United States Department of Labor
Employees' Compensation Appeals Board

B.S., Appellant	)	
and	)	**Docket No. 11-1518**
	)	**Issued: February 9, 2012**
U.S. POSTAL SERVICE, POST OFFICE, Idaho Falls, ID, 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, Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On June 14, 2011 appellant, through her attorney, filed a timely appeal from a February 23, 2011 merit decision of the Office of Workers' Compensation Programs (OWCP) affirming a denial of her claim for an employment-related injury. 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 an injury to her back in the performance of duty, causally related to factors of her federal employment.

On appeal, appellant's attorney contends that OWCP's decision is contrary to fact and law.

[1] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On March 5, 2010 appellant, then a 34-year-old mail processing clerk, filed an occupational disease claim alleging that she suffered from disorders due to repeated trauma. She noted that she first realized that the disease or illness was caused or aggravated by her employment on October 28, 2009. Appellant stated that she sent in a light-duty request on November 30, 2009 and that she was out seven weeks from that date. She contended that as soon as she came back she realized something was going on with her back. In an attachment, appellant states that starting on October 28, 2009 she started suffering from lower back pain and stiffness that would occur after scanning parcels in the early morning hours. She noted that most mornings she would scan for 90 minutes to 3 hours at a time. Appellant noted that on the morning of November 20, 2009 her back was more bothersome and she went home.

Notes by a physician's assistant, Wade K. Christensen, dated from December 16, 2009 through June 9, 2010 indicate that appellant was treated for headache and back pain. The record also contains a January 14, 2009 progress note by him noting that appellant complained of back pain for the last few days. Mr. Christensen noted that appellant fell one month ago and went to the emergency room where they x-rayed her back and stated it was bruised, but that it had improved. He assessed appellant with sacoiliitis at the time. Appellant also submitted notes from a physical therapist.

Appellant submitted a request for light duty dated March 12, 2010 along with a note from a physician's assistant noting restrictions due to a herniated disc with radiculopathy. She also submitted a note dated March 30, 2010 wherein she stated that she believed her job activities contributed to her injury. Appellant submitted further notes alleging that she handled parcels for 90 to 180 minutes a shift. She stated that the first time she stopped working due to her alleged injury was on November 20, 2009 and that she returned to work on January 25, 2010 part-time light duty. Appellant noted that she again stopped working on February 2, 2010 and returned to work on February 10, 2010 full-time light duty. She noted that she stopped working on February 17, 2010 due to the injury and returned to work on March 19, 2010 full-time light duty.

A December 16, 2009 x-ray was interpreted by Dr. John Strobel, a Board-certified radiologist, as evincing a negative lumbar spine.

In a February 24, 2010 report of a magnetic resonance imaging (MRI) scan of the lumbar spine, Dr. L. Chris Bachman, a Board-certified diagnostic radiologist, noted moderately advanced discogenic disease at L5-S1 with disc bulge resulting in minimal bilateral neuroforminal narrowing but no significant central canal stenosis.

In a March 8, 2010 report, Dr. Strobel indicated that appellant received epidural and Marcaine injections for lumbar disc displacement.

In an April 20, 2010 report, Dr. Wallace A. Baker, Board-certified in family medicine, stated that appellant has likely had years of developing degenerative disc disease in her lumbar spine. He noted that this was a normal occurrence which can become worse due to genetics, weight and life style. Dr. Baker opined that appellant's sudden increase of her symptoms of low back pain with accompanying radicular symptoms are from a disc herniation at L5-S1

documented on her MRI scan. He noted that her symptoms began after a change in her job duties which required abnormal bending and lifting conditions which did not allow her to use proper body mechanics which could have led to a herniation of the disc noted on the MRI scan.

