

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

D.A., Appellant)	
)	
and)	Docket No. 06-919
)	Issued: August 8, 2006
DEPARTMENT OF HOMELAND SECURITY,)	
TRANSPORTATION SECURITY)	
ADMINISTRATION, Oakland, CA,)	
Employer)	
)	

Appearances
D.A., pro se
Office of the Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge

JURISDICTION

On March 13, 2006 appellant filed a timely appeal from Office of Workers' Compensation Programs' decisions dated September 23, 2005 and January 5, 2006. Under 20 C.F.R. §§ 501(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether the Office met its burden of proof to rescind its acceptance of appellant's claim for a left breast disorder and left breast prosthesis malfunction; and (2) whether she has established that she sustained a left breast injury in the performance of duty.

FACTUAL HISTORY

Appellant, a 46-year-old baggage screener, filed a claim for benefits on June 29, 2005 alleging that she injured her left shoulder and left breast on June 15, 2005 as a result of lifting a bag from a table onto a conveyor belt. When she lifted the bag to the table, she felt a slight pain in her upper left shoulder and breast area but continued to screen baggage the rest of the day.

The following morning when appellant awoke her left breast was dark, swollen and painful. She experienced swelling, discomfort and burning. The Office initially handled the claim administratively and authorized up to \$1,500.00 in medical expenses.

In a report dated June 27, 2005, Dr. Jacqueline Jayne, an occupational health specialist, noted that appellant stated her injury resulted from constant motion of her left arm, pulling, lifting and picking up heavy to medium luggage. Appellant stated that sometime during the operation hours of her shift on June 15, 2005, at 10:00 a.m., she hurt her left chest muscle area. She further stated that on June 25, 2005 baggage hit her left breast at approximately 7:00 a.m. Under the heading, "Diagnosis," Dr. Jayne wrote "breast concerns." She did not indicate whether these "breast concerns" were causally related to the alleged June 15 and 25, 2005 work incidents.

In a July 6, 2005 report, Dr. Jaspal Sidhu, Board-certified in emergency medicine, noted the same history of injury depicted in Dr. Jayne's June 27, 2005 report and diagnosed a possible rupture of appellant's left breast implant. Appellant related that she injured her breasts while lifting baggage and awoke the next morning to find that her breasts were different; the right side was sagging and the left side felt swollen. Dr. Sidhu advised that mammography showed possible rupture and indicated that she had been scheduled for ultrasound and a follow-up examination with her plastic surgeon. He stated that appellant's condition was deemed by Dr. Jayne to be nonindustrial.

By letter dated August 9, 2005, the Office advised appellant that, due to her request for treatment, it was required to formally adjudicate her claim and consider it on the merits. The Office requested a statement explaining in detail how she believed employment activities on June 15, 2005 were responsible for her claimed condition. The Office also requested medical evidence from a physician which supported her claim that her claimed left breast injury was causally related to work activities.

In a report dated August 16, 2005, Dr. Kristoffer Ning Chang, a Board-certified plastic surgeon, stated:

"[Appellant] is a 46-year-old woman who is seen regarding painful left breast capsule contracture. She underwent augmentation mammoplasty in March 2002. [Appellant] underwent partial capsulectomy and reaugmentation mammoplasty in November 2002. She was well until about June 15, 2005, when [she] noticed sudden onset of hardness, diffuse bruising, pain, swelling and change in appearance of the left breast when she [awakened] in the morning. The day before the occurrence, she was working with heavy luggage; she recalled having experienced a slight painful sensation in the left anterior chest area after lifting a heavy piece of object.

[Appellant] went to see Dr. Ronald [E.] Iverson, a Board-certified plastic surgeon, who performed the previous breast surgery. The date of consultation was June 15, 2005. [She] requested the visit because of sudden change in the left breast which she experienced. At the time of the visit, the left breast according to Dr. Iverson, 'now has a capsule contracture which his Baker III, hard, tight and

firm. It is definitely raised much higher on the left than the right. The breasts look very different.

