United States Department of Labor
Employees' Compensation Appeals Board

D.B., Appellant	)	
and	)	**Docket No. 09-343**
	)	**Issued: August 10, 2009**
DEPARTMENT OF HOMELAND SECURITY, CITIZENSHIP & IMMIGRATION SERVICES, Los Angeles, CA, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
COLLEEN DUFFY KIKO, Judge

JURISDICTION

On November 17, 2008 appellant filed a timely appeal from an October 22, 2008 merit decision of the Office of Workers' Compensation Programs' Branch of Hearings and Review affirming an April 9, 2008 decision that denied her claim. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this claim.

ISSUE

The issue is whether appellant has met her burden of proof to establish that she sustained an injury in the performance of duty on January 15, 2008.

FACTUAL HISTORY

On February 11, 2008 appellant, a 59-year-old immigration information officer/contact representative, filed a traumatic injury claim (Form CA-1) for severe neck, scalp and shoulder pains, headache and trauma to her scalp and hair follicles. She attributed her injuries to a

January 15, 2008 incident when a coworker grabbed her hair, which was bound together in a unitary style and pulled it, propelling her head and neck backward.

By a February 4, 2008 report (Form CA-20), Dr. Elizabeth Swida-Skillen, a chiropractor, diagnosed appellant with: cervical and thoracic segmental dysfunction; whiplash trauma; thoracic sprain/strain and cephalgia. She first examined her January 23, 2008 and treated her on February 1 and 4, 2008. Dr. Swida-Skillen opined that appellant could return to light-duty work on February 14, 2008, with the restriction that she could only perform two to four hours of headphone and computer work per day.

In an undated statement, the coworker who pulled appellant's hair reported that on January 15, 2008 the Western Telephone Center (WTC) had group and team photographs taken. The members of the WTC were assembled prior to the photograph and during this time the coworker reported that he playfully "wiggled" her hair. The coworker reported that appellant turned around and asked him to stop and that he complied and apologized. He reported that she did not indicate that she was hurt or in any pain. The coworker also reported that he was "shocked and appalled" when he learned of the allegations lodged against him. In a separate statement dated March 31, 2008, Sylvia Tillman, appellant's supervisor, repeated a similar version of the events January 15, 2008 when this coworker jiggled appellant's hair. She also added that no police report had been filed.

Responding to the Office's February 21, 2008 letter, in a handwritten response dated March 30, 2008, appellant reported that she had a police report on record concerning the January 15, 2008 incident. After repeating a similar rendition of the facts as that proffered by her coworker and her supervisor, she reported that she immediately experienced symptoms of a migraine headache and a burning, pins and needles sensation in her hair follicles and scalp. Appellant also reported that she could not sleep due to the pain in her neck, head and scalp. She reported that she did not sustain any other injury between the time of the incident and the date upon which she reported her condition to her supervisor and physician.

Appellant submitted a copy of a police report pertaining to the events of January 15, 2008.

Appellant submitted no other evidence in support of her claim. By decision dated April 9, 2008, the Office denied her claim because the evidence of record was insufficient to establish that the claimed incident occurred in the manner alleged or that an injury was sustained due to the claimed employment factor.

Appellant disagreed and, through counsel, requested an oral hearing. By letter dated July 7, 2008, the Office notified appellant that a hearing had been scheduled for August 11, 2008 at 2:00 p.m. and that she and/or her attorney should be present.

In support of her hearing request, appellant submitted a March 18, 2008 report signed by Dr. Swida-Skillen, a chiropractor, who reported that she was assaulted by a coworker on January 15, 2008 who approached her and pulled her head backward by grabbing her hair. Dr. Swida-Skillen noted that appellant sustained a nonindustrial motor vehicle accident in 2006,

for which she received treatment and was released with good prognosis. Further, she also noted that appellant had a fall in 2007.

Dr. Swida-Skillen reported that x-rays of appellant's cervical spine revealed subluxation at the C6 level, slight degenerative changes and slight loss of cervical lordotic curve. The thoracic spine x-rays demonstrated subluxation at the T3 level as well as moderate degenerative changes. Dr. Swida-Skillen diagnosed cervical and thoracic segmental dysfunction, cephalgia, subluxation of the cervical spine at the C6 level, cervical and thoracic sprain/strain, thoracic subluxation and whiplash trauma. She asserted that appellant was unable to perform her regular duties due to these conditions and that she would return to work on April 17, 2008. Dr. Swida-Skillen also noted that "[t]he mechanics of injury do support [her] complaints and symptomatology."

