

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

C.M., Appellant)

and)

DEPARTMENT OF HOMELAND SECURITY,)
TRANSPORTATION SECURITY)
ADMINISTRATION, Philadelphia, PA,)
Employer)

**Docket No. 07-1991
Issued: January 24, 2008**

Appearances:
Mark W. Voigt, Esq., for the appellant
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 July 23, 2007 appellant filed a timely appeal from the Office of Workers' Compensation Programs' October 10 and November 2, 2006 and April 26, 2007 merit decisions denying her claim for a January 8, 2006 employment injury. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2), the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant met her burden of proof to establish that she sustained an injury in the performance of duty on January 8, 2006.

FACTUAL HISTORY

On January 8, 2006 appellant filed a claim alleging that she sustained an employment-related injury on that date. Regarding the cause of the injury, she stated: "Assisting elderly passenger, while in squatted position to pad down alarmed area (passenger's knee), my left

foot/ankle went inward. I tried to prevent myself from falling, strained back. Passenger helped me to get up.”¹

On January 16, 2006 an attending physical therapist stated that appellant reported that on January 8, 2006 she moved into a squatting position while patting down a passenger and her left leg buckled inwards causing her to almost fall down. Appellant indicated that she experienced a popping sensation and right low back pain which radiated into her right thigh.

On January 18, 2006 Dr. Larry Moss, an attending chiropractor, indicated that appellant reported injuring her left ankle on January 8, 2006 while squatting. He diagnosed lumbosacral sprain/strain with ligamentous instability and indicated that an underlying disc pathology had to be ruled out. Dr. Moss checked a “yes” box indicating that the diagnosed condition was related to the reported employment incident.

On January 31, 2006 Dr. Seth D. Krum, an attending osteopath, stated that appellant complained of pain, mostly medial, in her left ankle. He noted: “She states [that] she had another falling episode at work, although I have not had any documentation provided.”

In a February 22, 2006 report, Dr. Randall N. Smith, an attending Board-certified orthopedic surgeon, stated that appellant had a history of a back injury in 2002 and noted that she reported that she “returned to work and was doing quite well until January 8, 2006 when she lost her balance and twisted her left ankle.”² Since then, she has had pain in the left ankle and the lower back and numbness and pain going down the right leg.” Dr. Smith stated that appellant had a sprain/strain of the left ankle with neuropathy of the tendons which led to a gait dysfunction. In a February 22, 2006 form report, he noted that appellant reported hurting her left ankle and back on May 27, 2005 and January 8, 2006. Dr. Smith diagnosed left ankle sprain and low back pain with sciatica and checked a “yes” box indicating that the reported employment activity caused or aggravated the diagnosed condition.³

In a February 24, 2006 decision, the Office denied appellant’s claim for a January 8, 2006 employment injury. The Office found that appellant established the occurrence of an employment incident on January 8, 2006 in the form of squatting down and attempting to avoid falling over, but that she did not submit sufficient medical evidence to establish that she sustained injury due to the accepted employment incident.

Appellant requested a hearing before an Office hearing representative. Prior to the hearing, the Office hearing representative issued a March 23, 2006 decision, which vacated the

¹ The Office previously accepted that appellant sustained a left ankle sprain on May 27, 2005 due to walking on an inclined surface. Appellant claimed that she sustained a recurrence of disability on October 2, 2005 due to this injury and that she sustained a back condition as a consequence of the injury. This matter is not the subject of the present appeal before the Board.

² Dr. Smith discussed appellant’s May 2005 left ankle injury and stated: “Then she had a second injury on January 8, 2006 when she lost her balance injuring her ankle on the inside as well as her lower back becoming much more aggravated.”

³ Dr. Smith added illegible handwritten notes next to the checked box.

Office's February 24, 2006 decision and remanded the case to the Office for further development. The hearing representative directed the Office to refer appellant for a second opinion examination and opinion regarding whether she sustained an employment injury on January 8, 2006.

