U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of THESSALONIA JENKINS and U.S. POSTAL SERVICE, PROCESSING & DISTRIBUTION CENTER, Trenton, NJ

Docket No. 03-626; Submitted on the Record;
Issued May 14, 2003

DECISION and ORDER

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

The issue is whether appellant sustained an injury in the performance of duty on May 15, 2001, as alleged.

On May 15, 2001 appellant, then a 53-year-old clerk, filed a traumatic injury claim alleging that on that date, while lifting mail and twisting to place it in a tray, she sustained injuries to her neck and back. The employing establishment controverted the claim.

In support of her claim, appellant submitted documents indicating that she was seen on May 15, 2001 at Robert W. Johnson University Hospital. She related that she was lifting a tray of mail and that, when she turned; the twisting motion caused her to develop sharp pain in the neck and lower back.

In a May 16, 2001 note, Dr. A. Nagarajah indicated that appellant was being treated for right shoulder tendinitis and was awaiting an evaluation by an orthopedist on May 30, 2001.

In a June 6, 2001 attending physician's report, Dr. Richard E. Fleming, a Board-certified orthopedic surgeon, indicated that appellant had a rotator cuff sprain. Dr. Fleming checked a box indicating that this condition was caused or aggravated by appellant's employment.

On June 22, 2001 the Office of Workers' Compensation Programs referred appellant to Dr. David Rubinfeld, a Board-certified orthopedic surgeon, for a second opinion examination. In a report dated July 13, 2001, Dr. Rubinfeld noted that, at the time he saw appellant, she was complaining of nervousness and pain in the neck, back, right shoulder and right arm. He also indicated that she was experiencing intermittent numbness in the right shoulder, right arm and right fingers. Dr. Rubinfeld noted:

> "The accepted condition of cervical sprain is not present. There is evidence of a painful condition of the right shoulder, chronic bursitis with adhesive capsulitis.

It is not due to the May 15, 2001 injury. There is no evidence relating it to the 1994 accident."

He further noted that the accepted condition had resolved and that no additional care for the accepted condition was indicated.

On August 23, 2001 appellant underwent an arthroscopy of the right shoulder, debridement of partial tear of the rotator cuff, anterior acromioplasty and subacromial decompression, excision of the outer clavicle. The surgery was performed by Dr. Fleming.

In a letter dated August 21, 2001, appellant noted:

"My duties as a clerk in general and specifically on the date of the recurrence of my injuries are as follows: I am required to pick up a tub of mail from a utility cart and place the cart on the floor. The tubs weigh between 5 to 10 pounds. Once the tub is out of the utility cart and on the floor, I take the mail out of the tub in order to sort the mail. While it is true that I am able to sit during this process, in order to perform this job it is necessary to lift the tub out of the cart.

"On May 15, 2001 I was working and my injury was aggravated due to twisting and repetitive movement of my right arm. Although I filed a claim for recurrence of my original injury, the incident on May 15, 2001 was not a part of the recurrence. The May 15[, 2001] incident was an aggravation of my original injuries. My supervisor requested that I fill out the paperwork with respect to the aggravation of the injury. I completed the necessary paperwork and in no way was this paperwork a new claim."

On September 25, 2001 the employing establishment responded to appellant's description of her job duties by indicating that the tubs of mail weigh 5 to 10 pounds and once removed from the utility cart are only a step or 2 away from the desk at which appellant works. The employing establishment noted that the removal of the tubs from the utility cart happens no more than four times a tour.

In a medical report dated September 18, 2001, Dr. Fleming noted:

"[Appellant] has remained under medical care for chronic disability about the right shoulder. She ultimately has required arthroscopic intervention to treat partial tear of the rotator cuff associated with impingement syndrome, synovitis and progressive degenerative change of the acromioclavicular joint which has warranted surgical resection. These injuries are the result of her employment and of trauma sustained on May 15, 2001. Surgery was necessitated as the culmination of chronic repetitive injury and use of her dominant extremity in her occupation as a mail sorter and worker."

By decision dated November 10, 2001, the Office denied appellant's claim for the reason that a causal relationship between the May 15, 2001 incident and the claimed condition was not established.

On November 29, 2001 appellant, through her attorney, requested a hearing.

In a December 14, 2001 medical report, Dr. Fleming described appellant's medical history and noted:

> "She continues under care at this present time and requires ongoing treatment for both persistent shoulder inflammation with neck limitation and spinal disability. It is our assessment that she will be able to return in a limited-duty capacity in the early part of January 2002.
>
> "[Appellant] has a long and documented history of chronic disability about the neck and the right upper extremity. Such symptoms are the result of repetitive use of the nondominant extremity in the nature of her work. The findings of shoulder degeneration and rotator cuff partial tear are indeed the direct sequelae of the nature of her occupation and her injuries over the past years. Such injuries caused the need for her surgery of August 23, 2001 as well as the ongoing supervised therapy treatment and medical assessment about her axial skeleton."

