United States Department of Labor
Employees' Compensation Appeals Board

L.S., Appellant	)	
and	)	**Docket No. 07-1508**
	)	**Issued: November 15, 2007**
U.S. POSTAL SERVICE, POST OFFICE, Omaha, NE, 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
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On May 14, 2007 appellant filed an appeal of June 19, 2006 and March 13, 2007 merit decisions of the Office of Workers' Compensation Programs denying her traumatic injury claim, and an April 30, 2007 nonmerit decision denying her request for reconsideration. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.

ISSUES

The issues are: (1) whether appellant has established that she sustained a traumatic injury on October 9, 2005 in the performance of duty; and (2) whether the Office properly refused to reopen her case for further review of the merits under 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On October 11, 2005 appellant, then a 57-year-old mail processing clerk, filed a traumatic injury claim (Form CA-1) alleging that on October 9, 2005 she slipped on a plastic lid in a pile of debris left on the workroom floor. She asserted that she sustained an acute strain and spasm of her neck and shoulder, especially the left side. In the official supervisor's report,

Thomas Dugdale controverted the claim, contending that there were no witnesses to the alleged incident, and that the debris had been "put up" by appellant.

In a statement dated October 9, 2005, appellant indicated that, at approximately 3:15 p.m. on that date, she slipped on a white plastic lid in a pile of debris left on the workroom floor. She stated that, as she was walking to her work area, she slipped, "did the splits," and caught herself before she fell down. Appellant was shaken and scared but felt she was "doing O.K."

Appellant submitted numerous witness statements dated October 9, 2005. Gary Naple, a coworker, indicated that, on that date, appellant told him that she slipped on some trash and debris, which he observed in the middle of her work area. Charles Whitney, a coworker, stated that, on the date in question, appellant told him that her work area was dirty and that she had injured her back while trying to prevent herself from falling. Ken Fletcher, a coworker, stated that appellant informed him that she had slipped and fallen at approximately 3:30 p.m. Abelino Ortiz, a coworker, indicated that, on the date of the alleged injury, appellant asked him if he had seen her fall. Mr. Ortiz stated that he did not see her fall, but that he noticed a pile of debris on the floor "with a plastic type about the size of a baseball." Appellant told him that "she made a split and broke the fall." Nancy Kydney stated that, at approximately 3:30 p.m., appellant showed her a pile of trash and labels in the middle of her work area, and indicated that she had fallen. Luis Ferriera, a coworker, stated that he had been working 15 feet away from appellant on the date of the alleged accident. He did not see appellant fall; nor did he see a pile of trash. Mr. Ferriera did see a few labels on the floor, which he believed appellant had placed "to convince her supervisor" and to "lay a plot" for her accident. On October 10, 2007 Octell Howard, a coworker, indicated that, on October 9, 2005, appellant informed him that, while she was putting items "up in the locker," she slipped on a "pop top or something" in a pile of trash left on the floor in her work area.

In an October 9, 2005 duty status report, Dr. S.J. Witt, a treating physician, indicated that appellant had slipped on a plastic lid in a pile of debris left on the workroom floor. He diagnosed an acute neck strain and recommended that appellant be placed on light duty, which included a 20-pound lifting restriction. In an October 9, 2005 attending physician's report, Dr. Witt stated that appellant slipped on a lid at work and caught herself with both arms, straining her neck and left shoulder. He diagnosed left neck strain and shoulder spasm. In response to the question as to whether he believed that appellant's condition was caused by employment activities, Dr. Witt placed a checkmark in the "yes" box.

Appellant submitted medical reports and notes from Dr. Laura Frigyes, a Board-certified internist, for the period October 13, 2005 through February 6, 2006. On October 13, 2005 Dr. Frigyes indicated that, while at work on October 9, 2005, appellant "was walking and slipped on a plastic cap on the floor and managed to grab onto the machinery and broke her fall, so she did not fall but strained her upper shoulders and neck from grabbing on and catching herself." She diagnosed neck and left shoulder strain secondary to the alleged incident. On October 13, 2005 Dr. Frigyes stated that appellant slipped and fell on a plastic cap, caught herself, and strained her neck and shoulders. She diagnosed muscle strain and restricted appellant from lifting more than five pounds. In an October 25, 2005 attending physician's report, Dr. Frigyes diagnosed neck and upper back strain and recommended restrictions, including lifting no more than five pounds and working no more than six hours per day. On October 27, 2005 she stated

