United States Department of Labor
Employees' Compensation Appeals Board

W.F., Appellant	)	
and	)	**Docket No. 10-1218**
	)	**Issued: January 20, 2011**
U.S. POSTAL SERVICE, POST OFFICE, Lakeland, FL, Employer	)	

Appearances:
Alan 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 March 30, 2010 appellant, through her attorney, filed a timely appeal from a February 24, 2010 merit decision of the Office of Workers' Compensation Programs denying 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 sustained an injury on May 28, 2009 in the performance of duty.

FACTUAL HISTORY

On June 11, 2009 appellant, then a 46-year-old modified mail processing clerk, filed an occupational disease claim alleging that she sustained cervical pain due to factors of her federal employment. She related that she became aware of her condition on November 1, 2007 and realized that it was due to her employment injury on May 28, 2009. In an attached statement, appellant related that the Office forced her to return to employment. She resumed work on

May 28, 2009 but shortly thereafter began experiencing back pain after performing her work duties, including moving her head to review a job offer, casing mail, watching a coworker throw mail and sitting on a stool without back support.

On May 29, 2009 Dr. Eric Wan, Board-certified in emergency medicine, evaluated appellant in the emergency room for acute chronic neck and back pain.[1] He noted that she experienced daily chronic back pain subsequent to a 2002 employment injury and chronic neck pain beginning in 2007. Dr. Wan stated, "[Appellant] was working at the [employing establishment] tonight around midnight sorting mail and started having worsening of her pain." He diagnosed acute chronic back and neck pain and advised her to remain off work for three days.

On June 3, 2009 appellant received treatment at the emergency room for an exacerbation of pain. She requested a workers' compensation evaluation. The physician noted that appellant had been "sent back to work."[2]

In a statement dated June 12, 2009, the employing establishment controverted the claim. It noted that appellant had received compensation on the periodic rolls since January 5, 2005 under claim number xxxxxx530. On July 8, 2009 she filed the current claim after returning to work for a few hours on May 28, 2009. The employing establishment indicated that appellant cited November 1, 2007 as the time that she became aware of her condition but that medical reports revealed that on November 1, 2007 she experienced a nonemployment-related motor vehicle accident.

In a progress report dated June 16, 2009, Dr. Fernando L. Miranda, a Board-certified anesthesiologist, noted that appellant returned to work but experienced neck spasms two days later. He diagnosed cervicalgia, cervical strain, cervical muscle spasm and cervical facet syndrome.

By letter dated June 17, 2009, the Office requested that appellant clarify whether she was claiming a traumatic injury or an occupational disease and also requested additional factual and medical information.

On June 25, 2009 Dr. John C. Amann, a Board-certified neurosurgeon, related that appellant complained of neck pain with radiation into the shoulder and the back of her head but that diagnostic studies revealed only "some relatively mild disc changes." He found that she had reached maximum medical improvement "from the motor vehicle accident."

In a statement received July 13, 2009, appellant informed the Office that she was claiming a traumatic injury on May 28, 2009. She related that she experienced stiffness in her neck beginning in 1995 and that she had to limit overhead work or it would aggravate her

[1] X-rays of the cervical spine indicated that the physician should rule out muscle spasm. X-rays of the lumbar spine showed a transitional L5 vertebra with narrowing of the L5-S1 disc and left convex curvature.

[2] The name of the physician is not legible.

condition. Appellant asserted that on May 28, 2009 the employing establishment told her to perform her duties or it would call the police.

By decision dated August 4, 2009, the Office denied appellant's claim on the grounds that she had not established that the events occurred as alleged and as the medical evidence did not show a diagnosis causally related to the identified work events. On August 21, 2009 her attorney requested a telephone hearing.

In a report dated July 10, 2009, received by the Office on December 9, 2009, Dr. Amann related that the activities he wanted appellant to avoid such as twisting, bending and overhead work were precautions rather than restrictions. He noted that these activities might irritate soft tissues and muscles but "will not necessary cause harm or damage and therefore are not necessarily restricted." Dr. Amann stated:

> "The activity described on [May 28, 2009] does not necessarily fit my definition for accident or injury. I must admit this is a question that has both a legal and medical definition or opinion. Activities of that sort can certainly aggravate painful areas, but by my definition do not qualify as an injury or accident."

In a report dated July 28, 2009, Dr. Ada Lopez-Mendez, a Board-certified internist, discussed appellant's history of chronic low back pain due to a work injury and neck and shoulder pain after a November 1, 2007 motor vehicle accident. She diagnosed chronic pain syndrome and noted that she "does fulfill the criteria for fibromyalgia…."

At the telephonic hearing, held on December 8, 2009, the Office hearing representative noted that appellant continued to receive compensation for disability under another file number. Appellant related that she injured her neck in a nonemployment-related motor vehicle accident on November 1, 2007. She maintained that she reinjured her neck when she returned to work because she performed duties that violated her restrictions, such as moving her head. Appellant returned to work on May 28, 2009 for two hours but her neck became so painful she had to be taken to the emergency room that night. The Office hearing representative advised her that the emergency room diagnosis of pain was insufficient and held the record open for a rationalized medical report explaining how a diagnosed condition was causally related to the May 28, 2009 work injury. Appellant further confirmed that she was claiming a traumatic injury.