“On June 20, 2005 [appellant] and her husband had another office visit with Dr. Iverson and discussed her condition. [His] consultation notes stated, ‘[appellant is] having some pain on the left side of her body that goes out into the arm. She states that she even has discomfort in the legs. [Appellant] may even have headaches that are related to this. All of this started since her breasts got hard. [Appellant] states that the hardness basically occurred overnight. She woke up one morning and the breasts were hard.

“In summary, [appellant] has painful capsule contracture of the left breast and physical evidence of prior hemorrhage. Since the manifestation of the condition occurred suddenly and one day after she experienced painful symptoms due to heavy exertion at work, her capsule contracture of the left breast, based on available evidence, is related to the exertion at work the day before. I would recommend a capsulectomy of the left breast and reaugmentation of the mammary prosthesis.”

On August 23, 2005 appellant requested corrective surgery for her left breast.

By letter dated August 29, 2005, the Office advised appellant that further medical development was required before her request for surgery could be approved. On September 1, 2005 the Office accepted the claim for left breast disorder and left breast prosthesis malfunction. On September 13, 2005 the Office authorized surgery for removal of breast capsule and breast enlargement with implant.

Appellant submitted reports dated June 15 and 20, 2005 from the attending physician, Dr. Iverson, a Board-certified plastic surgeon. In a June 15, 2005 report, he stated that as of March 7, 2005 her implants were found to be soft, natural and without any problem. Dr. Iverson stated that appellant related that the left breast had become different than the right. She also reported slight discomfort in the left breast. Dr. Iverson advised on physical examination that her breast looked “very different” and diagnosed capsular contraction. He recommended waiting three months to see whether the condition improved without surgical intervention.

In a follow-up report dated June 20, 2005, Dr. Iverson related complaints of hardness of the left breast, differences between the two breasts, pain down the left side of appellant’s body and headaches. She indicated that these problems began when her breasts got hard, which “basically occurred overnight” and that she “woke up one morning” and experienced hardening in her left breast. Dr. Iverson diagnosed periprosthetic capsular contracture.

By decision dated September 23, 2005, the Office rescinded its acceptance of appellant’s claim for left breast disorder, left breast prosthesis malfunction and authorization for breast surgery on the grounds that she had not established the fact of injury on June 15, 2005. The Office indicated that the rescission was supported by new evidence which was not of record at the time appellant’s claim was accepted. The Office informed her that additional factual and medical

evidence was required to clarify the time, place and manner in which the claimed injury occurred and to establish the medical connection between appellant's diagnosed condition and the history of how the injury occurred. The Office stated that appellant had 30 days in which to submit the requested information.

In a written statement dated October 11, 2005, appellant stated:

“On June 15, 2005 I was screening baggage in my assigned [work]station. A large, heavy, unmarked ... black suitcase came down the rollers to my station. I lifted the suitcase from the rollers to the table. After screening the suitcase, I grabbed each side of the suitcase and pulled it towards my body before lifting and placing it on the floor onto the outbound conveyor belt which is when I felt the slight pain in my upper left shoulder and breast area.

The day I felt this was a work-related injury was June 27, 2005 which was my regular day off. After returning to work, my supervisor was notified.

I have not had any similar symptoms in the left chest, breast and left arm area prior to June 15, 2005.”

Appellant also submitted an October 7, 2005 report from Dr. Cheng.

In an email dated October 17, 2005, appellant's supervisor stated that she was initially notified that appellant had sustained an injury on June 28, 2005. She gave her a Form CA-2 to complete because she was not advised that appellant had sustained a traumatic injury.

By decision dated January 5, 2006, the Office denied appellant's claim that she sustained a left breast injury in the performance of duty.

LEGAL PRECEDENT -- ISSUE 1

The Board has upheld the Office authority to reopen a claim at any time on its own motion under section 8128(a) of the Federal Employees' Compensation Act and, where supported by the evidence, set aside or modify a prior decision and issue a new decision.¹ The Board has noted, however, that the power to annul an award is not an arbitrary one and that an award for compensation can only be set aside in the manner provided by the compensation statute.² It is well established that once the Office accepts a claim, it has the burden of justifying termination or modification of compensation.³ This holds true where, as here, the Office later decides that it has erroneously accepted a claim for compensation. To justify rescission of acceptance, the Office

¹ 5 U.S.C. § 8128(a). *Eli Jacobs*, 32 ECAB 1147, 1151 (1981).