that on October 9, 2005 appellant fell at work; caught herself; and strained her neck and upper arms. On November 28, 2005 Dr. Frigyes indicated that appellant had an injury at work, "with kind of a fall," and injured her neck and upper back. In a description of the alleged October 9, 2005 incident, she stated that appellant slipped on a pile of debris on the workroom floor. In work excuses dated December 6 and 7, 2005, Dr. Frigyes indicated that appellant was unable to work due to severe neck pain. On January 3, 2006 she noted that appellant continued to experience pain and stiffness in her neck and upper back, and recommended work restrictions, including lifting no more than 10 pounds and working no more than three to four hours per day. On February 3, 2006 Dr. Frigyes stated that appellant was distraught as a result of the way the employing establishment had handled her traumatic injury case. She noted that appellant had been hospitalized for post-traumatic stress disorder (PTSD), depression and anxiety and that she was still experiencing neck pain.

Appellant submitted an October 9, 2005 report from Midwest Minor Medical, bearing an illegible signature. The report indicated that appellant tripped on a lid at work, caught herself with both arms and had neck and shoulder pain.

The record contains December 6 and 7, 2005 memoranda to the file from Jerry Jordan, an injury compensation specialist, reflecting that appellant informed him that she was unable to work on those dates because she was "hurting so much," and that she could not drive. In a December 12, 2005 memorandum, Mr. Dugdale, supervisor, informed Mr. Jordan that appellant advised him on December 6, 2005 that she would be unable to work on December 6 and 7, 2005 because she would be receiving traction therapy.

The employing establishment initiated an investigation of the alleged October 9, 2005 incident. The record contains a December 20, 2005 investigative memorandum and related exhibits, pertaining to appellant's conduct and activity, prepared by Clayton Reeves, postal inspector, who noted inconsistencies in the information reported by appellant. Mr. Reeves also stated that appellant had demonstrated her ability to be active away from the employing establishment, although she alleged that she was unable to work. The report indicated that surveillance, video and gambling records showed that, since the alleged October 9, 2005 incident, appellant had gambled regularly at Ameristar Casino for periods longer than the six-hour work restriction, including October 12, 2005 and other days that she allegedly was unable to work. Appellant was also observed driving, running, moving trash cans and pumping gas.

Exhibits included sworn statements from, and records of interviews with, appellant and various coworkers and supervisors. On December 12, 2005 Nancy Kydney indicated that, on October 9, 2005, appellant informed her that she had fallen and called her over to her work area for the purpose of showing her a pile of labels on the floor. She noted that the pile was not "spread out," as it would likely have been had she fallen. Ms. Kydney indicated that she did not witness the alleged incident, and that appellant did not seem upset or injured in any way. She stated, "In the break room, there was disbelief that [appellant] had fallen." In a December 12, 2005 interview, Ms. Kydney indicated that the pile of debris consisted of mailing labels and dust.

In a sworn statement dated December 12, 2005, Abelino Ortiz, a coworker, indicated that, on the date in question, he noticed appellant looking at him as if something had happened to her. She was holding onto two pieces of equipment and asked if he saw her fall. Mr. Ortiz indicated

that he did not see or hear appellant fall. Appellant showed him a pile of debris, in which he observed a plastic cap the size of a baseball. She pushed the debris together with her foot, explaining to Mr. Ortiz that she was doing so in order to show it to the supervisor. Appellant told Mr. Ortiz that her neck and back were hurting. In a December 12, 2005 interview, Mr. Ortiz stated that, on October 9, 2005, he was working approximately 25 feet away from appellant's work area. He indicated that he observed appellant holding onto a nutting truck and a distribution case, as she said, "Did you see me fall?" Mr. Ortiz stated that he did not see her fall, but that it appeared as though she had just gotten up and was in pain. He further indicated that he saw a "little pile of labels and dust balls, and a plastic cap from a mailing tube" that was "off to the side of [appellant]."

In a sworn statement dated December 9, 2005, Luis J. Ferreira, a coworker, indicated that, on October 9, 2005, appellant called his attention to individual labels that were scattered on the floor over a 16- by 20-foot area. Later, he saw a pile of debris and labels on the floor that was not present earlier. Mr. Ferreira stated that he did not see appellant fall, and "did n[o]t believe that it happened because [he] was right there." In a December 9, 2005 interview, Mr. Ferreira, the postal inspector, stated that, on the date in question, he saw no piles of debris prior to the alleged incident. He stated that approximately 15 minutes after appellant allegedly fell, he noticed a maintenance man taking photos of a "neat little pile of debris" in appellant's work area. Mr. Ferreira noted that he had been working approximately 15 feet from appellant's work area, and that he had not left his work area from the time appellant showed him the labels until after the maintenance man arrived. He stated that "common sense told him that, if someone slipped on a pile of debris, that the pile would have been scattered rather than remain in a neat little pile."

