United States Department of Labor
Employees' Compensation Appeals Board

S.P., Appellant	)	
and	)	**Docket No. 09-2195**
	)	**Issued: August 16, 2010**
U.S. POSTAL SERVICE, POST OFFICE, Toledo, OH, Employer	)	

Appearances:
Allan 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
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On August 31, 2009 appellant filed a timely appeal from decisions of the Office of Workers' Compensation Programs dated April 23 and July 6, 2009. Under 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 has established that she sustained a back injury in the performance of duty on February 21, 2009; and (2) whether the refusal of the Office to reopen appellant's case for further consideration of the merits constituted an abuse of discretion.

FACTUAL HISTORY

Appellant, a 44-year-old letter carrier, filed a Form CA-1 claim for benefits on February 25, 2009, alleging that she strained her back and stomach as a result of a physical altercation with Coworker Donna Vargas on February 21, 2009. On the form the employing establishment controverted the claim. It contended that appellant falsely claimed that her injury occurred when Ms. Vargas pushed her.

In a February 21, 2009 statement, appellant stated that the incident occurred when Ms. Vargas walked over to the equipment bin carrying various trays. She was standing next to an orange gurney holding two or three trays when Ms. Vargas began yelling at her, demanding that she give back "her" trays. Appellant stated that she turned around and Ms. Vargas charged at her "quickly and aggressively," leaving her with no time to respond. She asserted that Ms. Vargas' violent pulling and shoving the trays into her abdomen caused her to fall backwards onto the orange gurney's hard surface, resulting in injuries to her back and abdomen.

In a statement dated February 21, 2009, Ms. Vargas challenged appellant's account of the February 21, 2009 incident. She stated that appellant entered her work area on February 20, 2009 and took a stack of trays without asking her. When Ms. Vargas asked appellant to return the trays, appellant left the work area without responding. The following day, February 21, 2009, appellant again entered Ms. Vargas' work area and took a stack of trays without asking. Ms. Vargas asserted that when she asked appellant to return the trays appellant responded that they were not her trays, that they were for everyone's use. She objected, stating that the trays were "hers" because they were in her setup. Ms. Vargas stated that when she went over to grab the trays from appellant's cart appellant grabbed them on the side at the same time and pulled two of them out of her hands. She stated that she never physically touched appellant.

In a February 21, 2009 routing slip, Jennifer Hufford, the station manager, stated that appellant walked into her office on February 21, 2009 and asserted that Ms. Vargas had snatched some trays out of her hand. Appellant then left the office, as Ms. Hufford told her that she would need to submit documentation that she was incapacitated to work that day.

Appellant submitted a report dated February 21, 2009 from Dr. Traci N. Watkins, a Board-certified family practitioner, who stated that appellant had a history of degenerative joint disease, arthritis and chronic back pain, which was exacerbated by an incident at work. Dr. Watkins related that appellant stated that she was approached by a clerk while she had mail trays in her hand, when the coworker pushed her and pulled the mail trays, causing her to exacerbate her back condition; appellant alleged that the coworker essentially assaulted her with the mail trays, pushing her into the orange gurney. On examination, she noted localized tenderness over her posterior thoracic and lumbar back muscles. Dr. Watkins stated that appellant was ambulatory to the room without any problems and had no neurovascular or motor deficit in her lower extremities. She released appellant in stable condition.

In a February 23, 2009 report, Dr. Jay Nielsen, Board-certified in family practice, stated:

> "[Appellant] reports that she was pushed while on duty on Saturday, February 21, 2009. [She] is requesting to be off work until her next appointment with me on March 3, 2009. [Appellant] is complaining of physical as well as emotional issues."

In a March 9, 2009 statement, appellant's supervisor, Shirley Hamer, controverted the claim. She stated that statements from the stationmaster and appellant's coworkers did not substantiate appellant's allegation that she was a victim of violence perpetuated by Ms. Vargas.

In a February 23, 2009 statement, received by the Office on March 16, 2009, appellant's coworker Rick Pinardo stated that he witnessed the February 21, 2009 altercation between appellant and Ms. Vargas. Mr. Pinardo indicated that there had been a similar confrontation between these employees on February 20, 2009, when appellant grabbed a stack of trays and Ms. Vargas asked her not to take all the trays because the clerks needed some of them. He stated that on February 21, 2009 appellant went back to the case area and proceeded to take the stack of trays again. Mr. Pinardo related that he heard some yelling regarding her taking all the trays, then she stormed off, became upset and left for the day; he stated, however, that there was no evidence of violence whatsoever.

