

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

K.B., Appellant)	
)	
and)	Docket No. 10-19
)	Issued: September 9, 2010
U.S. POSTAL SERVICE, POST OFFICE,)	
Manchester, NH, 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
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On September 30, 2009 appellant filed a timely appeal of the May 5, 2009 merit decision of the Office of Workers' Compensation Programs finding that she did not sustain an injury while in the performance of duty. 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 has established that she sustained left shoulder and neck injuries on March 19, 2009, as alleged.

On appeal, appellant contends that the medical evidence of record is sufficient to establish that her claimed injuries were causally related to her federal employment.

FACTUAL HISTORY

On March 24, 2009 appellant, then a 44-year-old letter carrier/collector, filed a traumatic injury claim alleging that on March 19, 2009 at 5:00 p.m. she experienced a pinching sensation in her left shoulder while lifting tubs over her shoulder. Her pain worsened following the date of injury. Appellant did not stop work. She reported the injury to the employing establishment on

March 24, 2009. A March 23, 2009 report from Kerry O'Malley, a physician's assistant, reviewed the history that on March 19, 2009 appellant was lifting tubs of mail when she experienced sharp pain in her neck and left arm. She advised that appellant sustained cervical radiculopathy and that appellant could perform sedentary work with restrictions. Appellant accepted the employing establishment's March 2009 job offer for a modified letter carrier position.

In a March 26, 2009 letter, an employing establishment customer services manager controverted appellant's claim contending that during a conversation with a supervisor on March 23, 2009 she never stated that she sustained a work-related injury. Appellant also failed to request the proper paperwork to seek medical attention. The manager questioned whether the claimed injury was caused by her prior nonemployment-related broken collarbone injury. In a March 30, 2009 letter, an employing establishment human resource specialist also controverted appellant's claim contending that on March 19, 2009 she continued to work until 7:00 p.m. following the alleged injury. Appellant did not report the injury to anyone on that date. On March 20, 2009 she worked nine and one-half hours and on March 21, 2009 she worked eight hours of overtime. After being off work on March 22, 2009 appellant called in sick on March 23, 2009. The specialist stated that she did not mention sustaining an injury. On March 24, 2009 appellant reported the injury to the employing establishment. The specialist requested documentation establishing that she was not currently receiving medical treatment for her prior shoulder injury.

By letter dated April 3, 2009, the Office advised appellant that the evidence submitted was insufficient to establish her claim. It addressed the factual and medical evidence she needed to submit.

Reports dated March 31 through April 8, 2009 from Carolann Altieri, a physical therapist, addressed the treatment of appellant's cervicgia.

A March 25, 2009 authorization for examination and/or treatment (Form CA-16) from Ms. O'Malley reiterated the history related to her by appellant regarding the March 19, 2009 incident and her prior diagnosis of cervical radiculopathy. She opined that the diagnosed condition was causally related to the March 19, 2009 incident.

In an April 4, 2009 magnetic resonance imaging (MRI) scan report of appellant's cervical spine, Dr. Peter Van Der Meer, a Board-certified radiologist, found bilateral C5-6 foraminal stenosis, right more than the left. He also found probable aberrant right subclavian artery coursing between the spine in the esophagus, which was in anatomic variant associated with swallowing problems.

An April 10, 2009 report from Dr. Thomas J. Kleeman, an attending Board-certified orthopedic surgeon, reviewed the history that on March 19, 2009 appellant experienced a sharp pain in her neck and left arm while lifting tubs of mail weighing up to 70 pounds. He also reviewed the history of her medical treatment, social and family background and x-ray and MRI scan results. Dr. Kleeman reported essentially normal findings on physical and neurological examination, noting that appellant rigidly held her neck. He advised that she had left-sided symptoms with C5-6 herniation that seemed to be acutely more on the right side. Dr. Kleeman stated that appellant's numb fingers suggested a lower level than C5-6. He ordered nerve conduction studies. In an April 10, 2009 treatment note, Dr. Kleeman advised that nerve

conduction studies test results were normal. He noted appellant's complaint of pain radiating into her left shoulder for which he scheduled a C6 nerve block. In an April 10, 2009 prescription, Dr. Kleeman ordered physical therapy to treat her cervical herniated nucleus pulposus. In an April 10, 2009 New Hampshire Workers' Compensation medical form, he reiterated the history of the March 19, 2009 tub lifting incident and his diagnosis of cervical herniation. Dr. Kleeman advised that appellant was totally disabled for work and that she had not reached maximum medical improvement. It was undetermined whether appellant's injury caused any permanent impairment.

