

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

JANET BRODA, Appellant

and

**DEPARTMENT OF THE TREASURY,
INTERNAL REVENUE SERVICE,
Holtsville, NY, Employer**

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**Docket No. 05-492
Issued: May 18, 2005**

Appearances:
Paul Kalker, Esq., for the appellant
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 December 21, 2004 appellant, through her attorney, filed a timely appeal from the Office of Workers' Compensation Programs' merit decisions dated April 8 and September 27, 2004, denying her traumatic injury claim. 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 sustained a traumatic injury while in the performance of duty on August 19, 2003.

FACTUAL HISTORY

On November 12, 2003 appellant, a 41-year-old clerk, filed a traumatic injury claim alleging that on August 19, 2003 she injured her neck, left arm and hand while moving files at work. Appellant stopped work on August 21, 2003.

Appellant submitted a certification of health care provider dated October 20, 2003, in which Dr. Laurence E. Mermelstein, a Board-certified orthopedic surgeon, indicated that appellant was temporarily disabled as a result of surgery on September 3, 2003. A duty status report dated October 16, 2003, signed by Dr. Mermelstein reflected appellant's representation that she was injured at work on August 19, 2003 and Dr. Mermelstein's positive response to the question of whether her diagnosed condition was "due to injury."

In an attending physician's report dated October 21, 2003, Dr. Mermelstein stated that his first examination of appellant occurred on August 16, 1999. He related the history of injury as given by appellant, indicating that "she began to feel tingling that was referring down her left upper extremity starting in April 2003. Symptoms became progressively worse with numbness." Dr. Mermelstein checked the "yes" box when asked if he believed appellant's condition was caused or aggravated by an employment activity and explained "patient states she was moving files at work. Pain referred down her left upper extremity and neck pain, down to her fingers." Indicating that he had performed an urgent C6-7 anterior cervical disectomy and fusion, he opined that appellant was temporarily totally disabled.

In letters dated January 30, 2004 to appellant and Dr. Mermelstein, the Office requested additional information, including details concerning the events surrounding the alleged injury and a rationalized medical opinion as to how the reported work activity caused or aggravated the claimed injury.

In a memorandum dated December 23, 2003, appellant's supervisor, Cathy DiBiasi, stated that appellant did not at any time discuss feelings of numbness in her hand or fingers or indicate that she was unable to move file folders. Ms. DiBiasi further reported that she was not aware that appellant had an accident and that appellant had not "said a word to anyone" on the date of her alleged accident.

In a report dated January 20, 2004, Dr. Joseph T. Sanelli, a Board-certified physiatrist, indicated that appellant's symptoms of neck pain and numbness, tingling, burning pain and weakness in the left hand had been present for six months and had been progressive.

Appellant submitted physician's notes dated August 22, 2003, signed by Dr. Mermelstein and Kristopher Stillwell, PA-C, reflecting that appellant's pain had become so severe that she went to the Brookhaven Hospital emergency room on August 21, 2003. Notes signed by Dr. Mermelstein dated August 25, 2003 indicated that appellant had been seen urgently the week before "due to a four[-]month history of severe left arm pain and weakness." Dr. Mermelstein further stated that a report of a magnetic resonance imaging (MRI) scan showed a herniated disc at C6-7. A report of appellant's surgery dated September 3, 2003, reflected a preoperative diagnosis of herniated nucleus pulposus C6-7. Postoperative reports by Dr. Mermelstein dated September 17 and October 16, 2003, reflected residual neck pain and dysesthetic pain in the left fingers. Notes dated November 13, 2003 signed by Dr. Mermelstein and Scott Gressin, PA-C indicated appellant's continued neck pain and stiffness posteriorly, particularly regional neuropathic pain at the left index and long finger and allodynia. In notes dated January 8, 2004, Dr. Mermelstein provided an impression of "dysesthetic nerve pain, left arm, rule out double crush syndrome and carpal tunnel syndrome." None of the above-referenced notes mentioned

the alleged August 19, 2003 injury or provided any explanation of causal relationship between appellant's condition and conditions of employment.

