

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

JEAN L. BERGBAUER, Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Tampa, FL, Employer**

)
)
)
)
)
)
)
)
)
)
)
)

**Docket No. 05-545
Issued: June 9, 2005**

Appearances:
Vivian Perez, for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

COLLEEN DUFFY KIKO, Member
DAVID S. GERSON, Alternate Member
A. PETER KANJORSKI, Alternate Member

JURISDICTION

On January 3, 2005 appellant filed a timely appeal from a merit decision of the Office of Workers' Compensation Programs dated October 5, 2004 in which an Office hearing representative affirmed the Office's May 16, 2003 decision denying appellant's claim for injury on February 12, 2003. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant has met her burden of proof in establishing that she sustained traumatic injury in the performance of duty on February 12, 2003.

FACTUAL HISTORY

On March 14, 2003 appellant, then a 60-year-old letter carrier, filed a traumatic injury claim alleging that on February 12, 2003 she sustained injuries to her neck, back, left shoulder

and both thumbs while in the performance of duty.¹ Appellant stopped work on February 14, 2003.

On February 10, 2003 Dr. John Kagan, an orthopedic surgeon, placed appellant off work until reexamination in three weeks. In a report dated February 13, 2003, Dr. Dan Lewis, appellant's treating chiropractor, placed appellant in a no work status from February 13 to 20, 2003. In a second report of that day, Dr. Lewis stated that appellant's cervical discomfort had worsened. He noted that when she went to work the prior day she aggravated her neck causing increased physical distress, tension, tautness, and tightness with decreased range of motion and increased pain. Dr. Lewis noted that appellant was tender at C2, C5 and C7 with reactionary irritation although neurologically intact. Sensory lateralization was observed at the C5-6 dermatome. He provided treatment and restricted her from work for seven days. Dr. Lewis subsequently submitted chiropractic treatment notes from February 17 through March 10, 2003.

On February 13, 2003 Jeanne Rosas, an employing establishment supervisor, noted that appellant called her and stated that she returned to work on February 12, 2003 but that her neck was hurting from an automobile accident she had off the job about a month prior. Appellant related that her doctor put her off work on February 13, 2003.

In a report dated February 13, 2003, Dr. Kagan stated that appellant was off work for three weeks. On February 14, 2003 Dr. Kagan stated that he treated appellant that day for neck and shoulder pain for an injury sustained in a motor vehicle accident on January 9, 2003. He related that appellant only presented for treatment that week. Dr. Kagan related that he prescribed medication for her February 2002 work-related lumbar injury and that he knew that appellant was taking that medication regularly due to the neck pain. Appellant was symptomatic with cervical pain, neck stiffness and left-sided pain radiating to the shoulder with certain movements and activities. The pain was moderate to severe and better with heat address. X-rays that day revealed a left shoulder mild acromioclavicular joint changes, multi-level degenerative disc narrowing and disc disease with loss of normal cervical lordosis. Appellant stated that her neck had limited cervical function on flexion and extension on lateral bending and rotation. Her neurological examination revealed diminished right reflexes when compared to the left. In her right shoulder there was impingement and abduction forward flexion. She had painful cross arm abduction and limited internal rotation. There was pain but no weakness on rotator cuff tests.

In a report dated February 17, 2003, Dr. Dale G. Bramlet, a treating orthopedic surgeon, stated that appellant had previously been off work due to right hand surgery but that she was released to light duty on July 23, 2001. In another report of that same day, Dr. Bramlet stated that appellant had advanced basal joint arthritis on left hand "as a result of her work," and that both thumbs were painful.

¹ Appellant also referenced a "consequential injury" to her thumbs and referenced a different Office claim number, 062057365. In a March 28, 2003 letter controverting the claim, the employing establishment noted that appellant had an accepted injury, under Office file No. 062028063, for which she had returned to work on February 12, 2003, in a modified position for six hours daily. These other claims are not before the Board on the present appeal which pertains to Office file No. 062081731.

In a report dated February 28, 2003, Dr. Kagan noted that appellant had cervical disc disease, a possible right-sided herniated disc and left shoulder impingement. On March 7, 2003 he noted appellant's automobile accident on January 9, 2003 resulting in injuries to her shoulder resulting in moderate ongoing and sharp intermittent pain. Dr. Kagan stated that a magnetic resonance imaging scan supported a diagnosis of cervicgia, cervical disc disease and left shoulder impingement.

