

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

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**P.G., Appellant**

**and**

**U.S. POSTAL SERVICE, GENERAL MAIL  
FACILITY, Newburgh, NY, Employer**

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**Docket No. 11-223  
Issued: September 6, 2011**

*Appearances:*  
*Thomas S. Harkins, Esq., for the appellant*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:  
ALEC J. KOROMILAS, Judge  
COLLEEN DUFFY KIKO, Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On November 4, 2010 appellant, through her attorney, filed a timely appeal from a May 25, 2010 merit decision of the Office of Workers' Compensation Programs (OWCP) denying her traumatic injury claim. Pursuant to the Federal Employees' Compensation Act (FECA)<sup>1</sup> and 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 August 23, 2007 in the performance of duty.

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<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

## **FACTUAL HISTORY**

On September 21, 2007 appellant, then a 44-year-old automation clerk, filed a traumatic injury claim alleging that on August 23, 2007 she sustained extreme pain in her left shoulder after lifting a tray of mail. She stopped work on August 23, 2007.

In a September 10, 2007 evaluation, Dr. Curtis D. Blumenthal, a chiropractor, discussed appellant's history of an employment injury on August 23, 2007. He diagnosed cervical and thoracic sprain and dysfunction.

In a statement dated October 5, 2007, appellant related that on August 23, 2007 she reached up to put a full mail tray onto the top shelf and "felt [and] heard a pop in my shoulder creating instant pain in my shoulder." She put ice on her shoulder and sought chiropractic treatment.

By decision dated October 29, 2007, OWCP denied appellant's traumatic injury claim after finding that she did not factually establish the occurrence of the alleged work incident. It further determined that Dr. Blumenthal's chiropractic report did not constitute medical evidence as he did not diagnose a subluxation by x-ray.

Appellant requested a telephone hearing. In a statement received on December 7, 2007, she related that for some time she had experienced left shoulder and back tightness but that it was not severe enough to see a physician. On August 23, 2007 appellant felt a pop in her shoulder with neck pain and stiffness. She began to complete an occupational disease claim form but the employing establishment and the union told her she had two separate claims. Appellant filed her traumatic injury claim instead of the occupational disease claim.

At the telephonic hearing, held on March 12, 2008, appellant related that prior to the August 23, 2007 incident she felt tightness under her shoulder blade and neck stiffness without pain. The hearing representative advised her that she should file an occupational disease claim if she believed her job duties over time contributed to an injury. He explained the limitations of chiropractors as physicians under FECA.

By decision dated April 24, 2008, the hearing representative affirmed the October 29, 2007 decision. He found that there was no medical evidence supporting her traumatic injury claim.

In a report dated June 13, 2008, Dr. Andrew D. Brown, a Board-certified physiatrist, discussed his treatment of appellant beginning April 11, 2008. He related that a magnetic resonance imaging (MRI) scan study showed disc bulging at C6-7. Dr. Brown reviewed the hearing representative's decision and noted that it indicated that she could not work from August 23, 2007 through January 10, 2008 after injuring her shoulder and neck on August 23, 2007 lifting a tray of mail. He disagreed with the hearing representative's finding that Dr. Blumenfeld's opinion was not competent medical evidence as "the fact that an x-ray of the

lumbar spine was not obtained does not in any way affect the diagnosis of her cervical spine.” Dr. Brown stated:

“When I examined [appellant], there was distinctly cervical pathology, and [her] presentation was consistent with nerve involvement. The disc herniation noted on MRI [scan] is consistent with the trauma described, and does result in nerve involvement.

“In summary, it is my medical opinion, that the event of August 23, 2007 as it has been described should be considered the competent cause for the claimant’s subjective complaints, objective findings, and functional limitations referable to her cervical spine as documented above. The claimant has been cleared to return to work on a limited capacity (three days per week).”

