

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

J.H., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Caspar, WY, Employer**

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**Docket No. 10-233
Issued: October 6, 2010**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On November 3, 2009 appellant filed a timely appeal from a May 8, 2009 merit decision of the Office of Workers' Compensation Programs regarding the denial of her traumatic injury claim. 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 established that she sustained an injury in the performance of duty on December 24, 2005, as alleged.

FACTUAL HISTORY

On December 24, 2005 appellant, then a 32-year-old distribution clerk, filed a traumatic injury claim alleging that on that date she strained her back and left leg when she tripped on a floor mat while walking at the employing establishment. The employing establishment controverted the claim as a witness did not see her trip.

In a December 27, 2005 statement, Keith Derby, acting supervisor, stated that on December 24, 2005 he went to fix a jam in a #3 DBCS machine and appellant followed him.

After pulling the jam, he saw appellant about two feet in front of him walking on a cushioned mat when he heard a slight popping sound. Mr. Derby saw appellant turn to the machine and lean against it. He stated that he inquired whether she was okay. Appellant replied that he would have to go around her. She subsequently informed him that she wanted to go to the hospital to be checked out and that an accident report should be filed as she tripped on the mat. Mr. Derby stated that he did not witness her stumbling or tripping on the mat but only saw her turn toward the machine, rest and leaned on it for a short time.

In support of her claim, appellant submitted a January 13, 2006 magnetic resonance imaging (MRI) scan which noted findings of mild L3-4 disc narrowing and postoperative L4-4 anterior interbody fusion changes with no complication seen. Dr. Tuenis Zondag, a treating Board-certified preventive medicine physician, advised on January 2, 2006 that appellant had prior back surgery on August 12, 2005 due to persistent complaints of back pain and had returned to work in mid-December 2005. Appellant informed him that on December 24, 2005 she tripped on a mat at work and heard a snap in her back which caused an onset of low back and leg pain. She related that the injury resulted in her inability to stand and an emergency room visit. Dr. Zondag diagnosed a trip injury with acute onset of low back pain and musculoskeletal spasm. He advised that his findings were consistent with an acute sprain and chronic pain disorder. In January 12 and 13, 2006 progress notes, Dr. Zondag related that appellant hit her foot on a mat while she was walking on December 24, 2005 and heard a snap in her back after twisting. He stated that “objectively she is at a point where if she had a twist-slip injury that she should have recovered.”

In a December 31, 2005 progress note, Dr. Arliss N. Thompson, a Board-certified internist, noted that appellant was seen on December 24, 2005. He diagnosed acute low back pain. Dr. Thompson stated that appellant tripped, did not fall and was briefly unsteady on her feet which caused an acute onset of low back pain.

By letter dated January 13, 2006, the Office informed appellant that the evidence submitted was insufficient to establish her claim. It requested that she submit additional factual and medical evidence, including a rationalized report from an attending physician which described a history of injury, provided a firm diagnosis, findings, symptoms and test results, and opinion with medical reasons on why the diagnosed condition was caused or aggravated by the claimed injury.

On January 31, 2006 Dr. Zondag stated that January 2, 2006 was the first time he saw appellant following the alleged December 24, 2005 employment incident but that he had treated her for years. Appellant related to him that her supervisor had been following her when she tripped and felt a snap in her back. On physical examination, Dr. Zondag noted some voluntary spasm. Based on the physical examination, an MRI scan, appellant’s medical history and the history of the injury, Dr. Zondag diagnosed an acute sprain. He opined that, if appellant had not tripped, she “simply had low back pain, which was evident.”

By decision dated February 23, 2006, the Office denied appellant’s traumatic injury claim on the grounds that the evidence was insufficient to establish that the incident occurred as alleged.

Subsequent to the decision, the Office received additional progress notes from Dr. Zondag who listed diagnoses of chronic low back pain and degenerative disc disease status

post two-level fusion with failed back syndrome and included surgical reports dated June 9 and December 13, 2006.

On March 10, 2006 appellant requested an oral hearing before an Office hearing representative, which was held on February 5, 2007.

In a March 9, 2007 report, Dr. Thomas A. Kopitnik, a treating Board-certified neurological surgeon, advised that he had treated appellant since June 18, 2005. He noted that she twisted her back on December 24, 2005 when she tripped on a mat at work. Since the injury appellant experienced low back pain radiating into her hips. Dr. Kopitnik opined that appellant underwent a second back surgery was a result of the December 24, 2005 twisting injury and, if she had not been injured, "she most likely would have not required the second operation."