² *Shelby J. Rycroft*, 44 ECAB 795, 802-03 (1993). *Compare Lorna R. Strong*, 45 ECAB 470, 479-80 (1994).

³ *See Frank J. Meta, Jr.*, 41 ECAB 115, 124 (1989); *Harold S. McGough*, 36 ECAB 332, 336 (1984).

must establish that its prior acceptance was erroneous based on new or different evidence or through new legal argument and/or rationale.⁴

ANALYSIS -- ISSUE 1

The Board notes that the Office presented new evidence which displays such inconsistencies regarding appellant's claimed June 15, 2005 injury as to cast serious doubt upon the validity of the claim. In its September 23, 2005 decision, the Office explained how this new evidence showed that she did not establish the fact of injury on June 15, 2005. The Office presented sufficient (new evidence) and argument to justify the rescission of its acceptance of appellant's claim for a herniated cervical disc and dorsal sprain.

The Office found that the factual and medical information of record provided several different accounts of the claimed injury. On the June 29, 2005 Form CA-1, appellant indicated that on June 15, 2005 she "pulled/lifted" a bar off a table onto a moving belt and then felt slight pain in her upper left shoulder and breast area. Dr. Jayne's June 27, 2005 report noted that appellant stated that her injury resulted due to constant motion of pulling, lifting and picking up heavy to medium baggage with her left arm. Dr. Sidhu advised that appellant stated that she injured her breasts while lifting baggage. On August 16, 2005 Dr. Cheng indicated that appellant was lifting luggage and that she recalled experiencing a slight painful sensation in the left chest area. Following the Office's August 9, 2005 letter requesting additional evidence, appellant submitted Dr. Iverson's June 15 and 20, 2005 reports. These reports indicated that appellant was examined by the attending physician who performed the original breast implant surgery on June 15, 2005 -- the date of the alleged work injury -- and on June 20, 2005. Dr. Iverson did not mention that she had sustained any employment-related injury to her left breast in either of these reports. He merely stated that appellant experienced pain in her left breast when it hardened overnight and she awakened to pain and hardening in her left breast the next morning.

The Board notes that the medical evidence contains sufficient inconsistencies regarding the date of injury, the date of onset of symptoms and the cause of injury as to cast doubt on the validity of appellant's claim. This new evidence, particularly when viewed in conjunction with previous evidence,⁵ shows that she did not establish the fact of injury on June 15, 2005. The Office presented sufficient new evidence and argument to justify the rescission of its acceptance of her claim for left breast disorder, left breast prosthesis malfunction and left breast implant corrective surgery.⁶

⁴ *Laura H. Hoexter (Nicholas P. Hoexter)*, 44 ECAB 987, 994 (1993); *Alphonso Walker*, 42 ECAB 129, 132-33 (1990); *petition for recon. denied*, 42 ECAB 659 (1991); *Beth A. Quimby*, 41 ECAB 683, 688 (1990); *Roseanna Brennan*, 41 ECAB 92, 95 (1989); *Daniel E. Phillips*, 40 ECAB 1111, 1118 (1989), *petition for recon. denied*, 41 ECAB 201 (1990).

⁵ Moreover, appellant did not report her alleged work injury to her supervisor until June 28, 2005.

⁶ *Edward W. Malaniak* (51 ECAB 279) (2000).

LEGAL PRECEDENT -- ISSUE 2

An employee seeking benefits under the Act⁷ has the burden of establishing that 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 and/or specific condition for which compensation is claimed are causally related to the employment injury.⁸ These are the essential elements of each and every compensation claim regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.⁹

To determine whether a federal 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.¹⁰ 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.¹¹

The Office cannot accept fact of injury if there are such inconsistencies in the evidence as to seriously question whether the specific event or incident occurred at the time, place and in the manner alleged or whether the alleged injury was in the performance of duty,¹² nor can the Office find fact of injury if the evidence fails to establish that the employee sustained an “injury” within the meaning of the Act. An injury does not have to be confirmed by eyewitnesses in order to establish the fact that an employee sustained an injury in the performance of duty, as alleged, but the employee’s statements must be consistent with surrounding facts and circumstances and her subsequent course of action.¹³ Such circumstances as late notification of injury, lack of confirmation of injury, continuing to work without apparent difficulty following the alleged injury and failure to obtain medical treatment may cast doubt on an employee’s statements in determining whether he or she has established his or her claim.¹⁴

⁷ 5 U.S.C. § 8101 *et seq.*

⁸ *Joe D. Cameron*, 41 ECAB 153 (1989); *Elaine Pendleton*, 40 ECAB 1143 (1989).

