

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

T.D., Appellant)	
)	
and)	
)	
DEPARTMENT OF VETERANS AFFAIRS,)	Docket No. 09-1311
PALO ALTO VETERANS ADMINISTRATION)	Issued: December 17, 2009
HOSPITAL, Palo Alto, CA, Employer)	
)	

Appearances: *Case Submitted on the Record*
Alan J. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director

DECISION AND ORDER

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

JURISDICTION

On April 22, 2009 appellant filed a timely appeal from a March 16, 2009 merit decision of the Office of Workers' Compensation Programs. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant sustained an injury in the performance of duty on May 8, 2008.

FACTUAL HISTORY

On May 12, 2008 appellant, a 67-year-old vocational nurse, filed a traumatic injury claim (Form CA-1) for injuries she sustained on May 8, 2008 after a coworker, Leanne Roderick, allegedly assaulted her. She alleged that Ms. Roderick pushed and shoved her causing her to experience pain in her right shoulder. The employing establishment reported that it was unable to establish this occurrence was intentional. Ms. Roderick reported that appellant was walking quickly down the hall when appellant lightly bumped into her. The employing establishment noted that no one witnessed the alleged incident.

The Office handled the case as a minor injury with no significant loss of time from work and authorized physical therapy from May 20 to June 24, 2008.

Appellant submitted physical therapy reports and notes, from May 9 through June 19, 2008, excusing her from work signed by Dr. Mattice Harris, Board-certified in family medicine.

On June 23, 2008 appellant filed a claim (Form CA-7) for reimbursement of leave without pay from June 26 to July 7, 2008. By letter dated July 2, 2008, the Office advised appellant that, although the claim had previously been handled as a minor case, it now needed to be adjudicated, as there was a claim for wage loss. It provided appellant a description of the type of evidence necessary to prove her claim.

On July 2, 2008 Dr. Harris released appellant to work, beginning July 3, 2008, with restrictions limiting repetitive movements with her arms and neck, no above-shoulder lifting and no lifting greater than 15 pounds.

By decision dated August 4, 2008, the Office accepted that the May 12, 2008 incident occurred as alleged but denied the claim because appellant had not submitted medical evidence establishing that the accepted incident caused a medically-diagnosed injury.

On August 12, 2008 appellant, through her attorney, requested a hearing. The Office received additional medical evidence from appellant.

Additional reports or treatment notes were received from Dr. Harris from May 9 through August 28, 2008 in which he diagnosed neck sprain and strain; right shoulder contusion and cervical spine strain; mixed hyperlipidemia, chronic pancreatitis, cervicgia, abdominal pain, peripheral autonomic neuropathy and Type II diabetes with neuropathy. In his May 9, 2008 report, he diagnosed cervical and shoulder pain and noted that this condition arose from an incident when another worker "apparently intentionally ran into her."

Appellant submitted a note dated October 20, 2008, in which she alleged that on February 15, 2008 she reported instances of misconduct, profanity and sexual harassment to her employer involving Ms. Roderick. She alleged that Ms. Roderick's conduct created a hostile work environment resulting in appellant being assaulted in a narrow hallway on May 8, 2008. On that date Ms. Roderick bumped shoulders with appellant as they passed each other. Appellant reported that her employer conducted an internal investigation¹ and determined that she was the cause of the hostility.

At a hearing conducted December 8, 2008, appellant described the events of May 8, 2008. She testified that she had worked with Ms. Roderick for 10 years and did not associate with Ms. Roderick outside of work. Appellant alleged that animosity between Ms. Roderick and her had been going on for about a year. She testified that Ms. Roderick was mad because appellant had reported her to the chief of ambulatory care and the clinic coordinator due to her misconduct and use of profanity in the clinic. Appellant testified that Ms. Roderick was disciplined for that misconduct. She testified that while walking down a narrow hallway a female coworker intentionally bumped into her causing shoulder-to-shoulder contact, causing extreme pain and spasms. Following the assault, appellant testified that her employer

¹ There is no evidence of this investigation in the record.

investigated the May 8, 2008 incident but found that she was responsible for causing the hostility in the clinic.

By decision dated March 16, 2009, the hearing representative affirmed the Office's August 12, 2008 decision because appellant had not established that her alleged injury occurred in the performance of duty. Rather it found the assault resulted from personal animosity not the performance of her federal employment duties.

