United States Department of Labor
Employees' Compensation Appeals Board

K.F., Appellant	)	
and	)	**Docket No. 08-2389**
	)	**Issued: April 8, 2009**
U.S. POSTAL SERVICE, POST OFFICE, Providence, RI, Employer	)	

Appearances:
Edwin T. Scallon, Esq., for the appellant
No appearance, for the Director

Oral Argument February 19, 2009

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On September 2, 2008 appellant filed a timely appeal from the Office of Workers' Compensation Programs' hearing representative's decision dated July 28, 2008, which denied her claim of recurrence of disability or for a new injury in the performance of duty. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether appellant met her burden of proof to establish that she sustained a recurrence of disability on January 5, 2007 causally related to her June 28, 1995 employment injury; and (2) whether appellant met her burden of proof to establish that she sustained an injury in the performance of duty on January 3, 2007.

FACTUAL HISTORY

On June 28, 1995 appellant, then a 37-year-old letter carrier, injured her right shoulder and back while exiting her vehicle. She stopped work on June 28, 1995 and returned to regular

duty on July 6, 1995. The Office accepted the claim for right shoulder strain and muscle strain of the neck. Appellant received appropriate compensation and benefits.[1]

On February 16, 2007 appellant filed a notice of recurrence of disability alleging that, on January 30, 2007, she was disabled due to her June 28, 1995 work injury. She noted that she regularly received chiropractic care for her neck and shoulders. Appellant described frequent headaches as well as numbness and tingling in her hands. On January 30, 2007 her shoulders became painfully stiff, such that she could not lift her right arm or turn her neck to the left or right and her headaches became more severe. Appellant stated that her recurrence was "related to the original injury because that injury NEVER healed." She stopped work on January 30, 2007. In a February 18, 2007 letter, appellant indicated that she was "doing well, although my neck and right arm has been hurting me terribly. At first I just thought it was because of the stress I was under because of my son, but as it turns out my MRI [magnetic resonance imaging scan] determined I have more problems than I realized making it impossible for me to case or carry my route."

In a January 8, 2007 disability certificate, Dr. Stuart Rosenthal, a chiropractor and treating physician, requested that appellant be excused from work beginning January 5, 2007. He diagnosed herniated discs at C6-7. Appellant also submitted a February 1, 2007 nurse's note stating that, "Due to a family crisis, [appellant] is under severe stress and will be out of work until further notice." In an attending physician's report dated February 23, 2007, Dr. Rosenthal diagnosed a herniated nucleus pulposus at C4-5 and C5-6 "per MRI [scan]." He checked the box "yes" in response to whether he believed that the conditions were work related noting that the right shoulder and neck strain were the result of the June 28, 1995 injury. Dr. Rosenthal added that appellant "aggravated a preexisting neck injury from carrying and lifting mail on her neck and shoulder on January 30, 2007." He opined that appellant was totally disabled from January 30, 2007 to the present.

In a March 19, 2007 statement, Ann-Marie Cadana, an injury compensation specialist, controverted appellant's claim. She contended that Dr. Rosenthal did not diagnose a subluxation. Ms. Cadana also noted that appellant had personal situations that might be contributing to her reasons for "being out of work." Appellant was advised of a disciplinary action against her in February and, after receiving this information, she requested forms from her supervisors to file a work-related injury. Ms. Cadana confirmed that appellant was not working on January 30, 2007 and had not worked since January 5, 2007.

On July 19, 2007 the Office requested additional evidence to support appellant's claim for a recurrence of disability.

