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

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| **H.T., Appellant**<br><br>**and**<br><br>**DEPARTMENT OF DEFENSE, DEFENSE AGENCIES SOUTHWEST REGION, Fort Lee, VA, Employer** | ) | **Docket No. 12-40**<br>**Issued: April 25, 2012** |

*Appearances:*
*Janice L. Jackson, 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 October 12, 2011 appellant, through her attorney, filed a timely appeal from a September 7, 2011 merit decision of the Office of Workers' Compensation Programs (OWCP) denying her traumatic injury claim. Pursuant to the Federal Employees' Compensation Act[1] (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 met her burden of proof to establish that she sustained a neck injury in the performance of duty on December 6, 2010.

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[1] 5 U.S.C. § 8101 *et seq.*

## ***FACTUAL HISTORY***

On December 18, 2010 appellant, then a 44-year-old sales store clerk, filed a traumatic injury claim (Form CA-1) alleging that she sustained a neck injury on December 6, 2010 when she was standing at the register and turned her neck to see if there was a cueing line. She reported that she informed her supervisor that she could not move her neck. Lisa Dunn, a witness to the incident, stated that on December 6, 2010 she saw appellant turn and hurt her neck.

By letter dated January 24, 2011, OWCP informed appellant that the evidence of record was insufficient to support her claim. Appellant was advised of the medical and factual evidence needed and was directed to submit it within 30 days.

In a January 12, 2011 report, Allison Campion, a physical therapist (PT), reported that on December 6, 2010 appellant turned her head to the right and experienced pain in her neck. An x-ray of the neck was interpreted as within normal limits. Ms. Campion noted that appellant had decreased posture, pain, cervical AROM, muscular tightness and joint stiffness. She diagnosed neck pain and recommended physical therapy. On February 3, 2011 appellant was released to work with no restrictions.

By decision dated February 25, 2011, OWCP denied appellant's claim for failing to establish fact of injury on the grounds that the medical evidence was insufficient to establish a diagnosed medical condition which could be connected to the December 6, 2010 employment incident. It noted that the medical evidence submitted contained a diagnosis of "pain" which is a symptom and not a diagnosed medical condition and that therapists are not considered physicians under FECA guidelines.

On March 28, 2011 appellant requested an oral hearing before an OWCP hearing representative.

In a February 3, 2011 attending physician's report (Form CA-20), Dr. Lisa Madsen, Board-certified in internal medicine, reported that appellant injured her neck on December 6, 2010 when she turned her head at the register. She noted that appellant's physical examination showed limited range of motion and an x-ray of the neck showed no fracture or subluxation. Dr. Madsen diagnosed neck pain with degenerative disc disease at C6-C7 and C3-C4 and checked the box marked "yes" when asked if she believed the condition was caused or aggravated by the employment condition.

At the July 7, 2011 hearing, appellant testified that on December 6, 2010 she turned her head too quickly when standing at the cash register at work and heard a pop in her neck which caused an immediate strain with pain radiating down the backside of her neck, head and spine. She waited to file a Form CA-1 when she realized that her neck injury was not improving. Appellant first sought treatment on December 23, 2010, noting that she was experiencing spasms and pain in her neck on a daily basis. She stated that she did not have any previous neck injuries. The hearing representative informed appellant and her representative of the medical evidence needed and the record was held open for 30 days.

In support of her claim, appellant submitted a July 13, 2011 report from Dr. Madsen, who stated that on December 6, 2010 appellant was at work when she turned her neck too quickly and experienced immediate pain. Since that date, appellant complained of shooting pains in her right neck area and limited range of motion due to decreased flexibility and pain. Dr. Madsen reported that appellant had an underlying history of degenerative disc disease which could have predisposed her to this condition and that there was a direct relationship between the December 6, 2010 employment incident and appellant's current issue of neck pain and decreased flexibility. Upon physical examination, she noted that appellant's right neck musculature was tender and diagnosed her with neck strain dating back to December 6, 2010.

On August 8, 2011 the employing establishment controverted the claim alleging that there were inconsistencies in appellant's claim and that appellant had a neck injury prior to December 6, 2010. In support of its challenge, it submitted appellant's master time history for the pay period from December 5, 2010 to January 29, 2011, a January 15, 2011 e-mail from Glennie Morris, appellant's supervisor, and a February 13, 2011 statement from Management Official Lynn Goins.