By letter dated April 15, 2003, the Office informed appellant of the type of evidence needed to support her claim of a bilateral wrist and hand condition.²

On May 16, 2003 the Office denied appellant's claim for a February 12, 2003 work-related injury finding that appellant failed to establish that an incident occurred on that date. The Office stated that Dr. Lewis' reports referred to a motor vehicle accident and Dr. Kagan's reports did not refer to a work-related injury even though one report was prepared two days after the alleged incident.

In a report dated May 10, 2003, appellant stated that she had an original nonwork-related injury on January 9, 2003 and that her pain on February 13, 2003 while working at her letter carrier position under restrictions was not because of the motor vehicle accident but because of the accumulative aggravation and acceleration of that injury on that date. Appellant stated that the restrictions of her job on February 12, 2003 were not in compliance with the accepted limitations of a prior claim for aggravation of basal joint arthritis. She indicated that those restrictions were established on July 23, 2001 by Dr. Bramlet. Appellant also noted that she was placed off work by Dr. R.A. Johnson, a psychiatrist, from September 18, 2002 to June 2, 2003.

In a report dated April 30, 2003 received by the Office on May 21, 2003, Dr. Lewis stated that appellant was involved in an off-work automobile accident on January 9, 2003, resulting in cervical dorsal injury with left shoulder involvement with progressive muscle irritation. He noted that appellant was released to return to work on a trial basis on February 12, 2003 but that during her workday she experienced an exacerbation of her neck, upper back and shoulder irritation as a result of simple mechanical movement such as extension, flexion and rotation of the head, upper neck and trunk. As a result appellant was placed on total disability. As a result of these conditions appellant was placed on total disability. He also noted that "an error occurred in evaluating this patient's situation based on her work status, returned to work status trial basis (sic) and the ensuing aggravation exacerbation."

On May 21, 2003 appellant requested an oral hearing. At the July 9, 2004 hearing, she clarified that her claim included both shoulders. Appellant stated that, on February 12, 2003, she returned to a limited-duty letter carrier position that was based on her June 2000 low back sprain. She said she delivered mail but that this activity caused an aggravation to her neck, shoulders and hands. Appellant testified that the employing establishment did not consider the work restrictions that related to her hand injuries. She also noted a January 2003 motor vehicle accident which caused a burning sensation in her neck and shoulders and that days after the

² Although the Office noted only a claim for wrist and hand condition, it also noted it had received medical evidence of a neck and left shoulder condition caused by the motor vehicle accident on January 9, 2003, and chiropractor notes identifying treatment for a neck and left shoulder condition.

accident she had stiffness in her neck and shoulders but did not seek medical care until February 11, 2003. She also testified that her psychiatrist placed her off work but that she had not filed a claim for a work-related emotional condition. The hearing representative indicated that the medical evidence in her case must come from her physician who was familiar with her history of injury including her hand conditions, her prior back condition and her motor vehicle accident and must include a determination of whether her conditions involving her upper back, neck and shoulders related to her February 12, 2003 duty assignment.

On August 20, 2004 appellant submitted a page from a report purportedly from a Dr. Gary Gallo to whom she referred as a second opinion physician. The complete report is not of record and the report does not address any injury claimed to have occurred on February 12, 2003.

By decision dated October 5, 2004, the hearing representative affirmed the Office's May 16, 2003 decision. The hearing representative found that appellant established the occurrence of an employment incident on February 12, 2003, but that she did not submit sufficient medical evidence to show that she sustained a diagnosed condition as a result.

LEGAL PRECEDENT

An employee seeking benefits under the Federal Employees' Compensation Act³ has the burden of establishing the essential elements of his 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 period 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.⁴ These are the essential elements of each compensation claim regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.⁵

To determine whether a federal employee has sustained a traumatic injury in the performance of duty, it first must be determined whether the fact of injury has been established. There are two components involved in establishing the fact of injury. 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.⁶ Second, the employee must submit evidence, in the form of medical evidence, to establish that the employment incident caused a personal injury.⁷ The term injury as defined by the Act, refers to some physical or mental condition caused by

³ 5 U.S.C. §§ 8101-8193.

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

⁵ *Delores C. Ellyett*, 41 ECAB 992, 998-99 (1990); *Ruthie M. Evans*, 41 ECAB 416, 423-27 (1990).