A hearing was conducted on August 11, 2008 and appellant and her attorney were present. She testified that, on January 15, 2008, she and her fellow coworkers assembled for a scheduled group photograph. Appellant testified that, while the photographer was positioning other employees for the picture, the coworker standing behind her pulled her hair. She reported that she heard a popping noise in her neck when her hair was pulled. Appellant testified that she had no outside relationship, disputes or disagreements with the coworker who pulled her hair and that she did not consider the incident horseplay or playful. She testified that she has shoulder length hair that, on the day in question, was tied up in a unitary style pony tail. Appellant testified that her supervisor witnessed the incident. She reported that she did not immediately know she was injured by this event, rather the condition surfaced on January 19, 2008. Appellant testified that she had a preexisting neck problem from a car accident two years prior to the hair-pulling incident. She testified that she filed a complaint with the police department and that, to her knowledge, the coworker who pulled her hair had not been charged with any crime.

By letter dated September 30, 2008, the employing establishment provided comments for the record in response to appellant's testimony at the hearing. The employing establishment noted that, although she alleged that she was injured by the hair-pulling incident of January 15, 2008, this incident was not documented until February 4, 2008. The employing establishment reported that it received no documentation concerning appellant's alleged injury until after February 4, 2008. The employing establishment reported that it had received six notes from Dr. Swida-Skillen, all of which were identical but for their respective dates.

By decision dated October 22, 2008, the Office's Branch of Hearings and Review affirmed the Office's April 9, 2008 decision finding that there were serious inconsistencies in the evidence of record which cast serious doubt that the January 15, 2008 incident occurred as alleged.

LEGAL PRECEDENT

An employee who claims benefits under the Federal Employees' Compensation Act[1] has the burden of establishing the occurrence of an injury at the time, place and in the manner

[1] 5 U.S.C. §§ 8101-8193.

alleged, by a preponderance of the reliable, probative and substantial evidence.[2] An injury does not have to be confirmed by eyewitnesses in order to establish the fact that an employee sustained an injury in the performance of duty, but the employee's statements must be consistent with the surrounding facts and circumstances and his or her subsequent course of action.[3] An employee has not met his or her burden of proof of establishing the occurrence of an injury when there are such inconsistencies in the evidence as to cast serious doubt upon the validity of the claim.[4] 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, if otherwise unexplained, cast sufficient doubt on an employee's statements in determining whether a *prima facie* case has been established.[5] 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 or persuasive evidence.[6]

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.[7] Second, the employee must submit evidence, in the form of medical evidence, to establish that the employment incident caused a personal injury.[8]

ANALYSIS

The Board finds that appellant has established that her coworker wiggled her hair on January 15, 2008. Appellant, however, has not established that her hair was pulled in a forceful manner sufficient to pull her head and neck backward. 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 or persuasive evidence.[9] The employing establishment reported that it did not receive documentation concerning her condition until February 4, 2008. The coworker acknowledged that he wiggled appellant's hair and appellant's supervisor, Ms. Tillman, confirmed that the coworker "jiggled" her hair. Furthermore, both of these individuals agree that in response to the coworker's actions appellant merely turned around and asked the coworker to

[2] *D.B.*, 58 ECAB ___ (Docket No. 07-440, issued April 23, 2007); *George W. Glavis*, 5 ECAB 363, 365 (1953).

[3] *M.H.*, 59 ECAB ___ (Docket No. 08-120, issued April 17, 2008); *George W. Glavis*, *see supra* note 2.

[4] *S.P.*, 59 ECAB ___ (Docket No. 07-1584, issued November 15, 2007); *Gus Mavroudis*, 9 ECAB 31, 33 (1956).

[5] *M.H.*, *see supra* note 3; *John D. Shreve*, 6 ECAB 718, 719 (1954).

[6] *S.P.*, *see supra* note 4; *Wanda F. Davenport*, 32 ECAB 552, 556 (1981).