In a February 14, 2008 report, Dr. Tejaswini Shah, a Board-certified physiatrist, noted appellant's history and of treating her since 1999 for neck pain, hand numbness and difficulty in lifting heavy weight. He noted that, as far back as 1999, appellant had a protrusion of the disc at

[1] Appellant filed a notice of recurrence on May 6, 1999 alleging that, on February 5, 1999, she had a recurrence and was totally disabled from February 24 to March 3, 1999 due to her June 28, 1995 work injury. She alleged that she had no other injuries since June 1995. On September 10, 1999 the Office denied appellant's recurrence claim. On October 29, 1999 it denied modification of the September 10, 1999 decision.

the C5-6 level and herniation on the left side. Dr. Shah advised that there were degenerative changes at C5-6 and C6-7 and that an electromyography (EMG) scan from 1999 revealed mild carpal tunnel syndrome bilaterally. He stated that appellant presented on December 18, 2007 with severe pain around the neck and both elbows. Appellant underwent diagnostic testing and an MRI scan from October 2007 revealed broad-based disc protrusion at C4-5 and disc herniations at C5-6 on the left with an osteophyte complex at C6-7. Dr. Shah also indicated that a November 2007 EMG scan revealed dysfunction of the left ulnar nerve at the elbow, but it was normal in the left arm for radiculopathy. He opined that a comparison of the diagnostic studies showed evidence of degeneration at the C5-6 and indicated herniation and osteophyte complex at C6-7. Dr. Shah noted that frequent mobility in the left elbow caused an ulnar dysfunction, which was consistent with her elbow pain. He opined that appellant was "in an occupation where weight bearing on the shoulder has been required, along with frequent movements of the upper extremities and there is supporting evidence with MRI and EMG scans to indicate the findings consistent with her complaint." Dr. Shah recommended restrictions in the arms and advised that appellant should not carry weight on her shoulders of more than three to four pounds, nor more than five pounds overheard lifting occasionally or two to three pounds frequently. He recommended that appellant avoid overhead activities with both shoulders.

In a March 7, 2008 decision, the Office denied appellant's claim for a recurrence of disability on January 30, 2007, finding that she failed to establish that her condition or work stoppage was causally related to the accepted work injury on June 28, 1995.

Appellant requested a hearing, which was held on June 10, 2008. At the hearing, she described her employment injury of June 28, 1995. Appellant noted that she was placed on light duty for a year in 1999 and that, thereafter, she returned to full duty. She sustained a neck injury in 2005 from an off-the-job automobile accident. Appellant alleged that on January 3, 2007 she reached back into her mail truck to grab a parcel and pulled her neck. She continued to work despite the pain. Appellant testified that she worked the next day and then called into work to report her injury on January 5, 2007. She later spoke with a supervisor, Craig Lyne, and informed him that she was not sure but she thought she injured herself reaching for a parcel in her vehicle. Appellant informed the acting postmaster that she hurt her neck but did not tell her how she hurt her neck. She also testified that, in February 2007, she was having problems with her teenage son and was under stress. Appellant has not worked since January 4, 2007.

In a July 1, 2008 statement, Mr. Lyne, a supervisor, indicated that appellant worked on January 3 and 4, 2007. On January 4, 2007 appellant said she was unable to work on January 5, 2007 due to a situation with her son. Mr. Lyne stated that appellant did not inform him at any time about any on-the-job injury. After January 4, 2007, he next had contact with her on February 13, 2007 when she turned in some documentation.

In a July 1, 2008 statement, Laurie Maguire, a health and resource management specialist, noted that Mr. Lyne had indicated that appellant did not tell him she injured her neck in early January 2007. She also noted that both the CA-2a form submitted by appellant as well as the February 23, 2007 report from Dr. Rosenthal indicated a date of recurrence of January 30, 2007.

In a July 8, 2008 statement, appellant's representative contended that the statements provided by Mr. Lyne and Ms. Maguire were fraught with untruths. He also noted that Dr. Rosenthal's report contained an error regarding the date of injury, which should have been January 3, 2007 as opposed to January 30, 2007. Appellant's representative also noted that he had incorrectly put in the date of January 30, 2007 on the recurrence form because he was utilizing Dr. Rosenthal's report. The Office received copies of previously received medical reports. An April 3, 2008 treatment note of Dr. Rosenthal diagnosed a herniated cervical disc and radiculopathy. Dr. Rosenthal checked a box to indicate that appellant's condition was an aggravation of a preexisting condition and prescribed restrictions for appellant. The Office also received diagnostic test results dating back to 1995 and physical therapy notes.