The employing establishment submitted statements controverting the claim. In a May 11, 2010 report, Damon Addison, a supervisor, indicated that he was appellant's direct supervisor, that management was not made aware of any issues regarding her scanning or other duties until November 30, 2009 and that at that time the postmaster was told that appellant was having issues with her back. He indicated that she told the postmaster that she had been in a car accident that injured her back in the previous year and that she was then instructed to request light-duty status and that she brought a light-duty request form and has been working under those restrictions since. Mr. Addison indicated that several employees came to the postmaster with concerns that appellant was only trying to get out of scanning parcels. He described appellant's duties, indicating that her activities required some form of lifting, pushing, pulling, bending or stooping on a daily basis. Mr. Addison noted that the specific task of scanning parcels is a 60- to 90-minute task daily depending on the volume of parcels and the task was split between multiple clerks when there were enough clerks to get the processing done on time. A note from Brett Drake, a coworker, indicated that when appellant was working she stated that she hurt her back at home and that she was going to get a Family and Medical Leave Act (FMLA) case number so she would not have to do scanning. Ms. Drake indicated that appellant told her that "she has been to work a day here and there" and was now okay to work. She stated that in her opinion that when appellant runs out of FMLA she will try for workers' compensation. In a statement dated May 11, 2010, Paulette Thomas, a coworker, indicated that she was working full time with appellant and that they had a lot of mail to scan. She indicated that she needed appellant to scan some more mail, and that appellant stated that if she was going to scan any more she was going home. Ms. Thomas stated that she asked appellant if she hurt her back at work and she stated no that she had fallen at home about a year ago.

By decision dated August 9, 2010, OWCP determined that the factual evidence did not establish that the events occurred as described and therefore denied appellant's claim.

On August 24, 2010 appellant, through counsel, requested a telephone hearing before an OWCP hearing representative. At the hearing held on December 2, 2010, she testified that she had worked for the employing establishment almost six years she was hired as a mail processing clerk and handler and now she also distributes mail. Appellant testified that she never had a back injury or any problem with her back or any workers' compensation case prior to the current injury. She testified that on October 28, 2009 she had to scan for about two and a half hours and when she went home that day she thought she had pulled a muscle. Appellant noted that finally she told her supervisor's supervisor that she could not do this as it was hurting her back. She contended that the tubs were not ergonomically designed for someone of her height and that this makes it difficult to bend properly. Appellant alleged that scanning mail was difficult because she was 35-years-old. She discussed her medical treatment. Appellant noted that when she saw the physician's assistant, he indicated that she had a fall last month, but that she actually told him that the fall was last year. She indicated that the fall was in December 2006 and that it was more of a slide. Appellant indicated that she saw the physician's assistant and not the doctor because you can wait six months to see the doctor. The back pain noted by the physician's assistant in

September 2009 was due to the flu. The car accident was a little fender bender and she never went to the doctor for it. Appellant testified that she had back surgery in July 2010.

In a July 26, 2010 operative report, Dr. Lynn Stromberg, a Board-certified orthopedic surgeon, indicated that appellant underwent a L5-S1 laminotomy, discectomy. Accompanying hospital notes indicate that appellant was being treated for an L5-S1 right lumbar disc herniation and that she had been treated for back pain since October. Dr. Stromberg noted that appellant was a post clerk and was seen by Dr. Baker for low back pain and right leg discomfort.

By decision dated February 23, 2011, OWCP's hearing representative affirmed the decision denying appellant's claim, finding that she had not established that the incident occurred as alleged and also did not submit medical evidence establishing a causal relationship.

LEGAL PRECEDENT

An employee seeking compensation under FECA[2] has the burden of establishing the essential elements of his claim by the weight of the reliable, probative and substantial evidence,[3] including that she is an "employee" within the meaning of FECA[4] and that he filed her claim within the applicable time limitation.[5] The employee must also establish that she sustained an injury in the performance of duty as alleged and that her disability for work, if any, was causally related to the employment injury.[6] 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.[7]

To establish that an injury was sustained in the performance of duty in a claim for occupational disease, an employee must submit: (1) a factual statement identifying employment factors alleged to have caused or contributed to the presence or occurrence of the disease or condition; (2) medical evidence establishing the presence or existence of the disease or condition for which compensation is claimed; and (3) medical evidence establishing that the diagnosed condition is causally related to the employment factors identified by the employee.[8]

An injury does not have to be confirmed by eyewitnesses in order to establish the fact that an employee sustained an injury while in the performance of duty. However, the employee's statements must be consistent with the surrounding facts and circumstances and her

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[2] *Id*. at §§ 8101-8193.