An unsigned history dictated by Dr. Mermelstein on September 1, 2003 for Huntington Hospital reflected that appellant presented with a four-month history of severe neck and left arm pain associated with numbness and weakness; that her history was significant for previous herniated cervical disc in 1999; that she underwent an intercervical discectomy and fusion with iliac crest bone graft in 1999; that she was last seen by Dr. Mermelstein on March of 2001; that she had been to the emergency room several times due to severe neck and arm pains; and that her arm pain had persisted.

In a statement dated February 16, 2004, appellant indicated that for three hours on August 19, 2003 she condensed files, which involved lifting, stretching, bending and twisting. She stated that just about everyone in the department saw her filing. She further indicated that she failed to report the alleged injury to her supervisor immediately after it occurred because she "was not sure if it was work related;" that the immediate effects of the injury were neck and shoulder pain, as well as pain in her left hand and second and third fingers; that appellant delayed seeking medical attention because she has a high threshold for pain; and that she did not realize that something was extremely wrong until she woke up in extreme pain and could not move her left arm, requiring her husband to take her to the emergency room. Appellant indicated that, in a May 1999 automobile accident, she had suffered severe whiplash and herniated disc, for which she required surgery.

In a narrative medical report dated February 27, 2004, Dr. Mermelstein stated that his initial evaluation of appellant occurred on August 22, 2003. He opined that "if the patient's history is correct, her lifting and bending activity of August 19, 2003 [is] directly and causally related to her subsequent herniated disc at C6-7 and the present residual symptoms." Dr. Mermelstein reported appellant's claim that a severe onset of neck pain and shoulder pain which radiated into her second and third fingers was severe enough that she was unable to file the next day. As told to him by appellant, Dr. Mermelstein related the history of appellant's condition, stating that appellant "describes moving a significant number of files while at work" on August 19, 2003. He indicated that on August 22, 2003 his clinical impression was that of a severe left-sided radiculopathy, probably secondary to an acute herniated disc; that, on August 25, 2003, due to her severe pain and neurological deficit, he scheduled appellant for an emergency anterior cervical discectomy and fusion at C6-7; that, following surgery on September 2, 2003, appellant continued to experience residual pain in her neck and hand; and that on February 11, 2004 her diagnosis was complex regional pain syndrome.

A record of an April 7, 2004 telephone call between the Office and appellant's team leader reflects that the leader was very surprised when this claim was filed because appellant first requested advanced sick leave, then solicited leave donations, then asked for Family Medical Leave Act (FMLA) protection and, finally, more than two months later, filed the compensation claim.

By decision dated April 8, 2004, the Office denied appellant's claim on the grounds that the evidence failed to establish that her medical condition resulted from factors of employment.

On June 11, 2004, appellant filed a request for reconsideration, claiming that the evidence presented established both the fact of injury and causal relationship. In his verified request for reconsideration of rejected claim, appellant's attorney states that the discharge report from the Brookhaven Hospital's emergency room, where appellant allegedly received treatment on August 21, 2003 was attached as Exhibit C. However, while the record contains an Exhibit A (appellant's February 16, 2004 statement) and an Exhibit B (Dr. Mermelstein's February 27, 2004 report), the record does not contain a copy of the emergency room discharge report.

By decision dated September 27, 2004, the Office denied modification of its April 8, 2004 denial of appellant's claim.

LEGAL PRECEDENT

The Federal Employees' Compensation Act¹ provides for payment of compensation for disability or death of an employee resulting from personal injury sustained while in the performance of duty.² The phrase "sustained while in the performance of duty" is regarded as the equivalent of the coverage formula commonly found in workers' compensation laws, namely, "arising out of and in the course of employment."³

An employee seeking benefits under the Act has the burden of proof to establish 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 period of the Act, that an injury was sustained in the performance of duty as alleged and that any disability or specific condition for which compensation is claimed is causally related to the employment injury.⁴ When an employee claims that he sustained a traumatic injury in the performance of duty, he must establish the "fact of injury," namely, he must submit sufficient evidence to establish that he experienced a specific event, incident or exposure occurring at the time, place and in the manner alleged and that such event, incident or exposure caused an injury.⁵ 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 his subsequent 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 substantial doubt on a claimant's statements. The employee has not met his

¹ 5 U.S.C. §§ 8101 *et seq.*

² 5 U.S.C. § 8102(a).