By decision dated May 5, 2009, the Office denied appellant's claim on the grounds that she did not establish that the claimed employment incident occurred at the time, place and in the manner alleged.

LEGAL PRECEDENT

An employee seeking benefits under the Federal Employees' Compensation Act¹ has the burden of establishing 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 filed within 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.² These are the essential elements of each and every compensation claim regardless of whether the claim is predicated on a traumatic injury of an occupational disease.³

To determine whether an employee sustained a traumatic injury in the performance of duty, the Office must determine whether fact of injury is established. An employee has the burden of demonstrating the occurrence of an injury at the time, place and in the manner alleged, by a preponderance of the reliable, probative and substantial evidence.⁴ The employee must also submit medical evidence to establish that the employment incident caused a personal injury.⁵ An employee may establish that the employment incident occurred as alleged, but fail to show that his or her disability and/or condition relates to the employment incident.⁶

In order to determine whether an employee actually sustained an injury in the performance of duty, the Office begins with an analysis of whether fact of injury has been established. Generally, fact of injury consists of two components which must be considered in conjunction with one another. The first component to be established is that the employee

¹ 5 U.S.C. §§ 8101-8193.

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

³ See *Irene St. John*, 50 ECAB 521 (1999); *Michael E. Smith*, 50 ECAB 313 (1999); *Elaine Pendleton*, *supra* note 2.

⁴ *Delphyne L. Glover*, 51 ECAB 146 (1999).

⁵ *Donna A. Lietz*, 57 ECAB 203 (2005); *Alvin V. Gadd*, 57 ECAB 172 (2005); *David Apgar*, 57 ECAB 137 (2005).

⁶ *Gary J. Watling*, 52 ECAB 278 (2001); *Shirley A. Temple*, 48 ECAB 404, 407 (1997).

actually experienced the employment incident which is alleged to have occurred.⁷ An injury does not have to be confirmed by eyewitnesses in order to establish 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.⁸ 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.⁹ 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 doubt on an employee's statements in determining whether a *prima facie* case has been established.¹⁰ However, an employee's statement regarding the occurrence of an employment incident is of great probative force and will stand unless refuted by strong or persuasive evidence.¹¹

The second component is whether the employment incident caused a personal injury and generally can be established only by medical evidence.¹² The evidence required to establish causal relationship is rationalized medical opinion evidence, based upon complete factual and medical background, showing a causal relationship between the claimed condition and the identified factors.¹³ The belief of the claimant that a condition was caused or aggravated by the employment is insufficient to establish a causal relationship.¹⁴

ANALYSIS

Appellant alleged that she sustained left shoulder and neck injuries in the performance of duty on March 19, 2009. The Board finds that she established that the employment incident occurred on March 19, 2009, as alleged.

Appellant consistently maintained that she sustained left shoulder and neck injuries on March 19, 2009 while lifting tubs of mail in the performance of duty as a letter carrier/collector. She received medical treatment contemporaneous to the March 19, 2009 incident and related a history of injury. On March 23, 2009 Ms. O'Malley, a physician's assistant, recorded that appellant experienced sharp pain in her neck and left arm while lifting tubs of mail on March 19, 2009. On March 30, 2009 she opined that appellant's cervical radiculopathy was caused by lifting tubs of mail on March 19, 2009. Dr. Kleeman's April 10, 2009 report and state

⁷ See *Louise F. Garnett*, 47 ECAB 639 (1996); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Fact of Injury*, Chapter 2.803(2)(a) (June 1995).

⁸ See *Betty J. Smith*, 54 ECAB 174 (2002).

⁹ *Id.*

¹⁰ *Linda S. Christian*, 46 ECAB 598 (1995).

¹¹ *Gregory J. Reser*, 57 ECAB 277 (2005).

