United States Department of Labor
Employees' Compensation Appeals Board

M.S., Appellant	)	
and	)	**Docket No. 12-461**
	)	**Issued: October 4, 2012**
DEPARTMENT OF THE NAVY, STRATEGIC SYSTEMS PROGRAMS, Mitchell Field, NY, Employer	)	

Appearances:
Roy C. Orlando, M.D., for the appellant
No appearance, for the Director

Oral Argument May 15, 2012

DECISION AND ORDER

Before:
RICHARD J. DASCHBACH, Chief Judge
COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On December 29, 2011 appellant's representative filed a timely appeal of an October 4, 2011 merit decision of the Office of Workers' Compensation Programs (OWCP). 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 sustained an injury in the performance of duty on August 21, 2009.

FACTUAL HISTORY

Appellant is a 60-year-old information technology specialist. On August 21, 2009 at 10:20 a.m. a coworker, Lois Clancy, discovered appellant unconscious and not breathing. Appellant was in an unoccupied cubicle on her knees, with her head and torso resting on the seat

[1] 5 U.S.C. §§ 8101-8193 (2006).

of an office chair. Another coworker, John Cullinan, administered first aid until paramedics arrived. Appellant was transported by ambulance to Winthrop University Hospital. She arrived at 11:20 a.m. The admitting diagnosis was respiratory arrest and aspiration. Treatment records indicated that "food containing particles" were discovered in appellant's mouth. While in the emergency room appellant had several episodes of ventricular tachycardia and multiple seizures. Due to loss of oxygen, she suffered anoxic brain injury. Appellant has been comatose since August 21, 2009. Raymond Sainthill, her spouse, is her court-appointed guardian. He filed the instant claim (Form CA-1) on September 30, 2009.

According to the employing establishment, when Mr. Sainthill arrived at the emergency room he stated that appellant had passed out at home on the evening of August 20, 2009. He wanted to take her to the hospital, but she declined. Mr. Sainthill also reportedly stated that, while at home on the morning of August 21, 2009, appellant complained of feeling dizzy and lightheaded. He again suggested that she go to the hospital, which she declined. Appellant went to work instead, but scheduled a physician's appointment for later that afternoon. Prior to being discovered unconscious, she was last seen at 10:10 a.m. Appellant had just completed work on a computer and was reportedly returning to her cubicle.[2]

In a decision dated November 17, 2009, OWCP denied appellant's traumatic injury claim.

On reconsideration, Mr. Sainthill claimed that appellant consumed food at an August 21, 2009 work-related meeting, which she later aspirated causing her injury. The employing establishment denied that there was a work-related meeting the morning of August 21, 2009. It also denied having provided appellant any food and noted that there was no evidence indicating that she consumed any food on the employing establishment premises that morning. Mr. Sainthill stated that she did not have breakfast before leaving for work on August 21, 2009 and, therefore, she must have eaten while at work.

In a report dated April 9, 2010, Dr. Harish C. Sood, a Board-certified internist, indicated that appellant suffered pulmonary arrest on August 21, 2009 after aspirating food while at work.[3]

OWCP further developed the medical evidence to determine what role food may have had in appellant's claimed injury.

In a September 29, 2010 report, Dr. Paul K. Wein, a Board-certified cardiologist and OWCP referral physician, indicated that there was no clear cause for appellant's cardiac respiratory arrest and subsequent brain damage. He also stated that it was unclear whether she aspirated food as a cause or result of cardiac arrest.

[2] Appellant began work on Martin Tai's computer at 9:45 a.m. Mr. Tai was appellant's supervisor and she reportedly informed him that she had not been feeling well and would be taking the afternoon off to attend a physician's appointment. He stated that when she left his office she was alert, talking and did not appear to be in distress.

[3] Dr. Sood had been appellant's primary care physician for seven years.

By decision dated October 15, 2010, OWCP denied modification based on Dr. Wein's findings.

Mr. Sainthill again requested consideration. He submitted a June 2, 2011 report from Dr. David C. Henke, a Board-certified internist with a subspecialty in pulmonary disease, who identified several possible causes for appellant's collapse, which included aspiration, cardiac arrhythmia, pulmonary embolus and seizure. Due to the lack of witnesses and because of her current comatose state, Dr. Henke stated that the "primary or most proximate insult producing ... hypoxia cannot be determined." However, he further noted that "aspiration at the time of [appellant's] collapse ... would have contributed to her hypoxia and anoxic brain injury."

OWCP also received an August 11, 2011 report from a gastroenterologist, who surmised that the food appellant aspirated at 10:20 a.m. on August 21, 2009 was in all "likelihood eaten while she was at work." Appellant reportedly arrived at work at 7:00 a.m.[4]

OWCP again denied modification on October 4, 2011.