By decision dated February 24, 2010, the Office hearing representative affirmed the August 4, 2009 decision. She found that appellant had established that she performed the identified work duties on May 28, 2009 as alleged and thus had established the factual basis for her claim. The hearing representative determined, however, that she had not submitted medical evidence diagnosing a condition due to the identified work factors. She also noted that, upon return of the case record, the Office should convert the claim to a traumatic injury.

LEGAL PRECEDENT

An employee seeking benefits under the Federal Employees' Compensation Act[3] 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 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.[4] 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.[5]

To determine whether an employee sustained a traumatic injury in the performance of duty, the Office must determine whether "fact of injury" is established. First, 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.[6] Second, the employee must submit sufficient evidence, generally only in the form of medical evidence, to establish a causal relationship between the employment incident and the alleged disability and/or condition for which compensation is claimed.[7] 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.[8]

ANALYSIS

Appellant alleged that she sustained an injury to her neck due to performing work duties for two hours on May 28, 2009. She has established that the May 28, 2009 incident occurred at the time, place and in the manner alleged. The issue, consequently, is whether the medical evidence establishes that she sustained an injury as a result of this incident.

The Board finds that appellant has not established that performing her work duties for two hours on May 28, 2009 resulted in an injury. The determination of whether an employment incident caused an injury is generally established by medical evidence.[9]

On May 29, 2009 Dr. Wan treated appellant in the emergency room for a worsening of chronic neck pain. He noted that she was at work and experienced increased pain after sorting mail. Dr. Wan diagnosed acute chronic back and neck pain. He did not, however, specifically

[3] 5 U.S.C. §§ 8101-8193.

[4] *Alvin V. Gadd*, 57 ECAB 172 (2005); *Anthony P. Silva*, 55 ECAB 179 (2003).

[5] *See Elizabeth H. Kramm (Leonard O. Kramm)*, 57 ECAB 117 (2005); *Ellen L. Noble*, 55 ECAB 530 (2004).

[6] *David Apgar*, 57 ECAB 137 (2005); *Delphyne L. Glover*, 51 ECAB 146 (1999).

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

[8] *Id.*

[9] *Lois E. Culver (Clair L. Culver)*, 53 ECAB 412 (2002).

attribute the increased pain to appellant's work duties. Medical evidence that does not offer any opinion regarding the cause of an employee's condition is of diminished probative value on the issue of causal relationship.[10] Additionally, a finding of pain is a description of a symptom rather than a clear diagnosis of a medical condition and generally does not constitute a basis for the payment of compensation.[11]

Appellant was again evaluated at the emergency room on June 3, 2009 for an exacerbation of pain. The physician noted that she had been "sent back to work." As the emergency room report does not contain a firm diagnosis or causation finding, it is of little probative value.[12]

On June 16, 2009 Dr. Miranda diagnosed cervicalgia, cervical strain, cervical muscle spasms and cervical facet syndrome. He noted that appellant experienced neck spasms two days after returning to work. Dr. Miranda did not attribute any condition to her performing work duties on May 28, 2009 and thus his opinion is insufficient to meet her burden of proof.

In a report dated June 25, 2009, Dr. Amann discussed appellant's complaints of neck pain with radiation into the shoulders and head. He asserted that she had reached maximum medical improvement after a motor vehicle accident. Dr. Amann addressed appellant's condition subsequent to a motor vehicle accident rather than the May 28, 2009 work incident and thus his opinion is of little probative value.

On July 10, 2009 Dr. Amann related that he advised appellant to avoid twisting, bending and overhead work as precautions rather than restrictions. He asserted that the May 28, 2009 activity did not seem to him as either an injury or accident. Dr. Amann stated, "Activities of that sort can certainly aggravate painful areas, but by my definition do not qualify as an injury or accident." As he did not find that appellant sustained an injury on May 28, 2009, his opinion does not support her claim.

In a report dated July 28, 2009, Dr. Lopez-Mendez noted that appellant experienced low back pain due to a work injury and neck and shoulder pain after a motor vehicle accident. She diagnosed chronic pain syndrome. Dr. Lopez-Mendez did not address whether appellant sustained a work injury on May 28, 2009 and thus her opinion is of diminished probative value.[13]

An award of compensation may not be based on surmise, conjecture, speculation or upon appellant's own belief that there is a causal relationship between her claimed condition and her employment.[14] Appellant must submit a physician's report in which the physician reviews those factors of employment identified by her as causing her condition and, taking these factors into

[10] *S.E.*, 60 ECAB __ (Docket No. 08-2214, issued May 6, 2009); *Conard Hightower*, 54 ECAB 796 (2003).

[11] *Robert Broome*, 55 ECAB 339 (2004).

[12] *K.W.*, 59 ECAB 271 (2007); *A.D.*, 58 ECAB 149 (2006).

[13] *Id*.

[14] *D.E.*, 58 ECAB 448 (2007); *George H. Clark*, 56 ECAB 162 (2004); *Patricia J. Glenn*, 53 ECAB 159 (2001).

consideration as well as findings upon examination and the medical history, explain how employment factors caused or aggravated any diagnosed condition and present medical rationale in support of his or her opinion.[15] She failed to submit such evidence and therefore failed to discharge her burden of proof

CONCLUSION

The Board finds that appellant has not established that she sustained an injury on May 28, 2009 in the performance of duty.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated February 24, 2010 is affirmed.

Issued: January 20, 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

[15] *D.D.*, 57 ECAB 734 (2006); *Robert Broome, supra* note 11.