In a report dated December 12, 2008, Dr. Brown related that, prior to experiencing left shoulder and neck pain in August 2007; she felt stiffness in the neck and left shoulder. He provided a detailed description of her work duties and noted that an MRI scan study showed a bulging disc and that an examination of the left shoulder showed loss of motion, weakness and signs of impingement.<sup>2</sup> Dr. Brown opined:

“It is my medical opinion, that the repetitive motions that [appellant] describes at work, are the competent producing course for her cervical and left shoulder pain, dysfunction and pathology. As noted above, [she] has significant repetitive motions with the upper extremities. [Appellant] also describes positions that cause more force on the shoulder and neck including overhead activities, and lifting with her arms fully extended. This places stress on the shoulder girdle muscles, and, the cervical spine as most of the shoulder girdle muscles are connected to the cervical spine. Over time this results in breakdown of the soft tissue, resulting in inflammatory changes. As the soft tissue breaks down, and the muscles become weaker, her body’s ability to protect itself becomes less, resulting in further breakdown.”

Dr. Brown noted that appellant had a history of a C1 fracture in a motor vehicle accident but that an MRI scan study obtained at that time did not reveal disc bulging and that she worked over seven years after the accident without symptoms. He attributed her cervical and left shoulder conditions to her work duties.

On December 30, 2008 appellant requested reconsideration.<sup>3</sup>

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<sup>2</sup> An MRI scan study of the cervical spine, obtained on April 17, 2008, showed disc bulging at C6-7 causing a ventral thecal sac deformity. An electromyogram, obtained on June 26, 2008, showed mild bilateral carpal tunnel syndrome.

<sup>3</sup> On March 2, 2009 appellant filed a recurrence of disability claim on August 3, 2008 due to her September 23, 2007 employment injury.

In a progress report dated May 9, 2008, Dr. Adam C. Carter, a Board-certified physiatrist, diagnosed cervical pain syndrome and degenerative disc disease. He found that she was disabled from employment.

By decision dated March 12, 2009, OWCP modified its prior decision to reflect that appellant had established the occurrence of the employment incident. It found that the medical evidence was insufficient to establish that she sustained a diagnosed condition due to the August 23, 2007 work incident.

On April 16, 2009 appellant requested reconsideration. By decision dated June 30, 2009, OWCP denied her request after finding that she had not submitted any evidence or raised any argument warranting reopening her case for further review of the merits under 5 U.S.C. § 8128.

On February 25, 2010 appellant, through her attorney, requested reconsideration. He argues that the factual and medical evidence established that she sustained an injury in the performance of duty. Counsel submitted a February 10, 2010 report from Dr. Brown in support of the reconsideration request.

On February 10, 2010 Dr. Brown discussed appellant's history of neck and left shoulder pain beginning around August 2007, with a prior history of stiffness and loss of cervical range of motion. He provided a detailed description of her work duties, his history of treatment and the findings on physical examinations. Dr. Brown diagnosed cervical pain syndrome with a bulging disc and left shoulder strain/impingement syndrome with possible internal derangement. He concluded that appellant's "cervical pain, pathology, dysfunction and diagnoses described above [are] causally related to the work responsibilities that I described in the beginning of this report. I do believe that [her] left shoulder pathology is consequential[ly] causally related."

By decision dated May 25, 2010, OWCP denied modification of its March 12, 2009 decision. It determined that Dr. Brown did not specifically find any condition resulting from the August 23, 2007 work incident or provide any rationale for his opinion. OWCP advised appellant that she could file an occupational disease claim if she believed that work factors over time caused her condition.