In a December 8, 2005 interview, Dennis Allen, manager, stated that he had not seen appellant fall on October 9, 2005. He stated, "I was standing right across from the area -- working there for some time. If she would have fallen, I would have known. Everyone down there is in tight quarters. If something would happen, everyone would know. There are too many people in this high traffic area for no one to have seen her slip. People come and go all the time but no one saw her slip."

In a December 12, 2005 interview with the postal inspector, appellant alleged that, at about 3:15 p.m. on October 9, 2005, she was carrying a box of labels when she entered the flat sorting area. She stated that there was a pile of debris on the floor, consisting of rubber bands, paper and a plastic end cap from a mailing tube. Appellant indicated that, as she reached over an orange hamper in order to put the box down, her foot hit the plastic cap and slipped forward and out from under her. She stated that she fell over the orange hamper and that her neck snapped backward and forward like a "whiplash." Appellant allegedly grabbed the equipment on either side of her and went down to her knees, hitting the side of her face on the equipment. She heard a pop in her neck when her head hit the equipment and the contact left a bump on her head. Appellant stated that she did not see any piles of debris prior to falling, only excess equipment. She indicated that she left work due to nausea and vomiting on October 11 and 12, 2005, and that she applied cold packs for nausea, and heat packs for neck and shoulder pain. Appellant also stated that, on December 6 and 7, 2005, she was unable to work and required rest due to traction therapy.

The record contains an October 11, 2005 "report of hazard," in which appellant alleged that a pile of debris had been left on the workroom floor. The record contains an October 12, 2005 accident report, bearing an illegible signature. The report indicates that, on October 9, 2005, appellant was working in a congested flat case work area. As she leaned across a machine to place her label box on a flat case, appellant slipped on a plastic lid in a partially concealed debris pile and caught herself on a machine. The incident allegedly resulted in an acute strain to appellant's left neck and shoulder. The record also contains photos of the work area where the October 9, 2005 incident allegedly occurred.

In a report dated December 15, 2005, Dr. Wendy J. Spangler, a treating physician, and Michele J. Julin, a physician's assistant, stated that, at work on October 9, 2005, appellant, "slipped and started to fall backwards and then caught herself and actually fell forward. She caught herself with her arms but she did feel her neck snap backwards and then forwards. Appellant had bumped her cheek actually on a hard counter and it disrupted a filling and she had to go to the dentist."

The record contains a January 12, 2006 notice of removal, whereby, the employing establishment terminated appellant for unacceptable conduct. The establishment alleged that appellant misrepresented her ability to work and engaged in activities inconsistent with her alleged injury.

By decision dated June 16, 2006, the Office denied appellant's claim on the grounds that the fact of injury had not been established. It found that appellant's statements and actions, coupled with the results of the employing establishment investigation, failed to establish that the alleged October 9, 2005 incident occurred at the time, place and in the manner alleged.

On January 9, 2007 appellant requested reconsideration. She alleged that she suffered from mental illness at the time of the alleged October 9, 2005 fall, and that management took advantage of her mental state. Appellant contended that the evidence established that the incident occurred as alleged. She submitted copies of documents previously received and considered by the Office, including: reports from Dr. Frigyes dated October 25 and November 28, 2005; an October 9, 2005 report from Dr. Watt; an October 9, 2005 report of hazard; an October 12, 2005 accident report; a copy of appellant's October 9, 2005 statement; and copies of October 9, 2005 witness statements from Mr. Whitney and Mr. Ortiz. Appellant submitted a Blue Cross/Blue Shield benefit statement dated January 12, 2006, which extended certification of the medical necessity of benefits for continued inpatient care at Nebraska Medical Center from January 6 through 16, 2006.

In a report dated December 13, 2005, Dr. Frigyes stated that he had known appellant for many years, and that she was an honest person. He opined that she had been hassled at work because of her neck injury and her reduced schedule. Dr. Frigyes indicated that he had observed her "go downhill, especially mentally."