By decision dated April 12, 2007, the Office hearing representative affirmed the denial of appellant's claim. He found the evidence insufficient to establish that the December 24, 2005 incident occurred in the manner alleged. The hearing representative also found the medical evidence was insufficient to establish a back injury causally related to the claimed incident.

On August 8, 2007 appellant requested reconsideration and submitted medical and factual evidence in support of her request. She contended that Mr. Derby's statement was not inconsistent with her version of how the incident occurred. Appellant contended that his statement on the accident report supported her version of events.

In the December 25, 2005 accident report, Mr. Derby noted walking behind appellant on December 24, 2005. He stated that she "was not twisting or doing anything other than walking that would have caused the back pain." Mr. Derby related that he heard a slight pop, but was unable to identify whether it was from appellant's back or not. He noted that appellant "turned being in pain toward the DBCS [m]achine, leaned upon it a short while, then walked away." Mr. Derby inquired about her pain shortly after and she replied "I hate it when that happens."

By decision dated November 7, 2007, the Office denied modification.

On April 15, 2008 appellant requested reconsideration she stated that, while she was talking to Mr. Derby, she turned left slightly and "the rubber sole of my shoe, and the rubber mat together caused friction that kept my shoe in place." This caused her upper body to continue moving while her lower body stopped moving which caused her to trip or stumble on the mat wrenching her back. She reiterated that there was a popping sound and that Mr. Derby asked if she was okay.

In an October 16, 2007 progress notes, Dr. Zondag diagnosed chronic pain problems. On January 30, 2008 he noted that appellant was currently on social security disability and diagnosed failed back syndrome with persistent pain.

In a June 26, 2008 decision, the Office denied modification of its prior decisions.

On February 17, 2009 appellant requested reconsideration and submitted a November 24, 2008 report from Dr. Zondag who reviewed a history of appellant's back injuries which began in 2001. She underwent a two-level anterior discectomy and fusion at L4-S1 on August 12, 2005 and returned to light-duty work in November 2005. Appellant related that on December 24,

2005 she tripped while at work, which led to an acute onset of low back pain. Dr. Zondag diagnosed morbid obesity, chron's colitis, hypertension, depression, headache, chronic pain and physical deconditioning. He stated that appellant "remain[s] symptomatic with her back pain now."

By decision dated May 8, 2009, the Office denied modification of its prior decisions.¹

LEGAL PRECEDENT

An employee seeking benefits under the Federal Employees' Compensation Act² has the burden of establishing the essential elements of his 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 the 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 must first be determined whether a fact of injury has been established.⁵ 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 sufficient evidence, generally only in the form of medical evidence, to establish that the employment incident caused a personal injury.⁷

Causal relationship is a medical issue and the medical evidence generally required to establish causal relationship is rationalized medical opinion evidence.⁸ 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

¹ Appellant submitted new medical evidence with her appeal; however, the Board may not consider new evidence for the first time on appeal. See 20 C.F.R. § 501.2(c); *M.B.*, 60 ECAB ____ (Docket No. 09-176, issued September 23, 2009); *J.T.*, 59 ECAB ____ (Docket No. 07-1898, issued January 7, 2008); *G.G.*, 58 ECAB 389 (2007); *Donald R. Gervasi*, 57 ECAB 281 (2005); *Rosemary A. Kayes*, 54 ECAB 373 (2003)

² 5 U.S.C. §§ 8101-8193.

³ *C.S.*, 60 ECAB ____ (Docket No. 08-1585, issued March 3, 2009); *Elaine Pendleton*, 40 ECAB 1143 (1989).

⁴ *S.P.*, 59 ECAB ____ (Docket No. 07-1584, issued November 15, 2007); *Victor J. Woodhams*, 41 ECAB 345 (1989); *Joe D. Cameron*, 41 ECAB 153 (1989).

⁵ *B.F.*, 60 ECAB ____ (Docket No. 09-60, issued March 17, 2009); *John J. Carlone*, 41 ECAB 354 (1989)

⁶ *D.B.*, 58 ECAB 464 (2007); *Paul Foster*, 56 ECAB 208 (2004).

⁷ *C.B.*, 60 ECAB ____ (Docket No. 08-1583, issued December 9, 2008); *D.G.*, 59 ECAB ____ (Docket No. 08-1139, issued September 24, 2008); *Bonnie A. Contreras*, 57 ECAB 364 (2006).