By decision dated July 28, 2008, the hearing representative found that appellant did not meet her burden of proof to establish a recurrence of disability on January 5, 2007, causally related to her June 28, 1995 work injury because she claimed an intervening work injury of January 3, 2007. The Office hearing representative further found that there were such inconsistencies casting doubt on her claim of a new injury that she did not establish that she sustained an injury in the performance of duty on January 3, 2007 at the time, place and in the manner alleged.

LEGAL PRECEDENT -- ISSUE 1

Section 10.5(x) of the Office's regulations provide that a recurrence of disability means an inability to work after an employee has returned to work, caused by a spontaneous change in a medical condition, which had resulted from a previous injury or illness without an intervening injury or new exposure to the work environment that caused the illness.[2]

An individual who claims a recurrence of disability resulting from an accepted employment injury has the burden of establishing that the disability is related to the accepted injury. This burden requires furnishing medical evidence from a physician who, on the basis of a complete and accurate factual and medical history, concludes that the disabling condition is causally related to the employment injury and who supports that conclusion with sound medical reasoning.[3]

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 employment nor her belief that her condition was aggravated by her employment is sufficient to establish causal relationship.[4]

The Board will not require the Office to pay compensation in the absence of medical evidence directly addressing the particular period of disability for which compensation is sought.

[2] 20 C.F.R. § 10.5(x); *see Theresa L. Andrews*, 55 ECAB719 (2004).

[3] *Dennis E. Twardzik*, 34 ECAB 536 (1983); *Max Grossman*, 8 ECAB 508 (1956); 20 C.F.R. § 10.104.

[4] *Walter D. Morehead*, 31 ECAB 188 (1986).

To do so would essentially allow employees to self-certify their disability and entitlement to compensation.[5]

ANALYSIS -- ISSUE 1

The Office accepted that appellant sustained a right shoulder strain and muscle strain of the neck on June 28, 1995. The record reflects that appellant eventually returned to full duty. On February 16, 2007 appellant alleged a recurrence in January 3, 2007, for which she had disability beginning January 5, 2007.[6] However, she testified during her hearing that she reached into her postal vehicle on January 3, 2007 and pulled her neck but continued to work. To the extent that appellant alleged that she injured herself on January 3, 2007 the Board notes that this would be considered an intervening injury.[7] This would preclude her claim for a recurrence of disability causally related to her accepted employment injury. However, appellant also testified at her hearing that she was not sure if reaching into her work vehicle was the cause of her symptoms.

To the extent that appellant asserts that she had a recurrence of disability and not a new injury, the Board finds that she did not submit sufficient reasoned medical evidence to establish that her present condition was causally related to her accepted injury.

Appellant submitted a February 14, 2008 report from Dr. Shah, who noted that, since 1999, she had a protrusion at C5-6 and degenerative changes at C5-6 and C6-7, as well mild carpal tunnel syndrome bilaterally. Dr. Shah opined that appellant was in a job where "weight bearing on the shoulder has been required, along with frequent movements of the upper extremities." He advised that the evidence supported her complaints and were consistent with his findings. Dr. Shah's opinion did not provide a reasoned opinion explaining why appellant's condition and disability, on or after January 3, 2007, was due to her June 28, 1995 original injury. Moreover, the hearing testimony revealed that appellant was in a 2005 car accident; however, Dr. Shah did not address how this accident may have affected her condition. Medical reports not containing rationale on causal relation are entitled to little probative value and are generally insufficient to meet an employee's burden of proof.[8]

Appellant submitted several reports from Dr. Rosenthal, a chiropractor. They included a February 23, 2007 attending physician's report diagnosing a herniated nucleus pulposus at C4-5 and C5-6 and indicating that he believed that appellant's conditions were work related due to the June 28, 1995 injury and from carrying and lifting mail on January 30, 2007. However, section 8101(2) of the Federal Employees' Compensation Act provide that the term physician includes chiropractors only to the extent that their reimbursable services are limited to treatment consisting of manual manipulation of the spine to correct a subluxation as demonstrated by x-ray

[5] *Fereidoon Kharabi*, 52 ECAB 291 (2001).

