

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

T.L., Appellant

and

**DEPARTMENT OF THE DEFENSE, DEFENSE
AGENCIES, Fort Eustis, VA, Employer**

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**Docket No. 11-1979
Issued: April 11, 2012**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

RICHARD J. DASCHBACH, Chief Judge
ALEC J. KOROMILAS, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On August 24, 2011 appellant filed a timely appeal from an August 3, 2011 merit decision of the Office of Workers' Compensation Programs (OWCP), which denied her traumatic injury claim. Pursuant to the Federal Employees' Compensation Act¹ (FECA) 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 in the performance of duty on May 9, 2011.

FACTUAL HISTORY

On May 9, 2011 appellant, then a 56-year-old military pay technician, filed a traumatic injury claim alleging that she experienced pain on the left side of her body when she opened the

¹ 5 U.S.C. § 8101 *et seq.*

service window of the finance office and the metal roll-up service window fell off the wall and struck the left side of her body. She submitted various witness statements.

In a May 11, 2011 radiology report, Dr. Yizhi Liang, a Board-certified diagnostic radiologist, noted appellant's complaints of upper back pain. The examination revealed small osteophytes on the thoracic spine vertebral bodies and no evidence of fracture, dislocation or subluxation. Vertebral body alignment was within normal limits and vertebral body heights were well maintained with no evidence of compression deformity. Dr. Liang diagnosed degenerative changes.

In a May 11, 2011 report, Dr. Tammy Beavers, a Board-certified family practitioner, noted appellant's complaints of pain in her upper back and flank area that started two days ago when a metal window shutter fell and hit her on the left side at work. Appellant related that she was seen in urgent care and was diagnosed with musculoskeletal pain. Upon examination, Dr. Beavers noted no bruising in appellant's upper thoracic area, but significant pain over T3-6 ribs on the left side. She diagnosed upper back pain and recommended appellant not work until May 19, 2011.

In a May 18, 2011 report, Dr. Beavers stated that appellant's back symptoms had improved from the last visit and noted that chest x-rays were negative. The examination revealed some swelling and tenderness over appellant's left upper back area, but no obvious deformity or crepitus was found. Dr. Beavers diagnosed upper back pain.

In a May 25, 2011 report, Dr. Beavers noted appellant's complaints of upper back pain and some left lower back pain. She observed some swelling and tenderness over appellant's left upper back area and tenderness over her scapula. Examination of appellant's lower back revealed lumbar left paraspinal muscles pain upon palpation and no obvious deformity or crepitus. Dr. Beavers diagnosed upper back pain.

In a May 25, 2011 radiology report, Dr. Jon Zachary Elliott, a Board-certified diagnostic radiologist, noted appellant's complaints of upper back pain. He observed mild degenerative changes of the left acromioclavicular joint but no acute fracture or dislocation.

In a June 1, 2011 report, Dr. Beavers examined appellant for complaints of upper back pain. Appellant related that the pain started four weeks ago when a heavy object fell on her at work. Dr. Beavers noted that this was an acute episode and that appellant did not have a prior history of back pain. Examination revealed some swelling and tenderness over the left upper back area and no obvious deformity or crepitus. Dr. Beavers noted significant soft tissue tenderness along the medial and superior scapula, but x-rays of the scapula were negative. She excused appellant from work until June 17, 2011.

On June 9, 2011 OWCP advised appellant that the evidence submitted was insufficient to establish that she sustained any diagnosed medical condition as a result of the May 9, 2011 employment incident. It requested additional factual and medical evidence to support her claim.

In a June 16, 2011 report, Dr. Beavers examined appellant for upper back pain that was most prominent in the mid-thoracic spine and radiated down to the neck and shoulders. She stated that the pain started six weeks ago when a heavy object fell on appellant at work.

Dr. Beavers noted that examination of the upper back was unremarkable and diagnosed acute low back pain. She noted that palpation of appellant's back demonstrated left-side spasm and pain to mild palpation muscles.

In a July 1, 2011 report, Dr. Beavers noted appellant's complaints of upper back pain and related that her symptoms had worsened since her last visit. Examination of appellant's back revealed left-side spasms upon palpation and pain to mild palpation. Dr. Beavers also observed that appellant's upper thoracic was swollen on the left side and tender, but found no bruising.