LEGAL PRECEDENT

An employee seeking benefits under the Federal Employees' Compensation Act² has the burden of establishing the essential elements of the claim, including the fact that the individual is an employee of the United States within the meaning of the Act, that the claim was filed within the applicable time limitation, that an injury was sustained while 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.³ These are essential elements of each and every compensation claim regardless of whether the claim is predicated on a traumatic injury or an occupational disease.⁴

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. 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.⁵ Second, the employee must submit evidence, in the form of medical evidence, to establish that the employment incident caused a personal injury.⁶

The employee must also establish the concurrent requirement of an injury arising out of the employment. This requires that a factor of employment caused the injury.⁷ Larson, in addressing assaults arising out of employment, states the following:

“Assaults arise out of the employment either if the risk of assault is increased because of the nature or setting of the work, or if the reason for the assault was a quarrel having its origin in the work.... Assaults for private reasons do not arise out of the employment unless by facilitating an assault which would not otherwise be made, the employment becomes a contributing factor.”⁸

² 5 U.S.C. §§ 8101-8193.

³ *C.S.*, 60 ECAB ___ (Docket No. 08-1585, issued March 3, 2009).

⁴ *S.P.*, 59 ECAB ___ (Docket No. 07-1584, issued November 15, 2007); *Joe D. Cameron*, 41 ECAB 153 (1989).

⁵ *Bonnie A. Contreras*, 57 ECAB 364, 367 (2006); *Edward C. Lawrence*, 19 ECAB 442, 445 (1968).

⁶ *T.H.*, 59 ECAB ___ (Docket No. 07-2300, issued March 7, 2008); *John J. Carlone*, 41 ECAB 354, 356-57 (1989).

⁷ *Guadalupe P. Americano*, 53 ECAB 297 (2002).

⁸ A. Larson, *The Law of Workers' Compensation*, Chapter 8 (2006).

ANALYSIS

The Board finds that the Office hearing representative improperly concluded that the assault resulted from personal animosity but finds that appellant has not established that she sustained an injury in the performance of duty on May 8, 2008.

Appellant alleged that she sustained an injury as a result of an assault by a coworker, during which she bumped shoulders with Ms. Roderick. On August 4, 2008 the Office accepted that appellant bumped into Ms. Roderick on May 8, 2008 as alleged, but denied the claim because the medical evidence of record did not demonstrate that this accepted incident caused an injury.

The Office hearing representative thereafter concluded that the incident did not arise out of the employment as the assault resulted from personal animosity. The evidence of record does not indicate that appellant and Ms. Roderick had any relationship outside of the workplace. The animosity between the two employees arose from workplace issues which surfaced approximately one year prior when appellant had reported alleged misconduct by Ms. Roderick to management. The origin of the bumping incident involved workplace issues, not personal, out-the-workplace issues.

The evidence of record, however, is still insufficient to establish appellant's claim. Causal relationship is a medical issue and the medical evidence generally required to establish causal relationship is rationalized medical opinion evidence. Rationalized medical opinion evidence is medical evidence which includes a physician's rationalized opinion on whether there is a causal relationship between the employee's diagnosed condition and the compensable employment factors. The opinion of the physician must be based on a complete factual and medical background of the employee, 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 employee.⁹

While Dr. Harris has diagnosed appellant's condition as cervical spine strain and cervicgia and right shoulder contusion, he offered no medical rationale to explain how the May 8, 2008 incident caused these conditions. In one report, although he referenced that her condition arose when a coworker ran into her intentionally, there is no discussion in the medical evidence how that incident caused the diagnosed conditions.

Appellant also submitted reports from a physical therapist. A physical therapist, though, does not qualify as a "physician" within the meaning of 5 U.S.C. § 8101(2) and cannot render a medical opinion.¹⁰ These reports are of no probative value.

As appellant has submitted no rationalized medical evidence to establish that she sustained an injury on May 8, 2008 causally related to her employment, she had not met her burden of proof.

⁹ *I.J.*, 59 ECAB ____ (Docket No. 07-2362, issued March 11, 2008); *Victor J. Woodhams*, 41 ECAB 345, 352 (1989).

¹⁰ *Vickey C. Randall*, 51 ECAB 357 (2000).

CONCLUSION

The Board finds that appellant has established that she was bumped at work in the performance of duty on May 8, 2008 but that she has not established that she sustained an injury as a result of this incident.

ORDER

IT IS HEREBY ORDERED THAT the March 16, 2009 decision of the Office of Workers' Compensation Programs is hereby affirmed as modified.

Issued: December 17, 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