

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

R.K., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Oakland, CA, Employer**

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**Docket No. 10-930
Issued: January 7, 2011**

Appearances:
Mark Coby, 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 February 9, 2010 appellant, through counsel, filed a timely appeal from the August 14, 2009 merit decision of the Office of Workers' Compensation Programs. 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 met her burden of proof to establish that she sustained a neck injury in the performance of duty as alleged.

FACTUAL HISTORY

On August 15, 2008 appellant, then a 41-year-old mail processing clerk, filed an occupational disease claim alleging that she sustained a neck injury due to her work duties. She indicated that she first became aware of her claimed condition on November 28, 2007 and that she first became aware of its relationship to her work on April 28, 2008. Appellant noted that she had been working in a limited-duty position due to her left shoulder and upper back injuries. On February 27, 2008 management reassigned her to go to another station at Willow Glenn to

watch computer monitors. Appellant stated that she had developed some neck problems due to her left shoulder injury, but noted that the new work assignment “aggravated my developing neck injury.” She stopped work on August 15, 2008.

In a September 3, 2008 letter, the Office requested that appellant submit additional factual and medical evidence in support of her claim.

In a September 8, 2008 statement, appellant provided further description of the job duties she performed after her reassignment on February 27, 2008. She stated, “I started to watch the computer monitors (which were connected to the delivery bar code sorter [DBCS] machines) on March 1, 2008 for eight hours for every night in a static position.” Appellant indicated that when the computer monitors showed that unplanned pieces of mail had come into the wrong stackers of DBCS machines, she wrote it down on a slip and gave it to the supervisor and the machine operators. She stated, “After I report this information, I continued to look at the computer monitors in a static position.” Appellant stated that she worked three days a week at the Willow Glenn worksite and two days a week at the San Jose worksite and watched computer monitors at both locations. She indicated that at Willow Glenn worksite she “looked at computer monitors for eight hours for every night” and that at San Jose worksite she “mostly watched computer monitors for eight hours.” Appellant stated that she worked this new assignment from March 1 to April 28, 2008.

Appellant submitted a June 20, 2008 report in which Dr. Alan Hsu, an attending Board-certified occupational medicine physician, stated that she had reported increased neck symptoms. Dr. Hsu discussed the medical treatment she received and stated, “However, despite all of these measures, the patient reported that her neck symptoms worsened further since she was given a new work assignment on March 1, 2008 [which] required her to continuously hold her head in static positions while looking at a computer monitor.” He noted that he had increased appellant’s work restrictions and described neck symptoms he observed while examining her on June 13, 2008. Dr. Hsu stated:

“It is my medical opinion that the patient’s current work-related cervical strain, although it was originally present before her new work assignment on March 1, 2008, was indeed worsened due to this new work assignment.... As new work factors were involved which caused an increase in her neck symptoms, it is my medical opinion that the patients current neck condition would actually be interpreted, under [the Federal Employees’ Compensation Act], as a new injury rather than a recurrence.”

In an August 26, 2008 letter, Ramon Martinez, manager of distribution operations, stated that appellant had reported that her new job aggravated her neck. He noted that the job did not violate her restrictions and would not have caused any further injury to her neck. Mr. Martinez asserted that appellant had led her doctor to believe that she was required to look at a computer monitor for eight hours without moving. He noted that was not true as she was only required to view a monitor intermittently as data popped up. The monitor was at eye level and did not require any type of hyperextension of her neck, shoulder or any part of her anatomy. Mr. Martinez noted that appellant was able to move at her leisure.

Appellant submitted additional reports, dated in September 2008, in which Dr. Hsu indicated that she sustained a neck injury due to her work duties beginning in March 2008.

In an October 3, 2008 decision, the Office denied appellant's claim that she sustained a neck injury in the performance of duty. Regarding the reason for the denial, it stated, "The evidence submitted is insufficient to establish that the event(s) occurred as alleged and you were advised of the deficiencies in your claim in a letter dated September 3, 2008, and provided the opportunity to provide the necessary evidence." The Office cited the Board precedent indicating that alleged employment incidents are not established when there are such inconsistencies in the evidence as to cast serious doubt upon the validity of the claim. Regarding the description of work duties that appellant provided in her September 8, 2008 statement, the Office stated:

"It is noted that you did not provide specifics as to how often ... you performed the activities described and for how long on each occasion (as requested in our September 3, 2008 development letter); other than to indicate that your job required you to sit in a static position.

"Your [a]gency has challenged your claim stating that you did not monitor the computer screen in a 'static' position as described by you and your physician.

"Indeed your physician states '... However, despite all of these measures, the patient reported that her neck symptoms worsened further since she was given a new work assignment on March 1, 2008 which required her to continuously hold her head in static positions while looking at a computer monitor.'

"The additional evidence did not establish that you sustained an injury as defined by the [Act] because the factual and medical evidence appear inconsistent."

Appellant submitted additional reports of Dr. Hsu, dated between October 2008 and March 2009. She requested a hearing before an Office hearing representative. At the March 30, 2009 hearing, appellant testified that she had to watch the computer screen for data on pieces of mail that had been recorded as going to the wrong stack. The data might pop-up quickly in order or there might be a gap of 10 to 16 minutes between the reported errors. Appellant indicated that the data errors were noted and she was supposed to write down the corresponding numbers and hand them to the appropriate person to put the pieces of mail in the right place. Each time she did this, she had a two to three-minute break from watching the computer. Appellant indicated that she performed this task all night on her shift. She had to watch the computer continuously because she did not want to miss an error message and she did not know whether there was a system to catch an error if it was not addressed the first time it popped up on screen.