In a report dated January 19, 2006, Dr. David Schmidt, a treating physician, stated that appellant had been depressed for more than two years. He provided diagnoses of depression and PTSD, and indicated that she had been treated as an inpatient from January 6 through 18, 2006. In an Immanuel Medical Center partial dismissal summary dated February 6, 2006, Dr. Schmidt

indicated that appellant had been admitted to the partial hospital program on January 17, 2006. He indicated that she was depressed, having experienced multiple stressors, including a job loss in December 2005.

Appellant submitted a May 21, 2006 decision from the Nebraska Appeal Tribunal, Nebraska Workforce Development, Department of Labor. The tribunal found that the employer had not met its burden under Nebraska employment security law to establish misconduct on the part of appellant warranting disqualification from benefits. The tribunal concluded that, because appellant suffered from mental illness, her behavior could not be found to be willful or malicious to the degree necessary to constitute disqualifying misconduct.

In a letter dated February 27, 2007, the employing establishment contended that appellant's request for reconsideration should be denied. Mr. Jordan stated that although appellant alleged in one report that she fell over an orange hamper, no such hamper appeared in the photos taken of the work area. He contended that her alleged depression was not material to the issue at hand and that, as the decision of the Nebraska Appeal Tribunal dealt with unemployment benefits, it was irrelevant to potential benefits under the Act.

By decision dated March 13, 2007, the Office denied modification of its June 16, 2006 decision. The Office found that inconsistencies in the record cast serious doubt on the validity of appellant's claim, and that she had submitted insufficient factual evidence to establish that the incident occurred at the time, place and in the manner alleged.

On March 18, 2007 appellant requested reconsideration. She contended that the evidence was sufficient to establish that an accident occurred. Appellant stated that her erratic behavior was due to her mental illness, for which she was first treated in April 2001; that her gambling was associated with the manic side of her manic depression; and that most of her gambling occurred on her days off. She submitted a definition of "mental illness" and an article entitled "About Mental Illness," both from unidentified sources.

In a letter dated January 24, 2007, Dr. Frigyes stated that appellant was originally treated with Paxil for depression and anxiety in April 2001. He indicated that he had recently been treating her for chronic pain syndrome and depression since, December 13, 2005.

In a report dated January 25, 2007, Dr. Gregory Keller, a Board-certified psychiatrist, stated that he had been treating appellant since September 29, 2006 for major depressive disorder. He indicated that appellant had suffered from life-long depression, which had become more severe since her October 2005 work injury. Dr. Keller opined that appellant's trauma possibly led to increased anxiety, lack of confidence in work abilities and physical limitations, secondary to the accident.

By decision dated April 30, 2007, the Office denied appellant's request for reconsideration on the grounds that the evidence submitted was irrelevant and insufficient to establish that the incident occurred as alleged.

LEGAL PRECEDENT -- ISSUE 1

The Federal Employees' Compensation Act[1] 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 she sustained a traumatic injury in the performance of duty, she must establish the "fact of injury," namely, she must submit sufficient evidence to establish that she 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 her 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

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[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 711 (2004); *see also Bernard D. Blum*, 1 ECAB 1 (1947).

[4] *Robert Broome*, 55 ECAB 339 (2004); *see also Elaine Pendleton*, 40 ECAB 1143 (1989).

[5] *Betty J. Smith*, 54 ECAB 174 (2002); *see also Tracey P. Spillane*, 54 ECAB 608 (2003). 5 U.S.C. § 8101(5). *See* 20 C.F.R. § 10.5(ee).

[6] *See Betty J. Smith, supra* note 5.

[7] *Katherine J. Friday*, 47 ECAB 591, 594 (1996).

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 -- ISSUE 1

The Board finds that appellant has failed to meet her burden of proof in establishing that she sustained a traumatic injury to her neck and shoulder on October 9, 2005. There are inconsistencies in the evidence which cast serious doubt on the validity of her claim.

Appellant has provided inconsistent versions of the alleged incident. In her original statement accompanying the CA-1 form, she indicated that she slipped on a white plastic lid in a pile of debris left on the workroom floor. Appellant stated that, as she was walking to her work area, she slipped, "did the splits," and caught herself before she fell down. She was shaken and scared, but felt she was "doing O.K." However, two months later, in an interview with the postal inspector, appellant provided a different account of the incident, stating that she was carrying a box of labels when she entered the flat sorting area. She claimed that there was a pile of debris on the floor, consisting of rubber bands, paper and a plastic end cap from a mailing tube. Appellant alleged that, as she reached over an orange hamper in order to put the box down, her foot hit the plastic cap and slipped forward and out from under her; that she fell over the orange hamper and her neck snapped backward and forward like a "whiplash;" and that she grabbed the equipment on either side of her, went down to her knees, and hit the side of her face on the equipment. She allegedly heard a pop in her neck when her head hit the equipment and the contact left a bump on her head.[10] Appellant did not explain why the details she provided on the date of the alleged event differed substantially from those provided two months later.

