United States Department of Labor
Employees' Compensation Appeals Board

R.H., Appellant	)	
and	)	**Docket No. 12-1923**
	)	**Issued: March 4, 2013**
DEPARTMENT OF VETERANS AFFAIRS, CONNECTICUT HEALTHCARE SYSTEM, West Haven, CT, Employer	)	

Appearances:
William E. Shanahan, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
RICHARD J. DASCHBACH, Chief Judge
COLLEEN DUFFY KIKO, Judge
PATRICIA HOWARD FITZGERALD, Judge

JURISDICTION

On September 19, 2012 appellant, through counsel, timely appealed the August 20, 2012 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 the claim.

ISSUE

The issue is whether appellant sustained a left rotator cuff tear in the performance of duty on January 27, 2012.

FACTUAL HISTORY

On February 24, 2012 appellant, then a 64-year-old registered nurse, filed a traumatic injury claim (Form CA-1) for acute left shoulder rotator cuff tear which allegedly occurred on

[1] 5 U.S.C. §§ 8101-8193.

January 27, 2012.[2] She stated that she had moved heavy instrument sets/trays -- 20 pounds and up -- from high and lower shelves to a cart at hip level. Appellant first advised the employing establishment of the claimed left shoulder condition on February 14, 2012, 18 days after the alleged injury. The employing establishment challenged the claim noting her delay in reporting the alleged injury. It also indicated that appellant provided different versions of the incident that allegedly caused her left shoulder condition.

In support of the claim, OWCP received a February 27, 2012 work capacity form from Dr. Rolf H. Langeland, a Board-certified orthopedic surgeon, who diagnosed left rotator cuff tear and advised that appellant could return to light-duty work.

On March 5, 2012 OWCP contacted both appellant and the employing establishment. It advised her that the medical evidence received to date was insufficient to establish her claim. OWCP explained the legal elements of the claim and the type of factual and medical evidence required to establish entitlement under FECA. It inquired about the identity of the physician who first treated appellant for her claimed injury and the date she initially received treatment. OWCP also asked her to explain why she waited a few weeks before reporting her left shoulder injury. In a separate March 5, 2012 letter, it asked the employing establishment to elaborate on its earlier statement that appellant had provided different stories about what happened. OWCP also inquired about whether there were any witnesses to the alleged January 27, 2012 employment incident. Lastly, it requested any treatment records from the employee health unit regarding appellant's claimed left shoulder injury.

The employing establishment confirmed on March 14, 2012 that she had picked cases on Friday, January 27, 2012 for surgical procedures scheduled for the following Monday. There were no reported witnesses to the alleged employment incident. According to Denise Ormrod, appellant picked "ortho instrument trays" on January 27, 2012. The instrument trays for Monday's cases included a "[t]otal hip, [carpal tunnel release] ortho, [c]olon, [h]ernias x 3 and one local case." Ms. Ormrod provided the respective weights of three of the trays appellant pulled on January 27, 2012. She noted that the "Ortho 1" tray weighed 19¼ pounds and "Ortho 2" weighed 18 pounds. Ms. Ormrod also indicated that the "Hip Retract" tray weighed 17½ pounds. She further advised that the height of the instrument shelves where the "three" trays were stored was 25 to 32 inches. Lastly, Ms. Ormrod stated the three-tiered case cart, which appellant described as being at hip level, had a top shelf that was 32 inches from the floor. The middle or 2nd shelf was 20 inches from the floor and the bottom or 1st shelf was 9 inches from the floor.[3] The employing establishment further noted that there was a stool available in the instrument storage room and the shelving was wide enough to accommodate a cart for transport of instruments such that carrying items to another cart was unnecessary.

Appellant's supervisor/nurse manager, Faith Dorio, provided a March 14, 2012 statement which indicated that appellant had informed her of the January 27, 2012 injury 18 days after the incident. Appellant reportedly told Ms. Dorio that while she was picking cases on January 27,

[2] Appellant claimed to have been injured at 2:00 p.m. Her regular tour of duty was 7:00 a.m. to 3:30 p.m.

[3] Ms. Ormrod did not identify the weights or shelf locations of several other instrument trays appellant reportedly picked on January 27, 2012.

2012 she felt some discomfort in her left shoulder, but she continued to work her shift and when she got to her car and opened the door she felt more pain and had difficulty raising her arm. She also noted that, on the day of the alleged incident, appellant did not report it to anyone and no one heard her complain. Appellant also did not seek medical attention at the time.

