

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

S.B., Appellant

and

**DEPARTMENT OF DEFENSE,
Fort Carson, CO, Employer**

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**Docket No. 07-1696
Issued: January 28, 2008**

Appearances:

Appellant, pro se

Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On June 11, 2007 appellant filed a timely appeal from a May 7, 2007 decision of an Office of Workers' Compensation Programs' hearing representative who affirmed the denial of her traumatic injury claim. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2), the Board has jurisdiction over the merits of this claim.

ISSUE

The issue is whether appellant met her burden of proof to establish that she sustained a traumatic injury on June 26, 2006.

FACTUAL HISTORY

On August 16, 2006 appellant, then a 36-year-old store worker, filed a traumatic injury claim (Form CA-1) alleging that on June 26, 2006 her left side became sore and she was sick to her stomach while working in a warehouse. Appellant stopped work June 27, 2006.¹ On

¹ Appellant returned to work the next day and stopped working shortly thereafter.

December 6, 2006 appellant underwent surgery for C7-T1 herniated nucleus pulposus. She has not returned to work.

In an August 4, 2006 statement, appellant indicated that on June 26, 2006 she received deliveries, consolidated pallets, and cleaned up the North warehouse prior to going to the South warehouse to receive deliveries and do salvage work. She became sick to her stomach and experienced a burning on her left side. Appellant's discomfort did not subside and she made an appointment with Dr. Patrick Higgins, a family practitioner. She submitted a July 13, 2006 magnetic resonance imaging (MRI) scan of the cervical and lumbar spine; a September 11, 2006 electromyography (EMG) and nerve conduction velocity (NCV) study; and an August 17, 2006 report from David Ryan Japp, a physician's assistant.

Dr. Higgins diagnosed a cervical herniated disc in medical reports dated July 31 to August 29, 2006. In an August 1, 2006 attending physician's report (Form CA-20), Dr. Higgins reiterated his diagnosis. He opined that the condition was caused or aggravated by appellant's employment activity by continual bending and lifting.

Dr. Richard Lazar, a Board-certified orthopedic surgeon, provided reports dated August 21 and September 19, 2006. He noted that appellant has been unable to work due to the severity of her symptoms and indicated that she may have multiple sclerosis (MS). He recommended a C7-T1 anterior cervical discectomy and fusion.

In a September 22, 2006 letter, the Office advised appellant that the evidence submitted was insufficient to establish her claim. It requested that she submit additional factual and medical evidence. In response, appellant submitted a September 27, 2006 statement and duplicative copies of the evidence of record. She also submitted disability notes from Dr. Lazar and duty status reports dated September 8 to October 27, 2006 from Dr. Higgins. On October 6, 2006 Dr. Higgins advised that appellant had a herniated disc at C4-C5 and C5-C6 and was totally disabled. He advised that her prognosis for a return to full duty was dependant upon the outcome of her surgery.

By decision dated November 7, 2006, the Office denied appellant's traumatic injury claim, finding that she had not established the claimed incident.

Appellant requested a telephonic hearing before an Office hearing representative, which was held March 7, 2007. Appellant described how her claimed injury occurred and advised that an MRI scan revealed that she had a herniated disc in her neck. On December 6, 2006 she underwent an anterior cervical discectomy fusion of C7-T1.

Appellant submitted copies of the December 6, 2006 surgery report, copies of diagnostic tests of the thoracic and lumbar spines and a March 23, 2007 MRI scan of the cervical spine. Dr. Lazar provided medical reports noting appellant's condition and treatment following surgery.

In a March 14, 2007 report, Dr. Higgins stated that appellant experienced excellent health prior to June 27, 2006, until her injury at work. Appellant was treated for neck pain, headaches and numbness and tingling. Diagnostic studies confirmed a herniated disc of the cervical spine and she underwent a cervical laminectomy/fusion at C7-T1 on December 6, 2006. Dr. Higgins

advised that appellant continued to experience pain and weakness and was disabled from work. Appellant was referred to pain management and for a repeat MRI scan.

By decision dated May 7, 2007, an Office hearing representative affirmed the denial of appellant's claim. The hearing representative found that appellant established that the June 26, 2006 incident but did not submit sufficient medical evidence to establish that the incident caused a personal injury.