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

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

[9] *Caroline Thomas*, 51 ECAB 451 (2000).

stop, but that she did not appear to be injured. The Board finds that the record contains sufficient evidence to cast doubt upon her allegation that her hair was pulled in a forceful manner sufficient to pull her head and neck backwards.[10]

The Board finds that appellant has not submitted sufficient evidence to establish that the mild nature of the January 15, 2008 employment incident resulted in an injury. The determination of whether an employment incident caused an injury is generally established by medical evidence.[11]

Appellant submitted evidence from Dr. Swida-Skillen. In assessing the probative value of chiropractic evidence, the initial question is whether the chiropractor is a "physician" as defined by the Act.[12] A chiropractor is not considered a physician under the Act unless it is established that there is a subluxation as demonstrated by x-ray to exist.[13] As the CA-20 form signed by Dr. Swida-Skillen did not diagnose appellant with subluxation as demonstrated by x-ray to exist, for purposes of this medical report, she does not qualify as a "physician" under the Act and therefore this report and the opinions contained therein do not constitute competent medical evidence. Thus, the CA-20 form signed by Dr. Swida-Skillen is of no probative medical value.

Thereafter, Dr. Swida-Skillen's March 18, 2008 report stated that appellant was assaulted by a coworker on January 15, 2008 who approached her and pulled her head backward by grabbing her hair. She reported that x-rays of appellant's cervical spine revealed subluxation at the C6 level, slight degenerative changes and slight loss of cervical lordotic curve. Thoracic spine x-rays demonstrated subluxation at the T3 level as well as moderate degenerative changes. For purposes of the Act and this report, because Dr. Swida-Skillen diagnosed subluxations as shown to exist by x-rays, she qualifies as a "physician" as defined by the Act.[14]

However, the March 18, 2008 report is of little probative value because Dr. Swida-Skillen did not proffer an opinion concerning the causal relationship between these cervical and thoracic conditions and the January 15, 2008 incident. Although she twice asserted that "[t]he mechanics of injury do support [appellant's] complaints and symptomatology," she did not discuss the mechanics of injury or how they operated to produce the conditions diagnosed or the injuries alleged by appellant. The Board notes that Dr. Swida-Skillen's history of injury would have to comport with the accepted version of the incident. The Board has consistently held that medical opinions lacking an opinion on causal relationship are of little probative value.[15] Causal

[10] *See Betty J. Smith*, 54 ECAB 174 (2002).

[11] *Lois E. Culver (Clair L. Culver)*, 53 ECAB 412 (2002).

[12] 5 U.S.C. § 8101(2).

[13] *Mary A. Ceglia*, 55 ECAB 626 (2004).

[14] 5 U.S.C. § 8101(2).

[15] *See Mary E. Marshall*, 56 ECAB 420 (2005) (medical reports that do not contain rationale on causal relationship have little probative value). *See also, Franklin D. Haislah*, 52 ECAB 457 (2001); *Jimmie H. Duckett*, 52 ECAB 332 (2001).

relationship is a medical issue[16] 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 of the physician must be based on a complete factual and medical background of the claimant,[17] must be one of reasonable medical certainty[18] 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.[19] Thus, Dr. Swida-Skillen's statement that appellant was "assaulted," coupled with a declaration that "[t]he mechanics of injury do support [her] complaints and symptomology" is not [based in the accepted nature of] the January 15, 2008 employment incident.

An award of compensation may not be based on surmise, conjecture, speculation or upon appellant's own belief that there is a causal relationship between her claimed condition and her employment.[20] Appellant must submit a physician's report in which the physician reviews those factors of employment identified by her as causing her condition and, taking these factors into consideration as well as findings upon examination and the medical history, explain how employment factors caused or aggravated any diagnosed condition and present medical rationale in support of his or her opinion.[21] She failed to submit such evidence and therefore failed to discharge her burden of proof.

CONCLUSION

The Board finds that appellant did not meet her burden of proof to establish that she sustained an employment-related injury in the performance of duty on January 15, 2008.

[16] *Mary J. Briggs*, 37 ECAB 578 (1986).

[17] *William Nimitz, Jr.*, 30 ECAB 567, 570 (1979).

[18] *See Morris Scanlon*, 11 ECAB 384, 385 (1960).

[19] *See William E. Enright*, 31 ECAB 426, 430 (1980).

[20] *Patricia J. Glenn*, 53 ECAB 159 (2001). *See also, Edgar G. Maiscott*, 4 ECAB 558 (1952) (holding appellant's self-serving declarations do not, in the opinion of the Board, constitute evidence of a sufficiently substantial nature).

[21] *Robert Broome*, 55 ECAB 339 (2004).

ORDER

IT IS HEREBY ORDERED THAT the October 22, 2008 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 10, 2009
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board