

**United States Department of Labor
Employees' Compensation Appeals Board**

JYOTIKA H. DESAI, Appellant)
and) Docket No. 04-1409
U.S. POSTAL SERVICE, ARLINGTON POST) Issued: November 19, 2004
OFFICE, Arlington, VA, Employer)

)

Appearances:
Jyotika H. Desai, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chairman
DAVID S. GERSON, Alternate Member
A. PETER KANJORSKI, Alternate Member

JURISDICTION

On May 3, 2004 appellant timely filed an appeal from a March 17, 2004 merit decision by the Office of Workers' Compensation Programs, which found that she had not submitted sufficient evidence to warrant modification of its January 20, 2004 decision. In its January 20, 2004 decision, the Office found that appellant had not established that she sustained an employment injury. The Board has jurisdiction over the merits of this case pursuant to 20 C.F.R. §§ 501.2(c) and 501.3.

ISSUE

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

FACTUAL HISTORY

On October 20, 2003 appellant, then a 46-year-old postal clerk, filed a claim for an October 14, 2003 traumatic injury alleging that she sustained injuries to her hands and right shoulder. She explained that on October 14, 2003 her supervisor ordered her to empty containers

filled with bypass mail, which was heavy. After she lifted several bundles she began to feel pain in her shoulder that was worse than normal. She continued to work until the end of the shift. The next day appellant's workday was the same as the day before. On October 18, 2003 she started to feel pain that was worse than before. Appellant commented that, on October 20, 2003, her pain was so unbearable that she concluded that she could not continue at work.

Appellant's supervisor stated that on October 20, 2003 appellant requested sick leave because she had to see her doctor later that day. A half-hour later, she claimed that her shoulder was hurting and swollen. Appellant indicated to him that she was loading bypass mail onto an all-purpose carrier when she felt pain in her shoulder.

In an October 20, 2003 memorandum, Debbie Berger, the manager of customer service, indicated that she was observing the carrier and clerk operation with the supervisors. She reported that appellant was working in a tri-wall container which was an unsafe practice. Appellant was ordered to get out of the container. Ms. Berger stated that appellant did not show that she had been injured in the performance of duty.

In a November 5, 2003 report, Dr. Anthony Aram indicated that appellant had some chronic discomfort in her right shoulder for several years due to overuse while lifting mail and packages overhead in her job. He reported that on October 15, 2003 appellant was lifting a magazine bundle overhead when she felt extreme pain in her right shoulder and was unable to lift the right arm above the head. On examination, Dr. Aram noted that appellant had some swelling directly over the trapezius muscle and a prominent supraclavicular lymphadenopathy present bilaterally, with tenderness in palpating over the cervical spine, the acromioclavicular joint and at the insertion of the bicep muscle. Dr. Aram found normal strength in the shoulder and a full active range of motion, with some difficulty at the end of forward flexion and abduction of appellant's right shoulder and full range of motion in the neck except for full hyperextension due to pain. He stated that her x-rays showed mild acromioclavicular joint osteoarthritis with small osteophyte formation and x-rays of the neck showed a minor subluxation of the C5-6 vertebrae. Dr. Aram diagnosed cervical radiculitis, particularly on the right, with a secondary right shoulder strain.

In a November 7, 2003 report, Dr. Nicholas Patronas stated that a magnetic resonance imaging (MRI) scan showed discogenic syndrome of a mild degree at C5-6, manifested by mild disc degeneration, nonfocal disc bulge and small hypertrophic bone spur formation. He noted that the bulging discs and the bone spurs compromised the cervical canal only slightly, but with no clearcut disc herniation.

In a December 10, 2003 report, Dr. Aram stated that appellant was seen in follow up for her thoracic outlet syndrome. He commented that appellant was doing extremely well until she lifted an object with her right arm the day before and caused an acute flare up of her thoracic outlet syndrome. On examination, Dr. Aram found full motion in her cervical spine, tenderness to palpation over the scalene muscle and the trapezius muscle and increased strength in her right arm.