⁸ *Y.J.*, 60 ECAB ____ (Docket No. 08-1167, issued October 7, 2008); *A.D.*, 58 ECAB 149 (2006); *Michael S. Mina*, 57 ECAB 379 (2006).

compensable employment factors.⁹ 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.¹⁰

ANALYSIS

To support fact of injury an employee must establish that an incident occurred at the time, place and in the manner alleged.¹¹ The Board finds that appellant failed to meet her burden of proof to establish that she sustained a traumatic incident on December 24, 2005.

Appellant asserted that she injured her back when she tripped on a mat while talking to Mr. Derby on December 24, 2005. She stated that she heard a popping sound and that Mr. Derby asked if she was okay. Appellant related that she started to cry, stopped moving and “turned toward and held onto the machine because of an excruciating, sharp, breath taking pain.” In a witness statement and accident report, Mr. Derby, an acting supervisor, stated that he was two feet behind appellant and did not observe her trip or stumble on the mat. He acknowledged hearing a popping sound, but did not know where it originated. Mr. Derby noted that he inspected the mat, which was cushioned and found no obstructions and indicated that it was in excellent condition. He related that he only saw her turn toward the #3 DBCS machine, rest and leaned on it for a short time. In a subsequent statement, appellant related that she had been talking to Mr. Derby when she turned left slightly and that while she was turning “the rubber sole of my shoe, and the rubber mat together caused friction that kept my shoe in place” causing her upper body to continue moving, her lower body to stop moving which caused her “to ‘trip’ or stumble on the mat wrenching my back.” She noted that she heard a popping sound and that Mr. Derby asked if she was okay. Appellant related that she started to cry, stopped moving and “turned toward and held onto the machine because of an excruciating, sharp, breath taking pain.”

Dr. Zondag, a Board-certified preventive medicine physician, stated that appellant heard a snap in her back after tripping on a mat which resulted in her low back and leg pain. Dr. Thompson diagnosed acute low back pain which was caused by appellant’s stumbling at work. Dr. Kopitnik, a treating Board-certified neurological surgeon, noted that appellant twisted her back on December 24, 2005 when she tripped on a mat at work resulting in low back pain radiating into her hips. The evidence from appellant’s manager, who appellant indicated was a witness, disputes that the claimed tripping incident occurred as alleged.

The Board notes that a claimant’s relation of an employment incident carries great probative value and will stand unless refuted by strong or persuasive evidence.¹² Appellant’s characterization of the circumstances surrounding her claimed injury is contradicted by Mr. Derby’s witness statement and accident report, neither of which supports her claim that she tripped or stumbled on December 24, 2005. According to Mr. Derby appellant indicated that she

⁹ *J.J.*, 60 ECAB ____ (Docket No. 09-27, issued February 10, 2009); *Sedi L. Graham*, 57 ECAB 494 (2006).

¹⁰ *I.J.*, 59 ECAB ____ (Docket No. 07-2362, issued March 11, 2008); *Victor J. Woodhams*, supra note 4.

¹¹ *Tracey P. Spillane*, 54 ECAB 608 (2003); *Betty J. Smith*, 54 ECAB 174 (2002).

¹² *S.P.*, supra note 4; *Constance G. Patterson*, 41 ECAB 206 (1989); *Thelma S. Buffington*, 34 ECAB 104 (1982).

was okay when he asked and that she continued to work the remainder of her shift until she informed him she was going to the emergency room. In addition, appellant initially stated that she tripped or stumbled on the mat, but later indicated that her injury occurred due to the friction between her shoe and the mat. As a result of this friction she alleged that her upper body continued to move while her lower body stopped moving. The Board finds that the evidence submitted contains such inconsistencies as to cast doubt on the validity of appellant's claim. Accordingly, the Board finds that appellant has not met her burden of proof in establishing that she experienced an employment-related incident at the time, place and in the manner alleged.¹³

CONCLUSION

The Board finds that appellant has not met her burden of proof to establish that she sustained a traumatic injury to her back in the performance of duty on December 24, 2005.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated May 8, 2009 is affirmed.

Issued: October 6, 2010
Washington, DC

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

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

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

¹³ As appellant did not establish an employment incident alleged to have caused her injury, it is not necessary to consider any medical evidence. *S.P.*, *supra* note 4; *Bonnie A. Contreras*, 57 ECAB 364 (2006).