³ This construction makes the statute effective in those situations generally recognized as properly within the scope of workers' compensation law. *Charles E. McAndrews*, 55 ECAB ____ (Docket No. 04-1257, issued, September 10, 2004); *see also Bernard D. Blum*, 1 ECAB 1 (1947).

⁴ *Robert Broome*, 55 ECAB ____ (Docket No. 04-93, issued February 23, 2004); *see also Elaine Pendleton*, 40 ECAB 1143 (1989).

⁵ *Betty J. Smith*, 54 ECAB ____ (Docket No. 02-149, issued October 29, 2002); *see also Tracey P. Spillane*, 54 ECAB ____ (Docket No. 02-2190, issued June 12, 2003). 5 U.S.C. § 8101(5). *See* 20 C.F.R. § 10.5(ee).

burden when there are such inconsistencies in the evidence as to cast serious doubt on the validity of the claim.⁶

The claimant has the burden of establishing by the weight of reliable, probative and substantial evidence that the condition for which compensation is sought is causally related to a specific employment incident or to specific conditions of employment.⁷ An award of compensation may not be based on appellant's belief of causal relationship. Neither the mere fact that a disease or condition manifests itself during a period of employment nor the belief that the disease or condition was caused or aggravated by employment factors or incidents is sufficient to establish a causal relationship.⁸

Causal relationship is a medical issue and the medical evidence generally required to establish causal relationship is rationalized medical opinion evidence. Rationalized medical opinion evidence is medical evidence that includes a physician's rationalized opinion on whether there is a causal relationship between the claimant's diagnosed condition and the established incident or factor of employment. The opinion must be based on a complete factual and medical background of the claimant, must be one of reasonable medical certainty and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the established incident or factor of employment.⁹

ANALYSIS

The Board finds that appellant has failed to meet her burden of proof in establishing that she sustained a traumatic injury to her neck, left arm and hand on August 19, 2003.

Appellant noted on her CA-1 form and in her personal statement that she injured her neck, left arm and hand while "condensing files." Although she provided a description of her assignment on August 19, 2003, she presented no evidence regarding the specific mechanism of injury, as required in a claim for traumatic injury, nor did she allege that she experienced a specific event, incident or exposure at a definite time, place and manner.¹⁰ Other than her statement that she moved files over a three-hour period, there was no explanation as to the time, place or manner in which appellant injured her neck, left arm and hand. Appellant's vague recitation of the facts does not support her allegation that a specific event occurred which caused

⁶ See *Paul Foster*, 56 ECAB ____ (Docket No. 04-1943, issued December 21, 2004).

⁷ *Id.* See also *Katherine J. Friday*, 47 ECAB 591, 594 (1996).

⁸ *Dennis M. Mascarenas*, 49 ECAB 215, 218 (1997).

⁹ *John W. Montoya*, 54 ECAB ____ (Docket No. 02-2249, issued January 3, 2003).

¹⁰ See *Betty J. Smith*, *supra* note 5.

an injury.¹¹ Appellant stated that she did not fall but that she was “sure [she] overstretched a lot.” Moreover, although appellant stated that “just about everyone in the department saw her filing,” she provided no witness statements supporting her allegations. Furthermore, her supervisor reported that she was not aware that appellant had an accident and that appellant had not “said a word to anyone” regarding the incident on the date of her alleged accident. The Board notes that the CA-1 form was not filed by appellant until November 12, 2003, nearly three months after the alleged work-related injury. Although the delayed filing does not automatically render appellant’s claim invalid, the Board must look to the circumstances surrounding her allegations in order to determine whether an injury has occurred as alleged.

The contemporaneous medical evidence of record does not support appellant’s allegation that her condition resulted from moving files. Appellant delayed seeking medical attention, allegedly because she has a high threshold for pain. Although appellant claimed that she went to the emergency room on August 21, 2003 as a result of her alleged injury, she failed to produce a copy of the emergency room report. The Board notes that the fact of her emergency room treatment on the aforementioned date is not in dispute; however, appellant has failed to establish that the reason for her treatment was the alleged August 19, 2003 work-related injury. Physicians’ notes dated August 22, 2003 reflect that appellant’s pain had become so severe that she sought emergency room treatment on August 21, 2003. However, physicians’ notes dated August 25, 2003 reflect that the need for appellant’s treatment was due to a four-month history of severe left arm pain and weakness.