In a July 7, 2011 letter to OWCP, Dr. Beavers provided an accurate history of injury that on May 9, 2011 appellant was injured at work when an open metal window shutter fell on her left upper back and posterior shoulder. Appellant received medical treatment from the employing establishment and was diagnosed with a soft tissue injury. During her initial evaluation, Dr. Beavers noted that she observed significant tenderness over appellant's left upper back and ribs. X-rays of appellant's ribs and thoracic spine revealed mild arthritis but no acute injury. Dr. Beavers believed that appellant had a significant soft tissue injury. During her follow-up examinations, she observed that appellant was still significantly tender and had some soft tissue swelling. Appellant underwent physical therapy treatments and stated that they helped her a lot. Dr. Beavers opined that appellant's left upper back soft tissue injury was directly caused by the heavy metal shutter which fell on her back on the morning of May 11, 2011.

In a July 8, 2011 report, Dr. Beavers noted appellant's complaints of muscle, ligament and fascia disorders. Appellant completed physical therapy but still had difficulty turning her head to the left and extending her neck due to muscle spasms to the left trapezius. Dr. Beavers noted some soft tissue swelling as well. Upon examination, she noticed that appellant was very tender over her left trapezius and tolerated very little pressure due to pain. Dr. Beavers observed soft tissue swelling at the top of the shoulder and decreased rotation to the left due to pain and spasm. No midline deformity or tenderness was present. Dr. Beavers diagnosed soft tissue disorder and provided two trigger point injections.

In a July 14, 2011 report, Dr. Beavers stated that appellant was evaluated for unspecified soft tissue disorders and noted that her symptoms had improved since the last visit. She observed less swelling to the lateral posterior left shoulder but noted considerable pain and swelling medially. Examination revealed swelling and pain along the spinal column on the left upper paraspinal muscles and less swelling where the last trigger point injection was provided. Dr. Beavers diagnosed unspecified soft tissue disorder and administered another injection.

In a July 14, 2011 return to work certificate, Dr. Beavers stated that appellant was under her care from May 11 to July 14, 2011 and authorized appellant to return to work on July 18, 2011. She diagnosed an upper back soft tissue injury and restricted appellant to working 4 hours a day 3 days a week with no stooping, bending or crawling, standing more than 30 minutes without being able to sit down and lifting more than 5 pounds,.

Appellant submitted various physical therapy progress notes dated from June 6 to July 11, 2011. The physical therapist noted appellant's back soreness and diagnosed back sprain.

OWCP referred the case to its medical adviser. In a July 15, 2011 report, a district medical adviser stated that he reviewed the information provided and found that no definitive diagnosis was provided. He related that appellant was apparently hit by something heavy and complained of upper back pain since then. The medical adviser noted that one provider found spasms and swelling but pointed out that these findings were not present during the initial medical visit. It was also noted that no bruising was present to suggest a more serious soft tissue injury. The medical adviser stated that appellant apparently had x-rays but the reports were not available for review. It was advised that her case be referred to a second-opinion examiner to determine if any objective findings were present. If nothing was found, the medical adviser suggested that the claim not be accepted based solely on pain because that was not considered a definitive diagnosis.

In a July 20, 2011 report, Dr. Beavers stated that appellant had returned to restricted duty and noted that her soft tissue disorder had worsened since her last visit. The examination revealed decreased range of motion with extension and rotation and tenderness along the left paraspinal muscles and the top edge of the trapezius. Dr. Beavers also observed persistent swelling along the top edge of appellant's trapezius. She diagnosed soft tissue disorders.

In a decision dated August 3, 2011, OWCP denied appellant's claim finding insufficient medical evidence to establish that she sustained a diagnosed medical condition as a result of the May 9, 2011 work event.

LEGAL PRECEDENT

An employee seeking benefits under FECA has the burden of proof to establish the essential elements of her claim by the weight of the reliable, probative and substantial evidence² including that she sustained an injury in the performance of duty and that any specific condition or disability for work for which she claims compensation is causally related to that employment injury.³

To determine whether a federal employee has sustained a traumatic injury in the performance of duty, it first must be determined whether "fact of injury" has been established.⁴ There are two components involved in establishing the fact of injury. First, the employee must submit sufficient evidence to establish that she actually experienced the employment incident at the time, place and in the manner alleged.⁵ Second, the employee must submit evidence, generally only in the form of probative medical evidence, to establish that the employment incident caused a personal injury.⁶ An employee may establish that the employment incident

² *J.P.*, 59 ECAB 178 (2007); *Joseph M. Whelan*, 20 ECAB 55, 58 (1968).