⁹ *Victor J. Woodhams*, 41 ECAB 345 (1989).

¹⁰ *John J. Carlone*, 41 ECAB 354 (1989).

¹¹ *Id.* For a definition of the term “injury,” see 20 C.F.R. § 10.5(e)(e).

¹² *Elaine Pendleton*, *supra* note 8.

¹³ See *Gene A. McCracken*, Docket No. 93-2227 (issued March 9, 1995); *Joseph H. Surgener*, 42 ECAB 541, 547 (1991).

¹⁴ See *Constance G. Patterson*, 42 ECAB 206 (1989).

ANALYSIS -- ISSUE 2

Appellant has not established fact of injury because of inconsistencies in the evidence that cast serious doubt as to whether the specific event or incident occurred at the time, place and in the manner alleged. Although she alleged in her CA-1 form that she injured her left breast on June 15, 2005 while lifting luggage, this statement was subsequently contradicted by Dr. Iverson's June 15, 2005 and 20, 2005 reports. Appellant failed to mention that she sustained an employment-related injury to her left breast but asserted that she experienced pain in her breast after it hardened overnight. She awakened to pain and hardening in her left breast on June 15, 2005. The evidence indicates that appellant did not inform her supervisor that she had sustained a traumatic injury on June 15, 2005 until June 28, 2005.¹⁵ These statements are not consistent with her assertion on her CA-1 form that she injured her left breast on June 15, 2005 while lifting luggage. This contradictory evidence created an uncertainty as to the time, place and in the manner in which appellant sustained her alleged left breast injury.

In addition, appellant failed to submit to the Office a witness statement in response to its request. This casts additional doubt on her assertion that she strained her left breast while lifting baggage on June 15, 2005. The Office requested that appellant submit additional factual and medical evidence explaining how she injured her left breast on the date in question and requested additional medical evidence in support of her claim that her left breast pain was related to the alleged work incident of June 15, 2005. She failed to submit such evidence.¹⁶ Therefore, given the inconsistencies in the evidence regarding how appellant sustained her injury, the Board finds that there is insufficient evidence to establish that she sustained an injury in the performance of duty as alleged.¹⁷

CONCLUSION

The Board finds that the Office met its burden of proof to rescind its acceptance of appellant's claim for a left breast disorder and left breast prosthesis malfunction. The Board finds that the Office properly found that she failed to meet her burden of proof to establish that she sustained a left breast injury in the performance of duty.

¹⁵ The evidence submitted by an employing establishment on the basis of their records will prevail over the assertions from the claimant unless such assertions are supported by documentary evidence. *See generally Sue A. Sedgwick*, 45 ECAB 211, 218 n.4 (1993); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Computation of Compensation*, Chapter 2.900(b)(3) (September 1990).

¹⁶ On appeal, appellant has submitted new evidence. However, the Board cannot consider evidence that was not before the Office at the time of the final decision. *See Dennis E. Maddy*, 47 ECAB 259 (1995); *James C. Campbell*, 5 ECAB 35 (1952); 20 C.F.R. § 501(c)(1). Appellant may resubmit this evidence and legal contentions to the Office accompanied by a request for reconsideration pursuant to 5 U.S.C. § 8128(a). 20 C.F.R. § 501(c).

¹⁷ *See Mary Joan Coppolino*, 43 ECAB 988 (1992) (where the Board found that discrepancies and inconsistencies in appellant's statements describing the injury created serious doubts that the injury was sustained in the performance of duty).

ORDER

IT IS HEREBY ORDERED THAT the January 5, 2006 and September 23, 2005 decisions of the Office of Workers' Compensation Programs be affirmed.

Issued: August 8, 2006
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board