

Appellant noted that the only other clerk on duty at the time of injury was pregnant. She alleged that she sustained a herniated disc and a pinched nerve in her lower back which caused weakness and pain in her back and right leg. Appellant stopped work on September 16, 2005.¹

In a letter dated November 14, 2005, Patricia Gold, a case manager from the employing establishment, controverted the claim. She noted that appellant had provided several explanations for her physical condition over the period September 1 to 15, 2005. Ms. Gold also noted that appellant continued to work without restriction for more than two weeks and was placed off work for total disability on September 16, 2005. In an October 26, 2006 statement, Alicia M. Mathes, a customer service supervisor, noted that on September 13, 2005 appellant alleged that she had a “sore stomach” and believed that it was her kidneys. Appellant indicated that she would contact her physician. Ms. Mathes alleged that on September 14, 2005 appellant alleged that “her back was bothering her.” She questioned appellant to ascertain whether it was job related and she informed her that “no, it was from picking up the grandbabies.” Appellant informed Ms. Mathes that she was calling her physician for an appointment. Ms. Mathes noted that, on September 15, 2005, appellant used sick leave to care for her husband. Additionally, she noted that she received a telephone call from appellant on September 19, 2005 informing her that she was in the hospital because of disc problems and a lump on her lung. Additionally, Ms. Mathes noted that appellant was involved in a nonwork-related automobile accident in March 2002.

In a September 21, 2005 report, Dr. Quynh-Nhu Pham, a Board-certified general surgeon, noted that appellant had spinal stenosis and nerve compression, which caused weakness and pain in her back and right leg. He advised that appellant was unable to stand or lift heavy objects. Dr. Pham opined that appellant was “incapable of working” and recommended that she remain off work from September 16 to October 31, 2005.

By letter dated December 5, 2005, the Office advised appellant that additional factual and medical evidence was needed. Appellant was requested to describe in detail how the injury occurred and to provide dates of examination and treatment, a history of injury given by her to a physician, a detailed description of any findings, the results of all x-rays and laboratory tests, a diagnosis and course of treatment followed and a physician’s opinion supported by a medical explanation as to how the reported work incident caused the claimed injury.

On December 16, 2005 the Office received an August 31, 2005 disability certificate in which Dr. Pham advised that appellant was “ill and had an appointment today.” In a September 2, 2005 certificate, Dr. Pham noted that appellant was “unable to work until Tuesday second to illness.” In a duty status report dated November 10, 2005, he diagnosed spinal foraminal stenosis and advised that appellant could return to work on December 6, 2005 with restrictions.²

¹ The employing establishment controverted continuation of pay as the claim was filed more than 30 days after the injury.

² The writing is difficult to decipher, but it appears that he indicated “December 2006.”

The Office also received an October 24, 2005 operative report from Dr. Robert Salvage, a Board-certified anesthesiologist, who performed a left-sided epidural injection for lumbar radiculopathy, lumbar displaced disc and lumbar degenerative disc disease.

By decision dated January 19, 2006, the Office denied appellant's claim on the grounds that she did not establish an injury as alleged. The Office found that the evidence was insufficient to establish that the events occurred as alleged. Appellant was advised that she needed to provide more details regarding the facts surrounding her claim, including a more detailed description of how the injury occurred, the approximate weight of the package she lifted, names of witnesses and why she waited for over two months to file her claim. The Office also advised appellant that they needed to know whether or not she had any other similar symptoms before the alleged injury to determine if any preexisting condition was playing a role in her condition. Appellant was advised that, because she did not respond to the letter, the Office could not determine the facts surrounding her claim.

On February 10, 2006 appellant requested a review of the written record.

The Office subsequently received the first page of a medical report dated October 17, 2005 from Dr. Salvage and the first pages of operative reports from Dr. Salvage dated October 25 and November 8, 2005. The Office also received a copy of Dr. Pham's November 10, 2005 duty status report.

A September 17, 2005 magnetic resonance imaging (MRI) scan of the lumbar spine read by Dr. Jean K. Yi, a Board-certified diagnostic radiologist, revealed mild congenital spinal stenosis and degenerative disc disease at the L4-5 level.