In the January 15, 2011 e-mail, Ms. Morris stated that on December 6, 2010 appellant came into work complaining that her neck hurt because she had slept on it wrong the night before. She alleged that appellant then went to her register and stated that she hurt her neck at work.

In a February 13, 2011 statement, Ms. Goins reported that on the morning of December 6, 2010 appellant was complaining of her neck being sore when she came into the cash cage to pick up her till. She reported that, later in the day, appellant then claimed she pulled her neck when she turned her head to see if anyone was waiting in the cueing line.

By decision dated September 7, 2011, the hearing representative affirmed the February 25, 2011 finding that the evidence of record failed to establish fact of injury. OWCP noted that the evidence of record was sufficient to cast doubt that the injury occurred at the time, place and in the manner alleged.

## ***LEGAL PRECEDENT***

An employee seeking benefits under FECA[2] 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 period of FECA[3] and that an injury was sustained in the performance of duty.[4] These are the essential elements of each compensation claim, regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.[5]

[2] 5 U.S.C. §§ 8101-8193.

[3] *Joe D. Cameron*, 41 ECAB 153 (1989).

[4] *James E. Chadden, Sr.*, 40 ECAB 312 (1988).

[5] *Delores C. Ellyett*, 41 ECAB 992 (1990).

In order to determine whether an employee actually sustained an injury in the performance of duty, OWCP 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 actually experienced the employment incident which is alleged to have occurred.[6] The second component is whether the employment incident caused a personal injury and generally can be established only by medical evidence.

When an employee claims that she sustained an injury in the performance of duty she must submit sufficient evidence to establish that she experienced a specific event, incident or exposure occurring at the time, place and in the manner alleged. She must also establish that such event, incident or exposure caused an injury.[7] Once an employee establishes that she sustained an injury in the performance of duty, she has the burden of proof to establish that any subsequent medical condition or disability for work, for which he claims compensation, is causally related to the accepted injury.[8]

To establish that an injury occurred as alleged, the injury need not be confirmed by eyewitnesses, but the employee's statements must be consistent with the surrounding facts and circumstances and his subsequent course of action. In determining whether a case has been established, such circumstances as late notification of injury, lack of confirmation of injury and failure to obtain medical treatment may, if otherwise unexplained, cast substantial doubt on the employee's statements. The employee has not met his burden when there are such inconsistencies in the evidence as to cast serious doubt on the validity of the claim.[9]

To establish a causal relationship between the condition, as well as any attendant disability claimed and the employment event or incident, the employee must submit rationalized medical opinion evidence based on a complete factual and medical background, supporting such a causal relationship.[10] The opinion of the physician must be based on a complete factual and medical background of the claimant, 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 claimant. This medical opinion must include an accurate history of the employee's employment injury and must explain how the condition is related to the injury. The weight of medical evidence is determined by its reliability, its probative value, its convincing quality, the care of analysis manifested and the medical rationale expressed in support of the physician's opinion.[11]

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[6] *Elaine Pendleton*, 40 ECAB 1143 (1989).

[7] *See generally John J. Carlone*, 41 ECAB 354 (1989); *see also* 5 U.S.C. § 8101(5) (injury defined); 20 C.F.R. § 10.5(q) and (ee) (1999) (occupational disease or illness and traumatic injury defined). *See Victor J. Woodhams*, 41 ECAB 345 (1989) regarding a claimant's burden of proof in an occupational disease claim.

[8] *Elaine Pendleton*, *supra* note 6.

[9] *Betty J. Smith*, 54 ECAB 174 (2002).

[10] *See* 20 C.F.R. § 10.110(a); *John M. Tornello*, 35 ECAB 234 (1983).

[11] *James Mack*, 43 ECAB 321 (1991).

## ***ANALYSIS***

The Board finds that appellant failed to establish that she sustained a neck injury in the performance of duty on December 6, 2010.

Appellant must establish all of the elements of her claim in order to prevail. She must prove her employment, the time, place and manner of injury, a resulting personal injury and that her injury arose in the performance of duty. In its September 7, 2011 decision, OWCP found that appellant did not establish that the incident occurred at the time, place and in the manner alleged. The Board finds, however, that the evidence of record is sufficient to establish that the December 6, 2010 incident occurred, as alleged.