Ms. Dorio twice noted that appellant stated that her injury occurred from "picking cases." She explained that picking cases was a process that involved picking instrument kits and soft supplies and placing them on a case cart for upcoming surgical procedures usually scheduled for the following day. Ms. Dorio stated that she believed appellant's story to be different from the incident report. She noted that the weight and location of kits picked was different than what had been described. Ms. Dorio also noted that appellant stated that she had to reach for "heavy kits" while picking case carts. She referenced Ms. Ormrod's March 6, 2012 statement describing the respective weights of the instrument kits, their location and the height of the shelving. Ms. Dorio stated that the instrument room had been designed utilizing ergonomic principles and with attention to detail regarding size and location of instrument kits. She also noted that, based on Ms. Ormrod's report, none of the shelves were high.

The employing establishment also submitted a telephone log prepared by its nurse case manager, Lisa Dabbs, who began monitoring appellant's case on or about February 14, 2012. After a couple failed attempts to reach appellant, Ms. Dabbs spoke with her on February 22, 2012. She indicated that appellant informed her that she was seeing her own medical provider. Appellant also indicated that she had injured her left shoulder, but according to Ms. Dabbs, would not elaborate how. Also, she advised that she had yet to file a workers' compensation claim and was unsure whether she was going to file one. Ms. Dabbs noted that appellant was left-hand dominant. Appellant reported that for the last five months she had asked for ergonomic changes at the job, but nothing had been done. There was also mention of an employment-related right shoulder injury that she had not yet claimed. Appellant reportedly had many other medical issues and was unsure what she would do about returning to work. Ms. Dabbs noted that appellant had discussed filing a claim with human resources but felt she did not have enough information to complete the paperwork.

In response to OWCP's request for additional information, appellant submitted a March 29, 2012 statement. She indicated that Dr. Langeland first examined her on February 13, 2012 regarding her left shoulder injury. With respect to her delay in reporting the January 27, 2012 employment injury, appellant explained that she thought the pain she experienced would resolve itself and that it was just a transient episode similar to those involving other parts of her body. The pain did not resolve on its own and instead worsened. Appellant also noted that she experienced a decline in range of motion. She then saw Dr. Langeland on February 13, 2010. Appellant explained that it was not possible to get an earlier appointment on short notice. Dr. Langeland's impression from the February 13, 2012 initial evaluation was left shoulder acute rotator cuff tear. Appellant indicated that she notified her supervisor the following day. She also stated that she had not had any similar disability or symptoms prior to the January 27, 2012 left shoulder injury.

A March 6, 2012 work capacity form from Dr. Langeland's office indicated a diagnosis of left rotator cuff tear.[4] It also noted that appellant was unable to return to work until further notice. Appellant was identified as a candidate for a reverse total shoulder arthroplasty and was scheduled to meet with Dr. Langeland to discuss surgical options.

OWCP also received a March 16, 2012 letter from Dr. Langeland who noted that appellant was currently under his care due to work-related injuries. Dr. Langeland excused appellant for all absences during the period February 13 to March 2, 2012.

By decision dated April 10, 2012, OWCP denied appellant's traumatic injury claim. It found that she failed to establish fact of injury. Appellant had not established that the January 27, 2012 employment incident occurred as alleged. OWCP also found that she had not established a medical diagnosis in connection with the alleged employment incident.

Appellant subsequently requested an oral hearing. On May 23, 2012 the Branch of Hearings and Review advised her that a telephone hearing was scheduled for July 2, 2012.[5] Appellant's counsel objected to the scheduling of a telephone hearing rather than an in-person oral hearing.[6] He believed credibility was crucial in determining fact of injury and questioned how the hearing representative could properly assess appellant's credibility over the telephone. Appellant's counsel subsequently withdrew the request for an oral hearing and instead requested a review of the written record.

OWCP received additional medical records which included treatment notes from the employee health unit as well as various reports from Dr. Langeland covering the period February 13 to July 9, 2012. Although his initial February 13, 2012 treatment notes are not part of the current record, OWCP received a similarly dated "addendum" from Dr. Langeland with the following history of injury:

> "The patient did state on office visit of February 13, 2012 [that she injured] herself at work moving instrument sets. This occurred with repetitive lifting of instruments sets which resulted in significant pain in both her right and left shoulders. In my opinion her repetitive lifting activities have resulted in ... bilateral shoulder pain."

On February 14, 2012 Mary E. Gawron, a physician assistant (PA-C), examined appellant at the employee health unit (EHU). She diagnosed work-related left rotator cuff injury -- tear versus strain. The injury reportedly occurred in the O.R. instrument room at 2:00 p.m. on

[4] The form was electronically signed by Kim Nagy, whose title and qualifications are not readily apparent from the record.