The Office referred appellant to Dr. Anthony Salem, a Board-certified orthopedic surgeon, for an examination and opinion regarding whether she sustained an employment injury on January 8, 2006. On July 13, 2006 Dr. Salem stated: "I have been asked to comment on whether the patient sustained an injury at work on January 8, 2006. I can only state that [appellant] did not give me a history of an injury on that date."⁴ In a September 25, 2006 supplemental report, he stated that the January 8, 2006 incident when appellant was squatting and moved did not result in an injury. There is no magnetic resonance imaging scan or clinical evidence of it.

In an October 10, 2006 decision, the Office denied appellant's claim for a January 8, 2006 employment injury. The Office again found that appellant established the occurrence of an employment incident on January 8, 2006, but that she did not submit sufficient medical evidence to establish that she sustained injury due to the accepted employment incident.

Appellant submitted a July 13, 2006 report of Dr. Bradley J. Stoltz, an attending osteopath, who stated that he understood that she was under Dr. Smith's care for "injuries that she sustained in May 2005 and early 2006."

In a November 2, 2006 decision, the Office affirmed its October 10, 2006 decision.

In a December 18, 2006 report, Dr. Smith stated: "She had two injuries; one in May 2006 and a second one in January 2006. Unfortunately, [appellant] has chronic left ankle pain as a result of this." In an undated form report, Dr. Smith indicated that appellant reported injuring herself on May 27, 2005 and January 8, 2006 and diagnosed chronic left ankle pain.⁵ He checked a "yes" box indicating that the reported employment activity caused or aggravated the diagnosed condition.

In a January 9, 2007 report, Dr. Krum summarized his January 31, 2006 treatment of appellant. He stated: "I do not have documentation of an actual injury in January 2006, although she did have new pain.... Without any formal documentation of a new medial injury in January 2006, I cannot relate her present continued complaints to a work incident." In an October 23, 2006 report, Dr. Nicholas Taweel, an attending podiatrist, stated that appellant reported injuring her left ankle on May 27, 2005 and noted that she also reported that she "sustained a reinjury in January 2006 which was a similar mechanism to her left ankle of plantar flexion inversion."

In an April 26, 2007 decision, the Office affirmed its November 2, 2006 decision.

⁴ Dr. Salem also determined that appellant did not have any residuals of her May 27, 2005 left ankle injury. As previously noted this matter is not currently on appeal before the Board.

⁵ The remainder of the diagnosis is illegible.

LEGAL PRECEDENT

An employee seeking benefits under the Federal Employees' Compensation Act⁶ 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.⁷ These are the essential elements of each compensation claim regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.⁸

To determine whether a federal employee has sustained a traumatic injury in the performance of duty, it first must be determined whether the "fact of injury" has been established. There are two components involved in establishing the fact of injury. First, the employee must submit sufficient evidence to establish that he actually experienced the employment incident at the time, place and in the manner alleged.⁹ Second, the employee must submit evidence, in the form of medical evidence, to establish that the employment incident caused a personal injury.¹⁰ The term "injury" as defined by the Act, refers to some physical or mental condition caused by either trauma or by continued or repeated exposure to, or contact with, certain factors, elements or conditions.¹¹

Under section 8101(2) of the Act, chiropractors are only considered physicians and their reports considered medical evidence, to the extent that they treat spinal subluxations as demonstrated by x-ray to exist.¹² The Office's regulations at 20 C.F.R. § 10.5(bb) have defined subluxation as an incomplete dislocation, off-centering, misalignment, fixation or abnormal spacing of the vertebrae which must be demonstrable on any x-ray film to an individual trained in the reading of x-rays.¹³

ANALYSIS

Appellant claimed that she sustained an injury on January 8, 2006 due to squatting down and attempting to avoid falling over while performing her work duties. The Board finds that,

⁶ 5 U.S.C. §§ 8101-8193.

⁷ *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

⁸ *Delores C. Ellyett*, 41 ECAB 992, 998-99 (1990); *Ruthie M. Evans*, 41 ECAB 416, 423-27 (1990).

⁹ *Julie B. Hawkins*, 38 ECAB 393, 396 (1987); see Federal (FECA) Procedure Manual, Part 2 -- Claims, *Fact of Injury*, Chapter 2.803.2a (June 1995).

