United States Department of Labor
Employees' Compensation Appeals Board

E.C., Appellant	)	
and	)	**Docket No. 09-1439**
	)	**Issued: March 23, 2010**
U.S. POSTAL SERVICE, POST OFFICE, Flushing, NY, Employer	)	

Appearances:
Appellant, pro se
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 May 21, 2009 appellant filed a timely appeal from a January 2, 2009 merit decision of the Office of Workers' Compensation Programs denying modification of a July 9, 2008 merit decision. 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 June 18, 2007 causally related to her employment.

FACTUAL HISTORY

On June 26, 2007 appellant, a 58-year-old window clerk, filed a traumatic injury claim (Form CA-1) alleging that on June 18, 2007 she hit her head on a drawer and experienced pain. She alleged experiencing back pain after pushing and pulling post carts.

On June 26, 2007 Dr. Allan Frishberg, a chiropractor, reported findings on examination and diagnosed lumbar and cervical sprain as well as neck spasms. He reported that appellant was injured when she hit her neck on a drawer.

The employing establishment controverted appellant's claim. In a letter dated June 27, 2007, it reported that she requested two weeks of vacation time beginning June 25, 2007. Appellant's supervisor informed appellant that she only had three days of annual leave and denied her request. The employing establishment alleged that appellant called in sick on June 19, 2007 and did not return to work until August 25, 2007. The employing establishment also noted that she attributed her absence to an incident when she hit her head and neck on a drawer the night of June 18, 2007.

On June 28, 2007 Dr. Sheryl S. Elkowitz, a Board-certified diagnostic radiologist, reported that x-rays of appellant's cervical spine revealed no evidence of fracture. She opined that the x-rays were consistent with muscle spasm.

On August 28, 2007 Dr. Frishberg reported findings on examination and diagnosed C5 changes and L5 segment dysfunction, and cervical sprain and strain. He attributed appellant's condition to loading and unloading mail trucks.

In a September 5, 2007 report (Form CA-20), Dr. Frishberg diagnosed cervical joint dysfunction, lumbar segment joint dysfunction and lumbar cervical sprain. He attributed appellant's condition to loading and unloading mail trucks as well as "[striking] her head sharply against [an] open drawer."

By decision dated September 20, 2007, the Office denied the claim because the evidence of record did not demonstrate that the identified employment incident occurred at the time, place and in the manner alleged.

On October 9, 2007 Dr. Frishberg excused appellant from work until October 27, 2007.

On October 15, 2007 appellant requested review of the written record. In a narrative statement, she described her employment duties. Appellant reported that, on June 18, 2007, while making change for a customer, she dropped a coin. Having bent over to retrieve the coin from the floor and forgetting that her cash drawer was open, she stood up and in the process hit her head on the cash drawer. Appellant reported experiencing head pain for which she took a Motrin. Later that night, she pushed post carts full of mail to the back of the employing establishment and loaded their contents into a truck.

On October 23, 2007 Dr. Frishberg indicated that x-rays had been taken of appellant's spine and based upon these x-rays diagnosed degenerative changes at the C5-6, C6-7, C7-T1, T1-T8, L2-3, L3-4, L4-5 levels. He also diagnosed scoliosis and lordosis.

By decision dated February 14, 2008, the Office affirmed its September 20, 2007 decision because the evidence of record did not establish that the incident occurred as alleged and lacked medical evidence demonstrating that the alleged incident caused a medically-diagnosed condition.

On May 1, 2008 appellant requested reconsideration. Her request noted that she had accepted a new position with the employing establishment. Appellant reported that she was awarded a position of window clerk but that upon reporting for duty found that the new position was that of dispatcher, not window clerk. She noted that the dispatcher position requires loading and unloading parcels onto tubs and post carts. Appellant felt that the employing establishment took advantage of her. She submitted a reassignment offer and a notice from the employing establishment.

In an undated note, appellant reported that her cash drawer had been malfunctioning; the attached computer indicated that the drawer was open when it was actually closed. She reported that, on June 18, 2007, while giving a customer change, she dropped a coin and, after closing her cash drawer, bent over to pick up the coin. Having grasped the coin, as appellant was standing up, her cash drawer opened and she struck her head on the drawer. She experienced a headache for which she took Motrin. Additionally, appellant reported that later during her shift she pushed and pulled tubs and post carts full of mail to the back of the store and loaded their contents into a truck. Later that evening, she reported experiencing pain in her head and lower back.

Appellant also submitted an August 27, 2007 report of Dr. Barbara Joyce Freeman, a Board-certified orthopedic surgeon, who diagnosed cervical and lumbar strain and sprain. Dr. Freeman opined that appellant could perform regular work for eight hours per day with restrictions concerning lifting, pushing and pulling, and no twisting and bending.

By decision dated July 9, 2008, the Office denied modification of its February 14, 2008 decision. It found that appellant had not established she experienced an employment-related incident or that this incident produced an injury. Furthermore, the Office noted that the medical evidence of record did not demonstrate that an employment-related incident caused a medically-diagnosed injury.

On October 7, 2008 appellant requested reconsideration.

Appellant submitted an August 21, 2007 report of Dr. Freeman in which she diagnosed cervical and lumbar spine sprain and strain. Dr. Freeman opined that appellant had a mild orthopedic disability but was capable of performing light-duty work eight hours per day. She restricted appellant's activities to lifting, pushing or pulling no more than five pounds.