There are inconsistencies in the evidence which cast serious doubt on the validity of appellant’s claim. She indicated that the immediate effects of the injury were neck and shoulder pain, as well as pain in her left hand and second and third fingers; however, she failed to report the alleged injury to her supervisor immediately after it occurred, because she “was not sure if it was work related.” Appellant also failed to obtain immediate medical treatment. She claims that she sought treatment on August 21, 2003, two days following the alleged injury. However, the evidence of record does not reflect that the first medical treatment appellant received was on August 21, 2003.

In his February 27, 2003 report, prepared six months after the alleged employment injury, Dr. Mermelstein related appellant’s claim that, after moving a significant number of files, while at work on August 19, 2003, severe onset of neck pain and shoulder pain, which radiated into her second and third fingers was severe enough that she was unable to file the next day. However, this belated history is in direct conflict with the history dictated by Dr. Mermelstein on September 1, 2003 for Huntington Hospital, in which he reported that appellant presented with a four-month history of severe neck and left arm pain associated with numbness and weakness; that her history was significant for previous herniated cervical disc in 1999; that she underwent an intercervical discectomy and fusion with iliac crest bone graft in 1999; that she was last seen by Dr. Mermelstein in March 2001; that she had been to the emergency room several times due to severe neck and arm pains; and that her arm pain has persisted. The Board notes that, in the

¹¹ See *Dennis M. Mascarena*, *supra* note 8.

history provided to the hospital, Dr. Mermelstein did not refer to an August 19, 2003 work-related injury as a cause for appellant's condition. The Board further notes Dr. Mermelstein's conflicting statements regarding the dates of his initial treatment of appellant. In his February 27, 2003 report, he stated that his initial evaluation of appellant occurred on August 22, 2003; however, he indicated in his October 21, 2003 attending physician's report that he first examined appellant on August 16, 1999. His October 21, 2003 report also reflects that appellant's symptoms began in April 2003 and became progressively worse. This report is inapposite to appellant's claim of traumatic injury on August 19, 2003. Additionally, in a report dated January 20, 2004, Dr. Joseph T. Sanelli, a Board-certified physiatrist, indicated that appellant's symptoms of neck pain and numbness, tingling, burning pain and weakness in the left hand had been present for six months and had been progressive.

A record of an April 7, 2004 telephone call between the Office and appellant's team leader reflects that the leader was "very surprised when this claim was filed because [appellant] first requested advanced sick leave, then solicited leave donations, then asked for FMLA protection and, finally, more than two months later, filed the compensation claim." Standing on its own, this information is not determinative; however, in combination with other inconsistencies in the record, it supports the conclusion that appellant's injury did not occur as alleged.

In *Paul Foster*,¹² appellant filed a claim alleging that he twisted his left knee while delivering mail. Appellant was unable to articulate exactly "what he did or when he did it that caused the knee pain." Given appellant's vague allegations and the lack of contemporaneous medical evidence supporting appellant's claim that his condition resulted from a twisted knee, the Board found that appellant had failed to establish the fact of injury.¹³ In this case, appellant's allegations are vague and do not relate with specificity the cause of the injury or specifically how she injured her neck, arm and hand while performing her duties on August 19, 2003. She did not address the immediate consequence of the injury (*e.g.*, whether she fell, stumbled or had to sit down). The Board finds that appellant has failed to establish the fact of injury: she did not submit sufficient evidence to establish that she actually experienced an employment incident at the time, place and in the manner alleged. Therefore, it is not necessary to discuss the probative value of the medical reports.¹⁴

CONCLUSION

Appellant has not met her burden of proof to establish that she sustained a traumatic injury in the performance of duty.

¹² See *Paul Foster*, *supra* note 6.

¹³ *Id.*

¹⁴ *Id.*

ORDER

IT IS HEREBY ORDERED THAT the September 27 and April 8, 2004 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: May 18, 2005
Washington, DC

Alec J. Koromilas
Chairman

David S. Gerson
Alternate Member

A. Peter Kanjorski
Alternate Member