At the hearing held on May 15, 2002 appellant testified that, at the time she was hired by the employing establishment in July 1978, she had no trouble with her arm or neck. She recalled a prior work-related injury on November 4, 1992 to her neck and right shoulder and another injury to her right shoulder on November 15, 1994. Appellant noted that, in 1995 or 1996, the employing establishment gave her a limited-duty job and that the employing establishment wanted her to work at this job for eight hours a day but that she only worked four hours a day due to her treating physician's restrictions. She described the duties of her limited-duty job, noting that she had to lift tubs weighing about 5 to 10 pounds out of a hamper and then she would be seated while she repaired the mail. In 1996, appellant indicated that there arose a dispute about her going back to work eight hours a day and she indicated that she could not do this because of her doctor's restrictions and that they terminated her compensation benefits. She noted that on May 15, 2001 she was already in pain and that, when she was getting mail out of the hamper and turned, she experienced pain in the upper part of her body and requested that she be taken to the emergency ward. Appellant indicated that she had surgery on August 23, 2002 and returned to work eight hours a day on April 16, 2002, but was doing no lifting and working at her own pace.

By letter dated June 10, 2002, the employing establishment filed comments in response to their review of the hearing transcript. The employing establishment contended that the instant claim was employee's response to efforts by her supervisor to have her resume working eight hours a day. Specifically, the employing establishment noted that on May 15, 2001 appellant's immediate supervisor pressed her to complete the appropriate form to request light duty and, within 15 minutes, appellant reported that she hurt herself. The employing establishment also noted that although appellant indicated in her Form CA-1 that she grabbed mail and placed it in a tray, her job did not involve lifting a tub or tray of mail.

Appellant submitted a June 5, 2002 report by Dr. Fleming, who reiterated his opinion that on May 15, 2001 appellant sustained a twisting injury to her right upper extremity, which necessitated the surgery of August 23, 2001.

By decision dated October 7, 2002, the hearing representative denied appellant's claim. He found that appellant had not met her burden of proof in establishing that on May 15, 2001 she sustained an injury as alleged.

The Board finds that this case is not in posture for decision on the issue of whether appellant sustained an injury while in the performance of duty on May 15, 2001.

An employee seeking benefits under the Federal Employees' Compensation Act[1] 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 timely filed within the applicable time limitation 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.[2] These are essential elements of each compensation claim regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.[3]

In order to determine whether an employee has sustained a traumatic injury in the performance of duty, the Office begins with an analysis of whether a "fact of injury" has been established. There are two components involved in establishing fact of injury which must be considered. First, the employee must submit sufficient evidence to establish that he actually experienced the employment incident at the time, place and in the manner alleged.[4] Second, the employee must submit sufficient evidence, generally only in the form of medical evidence, to establish that the employment incident caused personal injury.[5] The medical evidence required to establish causal relationship is, generally, rationalized medical opinion evidence.[6]

In the present case, the Board finds that appellant submitted sufficient evidence to establish that she experienced the employment incident at the time, place and in the manner alleged. Appellant contended that on May 15, 2001, when she was getting mail out of the hamper and twisted to work with the mail, she sustained an injury to her back, neck and right shoulder. The Board notes that there are some minor discrepancies between appellant's testimony and her claim form. Specifically, the Board notes that appellant did not mention a shoulder injury when she filed her Form CA-1, although she did mention injuries to her neck and back. Furthermore, the Board notes the employing establishment's comments that appellant misstated her job duties. The Board also notes that the employing establishment indicated that only 15 minutes after appellant was told she had to complete paperwork about limited-duty work, she contended that the May 15, 2001 incident occurred. However, the Board is convinced that these minor discrepancies are not sufficient to defeat appellant's claim. The Board has

[1] 5 U.S.C. §§ 8101-8193.

[2] *Joe D. Cameron*, 41 ECAB 153 (1989); *Elaine Pendleton*, 40 ECAB 1143 (1989).

[3] *Delores C. Ellyett*, 41 ECAB 992 (1990); *Victor J. Woodhams*, 41 ECAB 345 (1989).

[4] *Elaine Pendleton*, *supra* note 2.

[5] *Id.*

[6] *Id.*

consistently held that a claimant's statement that an injury occurred at a given time and in a given manner is of great probative value and will stand unless refuted by strong or persuasive evidence.[7]

The Board finds that there was a conflict between the opinions of Dr. Fleming, appellant's physician, and Dr. Rubinfeld, the second opinion physician as to whether the work-related incident of May 15, 2001 resulted in an injury to appellant's shoulder.

Section 8123(a) of the Act provides that, where there is a disagreement between the physician making the examination for the United States and the physician of the employee, a third physician shall be appointed to resolve the conflict.[8] Accordingly, the Board remands this case to the Office for an impartial medical examiner to resolve the conflict in evidence. After such further development of the record as the Office deems necessary, it should issue an appropriate decision.

The decision of the Office of Workers' Compensation Programs dated October 7, 2002 is set aside and the case is remanded for further action consistent with this decision of the Board.

Dated, Washington, DC
May 14, 2003

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member

[7] *Thelma Rogers*, 42 ECAB 866, 869-70 (1991).

[8] *Theresa Goode*, 51 ECAB 650, 652 (2000).