The factual and medical evidence of record reflects appellant's divergent reports of how the alleged incident occurred. On the one hand, she initially stated that she injured herself while trying to prevent a fall. Appellant told Mr. Whitney that she injured her back while trying to prevent herself from falling. She told Mr. Ortiz that "she made a split and broke the fall." On the date of the alleged injury, Dr. Witt related appellant's claim that she had slipped on a lid at work and caught herself with both arms, straining her neck and left shoulder. On October 13, 2005 Dr. Frigyes indicated that, while at work on October 9, 2005, appellant "was walking and

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

[9] *John W. Montoya*, 54 ECAB 306 (2003).

[10] The Board notes that the employing establishment controverted appellant's claim, in part, on the grounds that the photos taken at the time of the alleged incident did not show the presence of a hamper.

slipped on a plastic cap on the floor and managed to grab onto the machinery and broke her fall, so she did not fall but strained her upper shoulders and neck from grabbing on and catching herself." An October 9, 2005 report from Midwest Minor Medical also indicated that appellant tripped on a lid at work and caught herself with both arms. An October 12, 2205 accident report indicates that, on October 9, 2005, as appellant leaned across a machine to place her label box on a flat case, she slipped on a plastic lid in a partially concealed debris pile, and caught herself on a machine. However, Dr. Spangler's December 15, 2005 report reflects an entirely different allegation. Appellant informed Dr. Spangler that, at work on October 9, 2005, she "slipped and started to fall backwards and then caught herself and actually fell forward. She caught herself with her arms but she did feel her neck snap backwards and then forwards. Appellant had bumped her cheek actually on a hard counter and it disrupted a filling and she had to go to the dentist." She did not attempt to reconcile these conflicting reports.

The evidence of record does not support appellant's allegation that she slipped on a white plastic lid in a pile of debris left on the workroom floor. There were no eyewitnesses to the alleged incident. Mr. Ortiz indicated that he did not see or hear appellant fall, but that, after the alleged incident, she showed him a pile of debris, which included a white plastic cap. He noted that appellant had pushed the pile of debris together with her foot in order to show it to the supervisor. In a conflicting report, Ms. Kydney indicated that, after the alleged fall, appellant called her over to her work area for the purpose of showing her a pile of labels on the floor. The Board notes that appellant did not identify a white plastic lid in the debris. Appellant noted that the pile was not "spread out," as it would likely have been had she fallen. Ms. Kydney indicated that she had not witnessed the alleged incident, and that appellant had not seemed upset or injured in any way. She stated, "In the break room, there was disbelief that [appellant] had fallen." Mr. Ferreira stated that, prior to the alleged incident, appellant called his attention to individual labels that were scattered on the floor over a 16- by 20-foot area. After appellant allegedly fell, he saw a pile of debris and labels on the floor that was not present earlier. Mr. Ferreira stated that he did not see appellant fall, and "did n[o]t believe that it happened because [he] was right there." He stated that, approximately 15 minutes after appellant allegedly fell, he noticed a maintenance man taking photos of a "neat little pile of debris" in appellant's work area. Mr. Ferreira noted that he had been working approximately 15 feet from appellant's work area, and had not left his work area from the time appellant showed him the labels until after the maintenance man arrived. He stated that "common sense told him that, if someone slipped on a pile of debris, that the pile would have been scattered rather than remain in a neat little pile." Given the surrounding facts and circumstances, and her subsequent course of action, appellant's claim that she slipped on a white plastic lid in a pile of debris lacks credibility. The Board finds that the statements of Ms. Kydney and Mr. Ferreira, who was working 15 feet away from appellant at the time of the alleged incident, are of great probative value and, together with appellant's act of pushing the debris together in a neat pile, cast serious doubt on appellant's allegations.[11]

Appellant argued that her erratic behavior around the time of the alleged incident was due to her mental illness. However, it is an analysis of the facts and circumstances surrounding the alleged incident, rather than appellant's mental state, that determines whether she has met her

[11] *Betty J. Smith*, *supra* note 5.

