

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

B.W., Appellant)
and) Docket No. 07-165
U.S. POSTAL SERVICE, POST OFFICE,) Issued: April 25, 2007
Coral Spring, FL, Employer)

)

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On October 24, 2006 appellant filed a timely appeal from June 16 and September 26, 2006 merit decisions of the Office of Workers' Compensation Programs 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 has established that she sustained an injury on February 24, 2006 in the performance of duty.

FACTUAL HISTORY

On February 27, 2006 appellant, then a 49-year-old sales representative, filed a traumatic injury claim alleging that on February 24, 2006 she injured her right arm while lifting a package at work. She noted that Susan Hernandez, a coworker, "heard a customer ask about [a] heavy package. I explained in front of her that it was not a big deal; I have to lift up to 70 [pounds].

This was approx[imately] 40 [to] 50 [pounds].” Appellant stopped work on February 24, 2007 and returned to work on March 1, 2006.

In a statement accompanying her claim, appellant related that she felt “fine” when she left work but that when she arrived home and exited her car she could not raise her right arm and close the car door. She lifted a package at work and a customer warned her that it was heavy. Appellant did not “feel anything” after lifting the package but it was the only heavy item that she lifted on February 24, 2006. She stated, “It did [not] hurt when I left Friday from work. I had a dentist app[ointment].” When appellant got in the shower at home after resting she could not lift her arm. The next morning she went to the emergency room. The physician recommended a magnetic resonance imaging (MRI) scan. Appellant noted that she strained a muscle in her right shoulder in 1992 at work.

In a March 1, 2006 authorization for examination and/or treatment (Form CA-16), Dr. Daniel Grobman, an osteopath, listed the history of injury as appellant injuring her right shoulder lifting a package.¹ He diagnosed a rotator cuff strain and checked “yes” that the condition was caused or aggravated by the described employment activity. Dr. Grobman found that appellant was partially disabled. In a duty status report of the same date, Dr. Grobman diagnosed a rotator cuff tear and checked “yes” that it corresponded to the history provided on the form of appellant lifting a package.

The employing establishment controverted the claim. Appellant’s supervisor, Alicia Lincoln, reported that Ms. Hernandez denied overhearing a customer ask appellant about a heavy package. Ms. Lincoln also noted that the heaviest package appellant lifted on that date was 21 pounds 5.4 ounces. She referenced appellant’s statement and stated:

“Due to the fact that [appellant] felt no pain on the date of the alleged injury, her claim of servicing a 40[- to] 50[-] pound package when the heaviest one she serviced was 21 [pounds] 5.4 [ounces], the conflicting information of her doctor’s diagnoses, the allegation that a witness heard the statement from a customer and the alleged witness said she did not hear any such thing, the lapse in time from the alleged injury to the first pain and the fact that [appellant] would hook up a pain hours later to an alleged lifting of a package that weighed half of what she is claiming, all leads me to believe that this claim should be controverted.”

On March 31, 2006 the Office informed appellant that she needed to submit a rationalized medical report addressing causal relationship. The Office further noted that the employing establishment challenged that the injury occurred as alleged and requested that she respond to the employing establishment’s controversion of her claim. The Office provided her 30 days to submit the requested information.

¹ The record contains a properly executed Form CA-16, creating a contractual obligation, which does not involve the employee directly, to pay for the cost of the examination or treatment regardless of the action taken on the claim. *Tracey P. Spillane*, 54 ECAB 608 (2003).

An MRI scan of appellant's right shoulder obtained on March 6, 2006 revealed findings that included a thickened supraspinatus tendon likely indicating rotator cuff tendinosis or tendinopathy. Appellant also submitted chiropractic reports dated April and May 2006.

By decision dated June 16, 2006, the Office denied appellant's claim on the grounds that she had not submitted sufficient evidence to establish that she sustained an injury at the time, place and in the manner alleged. The Office noted that appellant failed to reply to the employing establishment's controversion of her claim.

On June 22, 2006 appellant requested reconsideration. She submitted an April 14, 2006 form report from Dr. Grobman who diagnosed a rotator cuff strain and checked "yes" that the condition was due to the described employment activity of appellant lifting mail and subsequently experiencing pain when raising her right arm. Dr. Grobman provided as rationale for his causation finding that her symptoms occurred after lifting and that she had not previously felt pain in her right shoulder. He found that she could perform light duty.

In an undated report received by the Office on July 27, 2006, Dr. Grobman stated:

"As you know, [appellant] sustained a right shoulder injury at work on February 24, 2006. [Appellant], while at work, had lifted a box off the surface of a table and felt a pop in her right shoulder. The reported weight of the box was somewhere around 25 [to] 40 pounds. This was accompanied with immediate pain in the shoulder as well as neck pain and trapezius pain on the right side, consistent with cervicalgia and muscle spasms."

Dr. Grobman noted that her symptoms suggested a labral tear which are often not seen on MRI scans.

On August 8, 2006 appellant again requested reconsideration and noted that the Office was not paying her medical bills. She indicated that her claim was denied because the physician did not report the cause of injury.

By decision dated September 26, 2006, the Office denied modification of its June 16, 2006 decision. The Office found that the factual evidence did not establish that she sustained an injury at work on February 24, 2006.

LEGAL PRECEDENT

An employee seeking benefits under the Federal Employees' Compensation Act² 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 filed within the applicable time limitation; that an injury was sustained while 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.³ These are the essential

² 5 U.S.C. §§ 8101-8193.