On January 20, 2006 the Office received a December 30, 2005 response from appellant. Appellant noted that in the beginning of September 2005, she was working the window when a customer brought in several packages. She alleged that she asked the customer if the packages were heavy and he responded, "no." Appellant further alleged that, when he set the package on the counter, she went to lift it to put it on the scale and that, while she could not recall the exact weight, she thought that it was approximately 30 pounds. She alleged that, as she lifted it to place it behind her, she felt a pinch in her lower back and her back began to hurt. Appellant alleged that she turned to the customer and informed him that she just hurt her back. She alleged that it continued to hurt her for a few weeks and she again informed her supervisor, who told her to sit in the back office and who never told her to fill out any forms. Appellant alleged that, in September, even though she "was not well," she was at the customer service window with a coworker, "Stacie," who was pregnant. She alleged that, after putting postage on approximately 25 parcels, she told Stacie that her "back was killing" her. Appellant alleged that her supervisor was not available so she could not file a complaint. She alleged that, when her supervisor arrived, she informed her that she was in pain and she was "told to sit for awhile and take it easy." Appellant also alleged that her supervisor "knew it was not the first time, I complained about my back hurting me." She alleged that she was hospitalized on September 16, 2005 because of her back pain and that a black spot on her lung was also discovered. Appellant disputed her supervisor's allegations that she injured herself lifting her granddaughter and alleged that her injury occurred while performing her duties.

In an undated report, received by the Office on January 20, 2006, Dr. Pham noted that appellant had debilitating back pain that at times was so severe that it prevented her from performing her duties. He noted that appellant was currently receiving pain medications and spine injections. Dr. Pham indicated that her “symptoms began last September 12, 2005.” He advised that appellant related that she noticed intense lower back pain immediately after lifting a heavy package at work. Dr. Pham noted that appellant tried conservative management with rest and nonsteroidal anti-inflammatory agents but the pain worsened over the next few days. He indicated that, when he saw appellant on September 16, 2005, she was in so much pain that she was unable to move and had lower leg weakness. Dr. Pham advised that appellant was hospitalized for pain management and for additional testing and observation. He noted that an MRI scan of her spine revealed severe L4-5 spinal foraminal stenosis and spinal nerve inflammation and opined that appellant’s condition was worsened with the musculoskeletal injury to her back on September 12, 2005.

The Office received a December 8, 2005 statement from Greg Shober, a window clerk, who noted that he worked with appellant on a daily basis. Mr. Shober alleged that appellant was having back pain from lifting heavy parcels and that, at times, she was unable to stand at the window. He alleged that she would have to sit down to relieve her pain.

On January 20, 2006 the Office received a statement from Calvin Allison, a customer, who alleged that he witnessed appellant hurt her back in September 2005, while handling one of his parcels.

The Office also received a patient discharge summary from a nurse, a light-duty work status report for nonjob-related injury or illness, Dr. Pham’s September 21 and October 31, 2005 reports, and Dr. Salvage’s October 17, 25 and November 8, 2005 reports. The Office also received a copy of an October 5, 2005 letter to appellant from Marcella Proctor, a regular carrier, regarding family medical leave.

By decision dated June 5, 2006, the Office hearing representative affirmed the Office’s January 19, 2006 decision.

On July 17, 2006 the Office received appellant’s undated request for reconsideration. Appellant alleged that she was enclosing a report from Dr. Pham, which supported that her injury occurred on September 1, 2005. In a June 23, 2006 report, Dr. Pham noted that he was amending previous errors and inconsistencies contained in his prior reports. He noted that appellant’s symptoms began on September 1, 2005 and not September 12, 2005.

The Office also received disability certificates dated May 15, 2006 from Dr. Pham requesting physical therapy and a May 19, 2006 report from Dr. Thomas D. Kohl, a Board-certified family practitioner, describing follow-up treatment.

By decision dated October 11, 2006, the Office denied appellant’s request for reconsideration on the grounds that it neither raised a substantive legal question nor included new and relevant evidence, and thus, it was insufficient to warrant a merit review of its prior decision.

LEGAL PRECEDENT -- ISSUE 1

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 or exposure, which is alleged to have occurred.³ In order to meet her burden of proof to establish the fact that she sustained an injury in the performance of duty, an employee must submit sufficient evidence to establish that she actually experienced the employment injury or exposure at the time, place and in the manner 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 as alleged, but the employee's statements must be consistent with surrounding facts and circumstances and her subsequent course of action. 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 sufficient doubt on an employee's statements in determining whether she has established a *prima facie* case. The employee has the burden of establishing the occurrence of the alleged injury at the time, place and in the manner alleged, by a preponderance of the reliable, probative and substantial evidence. An employee has not met this burden when there are such inconsistencies in the evidence as to cast serious doubt upon the validity of the claim.⁴

The second component is whether the employment incident caused a personal injury and generally can be established only by medical evidence.⁵ The evidence required to establish causal relationship is rationalized medical opinion evidence, based upon complete factual and medical background, showing a causal relationship between the claimed condition and the identified factors.⁶ The belief of the claimant that a condition was caused or aggravated by the employment is insufficient to establish a causal relationship.⁷

ANALYSIS -- ISSUE 1

Appellant alleged that she sustained a traumatic injury on September 1, 2005. She explained that, in the beginning of September 2005, she was working the window when a customer brought in several packages. Appellant alleged that she set the package on the counter, which she believed weighed approximately 30 pounds, and when she lifted it to place it behind her, she felt a pinch in her lower back and her back began to hurt. She alleged that she turned to

³ See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Fact of Injury*, Chapter 2.803(2)(a) (June 1995).