By letter dated March 19, 2009, the Office advised appellant that she needed to submit additional factual and medical evidence in support of her claim. It stated that although the evidence indicated that an incident occurred between appellant and Ms. Vargas, there were some discrepancies with respect to what actually occurred. The Office accepted that appellant and her coworker grabbed onto the trays and struggled to keep hold of them. However, it advised appellant that in order to establish that the injury occurred as alleged; *i.e.*, that Ms. Vargas charged at her and violently pulled and shoved the trays, causing appellant to fall backwards into a gurney, she was required to submit corroborative evidence, such as signed witness statements, to support that the incident occurred as alleged.

The Office further stated that there was insufficient medical evidence to establish that appellant sustained a medical condition in connection with the alleged work incident. It asked her to submit a comprehensive medical report from her treating physician describing her symptoms and the medical reasons for her condition and an opinion as to whether her claimed condition was causally related to her federal employment and a diagnosis of her claimed condition. The Office stated that appellant had 30 days to submit the requested information.

In a March 20, 2009 report, Dr. Nielsen stated:

> "[Appellant] reports that she was assaulted while on duty Saturday, February 21, 2009. This incident caused an aggravation of prior work-related injuries. By my request she is to be off work until results are obtained from diagnostic tests ordered by Dr. Kevin Koffel, (Board-certified in internal medicine) on Tuesday, March 17, 2009. [Appellant] will be totally unable to perform any work duties at this time. She is complaining of physical as well as emotional issues at this time."

In a March 27, 2009 investigative report, the employing establishment concluded on the basis of its internal investigation that Ms. Vargas had never touched appellant and that appellant had never fallen back into a gurney on February 21, 2009, as she had alleged. It stated that it had interviewed appellant, Ms. Vargas and Ms. Hufford in addition to several other coworkers on March 5, 2009. The report indicated that none of these other employees had substantiated appellant's account of the February 21, 2009 incident. In a March 5, 2009 interview, Ms. Vargas stated that at no time did appellant appear to have fallen or knocked into anything during the incident. The report indicated that several other employees overheard the argument between appellant and Ms. Vargas; other than Mr. Pinardo, however, there were no other employees who stated that they actually witnessed the incident. In his March 5, 2009 investigation interview,

Mr. Pinardo reiterated that he witnessed a verbal altercation between appellant and Ms. Vargas on February 21, 2009 but did not observe any violence. He again omitted to mention, however, that the two employees were both grabbing the trays at the same time and were engaged in a physical struggle to gain control of them.

In an April 9, 2009 report, Dr. Nielsen stated that he was treating appellant and that she needed to be excused from her work from February 21, 2009 until she was seen and treated by Dr. Koffel on April 24, 2009. He advised that this was due to the work injury she sustained on February 21, 2009.

By decision dated April 23, 2009, the Office denied appellant's claim, finding that she failed to establish fact of injury. It accepted that the February 21, 2009 incident had occurred. However, the Office found that appellant's assertion that Ms. Vargas pushed her and that she fell back into a gurney, striking a gurney, was contradicted by the evidence of record. It, therefore, found that the incident did not occur in the manner in which appellant alleged.

In an April 13, 2009 report, received by the Office on April 27, 2009, Dr. Nielsen diagnosed substantial aggravation of preexisting L5-S1 lumbar disc with sacroiliac strain, left ankle sprain and new contusion to thoracic spine posterior. He noted that he had read an account of the February 21, 2009 work incident and had concluded that his diagnosis was causally related to or aggravated by incident based on history, examination, radiographic studies, endoscopy and response to therapy. Dr. Nielsen indicated that appellant was totally disabled from work as of February 21, 2009 and continuing.

On May 8, 2009 appellant requested reconsideration.

In a report dated May 21, 2009, Dr. Nielsen reiterated the diagnoses of substantial aggravation of preexisting L5-S1 lumbar disc with sacroiliac strain, left ankle sprain and new contusion to thoracic spine posterior. He also reiterated his opinion that these diagnoses were causally related to the February 21, 2009 work incident based on appellant's description. Dr. Nielsen stated:

> "It is my medical opinion that the diagnosis was caused by the coworker allegedly assaulting [appellant] by wrestling, struggling, shoving, pushing, trays into her abdomen causing her to further hurt already hurt back onto the hard surface of Route 1 orange gurney. Allegedly, the coworker was violently pulling, pushing, shoving, wrestled and struggled the plastic trays away from [appellant] causing her to fall back onto the hard surface of the gurney[. I]t is my medical diagnosis the actions of the coworker caused these injuries."