³ *Anthony P. Silva*, 55 ECAB 179 (2003).

elements of each and every compensation claim regardless of whether the claim is predicated on a traumatic injury or an occupational disease.⁴

To determine whether an employee sustained a traumatic injury in the performance of duty, the Office must determine whether “fact of injury” is established. First, an employee has the burden of demonstrating the occurrence of an injury at the time, place and in the manner alleged, by a preponderance of the reliable, probative and substantial evidence.⁵ Second, the employee must submit sufficient evidence, generally only in the form of medical evidence, to establish a causal relationship between the employment incident and the alleged disability and/or condition for which compensation is claimed.⁶ An employee may establish that the employment incident occurred as alleged, but fail to show that his or her disability and/or condition relates to the employment incident.⁷

In order to determine whether an employee actually sustained an injury in the performance of duty, the Office begins with an analysis of whether fact of injury has been established. Generally, fact of injury consists of two components which must be considered in conjunction with one another. The first component to be established is that the employee actually experienced the employment incident which is alleged to have occurred.⁸ An injury does not have to be confirmed by eyewitnesses in order to establish that an employee sustained an injury in the performance of duty, but the employee’s statements must be consistent with the surrounding facts and circumstances and his or her subsequent course of action.⁹ An employee has not met his or her burden of proof in establishing the occurrence of an injury when there are such inconsistencies in the evidence as to cast serious doubt upon the validity of the claim.¹⁰ 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, if otherwise unexplained, cast doubt on an employee’s statements in determining whether a *prima facie* case has been established.¹¹ However, an employee’s statement regarding the occurrence of an employment incident is of great probative force and will stand unless refuted by strong or persuasive evidence.¹²

⁴ See *Ellen L. Noble*, 55 ECAB 530 (2004).

⁵ *Delphyne L. Glover*, 51 ECAB 146 (1999).

⁶ *Gary J. Watling*, 52 ECAB 278 (2001); *Shirley A. Temple*, 48 ECAB 404, 407 (1997).

⁷ *Id.*

⁸ See *Louise F. Garnett*, 47 ECAB 639 (1996).

⁹ See *Betty J. Smith*, 54 ECAB 174 (2002).

¹⁰ *Id.*

¹¹ *Linda S. Christian*, 46 ECAB 598 (1995).

¹² *Gregory J. Reser*, 57 ECAB ____ (Docket No. 05-1674, issued December 15, 2005).

ANALYSIS

Appellant alleged that she sustained a traumatic injury to her right arm on February 24, 2006 when she lifted a package at work. The Office denied her claim after finding that she did not demonstrate that the specific event occurred at the time, place and in the manner described.

The initial question presented is whether appellant has established that the February 24, 2006 employment incident occurred as alleged. An injury does not have to be confirmed by eyewitnesses in order to establish that an employee sustained an injury in the performance of duty, but the employee's statement must be consistent with the surrounding facts and circumstances and her subsequent course of action.¹³ An employee has not met her burden of proof when there are inconsistencies in the evidence sufficient to cast serious doubt on the validity of her claim.¹⁴

The Board finds that appellant has not established the occurrence of the February 24, 2006 employment incident. Appellant attributed the onset of her arm pain on February 24, 2006 to lifting a package at work weighing between 40 and 50 pounds. She related that she did not experience any discomfort after lifting the package or during the remainder of the workday. Appellant left work and went to a dental appointment. When she arrived home following the dental appointment, she was unable to raise her arm to close the car door. Appellant's description of the history of injury reveals that she experienced the onset of pain not after lifting a package at work but instead after performing various nonemployment-related activities, including driving a motor vehicle and visiting the dentist. The employing establishment controverted the claim based on her statement that she felt no pain at the time of lifting the package. The employing establishment also noted that the heaviest package appellant lifted on February 24, 2006 weighed 21 pounds 5.4 ounces. The Office requested that appellant respond to the employing establishment's challenge to her claim; however, she did not provide any further clarification. Appellant's description of the events of the February 24, 2006 incident does not support that she sustained an injury on that date after lifting a heavy package at work.

Moreover, the record is devoid of a medical report containing a history of injury of appellant experiencing arm pain at home after a dental appointment hours after lifting a package at work. Dr. Grobman submitted form reports in which he noted the history of injury as appellant lifting a box at work. The form reports did not include the history provided by appellant of sustaining pain when she arrived home after the end of the workday. Dr. Grobman diagnosed a possible labral tear in a report received by the Office on July 27, 2006. He noted the history of injury as appellant experiencing a pop in her shoulder and immediate shoulder and neck pain after lifting a box at work. The lack of a medical report containing a history of the February 24, 2006 employment incident consistent with that provided by appellant casts doubt on the validity of the claim.¹⁵

¹³ See *Betty J. Smith*, *supra* note 9.

¹⁴ See *Linda S. Christian*, *supra* note 11.

¹⁵ See *Caroline Thomas*, 51 ECAB 451 (2000) (a consistent history of the injury as reported on medical reports, to the claimant's supervisor and on the notice of injury can be evidence of the occurrence of an incident).

Accordingly, the Board finds that appellant failed to substantiate that the February 24, 2006 employment incident occurred as alleged and, therefore, has not established an injury in the performance of duty. As she has not established the factual aspect of her claim, it is not necessary for the Board to consider the medical evidence of record.¹⁶

CONCLUSION

The Board finds that appellant has not established that she sustained an injury on February 24, 2006 in the performance of duty.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated September 26 and June 16, 2006 are affirmed.

Issued: April 25, 2007
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

¹⁶ *Alvin V. Gadd*, 57 ECAB ____ (Docket No. 05-1596, issued October 25, 2005).