⁴ *Merton J. Sills*, 39 ECAB 572 (1988); *Vint Renfro*, 6 ECAB 477 (1954).

⁵ *John J. Carlone*, 41 ECAB 354 (1989); see 5 U.S.C. § 8101(5) (injury defined); 20 C.F.R. §§ 10.5(ee), 10.5(q) (traumatic injury and occupational disease defined).

⁶ *Lourdes Harris*, 45 ECAB 545 (1994); see *Walter D. Morehead*, 31 ECAB 188 (1979).

⁷ *Charles E. Evans*, 48 ECAB 692 (1997).

the customer and informed him that she just hurt her back. Appellant also alleged that she continued to work, but that it continued to hurt and that, when she informed her supervisor, she was told to sit in the back office, but was not told to fill out any forms.⁸ Additionally, she denied her supervisor's allegations that she injured herself lifting her granddaughter and alleged that it occurred in the performance of duty. To support her claim, appellant submitted a statement from Mr. Allison, a customer, who confirmed that he witnessed appellant hurt her back in September 2005 while handling one of his parcels. While the employing establishment controverted the claim and alleged that there were several explanations, it appears that appellant listed several instances where she may have sustained an injury. However, she was consistent with regard to the September 1, 2005 incident. While the employing establishment noted that appellant worked without restriction from September 1 to 15, 2005, she explained that her back began to hurt her when she lifted the package and that finally she was hospitalized on September 16, 2005 and unable to work. While Ms. Mathes noted that on September 13, 2005 appellant alleged that she had a "sore stomach" and believed that it was her kidneys, appellant noted that, when she was hospitalized, a black spot was also found on her lung. Furthermore, while Ms. Mathes suggested that appellant injured her back from picking up her grandchildren, appellant denied this allegation and provided a statement from the customer, Mr. Allison, who witnessed appellant handling his parcel when she stated that she hurt her back.

The Board finds that the first component of fact of injury, the claimed incident -- that she lifted a package at work on September 1, 2005 occurred as alleged. The Board finds that appellant has established that she experienced this incident at the time, place and in the manner alleged. With respect to whether appellant sustained an injury on September 1, 2005, the Board finds that the medical evidence is sufficient to require further development of the claim.

The record reflects that appellant's treating physician, Dr. Pham, noted that appellant was suffering from debilitating back pain which prevented her from performing her duties. He noted that her symptoms began on September 1, 2005.⁹ Dr. Pham noted appellant's description of the injury which included that she noticed intense lower back pain immediately after lifting a heavy package at work and that she tried conservative management with rest and nonsteroidal anti-inflammatory agents but that her pain worsened over the next few days. He indicated that an MRI scan of her spine revealed severe L4-5 spinal foraminal stenosis and spinal nerve inflammation and opined that appellant's condition was worsened with the musculoskeletal injury to her back on September 1, 2005.

The Board finds that the report of Dr. Pham is sufficient to require further development of the claim. The medical report reflects an accurate history of the accepted employment incident and noted, with explanation, how appellant's spinal foraminal stenosis was worsened by her work on September 1, 2005. While the report of Dr. Pham lacks a full review of appellant's preexisting conditions and is not fully rationalized to discharge appellant's burden of proof, it

⁸ Appellant also described another incident that occurred in September 2005, as noted in the text of this decision, which involved placing postage on approximately 25 parcels.

⁹ While he originally indicated September 12, 2005, the physician explained that this was an error and provided the correct date in an addendum dated June 23, 2006.

raises an uncontroverted inference between her condition and the accepted employment incident.¹⁰

On remand, the Office should further develop the medical evidence, as appropriate, to obtain a physician's opinion regarding whether the September 1, 2005 incident at work caused a condition or aggravated appellants preexisting conditions¹¹ and the need for treatment. After such further development as deemed necessary, the Office should issue a merit decision on appellant's entitlement to benefits under the Federal Employees' Compensation Act.

CONCLUSION

The Board finds that the case requires further development on whether appellant sustained injury to her back on September 1, 2005.

ORDER

IT IS HEREBY ORDERED THAT the October 11 and June 5, 2006 decisions of the Office of Workers' Compensation Programs are set aside and the case remanded for further proceedings consistent with the above opinion.¹²

Issued: June 7, 2007
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board

¹⁰ *John J. Carlone*, 41 ECAB 354 (1989); see 5 U.S.C. § 8101(5) (injury defined); 20 C.F.R. §§ 10.5(ee), 10.5(q) (traumatic injury and occupational disease defined).

¹¹ As noted above the record reflects that appellant had lumbar radiculopathy, lumbar displaced disc and lumbar degenerative disc disease in addition to the spinal stenosis.

¹² In light of the Board's disposition, the second issue is moot.