[5] At the time of her initial request, appellant did not state a preference for an in-person oral hearing, a telephone hearing or a videoconference hearing. She submitted a brief letter dated April 17, 2012 which merely requested an "oral hearing." Appellant also submitted the appeal request form that accompanied OWCP's April 10, 2012 decision. She placed an "x" in the appropriate space indicating her desire for an oral hearing. The appeal request form explained that under certain circumstances a telephone hearing or videoconference would be scheduled as a means of expediting the appeal process.

[6] The hearing representative has discretion in determining which type of hearing to conduct. 20 C.F.R. § 10.615.

January 27, 2012. Appellant reported that she had injured her left shoulder when pulling multiple trays of surgical instruments before surgical procedures. She further stated that she began to feel pain in her left shoulder when she pulled her car door closed at the end of her shift. Appellant's pain reportedly worsened overnight and she could not find a comfortable position for her arm and thus, could not sleep. She indicated that she saw her orthopedist on January 30, 2012 for follow-up regarding a right shoulder injury. After physical therapy for the right shoulder, appellant mentioned her new left painful shoulder to her doctor and she was scheduled to see a specific shoulder trauma orthopedist, Dr. Langeland. Ms. Gawron also reported that a magnetic resonance imaging (MRI) scan had been scheduled for diagnosis of appellant's left shoulder pain. It was noted that appellant had a prior history of right shoulder arthropathy -- chronic osteoarthritis.

Ms. Gawron deferred physical examination at that time because appellant was already seeing a shoulder specialist for her injury. However, she noted that appellant appeared in some discomfort and was favoring her left arm. Ms. Gawron also deferred to appellant's orthopedist for further treatment and medical management. She advised appellant to continue diagnostic workup for her shoulder injury and to follow her orthopedist's recommendations. Ms. Gawron also instructed appellant to obtain any specific work restrictions from her orthopedist. Regarding causal relationship, Ms. Gawron explained that appellant's injury was job related because her reported pain occurred at the end of a workday that involved lifting heavy surgical instrument trays.

A February 22, 2012 left shoulder MRI scan revealed acromioclavicular osteoarthritis, rotator cuff tendinopathy and a small full-thickness tear of the distal supraspinatus tendon.

Dr. Langeland's February 27, 2012 treatment notes indicated that appellant sustained a work-related injury on January 27, 2012 when she was lifting with her left-dominant arm. Appellant reportedly was moving 20-pound trays overhead when she felt pain in her shoulder. She had no prior shoulder pain. Appellant's pain became severe to the point where she was unable to lift her arm. Dr. Langeland noted that appellant's MRI scan showed a full-thickness rotator cuff tear. His diagnostic impression was left shoulder acute rotator cuff tear, causally related to appellant's January 27, 2012 work injury. Dr. Langeland placed appellant on light-duty status with no use of her left arm.

In his April 2, 2012 treatment notes, Dr. Langeland reiterated that appellant sustained a left shoulder injury when lifting instrument trays overhead. This event resulted in a rotator cuff tear. Dr. Langeland explained that on January 27, 2012 while in her usual working position lifting instrument trays, appellant noticed immediate shoulder pain when lifting a tray. He further noted that appellant had been performing this type of work for at least 16 years.

OWCP also received an undated attending physician's report (Form CA-20) from Dr. Langeland[7] who identified January 27, 2012 as the date of injury and the reported history of injury was "lifting [20-pound] instrument trays overhead ... felt immediate pain in the left shoulder." Dr. Langeland noted that there was no history or evidence of concurring or

[7] The report appears to have been authored in early April 2012. Dr. Langeland noted that he had last treated appellant on April 2, 2012 and OWCP received the report on April 13, 2012.

preexisting injury/disease. He diagnosed left shoulder rotator cuff tear (ICD-9 Code No. 727.61). Dr. Langeland attributed the diagnosis to appellant's employment, explaining that she had been lifting trays overhead during her 16 years with the VA.

A May 21, 2012 work capacity form from Dr. Langeland included diagnoses of both left and right rotator cuff tears. However, the corresponding treatment notes did not include a right shoulder diagnosis, but only noted left shoulder rotator cuff atrophy and acute rotator cuff tear. Appellant was reportedly unable to return to work until her next monthly appointment. Dr. Langeland also provided a July 9, 2012 work capacity form wherein he diagnosed left and right rotator cuff tears. He further noted that appellant was unable to return to work before July 20, 2012.