In an August 14, 2009 decision, an Office hearing representative affirmed the Office's October 3, 2008 decision. She cited the Board precedent indicating that alleged employment incidents are not established when there are such inconsistencies in the evidence as to cast serious doubt upon the validity of the claim. The Office hearing representative indicated that appellant had asserted that "she had to sit continuously, holding her head in a static position, to view a computer monitor." She indicated that appellant's assertions were not supported as she periodically had to look away from the screen to write down information and had to get up to

deliver error reports to other individuals. The Office hearing representative stated, “I find that the employer’s description of the job is more credible, in that the claimant obviously was able to get up and move around, as well as move her neck during the course of her task. Thus, the evidence of record fails to establish a neck injury as alleged.”

LEGAL PRECEDENT

An employee who claims benefits under the Federal Employees’ Compensation Act¹ 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 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.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 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.⁶

To establish that an injury was sustained in the performance of duty in an occupational disease claim, a claimant must submit the following: (1) medical evidence establishing the presence or existence of the disease or condition for which compensation is claimed; (2) a factual statement identifying employment factors alleged to have caused or contributed to the presence or occurrence of the disease or condition; and (3) medical evidence establishing that the employment factors identified by the claimant were the proximate cause of the condition for which compensation is claimed or, stated differently, medical evidence establishing that the diagnosed condition is causally related to the employment factors identified by the claimant.⁷

¹ 5 U.S.C. §§ 8101-8193.

² *William Sircovitch*, 38 ECAB 756, 761 (1987); *John G. Schaberg*, 30 ECAB 389, 393 (1979).

³ *Charles B. Ward*, 38 ECAB 667, 670-71 (1987); *Joseph Albert Fournier, Jr.*, 35 ECAB 1175, 1179 (1984).

⁴ *Tia L. Love*, 40 ECAB 586, 590 (1989); *Merton J. Sills*, 39 ECAB 572, 575 (1988).

⁵ *Samuel J. Chiarella*, 38 ECAB 363, 366 (1987); *Henry W.B. Stanford*, 36 ECAB 160, 165 (1984).

⁶ *Robert A. Gregory*, 40 ECAB 478, 483 (1989); *Thelma S. Buffington*, 34 ECAB 104, 109 (1982).

⁷ *See Donna Faye Cardwell*, 41 ECAB 730, 741-42 (1990).

ANALYSIS

On August 15, 2008 appellant filed a claim alleging that she sustained a neck injury due to work duties she started performing in March 2008, including watching a computer screen for extended periods. The Office appears to have denied her claim on the grounds that she had not established the existence of employment factors as alleged. It noted that there were inconsistencies in appellant's account of her work duties in this new position and indicated that she had not established her allegation that she looked at a computer screen for eight hours a day with her head in a "static position." Because the Office denied appellant's claim on this factual basis, it did not conduct any appreciable evaluation of the sufficiency of the medical evidence.

On appeal, counsel argued that appellant consistently reported the nature of her job duties and therefore there were not such inconsistencies in the evidence as to cast serious doubt upon the validity of her claim. The Board agrees with this argument and finds that appellant has established the existence of employment factors in connection with her claim. For example, in a September 8, 2008 statement, appellant indicated that when the computer monitors showed that unplanned pieces of mail had come into the wrong stackers of DBCS machines, she wrote it down on a slip and gave it to the supervisor and the machine operators. At the March 30, 2009 hearing, she testified in a manner consistent with her earlier statement when she indicated that, when data errors were noted, she wrote down the corresponding numbers and handed them to the appropriate person in order to put the pieces of mail in the right place. Appellant stated that the data might pop-up quickly in order or there might be a gap of 10 to 16 minutes between the reported errors.⁸

As noted above, 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. There is no persuasive evidence in the present case refuting appellant's account of her work duties in March and April 2008. The evidence of record establishes that she had to look at a computer screen for extended periods during her eight-hour workday, punctuated by periodic occasions when she looked away from the screen to write down errors and then deliver them to coworkers. The Board finds that appellant has established the existence of work factors.

As the Office denied appellant's claim on a factual basis, it did not evaluate the medical evidence of record. Appellant submitted a number of reports in which Dr. Hsu, an attending Board-certified occupational medicine physician, suggested that she sustained a new condition due to her work duties in March and April 2008. The Board finds that the case must be remanded to the Office to consider whether the medical evidence shows that she sustained a medical condition due to the accepted work factors. After such development as it deems necessary, the Office shall issue an appropriate decision regarding appellant's claim that she sustained a work-related neck injury.

⁸ Appellant indicated that each time she wrote down and delivered an error message, she had a two to three minute break from watching the computer screen.

CONCLUSION

The Board finds that the case is not in posture for decision regarding whether she sustained a neck injury in the performance of duty as alleged. Appellant has established the existence of work factors and the case must be remanded to the Office for consideration of the medical evidence.

ORDER

IT IS HEREBY ORDERED THAT the August 14, 2009 decision of the Office of Workers' Compensation Programs is set aside. The case is remanded to the Office for further proceedings consistent with this decision of the Board.

Issued: January 7, 2011
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