Dr. Nielsen reiterated that appellant was on total disability as of February 21, 2009 and continuing.

By decision dated July 6, 2009, the Office denied appellant's application for review on the grounds that it neither raised substantive legal questions nor included new and relevant evidence sufficient to require the Office to review its prior decision.

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under the Federal Employees' Compensation Act[1] has the burden of establishing that the essential elements of his or her claim including the fact that the individual is an "employee of the United States" within the meaning of the Act, that the claim was timely filed within the applicable time limitation period of the Act, that an injury was sustained 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.[2] These are the essential elements of each and every compensation claim regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.[3]

To determine whether a federal employee has sustained a traumatic injury in the performance of duty, it must first be determined whether a "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.[4] Second, the employee must submit sufficient evidence, generally only in the form of medical evidence, to establish that the employment incident caused a personal injury.[5]

The Office cannot accept fact of injury if there are such inconsistencies in the evidence as to seriously question whether the specific event or incident occurred at the time, place and in the manner alleged or whether the alleged injury was in the performance of duty.[6] Nor can the Office find fact of injury if the evidence fails to establish that the employee sustained an "injury" within the meaning of the Act. 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, as alleged, but the employee's statements must be consistent with surrounding facts and circumstances and her subsequent course of action.[7] 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 case doubt on an employee's statements in determining whether he or she has established his or her claim.[8]

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[1] 5 U.S.C. § 8101 *et seq.*

[2] *Joe D. Cameron*, 41 ECAB 153 (1989); *Elaine Pendleton*, 40 ECAB 1143 (1989).

[3] *Victor J. Woodhams*, 41 ECAB 345 (1989).

[4] *John J. Carlone*, 41 ECAB 354 (1989).

[5] *Id.* For a definition of the term "injury," *see* 20 C.F.R. § 10.5(ee).

[6] *Pendleton*, *supra* note 2.

[7] *See Joseph H. Surgener*, 42 ECAB 541, 547 (1991); *see also Gene A. McCracken*, Docket No. 93-2227 (issued March 9, 1995).

[8] *See Constance G. Patterson*, 41 ECAB 206 (1989).

ANALYSIS -- ISSUE 1

In the present case, the Office found that the record contained conflicting and inconsistent evidence regarding whether the claimed event occurred at the time, place and in the manner alleged. It noted that although appellant stated on her CA-1 form and in her February 21, 2007 statement that she injured her back on February 21, 2009 when she engaged in a physical struggle with Ms. Vargas and fell backward into a gurney, her assertion that she fell and struck the gurney was not corroborated by either Ms. Vargas or Mr. Pinardo, the only witness to the altercation. The Office concluded that appellant did not establish that she sustained the injury in the performance of duty on February 21, 2009. The Board finds, however, that she presented sufficient evidence to establish that an injury occurred at the time, place and in the manner alleged.[9]

As stated above, the Board has held that 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] Appellant's statement that she experienced back pain on February 21, 2009 when she and Ms. Vargas grabbed the mail trays at the same time and engaged in a struggle to gain control of them was not contradicted by any documentary evidence in the record. Ms. Hufford, appellant's branch manager, stated in her February 21, 2009 routing slip and in her March 5, 2009 investigative interview that appellant walked into her office on February 21, 2009 and asserted that Ms. Vargas had snatched some trays out of her hand. In addition, appellant sought medical attention from Dr. Watkins on February 21, 2009, the date she engaged in a physical struggle with Ms. Vargas. Dr. Watkins stated that she examined appellant in the emergency room on February 21, 2009, at which time appellant complained of low back pain and displayed tenderness in her lower back and that appellant told her she injured her back that day as a result of an altercation with a coworker. Dr. Nielsen indicated in his February 23, March 20 and April 9, 2009 reports that appellant told him that she had been involved in a physical altercation with a coworker on February 21, 2009.