Appellant alleged that she injured her neck at work on December 6, 2010 when she turned her head too quickly and heard a popping sound, causing pain to radiate down her head, neck and spine. Ms. Dunn, a witness to the incident, stated that on December 6, 2010 she saw appellant turn and hurt her neck. At the July 7, 2011 hearing, appellant testified that she waited to see if her neck pain improved before filing a Form CA-1 and seeking treatment. Further, appellant's medical reports are consistent in noting that she experienced neck pain on December 6, 2010 when she turned her head suddenly. Statements by Ms. Morris and Ms. Goins indicate that appellant came to work on December 6, 2010 complaining that her neck hurt. Despite this, these statements do not cast such inconsistencies as to cast doubt that the incident occurred at the time, place and in the manner alleged. The fact that appellant might have experienced neck pain prior to her shift on December 6, 2010 and complained about it does not, by itself, substantiate OWCP's finding that the December 6, 2010 incident, namely that appellant turned her head suddenly and heard a popping sound, did not occur as alleged.[12]

In medical reports dated February 3 and July 13, 2011, Dr. Madsen reported that appellant injured her neck on December 6, 2010 when she turned her head at the register too quickly. She noted that appellant's physical examination showed limited range of motion and an x-ray of the neck showed no fracture or subluxation. Dr. Madsen reported that appellant had an underlying history of degenerative disc disease which could have predisposed her to this condition. She opined that there was a direct relationship between the December 6, 2010 employment incident and appellant's current issue of neck pain and decreased flexibility. Dr. Madsen diagnosed neck strain dating back to December 6, 2010.

The Board finds that the medical evidence of record establishes a sufficient diagnosis of neck sprain and degenerative disc disease. Given that appellant has established a diagnosed condition, the question becomes whether the December 6, 2010 incident caused her neck injury. Thus, she must submit rationalized medical evidence to establish that her diagnosed medical condition is causally related to the accepted December 6, 2010 employment incident.

While Dr. Madsen's reports establish a diagnosis, they are not rationalized as to the issue of causal relation. She failed to address appellant's medical history other than briefly noting an underlying history of degenerative disc disease. Dr. Madsen did not discuss how appellant's preexisting degenerative disc disease would contribute to appellant's neck strain. While she

[12] *See Willie J. Clements*, 43 ECAB 244 (1991).

opined that there was a direct relationship between appellant's injury and the December 6, 2010 employment incident, she failed to state how this incident would cause appellant's injury. Medical reports without adequate rationale on causal relationship are of diminished probative value and do not meet an employee's burden of proof.[13] The opinion of a physician supporting causal relationship must rest on a complete factual and medical background supported by affirmative evidence, address the specific factual and medical evidence of record and provide medical rationale explaining the relationship between the diagnosed condition and the established incident or factor of employment.[14] Dr. Madsen's reports do not meet that standard and are insufficient to meet appellant's burden of proof.

The remaining medical evidence of record is also insufficient to establish causal relationship because nurses, physician's assistants, physical and occupational therapists are not "physicians" as defined by FECA, their opinions regarding diagnosis and causal relationship are of no probative medical value.[15]

The Board notes that statements from Ms. Goins and Ms. Morris indicate that appellant injured her neck prior to the December 6, 2010 employment incident. While appellant has established that the December 6, 2010 incident occurred as alleged, namely that she turned her head suddenly and heard a popping sound, she must submit rationalized medical evidence which establishes that her neck strain was caused or aggravated by the accepted employment incident and not a result of a preexisting condition or nonwork-related injury.

In the instant case, the record is without rationalized medical evidence establishing a causal relationship between December 6, 2010 employment incident and appellant's neck strain. Thus, appellant has failed to establish her burden of proof.

Appellant may submit additional evidence, together with a written request for reconsideration, to OWCP within one year of the Board's merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.606 and 10.607.

## ***CONCLUSION***

The Board finds that appellant did not meet her burden of proof to establish that her neck injury is causally related to the accepted December 6, 2010 employment incident.

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[13] *Ceferino L. Gonzales*, 32 ECAB 1591 (1981).

[14] *See Lee R. Haywood*, 48 ECAB 145 (1996).

[15] 5 U.S.C. § 8101(2) of FECA provides that the term "physician" includes surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors, and osteopathic practitioners within the scope of their practice as defined by State law. *See also Roy L. Humphrey*, 57 ECAB 238 (2005).

***ORDER***

**IT IS HEREBY ORDERED THAT** the September 7, 2011 decision of the Office of Workers' Compensation Programs is affirmed, as modified.

Issued: April 25, 2012
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