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 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. Regardless of whether the asserted claim involves traumatic injury or occupational disease, an employee must satisfy this burden of proof.³

Office regulations, at 20 C.F.R. § 10.5(ee), define a traumatic injury as a condition of the body caused by a specific event or incident or series of events or incidents within a single workday or shift.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. 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. 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.⁵

Causal relationship is a medical issue and the medical evidence required to establish a causal relationship is rationalized medical evidence.⁶ Rationalized medical evidence is medical evidence which includes a physician's rationalized medical opinion on the issue of whether there is a causal relationship between the claimant's diagnosed condition and the implicated employment factors. The opinion of the physician 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

² 5 U.S.C. §§ 8101-8193.

³ *Gary J. Watling*, 52 ECAB 278 (2001).

⁴ 20 C.F.R. § 10.5(ee); *Ellen L. Noble*, 55 ECAB 530 (2004).

⁵ *Gary J. Watling*, *supra* note 3.

⁶ *Jacqueline M. Nixon-Steward*, 52 ECAB 140 (2000).

condition and the specific employment factors identified by the claimant.⁷ 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 causal relationship.⁸

ANALYSIS

Appellant alleged that she sustained injury on June 26, 2006 after moving several pallets of items and bending over to count boxes. The Board notes that she established that she was moving pallets and bending over boxes on June 26, 2006. However, appellant did not submit sufficient medical evidence to establish that she sustained injury due to these work factors.

The record contains reports of diagnostic studies, including MRI's, an EMG and NCV studies. However, these reports do not address the causal relationship of appellant's diagnosed conditions and the June 26, 2006 employment incident. This evidence, therefore, is not probative on that issue.⁹ Appellant also submitted reports dated August 17, 2006 and February 13, 2007 from Mr. Japp, a physician's assistant. However, these reports are of no probative value as a physician's assistant is not a "physician" as defined under the Act. This does constitute competent medical evidence.¹⁰

Dr. Higgins treated appellant following the June 26, 2006 incident. Following diagnostic testing, he diagnosed a herniated nucleus pulposus of the cervical spine. However, his reports are of limited probative value as Dr. Higgins did not provide an opinion on the causal relationship between appellant's diagnosed condition and the June 26, 2006 employment incident.¹¹ In an August 1, 2006 attending physician's report (Form CA-20), Dr. Higgins diagnosed a herniated nucleus pulposus of the cervical spine and opined that the condition was caused or aggravated by appellant's employment activity of continual bending and lifting. This brief description of the employment factor implicated by appellant, does not adequately address how the bending or lifting would cause or contribute to the diagnosed cervical condition.¹² He did not explain the process by which these specific work activities caused or aggravated appellant's condition. Dr. Higgins' reports are insufficient to establish appellant's claim.

⁷ *Leslie C. Moore*, 52 ECAB 132 (2000); *Gary L. Fowler*, 45 ECAB 365 (1994).

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

⁹ See, e.g., *Charles H. Tomaszewski*, 39 ECAB 461, 467-68 (1988) (medical evidence which does not offer any opinion regarding the cause of an employee's condition is of limited probative value on the issue of causal relationship).

¹⁰ 5 U.S.C § 8101(2); see *Ricky S. Storms*, 52 ECAB 349 (2001).

¹¹ See *Charles H. Tomaszewski*, *supra* note 9.

¹² *Jimmie H. Duckett*, 52 ECAB 332 (2001); *Franklin D. Haislah*, 52 ECAB 457 (2001) (medical reports not containing rationale on causal relationship are entitled to little probative value).

Dr. Lazar treated appellant for a C7-T1 herniated nucleus pulposus and performed surgery on December 6, 2006. However, his reports of record do not provide a history of the June 6, 2006 work duties or make any mention of the employment factors implicated by appellant. Dr. Lazar's treatment records do not provide an opinion relating appellant's cervical disc condition to her work on June 26, 2006. This evidence is not sufficient to establish that her cervical condition or the need for surgery was due to her work on that date. Thus, Dr. Lazar's reports are insufficient to meet appellant's burden of proof.

An award of compensation may not be based on surmise, conjecture or speculation. Neither the fact that appellant's condition became apparent during a period of employment nor the belief that his condition was caused, precipitated or aggravated by his employment is sufficient to establish causal relationship. Causal relationship must be established by rationalized medical opinion evidence.¹³ Appellant failed to submit such evidence and the Office therefore properly denied appellant's claim for compensation.

CONCLUSION

The Board finds that appellant has not met her burden of proof in establishing that she developed an injury in the performance of duty on June 26, 2006.

ORDER

IT IS HEREBY ORDERED THAT the May 7, 2007 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 28, 2008
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

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

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

¹³ See *Dennis M. Mascarenas*, *supra* note 8.