OWCP also received a photograph of appellant purportedly in the VACT/instrument room.[8] Appellant is dressed in O.R. scrubs and standing in front of a multi-tiered (5) shelf with her right arm extended above her head. She appears to be touching and/or reaching for items on the top shelf which is above her head. Some items on the top shelf appear beyond appellant's reach. The next lowest shelf is approximately at her eye level and the one below that is positioned at her mid-torso. The reproduced photograph does not clearly depict the position of the two lower shelves in relation to appellant's body.

In an August 20, 2012 decision, the hearing representative affirmed OWCP's April 10, 2012 decision. She found that appellant had not provided medical evidence sufficient to meet her burden of proof. The hearing representative also noted "clear and compelling" factual inconsistencies in appellant's statements to the employing establishment and her delay in filing. Additionally, she noted that there were inconsistencies with Dr. Langeland's reported history, "specifically his description that the lifting was overhead...."

LEGAL PRECEDENT

A claimant seeking benefits under FECA has the burden of establishing the essential elements of his or 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.[9]

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.[10] The second component is whether the employment incident caused

[8] The photograph was signed by appellant and dated March 5, 2012.

[9] 20 C.F.R. § 10.115(e), (f); *see Jacquelyn L. Oliver*, 48 ECAB 232, 235-36 (1996).

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

a personal injury.[11] An employee may establish that an injury occurred in the performance of duty as alleged but fail to establish that the disability or specific condition for which compensation is being claimed is causally related to the injury.[12]

ANALYSIS

The employing establishment challenged fact of injury because, among other things, appellant waited 18 days before reporting her January 27, 2012 injury. Late notification of an injury, if otherwise unexplained, may cast doubt on an employee's statement that an injury occurred as alleged.[13] Appellant explained that she did not report her injury at the time because she thought the pain would resolve itself. She believed that it was just a transient episode similar to those involving other parts of her body. Appellant's left shoulder pain did not resolve on its own and instead worsened. The employee health unit records indicated that she reported having received treatment for an unrelated right shoulder condition on January 30, 2012, at which time she mentioned her new left shoulder pain. Appellant's personal physician scheduled her to see a specific shoulder trauma orthopedist, Dr. Langeland, who examined her two weeks later. Appellant explained that it was not possible to get an earlier appointment with Dr. Langeland on short notice. Once she saw him on February 13, 2012 she notified the employing establishment the following day. The Board finds that appellant provided a reasonable explanation for her delay in reporting the claimed January 27, 2012 left shoulder injury.

An injury need not be confirmed by eyewitness in order to establish that the injury occurred in the performance of duty.[14] Appellant claimed that she injured her left shoulder on January 27, 2012 while moving heavy instrument sets/trays. No one witnessed the incident; however, the employing establishment confirmed that her duties that day included "picking cases," with some O.R. kits weighing approximately 20 pounds. An employee's statement alleging that an incident or exposure occurred at a given time and in a given manner is of great probative value and will stand unless refuted by strong or persuasive evidence.[15]

In addition to the delay in filing, the employing establishment questioned the validity of the claim based on appellant having reportedly provided different stories or versions of the January 27, 2012 incident. However, this allegation is unsubstantiated. First, the employing establishment questioned appellant's statement regarding the weight and location of the

[11] *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). A physician's opinion on whether there is a causal relationship between the diagnosed condition and the implicated employment factors must be based on a complete factual and medical background. *Victor J. Woodhams*, 41 ECAB 345, 352 (1989). Additionally, the physician's opinion must be expressed in terms of a reasonable degree of medical certainty, and must be supported by medical rationale, explaining the nature of the relationship between the diagnosed condition and appellant's specific employment factors. *Id.*

[12] *Shirley A. Temple*, 48 ECAB 404, 407 (1997).

[13] *See, e.g., M.H.*, 59 ECAB 461, 463 (2008).

[14] *Id.*

[15] *Id.*; *B.B.*, 59 ECAB 234, 237 n.11 (2007).

instrument kits she picked. Appellant characterized the instrument trays as heavy -- weighing 20 pounds and up. Unlike the employing establishment, she appears to have estimated the weight of the O.R. kits. Although Ms. Ormrod provided specific weight measurements, this information appears incomplete. She noted that appellant had picked at least seven instrument trays on January 27, 2012, but Ms. Ormrod only provided information regarding three of those trays.[16] The "Ortho 1" tray which reportedly weighed 19¼ pounds is reasonably consistent with appellant's 20-pound and up estimate. Two other trays reportedly weighed 17½ and 18 pounds, respectively. No information was provided with respect to the remaining O.R. trays appellant picked on January 27, 2012. Not only was the employing establishment's data incomplete but the noted weight discrepancy was relatively minor.