[6] As noted previously, appellant's representative explained that he had incorrectly filled in January 30 as opposed to January 3, 2007. The record indicates that appellant did not work after January 4, 2007.

[7] *See supra* note 2. *See also* Analysis -- Issue 2 *infra.*

[8] *Elizabeth H. Kramm (Leonard O. Kramm)*, 57 ECAB 117 (2005).

to exist.[9] Dr. Rosenthal did not diagnose a subluxation.[10] In the absence of a diagnosis of subluxation based on x-rays, he is not a physician as defined under the Act. Moreover, a chiropractor providing an opinion on conditions other than subluxations of the spine is not considered to be a physician under the Act.[11] Consequently, the reports from Dr. Rosenthal have no probative value. The Office also received physical therapy notes and a February 1, 2007 excuse from a nurse. However, health care providers such as nurses and physical therapists are not physicians under the Act.[12] Thus, their opinions on causal relationship do not constitute rationalized medical opinions and have no weight or probative value.[13]

Other medical reports are insufficient to establish a recurrence of disability as they either predate the alleged recurrence of disability or do not specifically address whether the disabling condition beginning January 5, 2007 is causally related to the employment injury.

Appellant did not submit any other evidence to support a recurrence of total disability beginning January 5, 2007 with objective findings to support that her recurrence was causally related to the work injury of June 28, 1995. She had the burden of proving that she was disabled for work as a result of her employment injury.[14] Consequently, appellant has not met her burden of proof to establish that she sustained a recurrence of disability on January 5, 2007 causally related to her June 28, 1995 employment injury.

LEGAL PRECEDENT -- ISSUE 2

The burden is upon the employee to establish by evidence that she is entitled to compensation.[15] 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 or she actually experienced the employment incident at the time, place and in the manner alleged.[16] Second, the employee must

[9] 5 U.S.C. § 8101(2).

[10] The Office's implementing federal regulations define subluxation to mean an incomplete dislocation, off-centering, misalignment, fixation or abnormal spacing of the vertebrae which must be demonstrated on x-ray. *See* 20 C.F.R. § 10.5(bb).

[11] *Jay K. Tomokiyo*, 51 ECAB 361 (2000).

[12] *See* 5 U.S.C. § 8101(2) (this subsection defines a "physician" as surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors, and osteopathic practitioners within the scope of their practice as defined by State law. *See also Charley V.B. Harley*, 2 ECAB 208, 211 (1949) (where the Board has held that a medical opinion, in general, can only be given by a qualified physician).

[13] *Vickey C. Randall*, 51 ECAB 357 (2000); *see also Jane A. White*, 34 ECAB 515, 518 (1983).

[14] *See Fereidoon Kharabi*, *supra* note 5; *see also David H. Goss*, 32 ECAB 24 (1980).

[15] *Perez A. Brooks*, 7 ECAB 480 (1955); *Harold Hendrix*, 1 ECAB 54, 55 (1947).

[16] *Bonnie A. Contreras*, 57 ECAB 364, 367 (2006); *Edward C. Lawrence*, 19 ECAB 442, 445 (1968).

submit evidence, in the form of medical evidence, to establish that the employment incident caused a personal injury.[17]

An injury does not have to be confirmed by eyewitnesses in order to establish the fact that an employee sustained an injury while in the performance of duty. However, the employee's statements must be consistent with the surrounding facts and circumstances and his or her subsequent course of action.[18] 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 doubt on an employee's statements in determining whether he or she has established a *prima facie* claim for compensation. The employee has the burden of establishing the occurrence of an alleged injury at the time, place and in the manner alleged by a preponderance of the evidence.[19] An employee has not met this burden when there are such inconsistencies in the evidence that cast serious doubt upon the validity of the claim. However, an employee's statement alleging that an injury occurred at a given time and in a given manner is of great probative value and will stand unless refuted by strong and persuasive evidence.[20]

ANALYSIS -- ISSUE 2

Appellant alleged that she sustained injury in the performance of duty on January 3, 2007 when she reached back into her postal vehicle and felt pain in her neck. The Office denied her claim, finding that there were inconsistencies in the evidence with regard to the time, place and manner alleged. The Board finds that the Office properly determined that appellant did not submit sufficient evidence to establish that he or she actually experienced the employment incident at the time, place and in the manner alleged.