The Board finds that the totality of the evidence -- which includes appellant's February 21, 2009 statement, her March 5, 2009 investigative interview and her statements to Drs. Watkins and Nielsen, which indicated that she and Ms. Vargas simultaneously grabbed a stack of trays and were engaged in a physical struggle to wrest control of them -- is sufficient to establish that she sustained an injury in the performance of duty on February 21, 2009. The Office acknowledged that an incident occurred at the workplace between appellant and Ms. Vargas on February 21, 2009. However, it controverted the claim on the basis that appellant did not experience the incident in the manner she alleged. In her statements Ms. Vargas admitted that she yelled at appellant to put down the trays, that she and appellant grabbed the trays at the same time and that they engaged in a brief struggle to obtain control of them. She asserted, however, that appellant did not fall backwards and strike the gurney. The only person present during the confrontation, Mr. Pinardo, stated in both his February 21, 2009 statement and in his March 5, 2009 investigative interview that the two coworkers argued over the trays and that Ms. Vargas yelled at appellant but that he saw no violence occurring during the argument. This omission on the part of Mr. Pinardo to mention that both employees were grabbing the trays at

[9] *Id.*

[10] *Patterson, supra* note 8; *Thelma S. Buffington,* 34 ECAB 104 (1982).

the same time and that there was a physical struggle between appellant and Ms. Vargas over control of them, as even Ms. Vargas acknowledged, diminishes his credibility. The Board notes that the record contains no contemporaneous factual evidence contradicting appellant's account that a physical struggle occurred between appellant and Ms. Vargas on February 21, 2009.[11] In light of Mr. Pinardo's failure to mention the physical struggle which occurred during the February 21, 2009 incident -- and his consequential diminished credibility as a witness -- the Board is left with the conflicting assertions of Ms. Vargas and appellant as to whether she actually fell backward on the gurney and struck her back during the altercation. Under the circumstances of this case, therefore, the Board finds that appellant's allegations have not been refuted by sufficiently strong or persuasive evidence. The Board finds that the evidence of record is sufficient to establish that the incident in which appellant injured her back on February 21, 2009 occurred at the time, place and in the manner alleged.

The Board finds, however, that appellant failed to submit rationalized medical opinion evidence to sufficiently describe or explain the medical process by which the claimed February 21, 2009 work accident would have been competent to cause the claimed injuries. In this regard, the Board has held that the mere fact that a condition manifests itself during a period of employment does not raise an inference that there is a causal relationship between the two.[12]

An award of compensation may not be based on surmise, conjecture or speculation. Neither the fact that appellant's condition became apparent during a period of employment nor the belief that her condition was caused, precipitated or aggravated by her employment is sufficient to establish causal relationship.[13] Causal relationship must be established by rationalized medical opinion evidence and appellant failed to submit such evidence.

In her February 21, 2009 report, Dr. Watkins indicated that appellant was pushed into a gurney by a coworker, who pulled mail trays while she was holding them, causing an exacerbation of her preexisting back condition. She stated on examination that appellant had localized tenderness over her posterior thoracic and lumbar back muscles. Dr. Watkins stated that appellant was ambulatory and had no neurovascular or motor deficit in her lower extremities. Dr. Nielsen indicated in reports dated February 23, March 20 and April 9, 2009, that appellant was involved in some type of altercation at work on February 21, 2009 which caused an aggravation of prior work-related injuries. He placed her on total disability and referred her for diagnostic tests and treatment by Dr. Koffel due to the injuries she sustained from the February 21, 2009 work incident. Dr. Nielsen advised that appellant was complaining of physical as well as emotional issues. These reports, however, are not probative with regard to causal relationship because they do not contain rationalized medical opinion evidence.[14] In

[11] *See Thelma Rogers*, 42 ECAB 866 (1991).

[12] *See Joe T. Williams*, 44 ECAB 518, 521 (1993).

[13] *Id.*

[14] Furthermore, the September 20, 2007 Form CA-16 report from Dr. Parnes which supports causal relationship with a checkmark is insufficient to establish the claim, as the Board has held that without further explanation or rationale, a checked box is not sufficient to establish causation. *Debra S. King*, 44 ECAB 203 (1992); *Salvatore Dante Roscello*, 31 ECAB 247 (1979).