LEGAL PRECEDENT

A claimant seeking benefits under FECA has the burden of establishing the essential elements of her claim by the weight of the reliable, probative and substantial evidence, including that an injury was sustained in the performance of duty as alleged and that any specific condition or disability claimed is causally related to the employment injury.[5]

To determine if an employee sustained a traumatic 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 that must be considered in conjunction with one another. The first component is whether the employee actually experienced the employment incident that is alleged to have occurred.[6] The second component is whether the employment incident caused a personal injury.[7]

Injuries arising on the premises may be approved if the employee was engaged in activity reasonably incidental to the employment, such as personal acts for the employee's comfort,

[4] According to the Form CA-1, appellant's regular work hours were 7:15 a.m. to 3:45 p.m., Monday thru Friday.

[5] 20 C.F.R. § 10.115(e), (f) (2011); *see Jacquelyn L. Oliver*, 48 ECAB 232, 235-36 (1996).

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

[7] *John J. Carlone*, 41 ECAB 354 (1989). Causal relationship is a medical question, which generally requires rationalized medical opinion evidence to resolve the issue. *See Robert G. Morris*, 48 ECAB 238 (1996). The fact that the etiology of a disease or condition is unknown or obscure does not relieve an employee of the burden of establishing a causal relationship by the weight of the medical evidence nor does it shift the burden of proof to OWCP to disprove an employment relationship. *Judith J. Montage*, 48 ECAB 292, 294-95 (1997).

convenience and relaxation, eating meals and snacks on the premises, or taking authorized coffee breaks.[8]

ANALYSIS

Appellant's representative argued that food appellant allegedly ingested at work either caused or contributed to her respiratory/cardiac arrest. One theory is that appellant choked on food she had eaten at work, which resulted in her respiratory arrest (aspiration-induced). An alternative theory is that she had eaten something at work, which she later aspirated when she collapsed due to an unspecified medical condition. According to this latter theory, whatever medical condition may have caused appellant to throw-up, the aspirated food inhibited her breathing and caused respiratory arrest, which in turn led to her anoxic brain injury (aspiration-aggravated).

Both above-noted arguments are premised on the "personal comfort" rule and appellant having consumed food at work. However, the current record does not support her having consumed any food at work. While appellant's husband claimed that she had eaten during a work-related meeting that morning, the source of this information is unclear and the employing establishment specifically denied that such a meeting occurred and also denied having provided her any food.[9] The Board further notes that there are no witness statements attesting to appellant having been observed eating at work on the morning of August 21, 2009. Additionally, there is no mention of any food or food wrappers present at or near the cubicle where Ms. Clancy discovered appellant.

Appellant's emergency room (ER) treatment records revealed that "food containing particles" were discovered in her mouth. However, it is unclear when and where these "food ... particles" were first discovered. One might reasonably assume that the paramedics who responded to the scene were the first to discover food particles in appellant's mouth, but those records are not part of the current case file. The Board notes that the medical evidence of record is particularly sparse.[10]

At oral argument, Dr. Orlando, appellant's representative, provided extensive details about her medical history and treatment that was not otherwise documented in the record. The Board can only surmise that he was privy to medical records that have not been submitted to OWCP. Additionally, Mr. Sainthill, appellant's spouse and legal guardian, provided information regarding her activities during the days and hours prior to the August 21, 2009 incident. He also discussed his personal observations while in the ER on August 21, 2009 and during a subsequent

[8] *T.L.*, 59 ECAB 537, 540 (2008); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Performance of Duty*, Chapter 2.804.4a(2) (August 1992).

[9] While Mr. Sainthill stated that his wife did not have breakfast at home that particular morning, he did not address the possibility that appellant may have stopped during her commute to the office and perhaps purchased and consumed food prior to her arrival at work.

[10] Appellant was hospitalized for a month prior to being transferred to an extended care nursing facility. Despite her lengthy hospitalization, the current record includes only a dozen pages of treatment records regarding her August 21 to September 22, 2009 hospitalization.

visit to the employing establishment.[11] Some of the information Mr. Sainthill provided could not be independently verified based on the record compiled on or before October 4, 2011. While the Board does not question the veracity of either Mr. Sainthill or Dr. Orlando, that evidence is precluded from consideration for the first time on appeal.[12]

Based on the record before OWCP, the evidence is at best speculative with respect to whether appellant consumed food at work on the morning of August 21, 2009. In a report dated August 11, 2011, Dr. Nicholas J. Shaheen, a Board-certified internist with a subspecialty in gastroenterology, surmised that the food she aspirated at 10:20 a.m. on August 21, 2009 was in all "likelihood eaten while she was at work." He explained that normal gastric emptying would be expected to be essentially complete by two hours following a meal consisting of solids or solids and liquids. Appellant's husband reportedly advised Dr. Shaheen that she arrived at work at 7:00 a.m. and subsequently collapsed/aspirated at 10:20 a.m. Based on these parameters Dr. Shaheen concluded that given appellant's presence at work from 7:00 a.m. until the time of her collapse at 10:20 a.m. -- a 3[-]hour, 20[-]minute time span -- the presence of food in her mouth at the time of her collapse was "in all likelihood eaten while she was at work."