³ *M.M.*, Docket No. 08-1510 (issued November 25, 2010); *G.T.*, 59 ECAB 447 (2008); *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

⁴ *S.P.*, 59 ECAB 184 (2007); *Alvin V. Gadd*, 57 ECAB 172 (2005).

⁵ *Bonnie A. Contreras*, 57 ECAB 364 (2006); *Edward C. Lawrence*, 19 ECAB 442 (1968).

⁶ *David Apgar*, 57 ECAB 137 (2005); *John J. Carlone*, 41 ECAB 354 (1989).

occurred as alleged but fail to show that her disability or condition relates to the employment incident.⁷

Whether an employee sustained an injury in the performance of duty requires the submission of rationalized medical opinion evidence providing a diagnosis or opinion as to causal relationship.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 specified employment factors or incident.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 However, it is also well established that proceedings under FECA are not adversarial in nature and while the claimant has the burden of establishing entitlement to compensation, OWCP shares responsibility in the development of the evidence to see that justice is done.¹¹

ANALYSIS

OWCP accepted that on May 9, 2011 appellant experienced pain on the left side of her body when the service window of the finance office struck the left side of her body but found that the medical evidence failed to establish that she sustained any condition as a result of the accepted incident, based on the July 15, 2011 report of the district medical adviser. The Board finds, however, that the district medical adviser's report is insufficient to form the basis of OWCP's August 3, 2011 decision.

In support of her claim, appellant submitted various medical reports by Dr. Beavers. In a July 7, 2011 report, she provided an accurate history of injury that on May 9, 2011 a metal window shutter fell and hit her on the left side at work. Dr. Beaver's initial evaluations revealed some swelling and tenderness over appellant's left upper back area and lumbar left paraspinal muscle pain upon palpation. During her follow-up examinations, she observed that appellant was still significantly tender and had some soft tissue swelling. Dr. Beavers stated that she believed appellant suffered a significant soft tissue injury. She concluded that appellant's left upper back soft tissue injury was directly caused by the heavy metal shutter which fell on her at work. Additional diagnostic reports by Drs. Liang and Elliott further revealed small osteophytes on the thoracic spine and mild degenerative changes.

⁷ *T.H.*, 59 ECAB 388 (2008); *see also Roma A. Mortenson-Kindschi*, 57 ECAB 418 (2006).

⁸ *See J.Z.*, 58 ECAB 529 (2007); *Paul E. Thams*, 56 ECAB 503 (2005).

⁹ *I.J.*, 59 ECAB 408 (2008); *Victor J. Woodhams*, 41 ECAB 345 (1989).

¹⁰ *D.S.*, Docket No. 09-860 (issued November 2, 2009); *B.B.*, 59 ECAB 234 (2007); *Victor J. Woodhams*, *supra* note 9 at 352.

¹¹ *Philip L. Barnes*, 55 ECAB 426 (2004); *Virginia Richard*, 53 ECAB 430 (2002).

OWCP referred appellant to the district medical adviser for an opinion on whether she sustained any diagnosed condition as a result of the May 9, 2011 employment incident. The medical adviser stated that she was hit by something heavy and that one provider found spasms and swelling. He noted that appellant underwent x-rays but the reports were not available for review. The medical adviser suggested that her case be referred to a second-opinion examiner to determine if any objective findings were present. If nothing was found, the medical adviser stated that the claim should not be accepted based solely on pain because that was not considered a definitive diagnosis.

The Board finds that this report was based upon an incomplete record as the medical adviser did not review appellant's x-ray reports when he provided his opinion. Proceedings under FECA are not adversarial in nature and OWCP is not a disinterested arbiter.¹² While the claimant has the responsibility to establish entitlement to compensation, OWCP shares responsibility in the development of the evidence.¹³ Accordingly, once OWCP undertakes to develop the medical evidence further, it has the responsibility to do so in the proper manner.¹⁴ As it undertook to develop the medical evidence by referring appellant to the district medical adviser, it had an obligation to secure a report based upon an accurate medical record and that addresses the relevant issue. Therefore, the case shall be remanded to OWCP for further development of the medical evidence. After such further development as it deems necessary, OWCP should issue an appropriate decision.

CONCLUSION

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

¹² *Vanessa Young*, 55 ECAB 575 (2004).

¹³ *Richard E. Simpson*, 55 ECAB 490 (2004).

¹⁴ *Melvin James*, 55 ECAB 406 (2004).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated August 3, 2011 is set aside and the case remanded for further proceedings consistent with this decision of the Board.

Issued: April 11, 2012
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

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