¹² *John J. Carlone*, 41 ECAB 354 (1989); see 5 U.S.C. § 8101(5) (injury defined); 20 C.F.R. §§ 10.5(ee), 10.5(q) (traumatic injury and occupational disease defined).

¹³ *Lourdes Harris*, 45 ECAB 545 (1994); see *Walter D. Morehead*, 31 ECAB 188 (1979).

¹⁴ *Charles E. Evans*, 48 ECAB 692 (1997).

workers' compensation form stated that appellant experienced sharp neck and left arm pain while lifting tubs of mail on March 19, 2009. Appellant also provided notice to the employing establishment on March 24, 2009, which was contemporaneous to the injury.

Although the employing establishment contended that the March 19, 2009 incident did not occur at the time, place and in the manner alleged, the Board finds that the reports of Ms. O'Malley and Dr. Kleeman provide a consistent history of incident and that appellant received medical treatment for her left arm and neck contemporaneous to the March 19, 2009 incident. Accordingly, the Board finds that the evidence supports that the March 19, 2009 incident occurred as alleged.¹⁵

The Board, however, finds that appellant did not submit sufficient medical evidence to establish that she sustained a left shoulder or neck injury due to the accepted March 19, 2009 employment incident. As noted, Dr. Kleeman's April 10, 2009 report and state workers' compensation form described the March 19, 2009 employment incident. He also listed essentially normal findings on physical and neurological examination and diagnosed C5-6 herniation. In an April 10, 2009 prescription, Dr. Kleeman ordered physical therapy to treat the diagnosed cervical condition. However, he did not provide an opinion addressing the causal relationship between the diagnosed condition and the March 19, 2009 employment incident.¹⁶ The Board finds that Dr. Kleeman's reports and prescription are insufficient to establish appellant's claim.

Dr. Kleeman's April 10, 2009 treatment note provided normal nerve conduction studies. He scheduled C6 nerve block procedure to treat appellant's pain radiating into her left shoulder. Dr. Kleeman did not provide a firm diagnosis causally related to the accepted employment incident. The Board has held that a physician's mere diagnosis of pain does not constitute a basis for payment of compensation as pain is a symptom, not a medical condition.¹⁷ The Board finds, therefore, that Dr. Kleeman's treatment note is insufficient to establish appellant's claim.

The reports of Ms. O'Malley and Ms. Altieri, a physical therapist, are of no probative medical value, as neither a physician's assistant¹⁸ nor a physical therapist¹⁹ is considered to be a physician as defined under the Act.

Dr. Van Der Meer's diagnostic test results are insufficient to establish appellant's claim. He did not provide an opinion on the causal relationship between the March 19, 2009 employment incident and the diagnosed conditions.²⁰

¹⁵ *Louise F. Garnett*, 47 ECAB 639, 643-44 (1996); *Constance G. Patterson*, 41 ECAB 206 (1989); *Julie B. Hawkins*, 38 ECAB 393 (1987).

¹⁶ *A.D.*, 58 ECAB 149 (2006); *Jaja K. Asaramo*, 55 ECAB 200 (2004); *Michael E. Smith*, 50 ECAB 313 (1999).

¹⁷ *See C.F.*, 60 ECAB ____ (Docket No. 08-1102, issued October 10, 2008); *Robert Broome*, 55 ECAB 339 (2004).

¹⁸ 5 U.S.C. § 8101(2); *Roy L. Humphrey*, 57 ECAB 238, 242 (2005).

¹⁹ *A.C.*, 60 ECAB ____ (Docket No. 08-1453, issued November 18, 2008).

²⁰ *See cases cited supra* note 16.

The Board finds that there is insufficient rationalized medical evidence of record to establish that appellant sustained a left shoulder or neck injury causally related to the accepted March 19, 2009 employment incident. Appellant did not meet her burden of proof.

The Board further finds that appellant's contention on appeal, that she sustained employment-related left shoulder and neck injuries on March 19, 2009 has not been established. As stated, the medical evidence of record does not provide an opinion addressing whether her left shoulder and neck conditions were caused by the accepted March 19, 2009 employment incident.

CONCLUSION

The Board finds that appellant has failed to establish that she sustained left shoulder and neck injuries on March 19, 2009, as alleged.

ORDER

IT IS HEREBY ORDERED THAT the May 5, 2009 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 9, 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