United States Department of Labor
Employees' Compensation Appeals Board

J.G., Appellant	)	
and	)	**Docket No. 08-1879**
	)	**Issued: January 27, 2009**
U.S. POSTAL SERVICE, POST OFFICE, Syosset, NY, Employer	)	

Appearances:
Appellant, pro se
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 June 26, 2008 appellant filed a timely appeal from the Office of Workers' Compensation Programs' February 20, 2008 merit decision denying her claim for a traumatic injury and a May 29, 2008 decision denying her request for further review of the merits. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2), the Board has jurisdiction over these decisions.

ISSUES

The issues are: (1) whether appellant met her burden of proof to establish that she sustained a traumatic injury in the performance of duty; and (2) whether the Office properly denied appellant's request for further review of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On October 27, 2007 appellant, then a 48-year-old distribution clerk, filed a traumatic injury claim alleging that she sustained injury at work on October 24, 2007 when she engaged in

bending and lifting while dumping and breaking down mail. She stated that when she bent down and stood up she felt a pulling strain in her lower back and a shooting pain down her left leg. On the same form, appellant's supervisor noted that appellant advised him on October 25, 2007 that the claimed injury occurred on October 24, 2007.[1] Appellant stopped work on October 24, 2007.

In an October 25, 2007 note, Dr. Joseph Gigante, an attending Board-certified family practitioner, stated that appellant reported experiencing back and leg pain after lifting, squatting and bending over while breaking down mail the prior day. He noted that on examination appellant had decreased back motion and diagnosed low back strain/sprain. Dr. Gigante arranged for appellant to undergo magnetic resonance imaging (MRI) scan testing and indicated that she was disabled from October 25 to 28, 2007. The findings of a November 5, 2007 MRI scan of appellant's back showed bulging discs at L3-4 and L5-S1 and slight anterior spondylolisthesis of L4 upon L5.

In form reports dated from mid December 2007, Dr. Gigante listed the date of injury as October 27, 2007 and the history of injury as "lifting heavy objects."[2] He diagnosed low back sprain and checked a "yes" box indicating that appellant's condition was caused or aggravated by the reported employment activity. Dr. Gigante stated that appellant had been totally disabled since the time of the injury.

In a December 20, 2007 report, Dr. Kevin J. Mullins, an attending Board-certified neurosurgeon, stated that appellant reported hurting her back on October 27, 2007 due to repetitive heavy lifting. He stated that appellant "presents following a work-related injury with significant myofascial back pain" and recommended that she participate in an outpatient spinal rehabilitation program.

On January 14, 2008 the Office requested that appellant submit additional factual and medical evidence in support of her claim. Appellant submitted an undated report in which Dr. Jamie P. Skurka, an attending chiropractor, stated that she reported that she injured her lumbar spine on October 27, 2007 and that her job required repetitive lifting, twisting and turning. Dr. Skurka indicated that November 5, 2007 MRI scan testing showed bulging discs at L3-4 and L5-S1 and slight anterior spondylolisthesis of L4 upon L5 and provided these conditions in the diagnosis portion of his report. He obtained x-ray testing[3] and also diagnosed lumbar facet syndrome, lumbar radiculitis and myofascial pain syndrome. Dr. Skurka stated that appellant's lumbar condition was "resultant from the repetitive lifting, twisting and bending event that occurred on October 27, 2007."

In a February 20, 2008 decision, the Office denied appellant's claim that she sustained an employment-related traumatic injury on the grounds that she did not establish the occurrence of

[1] Appellant's supervisor checked a box indicating that the injury occurred in the performance of duty and added the notation, "Unknown/employee does n[o]t know how she got hurt (original statement)."

[2] Dr. Gigante's listing of the date of injury as October 27, 2007 would appear to be inadvertent as he previously listed the proper date of October 24, 2007 when he examined appellant on October 25, 2007.

[3] Another document indicates that x-rays were taken on January 11, 2008.

an employment incident. It indicated that there were inconsistencies in the factual aspects of appellant's claim.

Appellant requested reconsideration of her claim and submitted additional reports of Dr. Skurka.[4] In a May 29, 2008 decision, the Office denied appellant's request for further review of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

LEGAL PRECEDENT

An employee who claims benefits under the Federal Employee's Compensation Act[5] has the burden of establishing the occurrence of an injury at the time, place and in the manner alleged, by a preponderance of the reliable, probative and substantial evidence.[6] 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.[7] An employee has not met his or her burden of proof in 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.[8] 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.[9] 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.[10]

If an employment incident is established, a claimant must present rationalized medical opinion evidence, based upon a complete and accurate factual and medical background, establishing causal relationship between the established employment incident and the claimed medical condition.[11] However, it is well established that proceedings under the Act are not adversarial in nature and while the claimant has the burden to establish entitlement to compensation, the Office shares responsibility in the development of the evidence.[12]

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[4] Appellant initially requested a hearing regarding her claim but she later withdrew this request.

[5] 5 U.S.C. §§ 8101-8193.

[6] *William Sircovitch*, 38 ECAB 756, 761 (1987); *John G. Schaberg*, 30 ECAB 389, 393 (1979).

