

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

J.P., Appellant

and

**SOCIAL SECURITY ADMINISTRATION,
Fort Lauderdale, FL, Employer**

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**Docket No. 12-877
Issued: September 18, 2012**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On March 13, 2012 appellant filed a timely appeal from a February 29, 2012 merit decision of the Office of Workers' Compensation Programs (OWCP). 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.²

ISSUE

The issue is whether appellant sustained an injury in the performance of duty on July 8, 2011.

¹ 5 U.S.C. § 8101 *et seq.*

² On appeal, appellant submitted new evidence. The Board's review of a case is limited to evidence that was before OWCP at the time of its final decision. 20 C.F.R. § 501.2(c)(1).

FACTUAL HISTORY

On July 8, 2011 appellant, then a 51-year-old service representative, filed a traumatic injury claim (Form CA-1) alleging that on July 8, 2011 she sustained severe right shoulder pain from sitting and using a computer. She previously sustained a work injury on March 25, 2011. A statement from the employing establishment indicated that appellant had returned to work on July 8, 2011 for four hours per day, then filed the CA-1 form claim “stating that she couldn’t perform her duties due to shoulder pain.” The claim form reported that she stopped work on July 8, 2011.

Appellant submitted a July 12, 2011 note from Dr. Harold Grusky, a chiropractor. The note stated that she was treated for injuries sustained at work and was disabled.

In a statement dated July 29, 2011, appellant related that on July 8, 2011 she received an e-mail regarding an office move to a new location. She asserted that she threw out manuals, books and boxes, resulting in injury to her right hip and shoulder. Appellant told a supervisor of the new injury, but another supervisor, a Mark Spicker, refused to allow her to be examined and refused to authorize her continuation of pay.

In a report dated July 29, 2011, Dr. Robin Simon, an osteopath, stated that appellant continued to have bilateral thumb and wrist pain. He reported that she attempted to go back to work, but on that day “they were moving and her hands got worse.” Dr. Simon diagnosed status post work injury, bilateral thumb and wrist sprain and right rotator cuff sprain. In a work capacity evaluation (OWCP-5c) dated July 29, 2011, he advised that appellant could work four hours a day. As to specific restrictions, Dr. Simon wrote “no change.”

By decision dated August 26, 2011, OWCP denied the claim for compensation. It found that the medical evidence was insufficient to establish causal relation.

Appellant requested a hearing before an OWCP hearing representative, which was held on December 16, 2011. At the hearing she stated that on July 8, 2011 she threw away old manuals and books into the trash. Appellant asserted that she told Mr. Spicker that day that she injured herself “throwing out the manuals.” Mr. Spicker stated that it was the same injury and would not complete additional paperwork.

In a statement dated January 11, 2012, Mr. Spicker noted that appellant did not report that she injured herself on July 8, 2011 due to cleaning out her workspace. The first he heard about her allegation was from the hearing transcript. Mr. Spicker noted that the e-mail regarding a move was dated July 5, 2011 and specifically stated that the cleaning schedule for her unit was July 22, 2011. He stated that appellant was never told to clean out her desk and certainly not on her first day back at work.

By decision dated February 29, 2012, an OWCP hearing representative affirmed the August 26, 2011 decision. The hearing representative found that the July 8, 2011 incident was not established as alleged and the medical evidence was also insufficient.

LEGAL PRECEDENT

FECA provides for the payment of compensation for “the disability or death of an employee resulting from personal injury sustained while in the performance of duty.”³ The phrase “sustained while in the performance of duty” in FECA is regarded as the equivalent of the commonly found requisite in workers’ compensation law of “arising out of an in the course of employment.”⁴ An employee seeking benefits under FECA has the burden of establishing that he or she sustained an injury while in the performance of duty.⁵ 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. The second component is whether the employment incident caused a personal injury and generally this can be established only by medical evidence.⁶

To constitute a rationalized medical evidence, the opinion of the physician must be based on a complete factual and medical background, must be of reasonable medical certainty and supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant. The weight of medical evidence is determined by its reliability, its probative value, its convincing quality, the care of the analysis manifested and the medical rationale expressed in support of the physician’s opinion.⁷

An employee has the burden of establishing the occurrence of an injury at the time, place and in the manner alleged, by a preponderance of the reliable, probative and substantial evidence.⁸ An injury does not have to be confirmed by eyewitnesses to establish that an employee sustained an injury in the performance of duty, but the employee’s statements must be consistent with the surrounding facts and circumstances and his subsequent course of action.⁹ It is well established that a claimant cannot establish fact of injury if there are inconsistencies in the evidence that cast serious doubt as to whether the specific event or incident occurred at the time, place and in the manner alleged.¹⁰ 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, if otherwise unexplained, cast sufficient

³ 5 U.S.C. § 8102(a).

⁴ *Valerie C. Boward*, 50 ECAB 126 (1998).

⁵ *Melinda C. Epperly*, 45 ECAB 196, 198 (1993); *see also* 20 C.F.R. § 10.115.

⁶ *See John J. Carlone*, 41 ECAB 354, 357 (1989).

⁷ *Jennifer Atkerson*, 55 ECAB 317, 319 (2004).

⁸ *William Sircovitch*, 38 ECAB 756, 761 (1987); *John G. Schaberg*, 30 ECAB 389, 393 (1979).

⁹ *Charles B. Ward*, 38 ECAB 667, 667-71 (1987).

¹⁰ *Gene A. McCracken*, 46 ECAB 593 (1995); *Mary Joan Coppolino*, 43 ECAB 988 (1992).

doubt on an employee's statements in determining whether a *prima facie* case has been established.

ANALYSIS

Appellant filed a traumatic injury claim for an injury on July 8, 2011. The record indicates that she had been off work due to a March 25, 2011 injury and returned to work on July 8, 2011. To satisfy the factual element appellant's burden of proof, the evidence must establish an employment incident as alleged. A clear understanding of the employment incident is also necessary to determine if the medical evidence is based on an accurate history of injury.

On July 8, 2011 appellant alleged that she injured her right shoulder from sitting and using a computer. While clearly there was no late notification of an injury, there are inconsistencies regarding the nature of the employment incident of July 8, 2011. Appellant provided a July 29, 2011 statement that her injuries resulted not from sitting and using a computer; but from lifting and throwing out books and manuals. There is no explanation as to why she did not report such activity on the claim form. Appellant stated that she told a supervisor of the nature of her injury, but Mr. Spicker denied that she made any mention of throwing out materials as the cause of injury. She referred to an e-mail regarding the moving of her workspace, but the e-mail of record clearly noted only that there was time reserved on July 22, 2011 for such activity. The e-mail does not provide support for appellant's allegation. Moreover, medical evidence of record does not contain any history of throwing out books or similar activity, until a brief mention in Dr. Simon's July 29, 2011 report stating that appellant was "moving" the day she returned to work.

Based on the evidence of record, the Board finds that the employment incident of July 8, 2011, regarding throwing out manuals or similar activity, is not established as alleged. There are inconsistencies between appellant's allegations on July 29, 2011 and her prior actions, namely the failure to describe such activities on the claim form, failure to notify the employing establishment of the alleged incident and failure to provide contemporaneous medical reports with a history of such activity on July 8, 2011. Appellant did not meet her burden of proof in this regard.

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

The Board finds that appellant did not establish an injury in the performance of duty on July 8, 2011.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated February 29, 2012 is affirmed.

Issued: September 18, 2012
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

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