addition, Dr. Nielsen failed to present a diagnosis of appellant's condition causally related to the February 21, 2009 employment incident. Drs. Watkins and Nielsen did not provide an adequate medical rationale in support of their conclusions. They did not describe appellant's accident in any detail or how the accident would have been competent to cause the claimed back conditions. Moreover, the opinions of these physicians are of limited probative value for the further reason that they are generalized in nature and equivocal in that they only noted summarily that appellant's conditions were causally related to the February 21, 2009 incident in which she was struggling with Ms. Vargas to gain possession of a stack of mail trays. The weight of medical opinion is determined by the opportunity for and thoroughness of examination, the accuracy and completeness of physician's knowledge of the facts of the case, the medical history provided, the care of analysis manifested and the medical rationale expressed in support of stated conclusions.[15] Appellant failed to provide a rationalized, probative medical opinion relating her current condition to any factors of her employment. Therefore, she failed to provide a medical report from a physician that the work incident of February 21, 2009 caused or contributed to the claimed back injury.

The Office advised appellant of the evidence required to establish her claim; however, she failed to submit such evidence. Appellant, therefore, did not provide a medical opinion to sufficiently describe or explain the medical process through which the February 21, 2009 work incident would have caused the claimed injuries. Accordingly, as she has failed to submit any probative medical evidence establishing that she sustained an injury to her back in the performance of duty, the Office properly denied her claim for compensation.

LEGAL PRECEDENT -- ISSUE 2

Under 20 C.F.R. § 10.606(b), a claimant may obtain review of the merits of his or her claim by showing that the Office erroneously applied or interpreted a specific point of law; by advancing a relevant legal argument not previously considered by the Office; or by submitting relevant and pertinent evidence not previously considered by the Office.[16] Evidence that repeats or duplicates evidence already in the case record has no evidentiary value and does not constitute a basis for reopening a case.[17] When a claimant fails to meet one of the above standards, it is a matter of discretion on the part of the Office whether to reopen a case for further consideration under section 8128(a) of the Act.[18]

ANALYSIS -- ISSUE 2

The Board has duly reviewed the case record and finds that the refusal of the Office to reopen appellant's case for further consideration of the merits pursuant to 5 U.S.C. § 8128(a), constituted an abuse of discretion. In the present case, appellant requested reconsideration of the Office's July 6, 2009 decision finding that she did not sustain an injury in the performance of

[15] *See Anna C. Leanza*, 48 ECAB 115 (1996).

[16] 20 C.F.R. § 10.606(b)(1); *see generally* 5 U.S.C. § 8128(a).

[17] *Howard A. Williams*, 45 ECAB 853 (1994).

[18] *Joseph W. Baxter*, 36 ECAB 228, 231 (1994).

duty on February 21, 2009. In support of her request, she submitted the April 13 and May 21, 2009 reports from Dr. Nielsen, who diagnosed substantial aggravation of preexisting L5-S1 lumbar disc with sacroiliac strain, left ankle sprain and new contusion to thoracic spine posterior. Dr. Nielsen stated that his diagnoses were causally related to the February 21, 2009 work incident and that appellant was totally disabled from work as of February 21, 2009 and continuing. In his May 21, 2009 report, he opined that appellant's diagnosed conditions were caused by her coworker wrestling, struggling, shoving and pushing trays into her abdomen, causing her to fall back onto the gurney; he stated that this incident aggravated her preexisting back conditions. The Board finds that these reports, which indicated that appellant's February 21, 2009 work incident; *i.e.*, the altercation with Ms. Vargas, caused an aggravation of her accepted back conditions, constitutes relevant and pertinent evidence not previously considered by the Office in regard to the issue of whether appellant sustained an injury in the performance of duty on February 21, 2009. Therefore, in light of the Board's finding that appellant has established fact of injury in this case, the refusal of the Office to reopen her case for further consideration of the merits of her claim constituted an abuse of discretion.[19] The Board therefore reverses the July 6, 2009 decision and the case is remanded for a review of the merits of her claim and any other proceedings deemed necessary by the Office, to be followed by an appropriate decision.

CONCLUSION

The Board finds that the Office properly found that appellant failed to meet her burden of proof to establish that she sustained injuries to her back in the performance of duty. The Board finds that the Office abused its discretion by refusing to reopen her case for further consideration of the merits.

[19] *Carol Cherry (Donald Cherry)*, 47 ECAB 658 (1996).

ORDER

IT IS HEREBY ORDERED THAT the April 23, 2009 decision of the Office of Workers' Compensation Programs is affirmed, as modified. The July 6, 2009 decision of the Office of Workers Compensation Programs is set aside. The case is remanded for further proceedings by the Office consistent with this decision.

Issued: August 16, 2010
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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