Dr. Shaheen offered a general statement about the human digestive system under normal circumstance. He did not personally examine appellant and does not appear to have reviewed any of her medical records. Based on very limited information Dr. Shaheen speculated that she ingested food while at work. Although appellant's husband advised Dr. Shaheen that she arrived at work at 7:00 a.m., her normal tour-of-duty began at 7:15 a.m. and the record is unclear as to when she actually arrived at work on the morning of August 21, 2009. Also, Dr. Shaheen did not comment on the observed "food containing particles" and whether it was the type of food normally digested within two hours. His rather generic analysis is akin to a medical text or treatise. Because this report is not specific to appellant's habitus, like a medical text or treatise it is of general application and thus, warrants no evidentiary value regarding her particular circumstances.[13] Accordingly, the Board finds that appellant failed to establish that her August 21, 2009 collapse and subsequent brain injury was associated with her consumption of an on-premises meal or snack, such that her injury would be covered under the "personal comfort" rule.

Appellant's representative also argued that appellant should be covered under FECA based on the employer's negligence. As previously noted, appellant had informed her supervisor that she had not been feeling well and that she had scheduled a physician's appointment for later that same day. Her representative argued that had the employing establishment properly monitored her, the extent of her brain injury could have perhaps been minimized.

[11] During oral argument, Mr. Sainthill stated that appellant's clothing was stained with what he believed to be a Jamaican meat pie, which she regularly treated herself to on Fridays. Appellant's injury occurred on Friday, August 21, 2009. Mr. Sainthill did not indicate where or when she might have gotten a Jamaican meat pie prior to her collapse at work on August 21, 2009.

[12] 20 C.F.R. § 501.2(c)(1).

[13] *See D.I.*, 59 ECAB 158, 161 (2007).

The employing establishment has the duty to make reasonable efforts to procure medical aid or other means of relief to an employee who becomes ill or injured on the job and as a result is helpless to provide for her own care.[14] A failure to satisfy this duty -- the human instincts doctrine -- may be sufficient to establish a causal connection between an employee's condition and the employment if it is shown that the employing establishment failure contributed to the claimed condition.[15]

The record does not establish the amount of time that passed between appellant's collapse and when Ms. Clancy discovered appellant at 10:20 a.m. When Mr. Tai last saw appellant at 10:10 a.m. she was alert, talking and in no apparent distress. Ten minutes later Ms. Clancy discovered her unconscious and not breathing. What transpired during those 10 minutes is unclear. Soon after appellant was discovered, Mr. Cullinan administered first aid to her and he continued to do so until the paramedics arrived.[16] Although appellant had earlier advised Mr. Tai that she had not been felling well and planned to see a physician later that day, she apparently did not express a need for emergency treatment. In fact, she continued to work on Mr. Tai's computer for approximately 25 minutes. When appellant left his office at 10:10 a.m. she was in no apparent distress. Appellant's representative would hold Mr. Tai and the employing establishment to a higher duty of care than appellant exercised in her own right. Under the circumstances, the Board finds that the employing establishment acted appropriately both before and after she was discovered unconscious at 10:20 a.m. on August 21, 2009.

While the Board is mindful that appellant is unable to assist in the factual development of her claim, her incapacity does not diminish or otherwise relieve her of her burden of proof. The uncertainty as to the cause of appellant's August 21, 2009 collapse at work does not shift the burden to OWCP.[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 through 10.607.

CONCLUSION

Appellant did not establish that she sustained an injury in the performance of duty on August 21, 2009.

[14] *J.W.*, Docket No. 11-1655 (issued May 18, 2012); *Joseph J. Rotelli*, 40 ECAB 987, 992 (1989).

[15] *J.W., id.*

[16] While it is unclear when the paramedics arrived at the employing establishment, the Winthrop Hospital emergency department records indicate that appellant arrived there at 11:20 a.m.

[17] *Judith J. Montage*, *supra* note 8.

ORDER

IT IS HEREBY ORDERED THAT the October 4, 2011 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 4, 2012
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board