⁶ *Julie B. Hawkins*, 38 ECAB 393, 396 (1987); see Federal (FECA) Procedure Manual, Part 2 -- Claims, *Fact of Injury*, Chapter 2.803.2a (June 1995).

⁷ *John J. Carlone*, 41 ECAB 354, 356-57 (1989); see Federal (FECA) Procedure Manual, Part 2 -- Claims, *Fact of Injury*, Chapter 2.803.2a (June 1995).

either trauma or by continued or repeated exposure to, or contact with, certain factors, elements or conditions.⁸

ANALYSIS

In this case, appellant claimed that she sustained injuries to her neck, back, both shoulders and both hands on February 12, 2003 while in the performance of duty. It is not disputed that the employment incident occurred as alleged on February 12, 2003. However, the medical evidence is insufficient to establish that the employment incident or activities on February 12, 2003 caused or aggravated an injury.

In support of her claim, appellant submitted medical reports from Dr. Kagan, her treating orthopedic surgeon. However, his reports do not include a rationalized medical opinion⁹ establishing a causal relationship between her alleged injuries on February 12, 2003 and her diagnosed condition. Dr. Kagan's February 10, 2003 report placing her on total disability for three weeks predated the February 12, 2003 incident. His February 13, 2003 report did not relate her condition to the February 12, 2003 incident. Dr. Kagan's February 14, 2003 report, one day after the claimed work-related injury, related her conditions to the January 9, 2003 motor vehicle accident and did not refer to any event alleged to have occurred at work on the previous day. His March 7, 2003 report similarly referred her conditions to the January 9, 2003 motor vehicle accident. Thus, none of his reports establish that appellant sustained a work-related injury on February 12, 2003.

Dr. Lewis, appellant's treating chiropractor, did not diagnose a subluxation of the spine as demonstrated by x-ray to exist. Under section 8101(2) of the Act, "[t]he term 'physician' includes chiropractors only to the extent that their reimbursable services are limited to treatment consisting of manual manipulation of the spine to correct a subluxation of the spine as demonstrated by x-ray to exist and subject to regulation by the Secretary."¹⁰ In order for Dr. Lewis to be considered a "physician" under the Act, and therefore establish his reports as probative medical evidence, he must diagnose a subluxation as demonstrated by x-ray. He did not diagnose a subluxation as demonstrated by x-ray to exist. Accordingly, the Board finds that Dr. Lewis is not a "physician" under the Act and his reports are of no probative medical value to appellant's claim.

Dr. Bramlet's reports did not specifically address whether appellant sustained a new injury, by cause or aggravation, on February 12, 2003. While the physician noted in a February 17, 2003 report, that appellant's thumbs were painful as a result of her work, he did not indicate an awareness of the February 12, 2003 employment activities to which appellant attributed her claimed injury nor did he explain how any such activities would cause or aggravate

⁸ *Elaine Pendleton*, *supra* note 5; 20 C.F.R. § 10.5(a)(14).

⁹ *See George Randolph Taylor*, 6 ECAB 986, 988 (1954) (where the Board found that a medical opinion not fortified by medical rationale is of little probative value).

¹⁰ 5 U.S.C. § 8101(2); *Carmen Gould*, 50 ECAB 504 (1999).

a diagnosed condition.¹¹ No other medical reports of record specifically address how and why any employment incidents on February 12, 2003 caused or aggravated an injury.

Appellant argued that she could not perform the duties of her February 12, 2003 restricted letter carrier position based on pain which was aggravated by a January 9, 2003 nonwork-related motor vehicle accident. However, the claim before the Board pertains to a new traumatic injury that appellant claimed occurred on February 12, 2003. The medical evidence submitted by appellant does not explain how employment activities on February 12, 2003 caused or aggravated a diagnosed condition. Consequently, appellant has not met her burden of proof in establishing that she sustained a traumatic injury on February 12, 2003.

CONCLUSION

The Board finds that appellant did not meet her burden of proof to establish that she sustained an injury in the performance of duty on February 12, 2003.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated October 5, 2004 is affirmed.

Issued: June 9, 2005
Washington, DC

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

A. Peter Kanjorski
Alternate Member

¹¹ See *Cowan Mullins*, 8 ECAB 155, 158 (1955) (where the Board held that a medical opinion based on an incomplete history was insufficient to establish causal relationship).