As noted, late notification of injury is one factor to be considered. In the present case, appellant did not allege that such an injury occurred until her hearing on June 10, 2008, almost a year and a half after she filed her recurrence claim. During the hearing, she alleged that on January 3, 2007 she reached back into her mail truck to grab a parcel and she pulled her neck but she continued to work despite the pain.

On her recurrence claim form, which was filed on February 16, 2007, appellant alleged that her recurrence occurred on January 30, 2007 and that her shoulders became painfully stiff such that she could not lift her right arm or turn her neck to the left or right and that her headaches became more severe. She also alleged that she believed that her claim was a recurrence because the original injury never healed. Although appellant's representative explained that the date of January 30, 2007 was incorrect; regardless of the date, appellant made no mention of reaching back into her mail truck to grab a parcel when she filed her claim for a

[17] *T.H.*, 59 ECAB ___ (Docket No. 07-2300, issued March 7, 2008); *John J. Carlone*, 41 ECAB 354, 356-57 (1989).

[18] *See Mary Jo Coppolino*, 43 ECAB 988 (1992).

[19] *S.B.*, 58 ECAB ___ (Docket No. 06-978, issued March 5, 2007).

[20] *Allen C. Hundley*, 53 ECAB 551 (2002); *Earl David Seal*, 49 ECAB 152 (1997).

recurrence of disability. Other documents contemporaneous with the filing of the recurrence claim also do not mention that appellant had symptoms upon reaching into her work vehicle on January 3, 2007.

Additionally, the employing establishment submitted evidence questioning whether appellant had a new injury. Ms. Cadana indicated that appellant had personal situations that might be contributing to her reasons for "being out of work." She also indicated that appellant was advised of a disciplinary action in February and that, after receiving this information, she requested forms from her supervisors to file a work-related injury. Mr. Lyne, a supervisor, noted that appellant did not inform him at any time about any on-the-job injury and that, after January 4, 2007, he next had contact with her on February 13, 2007 when she turned in some documentation.

Additionally, the medical evidence does not convey an injury as occurring on January 3, 2007 related to reaching into the back of her postal vehicle and lifting mail. The history of injury noted in Dr. Rosenthal's reports make no mention of a January 3, 2007 injury.[21] In a February 23, 2007 report, Dr. Rosenthal indicates that appellant "aggravated a preexisting neck injury from carrying and lifting mail on her neck and shoulder on January 30, 2007." He did not indicate that appellant mentioned a reaching incident at work on January 3, 2007. Likewise, Dr. Shah's February 14, 2008 report also made no mention of the alleged January 3, 2007 employment incident.

The Board finds that there are such inconsistencies in the evidence to cast doubt upon the validity of appellant's claim that she sustained an injury on June 3, 2007 in the time, place and manner alleged. Appellant's account of reaching back into her postal vehicle was not supported by her supervisor, there is no contemporaneous evidence supporting that the incident happened and it was not reported for well over a year. Moreover, the histories related to appellant's physicians are not consistent. For these reasons, the Board finds that the evidence of record does not establish that appellant sustained injury on January 3, 2007 at the time, place or in the manner alleged.

CONCLUSION

The Board finds that appellant did not meet her burden of proof to establish a recurrence of disability beginning January 5, 2007 causally related to the June 28, 1995 employment injury. Further, the Board also finds that appellant did not meet her burden of proof to establish that she sustained an injury in the performance of duty on January 3, 2007.

[21] While these reports cannot be considered as medical evidence, *see supra* notes 9-11, the history set forth in the reports may be considered in determining whether the factual evidence supports that the January 3, 2007 reaching incident occurred as alleged.

ORDER

IT IS HEREBY ORDERED THAT the July 28, 2008 decision of the Office of Workers' Compensation Programs' hearing representative is affirmed.

Issued: April 8, 2009
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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