Appellant submitted a September 23, 2008 note in which Dr. Frishberg reported that x-rays of appellant's spine revealed subluxations "at all levels." He opined:

> "It is my [m]edical [o]pinion that lifting the heavy boxes and pushing the heavy post carts caused her to have muscle spasms, which pulled on her spine causing a [s]train, which pulled on the [v]ertebrae causing [s]ubluxations. Hitting her head caused [t]rauma to her [n]eck since they are connected in such a way similar to a whiplash syndrome. This added to her condition aggravating her [n]eck and [u]pper [t]horacic regions. All of this is back [*sic*] by your own [o]rthopedic [d]octor, Barbara Freeman and the [f]irst med[ical] [d]octor.
>
> "The injury sustained on June 18, 2007 is causally related to the accident as described to me by my patient."

By decision dated January 2, 2009, the Office denied modification of its July 9, 2008 decision. It found appellant had not established that she sustained an injury as alleged on June 18, 2007.

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 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]

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

ANALYSIS

Appellant attributed her condition to a June 18, 2007 incident when she struck her head on an allegedly malfunctioning cash drawer. She also attributed her condition to lifting, pushing and pulling tubs and post carts as well as loading mail into a truck on June 18, 2007. The record lacks any evidence contradicting the occurrence of these events. An employee's statement

---

[1] 5 U.S.C. §§ 8101-8193.

[2] *D.B.*, 58 ECAB 464 (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*, *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.*, *supra* note 3; *John D. Shreve*, 6 ECAB 718, 719 (1954).

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

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

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.[8] Moreover, 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.[9] As either of these uncontradicted statements is sufficient to establish appellant experienced an employment-related incident, the Board finds the June 18, 2007 employment incidents are established.

However, appellant has not submitted sufficient probative, competent rationalized medical opinion evidence demonstrating that the established employment incidents caused a medically-diagnosed injury and therefore has not satisfied her burden of proof. Causal relationship is a medical issue that can only be proven by submission of probative 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 accepted employment incident. 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 incident identified by the employee.[10]

Immediately following the alleged injury, appellant was seen by Dr. Frishberg, a chiropractor. 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 to exist.[11] A chiropractor is not considered a physician under the Act unless it is established that there is a spinal subluxation as demonstrated by x-ray to exist.[12] The first reports from Dr. Frishberg did not diagnose a subluxation, but rather diagnosed cervical and lumbar sprains. As such, his reports did not constitute competent medical evidence. Dr. Frishberg continued to treat appellant and in his reports dated August 28 and September 5, 2007 he diagnosed lumbar and cervical segment joint dysfunction, which might be diagnoses of subluxation, but he still did not indicate that these diagnoses were made based upon x-ray evidence. Therefore these were still not competent medical diagnoses.[13] On October 23, 2007 the Office received an undated report from Dr. Frishberg wherein he indicated

[8] *S.P.*, 59 ECAB ___ (Docket No. 07-1584, issued November 15, 2007); *Wanda F. Davenport*, 32 ECAB 552, 556 (1981).

[9] *See Shirley A. Temple*, 48 ECAB 404, 407 (1997); *Joseph H. Surgener*, 42 ECAB 541, 547 (1991).

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

[11] 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 to exist and subject to regulation by the Secretary. 5 U.S.C. § 8101(2); *see also Jack B. Wood*, 40 ECAB 95 (1988).

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

[13] The Office's 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. 20 C.F.R. § 10.5(bb).

that he had reviewed x-rays of appellant's spine, but he diagnosed degenerative changes of the cervical, thoracic and lumbar spine, rather than subluxation. In his report dated September 23, 2008, Dr. Frishberg diagnosed subluxations "at all levels," which he also stated were diagnosed based upon x-ray evidence. However, he did not include an x-ray report. Dr. Frishberg also did not indicate the date of the x-ray report upon which the new diagnosis was made and he did not explain why this diagnosis, if retroactive to the June 18, 2007 injury, had not been made in his earlier reports. As such, the reports from Dr. Frishberg are of limited probative value.

The other medical evidence of record consists of reports from Drs. Elkowitz and Freeman. Dr. Elkowitz diagnosed muscle spasms, based upon x-rays and Dr. Freeman diagnosed cervical and lumbar strain and sprain. These reports have little probative value however as they lack a rationalized opinion explaining how the established employment incidents caused the diagnosed medical conditions.[14] This deficiency reduces the probative value of these physician's opinions such that their reports are insufficient to satisfy appellant's burden of proof.

The Board has held the fact that a condition manifests itself or worsens during a period of employment[15] or that work activities produce symptoms revelatory of an underlying condition[16] does not raise an inference of causal relationship between a claimed condition and employment factors.

The Board finds that appellant has not established that she sustained an injury in the performance of duty on June 18, 2007.

CONCLUSION

The Board finds that appellant established that the employment incident occurred as alleged but the medical evidence of record is insufficient to demonstrate that the established incident caused a medically-diagnosed condition.

[14] *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).

[15] *E.A.*, 58 ECAB 677 (2007); *Albert C. Haygard*, 11 ECAB 393, 395 (1960).

[16] *D.E.*, 58 ECAB 448 (2007); *Fabian Nelson*, 12 ECAB 155, 157 (1960).

ORDER

IT IS HEREBY ORDERED THAT January 2, 2009 and July 9, 2008 decisions of the Office of Workers' Compensation Programs are modified in part and affirmed in part.

Issued: March 23, 2010
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