[3] *J.P.*, 59 ECAB 178 (2007); *Joseph M. Whelan*, 20 ECAB 55, 57 (1968).

[4] *See M.H.*, 59 ECAB 461 (2008); *Emiliana de Guzman (Mother of Elpedio Mercado)*, 4 ECAB 357, 359 (1951); *see* 5 U.S.C. § 8101(1).

[5] *R.C.*, 59 ECAB 427 (2008); *Kathryn A. O'Donnell*, 7 ECAB 227, 231 (1954); *see* 5 U.S.C. § 8122.

[6] *G.T.*, 59 ECAB 447 (2008); *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

[7] *See Irene St. John*, 50 ECAB 521 (1999); *Michael E. Smith*, 50 ECAB 313 (1999).

[8] *See Roy L. Humphrey*, 57 ECAB 238, 241 (2005); *Ruby I. Fish*, 46 ECAB 276, 279 (1994).

subsequent course of action.[9] 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 cast doubt on an employee's statements in determining whether he or she has established a *prima facie* claim for compensation. The employee has the burden of establishing the occurrence of an alleged injury at the time, place and in the manner alleged by a preponderance of the evidence.[10] An employee has not met this burden when there are such inconsistencies in the evidence that cast serious doubt upon the validity of the claim. 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 and persuasive evidence.[11]

Causal relationship is a medical issue[12] and the medical evidence generally required to establish causal relationship is rationalized medical opinion evidence. Rationalized medical opinion evidence is medical evidence that includes a physician's rationalized opinion on whether there is a causal relationship between the claimant's diagnosed condition and the established incident or factor of employment. The opinion of the physician must be based on a complete factual and medical background of the claimant,[13] must be one of reasonable medical certainty,[14] and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the established incident or factor of employment.[15]

ANALYSIS

The Board finds that appellant failed to establish her claim for a back injury.

The Board notes that appellant's history is inconsistent. Appellant testified that she never had any problem with her back until she suffered the work injury on or about October 28, 2009. However, in a physician's assistant's note dated January 14, 2009, he indicated that she complained of back pain for the last few days and that she told him that she fell one month prior to that, had emergency room x-ray her back and was told that it was bruised. Mr. Addison indicated in his statement that appellant had been in an automobile accident the year prior to following her claim, although appellant testified that this was not a serious accident. He stated that several employees came to him and stated that appellant was trying to get out of scanning parcels. Ms. Drake indicated that appellant was working when she told her that she hurt her back at home and was going to get a FMLA case number so that she would not have to do scanning. Ms. Thomas indicated that appellant stated that if she needed to scan any more mail she was

[9] *See Mary Jo Coppolino*, 43 ECAB 988 (1992).

[10] *R.H.*, Docket No. 11-535 (issued October 5, 2011).

[11] *See Allen C. Hundley*, 53 ECAB 551 (2002); *Earl David Seal*, 49 ECAB 152 (1997).

[12] *Mary J. Briggs*, 37 ECAB 578 (1986).

[13] *William Nimitz, Jr.*, 30 ECAB 567, 570 (1979).

[14] *See Morris Scanlon*, 11 ECAB 384, 385 (1960).

[15] *See William E. Enright*, 31 ECAB 426, 430 (1980).

going home and that when Ms. Thomas asked if she hurt her back at work she stated no that she had fallen at home a year ago. All of these statements cast serious doubt on appellant's credibility. Appellant also inferred that scanning mail was difficult due to her age of, 35-years-old, but did not explain or produce evidence regarding the significance of her age and in scanning mail.

The evidence submitted contains such inconsistencies as to cast doubt on the validity of appellant's claim. Accordingly, the Board finds that appellant has not met her burden of proof in establishing that she experienced an employment-related incident at the time, place and in the manner alleged.[16]

Given that appellant did not establish an employment incident, further consideration of the medical evidence is unnecessary.[17]

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 and 10.607.

CONCLUSION

The Board finds that appellant did not meet her burden of proof to establish that she sustained an injury to her back in the performance of duty causally related to factors of her federal employment.

[16] *R.H., supra* note 10.

[17] *See Bonnie A. Conteras,* 57 ECAB 364, 368 n.10 (2006).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated February 23, 2011 is affirmed.

Issued: February 9, 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