Gray opined that, based on his physical examination and as a result of appellant's activities prior to and on September 24, 1999, her injures were directly job related.

Appellant submitted statements signed by several coworkers indicating that on and prior to September 29, 1999 they had seen her go over to the delivery bar code sorter machines to get trays of mail on several occasions and collect data from these machines. They noted that appellant took the trays of mail to her work area.

In a May 20, 2002 decision, the Office denied modification of the February 26, 2001 decision.

The Board finds that appellant has failed to establish that she sustained an injury in the performance of duty.

To determine whether an 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.[1] To establish that an injury occurred as alleged, the injury need not be confirmed by eyewitnesses, but the employee's statements must be consistent with the surrounding facts and circumstances and her subsequent

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

course of action. In determining whether a *prima facie* case has been established, such circumstances as late notification of injury, lack of confirmation of injury and failure to obtain medical treatment may, if otherwise unexplained, cast sufficient doubt on a claimant's statements. The employee has not met this burden when there are such inconsistencies in the evidence as to cast serious doubt on the validity of the claim.[2]

In this case, the Office found that there were such inconsistencies in the evidence as to cast doubt that the incident occurred as alleged. Appellant maintained that, on September 24, 1999, she lifted a tray of mail weighing approximately 15 to 20 pounds from a baby carriage and experienced chest, back, knee and joint pain, and stress causing her entire body to experience a spasm. She advised her supervisor about her injury and sought immediate medical treatment from the employing establishment's medical unit on the date of injury. The statement of Mr. Moore, appellant's coworker, indicated that he was instructed by Supervisor Fields to take appellant to the medical unit on September 24, 1999 and that appellant appeared to be in severe pain. Appellant was treated at the employing establishment medical unit. The September 27, 1999 duty status report of Dr. Yoon, an internist and employing establishment physician, indicated the date of injury as September 24, 1999 and a diagnosis of cervical/thoracic intercostal sprain. Appellant explained the delay in filing her traumatic injury claim form on September 27, 1999 noting that she did not return to work until then due to severe pain. The December 8, 1999 letter of Dr. Weiland, a Board-certified neurologist, provided a corrected version of the history of the September 24, 1999 incident and appellant's injuries and his December 7, 1999 letter provided a history of the incident. Similarly, the October 18, 1999 report and August 20, 2001 letter of Dr. Gray, a Board-certified orthopedic surgeon, provided a history of the September 24, 1999 incident.

Mr. Connolly, an employing establishment human resources manager, contends that the statements of several supervisors contradict the history of injury as provided by appellant. The record, however, does not contain these statements.

The Board finds that the statements of appellant and Mr. Moore, and the contemporaneous medical evidence from Drs. Yoon, Weiland and Gray are sufficient to establish that the September 24, 1999 incident occurred, as alleged.

The second component of fact of injury is whether the employee submitted sufficient evidence to establish that the employment incident caused a personal injury.[3] An employee may establish that an injury occurred in the performance of duty as alleged, but fail to establish that his or her disability and/or specific condition for which compensation is claimed are causally related to the injury.[4] To accept fact of injury in a traumatic injury case, the Office, in addition to finding that the employment incident occurred in the performance of duty as alleged, must

[2] *Carmen Dickerson*, 36 ECAB 409 (1985); *Joseph A. Fournier*, 35 ECAB 1175 (1984); *see also George W. Glavis*, 5 ECAB 363 (1953).

[3] *John J. Carlone*, *supra* note 1.

[4] As used in the Act, the term "disability" means incapacity because of an injury in employment to earn the wages the employee was receiving at the time of injury, *i.e.*, a physical impairment resulting in loss of wage-earning capacity; *see Frazier V. Nichol*, 37 ECAB 528 (1986).

also find that the employment incident resulted in an " injury." The term "injury" as defined by the Federal Employees' Compensation Act, as commonly used, refers to some physical or mental condition caused either by trauma or by continued or repeated exposure to, or contact with, certain factors, elements or conditions.[5] The question of whether an employment incident caused a personal injury generally can be established only by medical evidence.[6]

Dr. Weiland's October 4, 1999 and Dr. Gray's undated attending physician's reports indicated that appellant had sustained several cervical conditions caused by the September 23, 1999 employment incident by placing a checkmark in the box marked "yes." Their reports, however, are insufficient to establish appellant's burden because they indicated that the date of injury was September 23, 1999 rather than September 24, 1999. Further, neither physician provided any medical rationale explaining how or why appellant's conditions were caused by the September 24, 1999 employment incident.[7]

Dr. Weiland's September 28, 1999 report indicating a history that appellant sustained injuries while attempting to open a file cabinet weighing 15 to 20 pounds is inaccurate. In addition, he failed to offer any explanation as to why his diagnoses of cervical sprain/strain, thoracic sprain/strain and intercostals muscle sprain/strain, and appellant's impairments and disability were causally related to the September 24, 1999 employment incident.

Similarly, Dr. Weiland's December 7, 1999 letter and Dr. Gray's October 18, 1999 letter and August 20, 2001 letter revealing that appellant's neck and upper back conditions were caused by the September 24, 1999 employment incident failed to provide any medical rationale in support of their opinions.

Inasmuch as appellant has failed to submit rationalized medical evidence establishing that she sustained an injury causally related to her September 24, 1999 employment incident, she has failed to satisfy her burden of proof in this case.

[5] *Elaine Pendleton*, 40 ECAB 1143 (1989).

[6] *John J. Carlone*, *supra* note 1.

[7] *Lucrecia M. Nielson*, 42 ECAB 583, 594 (1991).

The May 20, 2002 decision of the Office of Workers' Compensation Programs is hereby affirmed, as modified.

Dated, Washington, DC
March 7, 2003

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member