In a December 22, 2003 letter, the Office informed appellant that the evidence she had submitted was insufficient to support her claim. The Office stated that she had not submitted a

physician's opinion on how the alleged incident resulted in the condition diagnosed. Also, the Office requested a clarification of the duties she was performing at the time of the alleged injury.

Appellant submitted a November 19, 2003 report from Dr. Aram, who stated that appellant did not have supraclavicular lymphadenopathy. On examination he found swelling of the scalene muscle and in the right supraclavicular area and tenderness over the insertion of the scalene muscle into the right clavicle. Dr. Aram noted that appellant had a full flexion of the neck with some tenderness to lateral flexion to the left and full range of motion of the right shoulder. He concluded that appellant's numbness and tingling in her right arm was due to thoracic outlet syndrome.

In a January 20, 2004 decision, the Office denied appellant's claim on the grounds that she had not met the requirements for establishing that she sustained an injury as defined by the Federal Employees' Compensation Act.

Appellant submitted a January 14, 2004 statement, in which she indicated that she had to reach into a three-foot tall container to retrieve magazines; that she had to stretch to reach the bundles of magazines at the bottom of the container, lift them out of the container; and then stack each bundle in an all purpose carrier. She noted that each bundle weighed 10 to 15 pounds. Appellant explained that she thought that over-the-counter pain medication would help her, but that the pain became worse so she reported the injury to her supervisor.

Appellant also submitted a January 2, 2004 report from Linda Reed, a physician's assistant. She reported that appellant gave a history of chronic shoulder pain due to repetitive overhead work at the employing establishment. Ms. Reed indicated that appellant experienced a specific injury on October 14, 2004 to her right shoulder and neck. In reviewing appellant's medical record, she indicated that the diagnosis was thoracic outlet syndrome, which was a compression of the brachial plexus nerves or the subclavian vessels as they exited the narrow space between the shoulder girdle and the first rib. Ms. Reed commented that swelling of the shoulder girdle muscles due to long-term repetitive overhead activities or an acute strain of these muscles from lifting overhead could cause this syndrome and that appellant's symptoms were classic symptoms of thoracic outlet syndrome. She concluded that appellant's overhead work at the employing establishment caused her condition.

Appellant also submitted a January 21, 2004 report from Dr. Aram, who stated that, in an examination that day, appellant was neurovascularly intact. He found that appellant had a full range of motion in her shoulder and neck and that all provocative tests for the shoulder were nontender. Dr. Aram found some tenderness to palpation over the trapezius muscle at the base of thoracic spine and thorax. He noted that appellant had positive point tenderness over the lateral epicondyle which worsened with resisted extension of the long finger and the wrist. Dr. Aram diagnosed thoracic outlet syndrome and secondary right lateral epicondylitis secondary to a compensatory function of the right arm.

In a February 23, 2004 letter, appellant requested reconsideration. In a March 17, 2004 merit decision, the Office denied appellant's request for modification because the evidence submitted was not sufficient to warrant modification of the January 20, 2004 decision. The Office indicated that Ms. Reed's January 2, 2004 report could not be considered medical

evidence because she was a physician's assistant. It commented that, if Dr. Aram had signed the report, it would have been sufficient to support appellant's claim for compensation.¹

LEGAL PRECEDENT

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. 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. 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 a specific condition for which compensation is claimed are causally related to the injury.² A claimant seeking benefits under Act³ has the burden of establishing by reliable, probative and substantial evidence that any disability for work or specific condition for which compensation is claimed is causally related to the employment injury. To establish causal relationship between a condition, including 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. Neither the fact that the condition manifests itself during a period of federal employment, nor the belief of the claimant that factors of employment caused or aggravated the condition, is sufficient in itself to establish causal relationship.⁴