[7] *Charles B. Ward*, 38 ECAB 667, 670-71 (1987); *Joseph Albert Fournier, Jr.*, 35 ECAB 1175, 1179 (1984).

[8] *Tia L. Love*, 40 ECAB 586, 590 (1989); *Merton J. Sills*, 39 ECAB 572, 575 (1988).

[9] *Samuel J. Chiarella*, 38 ECAB 363, 366 (1987); *Henry W.B. Stanford*, 36 ECAB 160, 165 (1984).

[10] *Robert A. Gregory*, 40 ECAB 478, 483 (1989); *Thelma S. Buffington*, 34 ECAB 104, 109 (1982).

[11] *Brian E. Flescher*, 40 ECAB 532, 536 (1989); *Ronald K. White*, 37 ECAB 176, 178 (1985).

[12] *Dorothy L. Sidwell*, 36 ECAB 699, 707 (1985); *William J. Cantrell*, 34 ECAB 1233, 1237 (1983).

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.[13] 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.[14]

ANALYSIS

On October 27, 2007 appellant filed a traumatic injury claim alleging that she sustained injury at work on October 24, 2007 when she engaged in bending and lifting while dumping and breaking down mail. She stated that when she bent down and stood up she felt a pulling strain in her lower back and a shooting pain down her left leg. The Office denied appellant's claim that she sustained an employment-related traumatic injury on the grounds that she did not establish the occurrence of an employment incident.

The Board finds that an employment incident occurred on October 24, 2007 when appellant engaged in bending and lifting while dumping and breaking down mail. There are no such inconsistencies in the factual record to cast doubt on appellant's account of the incident. Appellant provided one basic account of the mechanism of the employment incident. She stopped work on October 24, 2007 and sought medical treatment the next day. The record contains an October 25, 2007 report of Dr. Gigante, an attending Board-certified family practitioner, which contains a description of the October 24, 2007 employment incident which is consistent with that provided by appellant. Appellant reported to her supervisor on October 25, 2007 that the claimed injury occurred on October 24, 2007.[15] She filed a traumatic injury on October 26, 2007, *i.e.*, a period shortly after the claimed October 24, 2007 injury.[16]

Given that appellant has established an October 24, 2007 employment incident, the question becomes whether she sustained an injury due to this incident. The Board notes that while none of the reports of Dr. Gigante are completely rationalized, they are consistent in indicating that appellant sustained an employment-related injury on October 24, 2007 and are not contradicted by any substantial medical or factual evidence of record. In a report dated October 25, 2007, Dr. Gigante noted that appellant reported experiencing back and leg pain after lifting, squatting and bending over while breaking down mail the prior day. He stated that on examination appellant had decreased back motion and diagnosed low back strain/sprain. In a report from mid December 2007, Dr. Gigante diagnosed low back sprain and checked a "yes"

[13] 5 U.S.C. § 8101(2). *See Jack B. Wood*, 40 ECAB 95, 109 (1988).

[14] 20 C.F.R. § 10.5(bb); *see also Bruce Chameroy*, 42 ECAB 121, 126 (1990).

[15] *See supra* note 1. However, appellant's supervisor did not provide any additional details of what appellant told him on October 25, 2007.

[16] In several medical reports dated in December 2007 and January 2008 it appears that appellant reported the date of injury as October 27, 2007. This appears to have been an inadvertent mistake as appellant consistently reported the same mechanism of claimed injury to his physicians.

box indicating that appellant's condition was caused or aggravated by lifting heavy objects.[17] Therefore, while the reports are not sufficient to meet appellant's burden of proof to establish her claim, they raise an uncontroverted inference between her claimed condition and the employment incident of October 24, 2007 and are sufficient to require the Office to further develop the medical evidence and the case record.[18]

Accordingly, the case will be remanded to the Office for further evidentiary development regarding the issue of whether appellant sustained an employment-related injury on October 24, 2007 and, if so, whether she sustained any disability as a result. It should prepare a statement of accepted facts and obtain a medical opinion on this matter. After such development of the case record as the Office deems necessary, an appropriate decision shall be issued.[19]

CONCLUSION

The Board finds that the case is not in posture for decision regarding whether appellant sustained an injury in the performance of duty. Appellant established the existence of an employment incident on October 24, 2007, but additional development of the medical evidence is necessary to determine whether she sustained an injury due to that incident and, if so, whether she sustained any disability as a result.

[17] Dr. Gigante inadvertently listed the date of injury as October 27, 2007. The record also contains a report in which Dr. Skurka, an attending chiropractor, stated that appellant's lumbar condition was due to repetitive lifting, twisting and bending at work. However, Dr. Skurka would not be considered a physician under the Act and his reports would not constitute probative medical evidence because he did not diagnose spinal subluxations as demonstrated by x-rays to exist. *See supra* notes 13 and 14 and accompanying text.

[18] *See Robert A. Redmond*, 40 ECAB 796, 801 (1989).

[19] Given the Board's findings regarding the merit issue of this case, it is unnecessary for the Board to consider the nonmerit issue of this case.

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' February 20, 2008 decision is modified to reflect that appellant sustained an October 24, 2007 employment incident. The case is remanded to the Office for further development of the medical evidence and any proceedings consistent with this decision of the Board.

Issued: January 27, 2009
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