¹⁰ *John J. Carlone*, 41 ECAB 354, 356-57 (1989); see Federal (FECA) Procedure Manual, Part 2 -- Claims, *Fact of Injury*, Chapter 2.803.2a (June 1995).

¹¹ *Elaine Pendleton*, *supra* note 7; 20 C.F.R. § 10.5(a)(14).

¹² 5 U.S.C. § 8101(2). See *Jack B. Wood*, 40 ECAB 95, 109 (1988).

¹³ 20 C.F.R. § 10.5(bb); see also *Bruce Chameroy*, 42 ECAB 121, 126 (1990).

although appellant established the occurrence of an employment incident on January 8, 2006, she did not submit sufficient medical evidence to establish that she sustained injury due to the accepted employment incident.

A number of physicians mentioned that appellant had reported injuring her left ankle on January 8, 2006 but none of the physicians provided a clear opinion that she sustained an injury on that date due to the reported employment incident. In a February 22, 2006 report, Dr. Smith, an attending Board-certified orthopedic surgeon, stated that appellant had a history of a back injury in 2002 and noted that she reported that she “returned to work and was doing quite well until January 8, 2006 when she lost her balance and twisted her left ankle.” Although he stated that appellant had a sprain/strain of the left ankle with neuropathy of the tendons he did not provide a clear opinion that this condition was caused by the January 8, 2006 employment incident. In a February 22, 2006 form report, Dr. Smith listed the dates of injury as May 27, 2005¹⁴ and January 8, 2006 and indicated that appellant had an employment-related left ankle sprain and low back pain. However, he did not clearly indicate in this report on which date appellant might have sustained such an injury. Dr. Smith did not provide a description of the mechanism of injury.¹⁵ In a December 18, 2006 report, he stated: “She had two injuries; one in May 2006 and a second one in January 2006. Unfortunately, she has chronic left ankle pain as a result of this.” He again failed to clearly indicate whether appellant actually sustained a specific left ankle injury on January 8, 2006.

Other physicians merely reported appellant’s belief that she sustained an injury on January 8, 2006 or indicated that they had no basis to believe that she sustained an injury on that date. On January 31, 2006 Dr. Krum, an attending osteopath, noted: “She states she had another falling episode at work, although I have not had any documentation provided.” In a January 9, 2007 report, he stated: “Without any formal documentation of a new medial injury in January 2006, I cannot relate her present continued complaints to a work incident.” In July 13 and September 25, 2006 reports, Dr. Salem, an Office referral physician and Board-certified orthopedic surgeon, indicated that appellant did not give him a history of injury on January 8, 2006 and posited that he had no basis to determine that she sustained an injury on that date. In a July 13, 2006 report, Dr. Stoltz, an attending osteopath stated that he understood that appellant was under Dr. Smith’s care for “injuries that she sustained in May 2005 and early 2006.” In an October 23, 2006 report, Dr. Taweel, an attending podiatrist, simply noted that appellant reported sustaining a left ankle injury in January 2006. None of these physicians provided their own opinion that appellant sustained a left ankle injury on January 8, 2006.

On January 18, 2006 Dr. Moss, an attending chiropractor, mentioned the January 8, 2006 incident and diagnosed lumbosacral sprain/strain with ligamentous instability and rule out underlying disc pathology. He checked a “yes” box indicating that the diagnosed condition was related to the reported employment incident. However, Dr. Moss’ opinion is of no probative value on the relevant issue of this case because he would not be a physician within the meaning

¹⁴ The Office had accepted that appellant sustained a left ankle sprain on May 27, 2005.

¹⁵ The record contains another undated form report of Dr. Smith which contains similar deficiencies.

of the Act. He did not indicate in his report that appellant had spinal subluxations as demonstrated by x-rays to exist.¹⁶

CONCLUSION

The Board finds that appellant did not meet her burden of proof to establish that she sustained an injury in the performance of duty on January 8, 2006.

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' April 26, 2007 and November 2 and October 10, 2006 decisions are affirmed.

Issued: January 24, 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

¹⁶ See *supra* notes 12 and 13 and accompanying text.