Section 8101(2)⁵ defines "physician" to include surgeons, podiatrists, dentists, clinical psychologists, optometrists and osteopathic practitioners within the scope of their practice as defined by state law.⁶ The report of a physician's assistant is entitled to no weight because physician's assistants are not physicians pursuant to section 8101(2)⁷

ANALYSIS

Appellant claimed that she sustained an injury on October 14, 2003. She initially stated that she was injured on that date when she was lifting bypass mail which included bundles of

¹ Appellant submitted additional evidence to the record after the Office's March 17, 2004 merit decision. The Board's review of a case is limited to the evidence in the case record which was before the Office at the time of its final decision. 20 C.F.R. § 501.2(c).

² As used in the Act, the term "disability" means incapacity because of an injury in employment to earn wages the employee was receiving at the time of the injury, *i.e.*, a physical impairment resulting in loss of wage-earning capacity. *See Frazier V. Nichol*, 37 ECAB 528 (1986).

³ 5 U.S.C. §§ 8101-8193.

⁴ *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

⁵ 5 U.S.C. § 8101(2); 20 C.F.R. § 10.5(t).

⁶ *Shelia G. Peckenschneider*, 49 ECAB 430, 431 (1998).

⁷ *Lyle E. Dayberry*, 49 ECAB 369, 372 (1998).

magazines and catalogs. Appellant indicated that her duties on October 15, 2003 were the same as the day before. In a November 5, 2003 report, Dr. Aram stated that she had an injury on October 15, 2003 when she was lifting a magazine bundle overhead and felt extreme pain in the right shoulder. In a January 2, 2004 report, Ms. Reed, the physician's assistant, reported that appellant had an injury to her right shoulder and neck on October 14, 2003 when she was lifting a magazine bundle overhead. In a January 14, 2004 statement, appellant indicated that she had to reach into a three-foot high container to retrieve magazine bundles and then lift them onto an all-purpose carrier, reaching over her head. She delayed in reporting the injury for six days because she thought the pain would resolve by using over-the-counter pain medication. Dr. Aram, in the November 5, 2003 report, stated that the injury occurred on October 15, 2003. Although he misidentified the date of injury, the inconsistency was only by one day, which is not significant by itself to establish that appellant had misstated the date and facts of the injury. She sought medical treatment when the pain grew worse instead of improving. The only statement that contradicted appellant's description of her injury was the comment by the manager of customer service who stated that appellant did not show any sign of pain or injury on October 14, 2003. The manager, however, did not indicate how close she was to appellant to make the observation. She only noted that appellant continued working. Appellant stated that, after she felt the pain, she continued working until the end of her shift. Her consistent statements and her reasonable actions on and after the given date of the injury are sufficient to establish that the incident did occur at the time, place and in the manner she alleged.

Appellant, however, did not establish that her October 14, 2003 employment incident caused an injury. Dr. Aram gave the history of the injury, reported that findings on physical examination and diagnosed appellant's condition. But he did not provide in any of his reports a reasoned opinion in describing how appellant's injury caused the thoracic outlet syndrome. Ms. Reed, in the January 2, 2004 report, gave an explanation on how repetitive lifting and working overhead would have caused appellant's thoracic syndrome. But her report has no probative value because a physician's assistant is not defined as a physician under the Act. As this report was the only medical evidence relating appellant's condition to the employment incident, she did not meet her burden of proof in establishing that she sustained an employment injury.

CONCLUSION

Appellant established that the incident occurred at the time, place and in the manner alleged. She did not, however, establish by medical evidence that the October 14, 2003 incident caused her diagnosed thoracic outlet syndrome. Appellant has, therefore, not established fact of injury.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated March 17 and January 20, 2004 be affirmed.

Issued: November 19, 2004
Washington, DC

Alec J. Koromilas
Chairman

David S. Gerson
Alternate Member

A. Peter Kanjorski
Alternate Member