

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

C.S., Appellant)

and)

**DEPARTMENT OF THE ARMY, NATIONAL
GUARD YOUTH CHALLENGE PROGRAM,
ILLINOIS NATIONAL GUARD, Springfield, IL,
Employer**)

**Docket No. 08-1442
Issued: November 3, 2008**

Appearances:

*Alan J. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director*

Case Submitted on the Record

DECISION AND ORDER

Before:

DAVID S. GERSON, Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On April 15, 2008 appellant filed a timely appeal of decisions of the Office of Workers' Compensation Programs dated September 6, 2007 and March 20, 2008 denying her claim for compensation as fact of injury was not established. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review the merits of this case.

ISSUE

The issue is whether appellant established that she sustained an injury in the performance of duty, as alleged.

FACTUAL HISTORY

On July 5, 2007 appellant, then a 55-year-old manager, filed an occupational disease claim alleging that as a result of constant use of the telephone and cradling the telephone at work

from June 5 through 7, 2007, she suffered from pinched or damaged nerves in her neck, back, shoulder and arms.

In support of her claim, appellant submitted notes from physical assessments done on June 11 and 15, 2007 wherein Dr. Eugene Wenthe, a Board-certified family practitioner, indicated that appellant was complaining of pain in her neck, back and shoulder. These notes are largely illegible.

By letter dated July 20, 2007, the Office requested that appellant submit medical evidence of a diagnosed condition causally related to the alleged employment factors. In response appellant submitted physical therapy notes.

In a July 27, 2007 report, Dr. Joshua D. Warach, a Board-certified neurologist, noted that electromyogram/nerve conduction velocity studies in both of appellant's upper extremities provided evidence of a right C6 radiculopathy as well as left middle cervical root irritation, electrophysiologically subacute. He noted that cervical spine x-rays of July 12, 2007 with flexion and extension views showed degenerative changes.

Appellant also submitted notes dated August 2 and 21, 2007 by Dr. Wenthe indicating that appellant could not drive over 20 miles in one day and excusing her from a conference because she could not drive the necessary distance due to neck, back and shoulder pain.

By decision dated September 6, 2007, the Office denied appellant's claim for compensation because the medical evidence did not establish that the claimed medical condition resulted from the accepted events.

By letter dated September 11, 2007, appellant, through her attorney, requested a telephonic hearing. This hearing was conducted on January 4, 2008 at which point she testified that, during the period June 4 to 7, 2007, one of the busiest times of the year, she worked longer hours and was constantly on the telephone and cradling the telephone with her neck while typing on the computer. Appellant noted that she was not having any problems with her neck prior to June 4, 2007 and that after these busy days she developed a neck problem and sought medical treatment from her civilian doctor, Dr. Wenthe.

In further support of her claim, appellant submitted the result of a June 11, 2007 x-ray of the thoracic spine which was interpreted by Dr. Anton J. Johnson, a Board-certified radiologist, as showing mild degenerative changes, no evidence of acute fracture or subluxation of thoracic spine. An x-ray of the same date of the cervical spine was interpreted by Dr. Johnson as showing no evidence of acute fracture, subluxation, prevertebral soft tissue swelling, or neural foraminal encroachment by hypertrophic spur formation.

In an electrocardiogram report dated June 22, 2007, Dr. Robert V. Trask, a Board-certified internist with a subspecialty in cardiovascular disease, noted that the study was generally normal with mild predominantly fixed distal anteroseptal defect without significant reversible ischemia.

By decision dated March 20, 2008, the hearing representative affirmed the Office's September 6, 2007 decision. He noted that the medical records provided a diagnosis of cervical radiculopathy but failed to link this condition to appellant's claimed employment factors.

LEGAL PRECEDENT

An employee seeking compensation under the Federal Employees' Compensation Act¹ has the burden of establishing the essential elements of her claim by the weight of the reliable, probative and substantial evidence,² including that she is an "employee" within the meaning of the Act³ and that she filed her claim within the applicable time limitation.⁴ To establish that an injury was sustained in the performance of duty in a claim for occupational disease, an employee must submit: (1) a factual statement identifying employment factors alleged to have caused or contributed to the presence or occurrence of the disease or condition; (2) medical evidence establishing the presence or existence of the disease or condition for which compensation is claimed; and (3) medical evidence establishing that the diagnosed condition is causally related to the employment factors identified by the employee.⁵ The medical evidence 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 specific employment factors identified by the claimant.⁶

ANALYSIS

The Board finds that appellant failed to meet her burden of proof to establish a *prima facie* claim for compensation. Although she submitted a statement which identified the factors of employment that she believed caused her condition, which the Office accepted as factual, she failed to submit medical evidence sufficient to show that she developed a diagnosed condition causally related to these employment factors. The Office informed appellant of the need to submit a physician's opinion which explained how the claimed condition was related to the implicated employment factors. However, none of the medical evidence in the record establishes this causal relationship. The reports of Drs. Warach, Johnson and Trask discuss objective tests but these physicians make no conclusions on causation. Dr. Wenthe's reports note symptoms and indicate restrictions on activity, but also do not make any conclusions with regard to causation. An award of compensation may not be based on surmise, conjecture or speculation. Neither the fact that appellant's claimed condition became apparent during a period of

¹ 5 U.S.C. §§ 8101-8193.

² *J.P.*, 59 ECAB ___ (Docket No. 07-1159, issued November 15, 2007); *Joseph M. Whelan*, 20 ECAB 55, 57 (1968).

³ *See M.H.*, 59 ECAB ___ (Docket No. 08-120, issued April 17, 2008); *Emiliana de Guzman (Mother of Elpedio Mercado)*, 4 ECAB 357, 359 (1951); *see* 5 U.S.C. § 8101(1).

⁴ *R.C.*, 59 ECAB ___ (Docket No. 07-1731, issued April 7, 2008); *Kathryn A. O'Donnell*, 7 ECAB 227, 231 (1954); *see* 5 U.S.C. § 8122.

⁵ *See Roy L. Humphrey*, 57 ECAB 238, 241 (2005); *Ruby I. Fish*, 46 ECAB 276, 279 (1994).

⁶ *Solomon Polen*, 51 ECAB 441 (2000); *see also Michael E. Smith*, 50 ECAB 313 (1999).

employment nor his belief that his condition was aggravated by his employment is sufficient to establish causal relationship.⁷ As appellant failed to provide medical evidence establishing a causal relationship between a medical condition and her claimed employment factors, the Office properly denied her claim.

CONCLUSION

The Board finds that appellant failed to establish that she sustained an injury in the performance of duty, as alleged.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated March 20, 2008 and September 6, 2007 are affirmed.

Issued: November 3, 2008
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

⁷ *D.I.*, 59 ECAB ___ (Docket No. 07-1534, issued November 6, 2007); *Ruth R. Price*, 16 ECAB 688, 691 (1965).