### **LEGAL PRECEDENT**

An employee seeking benefits under FECA<sup>4</sup> 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 FECA; 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

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<sup>4</sup> 5 U.S.C. § 8101 *et seq.*

employment injury.<sup>5</sup> 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.<sup>6</sup>

To determine whether an employee sustained a traumatic injury in the performance of duty, OWCP 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.<sup>7</sup> 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.<sup>8</sup> 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.<sup>9</sup>

Proceedings under FECA are not adversarial in nature and OWCP is not a disinterested arbiter. While the claimant has the burden to establish entitlement to compensation, OWCP shares responsibility to see that justice is done.<sup>10</sup> The nonadversarial policy of proceedings under FECA is reflected in OWCP’s regulations at section 10.121.<sup>11</sup>

### ANALYSIS

Appellant alleged that she experienced pain in her left shoulder and neck on August 27, 2007 after lifting a full tray of mail. OWCP accepted that the August 27, 2007 incident occurred at the time, place and in the manner alleged. The issue, consequently, is whether the medical evidence establishes that appellant sustained an injury as a result of this incident.

Proceedings under FECA are not adversarial in nature, nor is OWCP a disinterested arbiter. While the claimant has the burden to establish entitlement to compensation, OWCP shares responsibility in the development of the evidence to see that justice is done.<sup>12</sup> In his June 13, 2008 report, Dr. Brown provided a clear opinion that appellant’s disc herniation at C6-7 was causally related to the August 23, 2007 work incident. He based his diagnosis on an MRI scan study of the cervical findings. Dr. Brown evidenced a thorough knowledge of appellant’s work duties before finding that lifting a tray of mail was a “competent cause” for the subjective complaints and objective findings. His opinion is supportive, unequivocal, bolstered by objective findings and based on a firm diagnosis and an accurate work history. Dr. Brown’s

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<sup>5</sup> *Alvin V. Gadd*, 57 ECAB 172 (2005); *Anthony P. Silva*, 55 ECAB 179 (2003).

<sup>6</sup> See *Elizabeth H. Kramm (Leonard O. Kramm)*, 57 ECAB 117 (2005); *Ellen L. Noble*, 55 ECAB 530 (2004).

<sup>7</sup> *David Apgar*, 57 ECAB 137 (2005); *Delphyne L. Glover*, 51 ECAB 146 (1999).

<sup>8</sup> *Gary J. Watling*, 52 ECAB 278 (2001); *Shirley A. Temple*, 48 ECAB 404, 407 (1997).

<sup>9</sup> *Id.*

<sup>10</sup> *Jimmy A. Hammons*, 51 ECAB 219 (1999).

<sup>11</sup> 20 C.F.R. § 10.121.

<sup>12</sup> *A.A.*, 59 ECAB 726 (2008); *Phillip L. Barnes*, 55 ECAB 426 (2004).

opinion lacks only an explanation of why the lifting incident resulted in the disc herniation. Consequently, while the medical evidence from Dr. Brown is insufficiently rationalized to meet appellant's burden of proof, it is sufficient to require further development by OWCP.<sup>13</sup> Accordingly, the Board will remand the case to the OWCP. On remand, OWCP should further develop the medical record to determine whether appellant sustained an injury causally related to the August 23, 2007 work incident. Following this and such further development as OWCP deems necessary, it shall issue a *de novo* decision.<sup>14</sup>

### **CONCLUSION**

The Board finds that the case is not in posture for decision.

### **ORDER**

**IT IS HEREBY ORDERED THAT** the May 25, 2010 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: September 6, 2011  
Washington, DC

Alec J. Koromilas, Judge  
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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

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<sup>13</sup> *Id.*

<sup>14</sup> An occupational disease or illness is a condition produced by the work environment over a period longer than a single workday or shift. 20 C.F.R. § 10.5(q); *Ellen L. Noble, supra* note 6. Appellant is also claiming an occupational disease claim that occurred over a period of time. She submitted medical reports from Dr. Brown dated December 12, 2008 and February 10, 2010 supporting that she sustained cervical and left shoulder conditions due to repetitive work duties. It is well established that a claim for compensation need not be filed on any particular form. A claim may be made by filing any paper containing words which reasonably may be construed or accepted as a claim. *Barbara A. Weber*, 47 ECAB 163 (1995). Upon return of the case record, OWCP should proceed to adjudicate her occupational disease claim.