burden of proof. Appellant also contends that the May 21, 2006 decision from the Nebraska Appeal Tribunal established her entitlement to benefits under the Act. The decision of the Nebraska Appeal Tribunal, which dealt with unemployment benefits under Nebraska employment security law, is not relevant to the case at hand. Under Nebraska employment security law, the burden is on the employer to establish disqualifying conduct on the part of a claimant by the preponderance of the evidence. Under the Act, the burden is on appellant to establish that her injury occurred at the time, place and in the manner alleged. Therefore, the Tribunal's finding that, because appellant suffered from mental illness, her behavior could not be found to be willful or malicious to the degree necessary to constitute disqualifying misconduct, does not establish the fact of injury in this case.[12]

Pursuant to the employing establishment's investigation, appellant engaged in activities inconsistent with her alleged injuries, including gambling on a regular basis, when she was allegedly unable to work. Although her behavior subsequent to the alleged incident does not bear directly on the fact of injury issue, it creates significant doubt as to appellant's credibility. Due to the inconsistencies in the evidence regarding the time, place and manner in which the alleged incident occurred, the Board finds that appellant has failed to establish her claim.[13]

LEGAL PRECEDENT -- ISSUE 2

Under section 8128(a) of the Act,[14] the Office has the discretion to reopen a case for review on the merits. The Office must exercise this discretion in accordance with the guidelines set forth in section 10.606(b)(2) of the implementing federal regulations, which provides that a claimant may obtain review of the merits of his or her written application for reconsideration, including all supporting documents, sets forth arguments and contain evidence that: shows that the Office erroneously applied or interpreted a specific point of law; advances a relevant legal argument not previously considered by the Office; or constitutes relevant and pertinent new evidence not previously considered by the Office.[15]

Section 10.608(b) provides that any application for review of the merits of the claim which does not meet at least one of the requirements listed in section 10.606(b) will be denied by the Office without review of the merits of the claim.[16]

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[12] The Board notes that the determination of an employee's rights and remedies under other statutory authority does not establish entitlement to benefits under the Act for disability. Under the Act, for a disability determination, the employee's injury must be shown to be causally related to an accepted injury or factors of employment. For this reason, the determinations of other administrative agencies or courts, while instructive, are not determinative with regard to disability under the Act. *See Daniel Deparini*, 44 ECAB 657 (1993). Findings made by the Merit Systems Protection Board or Equal Employment Opportunity Commission may constitute substantial evidence relative to the claim to be considered by the Office and the Board. *See Donna Faye Cardwell*, 41 ECAB 730 (1990).

[13] *See Caroline Thomas*, 51 ECAB 451, 455 (2000).

[14] 5 U.S.C. § 8128(a).

[15] 20 C.F.R. § 10.606(b).

[16] 20 C.F.R. § 10.608(b).

ANALYSIS -- ISSUE 2

Appellant's March 18, 2007 request for reconsideration neither alleged, nor demonstrated that the Office erroneously applied or interpreted a specific point of law. Additionally, she did not advance a relevant legal argument not previously considered by the Office. Appellant merely reiterated her earlier contentions and argued that her erratic behavior was due to her mental illness. Consequently, she is not entitled to a review of the merits of her claim based on the first and second above-noted requirements under section 10.606(b)(2).

Appellant also failed to submit relevant and pertinent new evidence not previously considered by the Office. The Office denied appellant's claim on the grounds that the fact of injury was not established, as the evidence did not substantiate that the claimed event occurred as alleged. However, the evidence submitted in support of appellant's request for reconsideration was either duplicative or irrelevant to the issue at hand.

Appellant submitted two doctors' reports, describing her treatment for depression and anxiety, and literature on the subject of mental illness. These documents are not relevant to the issue decided by the Office, namely whether appellant established that the incident occurred at the time, place and in the manner alleged. This type of information is *prima facie* insufficient to warrant merit review.

The Board finds that the Office properly determined that appellant was not entitled to a review of the merits of her claim pursuant to any of the three requirements under section 10.606(b)(2), and properly denied her March 18, 2007 request for reconsideration.

CONCLUSION

The Board finds that appellant has not established that she sustained a traumatic injury on October 9, 2005 in the performance of duty. The Board further finds that the Office properly refused to reopen her case for further review of the merits of her claim under 5 U.S.C. § 8128(a).

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated April 30 and March 13, 2007 and June 19, 2006 are affirmed.

Issued: November 15, 2007
Washington, DC

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

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

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