The employing establishment also questioned the location of the O.R. instrument kits. On her CA-1, appellant reported having moved instrument sets/trays from high and lower shelves to a cart at hip level. The photograph she provided depicted her standing in the instrument room in front of a multi-tiered (5) shelf stocked with supplies. The top three tiers of the shelf range from appellant's mid-torso to above her head. With her arm extended upward, it appeared she could barely reach the top tier. The information Ms. Ormrod provided addressed the location of only three instrument trays. She reported that the height of the instrument shelves where the "three ortho trays" were stored was 25 to 32 inches. Based on this information, Ms. Dorio represented that "none of the shelves were high...." Despite the noted measurements, Ms. Ormrod's statement neither contradicts nor is it inherently inconsistent with appellant's statement that she moved trays from high and lower shelves to a cart. Moreover, the probative value of Ms. Ormrod's March 6, 2012 statement is seriously undermined because she appears to have provided incomplete information.

Another of the perceived discrepancies involved appellant's reported left shoulder pain when accessing her vehicle after her shift ended on January 27, 2012. The employee health unit treatment records from February 14, 2012 noted that appellant reported feeling pain in her left shoulder when she "pulled her car door closed." However, Ms. Dorio indicated that appellant told her that when she got to her car and "opened" the door she felt more pain and had difficulty raising her arm. The employing establishment suggested that the distinction between opening and closing the vehicle door was further justification for questioning appellant's veracity. Appellant is left-hand dominant and it is not inconceivable that she experienced pain both opening the driver-side door and when pulling it closed from within the vehicle.

The circumstance surrounding the reported left shoulder pain appellant experienced while accessing her vehicle is relatively inconsequential. More significant is the fact that appellant consistently attributed her left shoulder condition to moving instrument sets/trays. Ms. Dorio twice noted in her March 14, 2012 statement that appellant stated that her injury occurred from "picking cases" on January 27, 2012. Appellant provided similar information to the employee health unit, Dr. Langeland and OWCP.

The Board finds that appellant experienced left shoulder pain on January 27, 2012 while moving several O.R. instrument trays from a multi-tiered shelf to a cart. The instrument trays

[16] The reported cases (7) included: "Total hip, CTR ortho, Colon, Hernias x 3 and one local case."

varied in weight; three of which ranged between 17½ and 19¼ pounds. The employment incident occurred at approximately 2:00 p.m. After appellant's shift concluded around 3:30 p.m., she again experienced left shoulder pain while opening and closing the door of her personal vehicle. The record further establishes a diagnosis of left rotator cuff tear, which was confirmed by a February 22, 2012 left shoulder MRI scan.

While the January 27, 2012 employment incident is factually established and there is a confirmed medical diagnosis of left shoulder rotator cuff tear, appellant has nonetheless failed to establish that her left shoulder condition is causally related to the accepted employment incident. Dr. Langeland attributed appellant's left rotator cuff tear to a January 27, 2012 employment injury; however, he has not always been consistent regarding the particular mechanism of injury.

In his February 13, 2012 addendum, Dr. Langeland indicated that appellant's injury was due to "repetitive lifting of instruments sets" which resulted in bilateral shoulder pain. His February 27, 2012 treatment notes indicated that, on January 27, 2012, appellant had been lifting with her left-dominant arm, moving 20-pound trays overhead when she felt pain in her shoulder. In April 2012, Dr. Langeland reiterated that appellant was injured while lifting instrument trays "overhead." However, he also emphasized that appellant had been performing these duties for 16 years.

It is not entirely clear whether Dr. Langeland believed appellant sustained a repetitive use type injury over a 16-year period or whether the events of January 27, 2012 were solely responsible for her left rotator cuff tear. He also failed to explain how "overhead" lifting was responsible for the injury appellant sustained. Appellant reported having moved trays from high and lower shelves but Dr. Langeland focused only on overhead lifting as a causative factor. Dr. Langeland also did not explain what, if any, significance the weight of the instrument trays played in appellant's left shoulder injury. His opinion on causation is further clouded by his unexplained diagnosis of right shoulder rotator cuff tear, which he seemed to suggest was due to employment-related repetitive lifting. In view of these deficiencies, the Board finds that the medical evidence of record does not establish that appellant's diagnosed left rotator cuff tear is causally related to the accepted January 27, 2012 employment incident.[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

Appellant established the January 27, 2012 employment incident. She also established a medical diagnosis of left rotator cuff tear. However, appellant failed to establish that her left rotator cuff tear was due to the January 27, 2012 employment incident. Accordingly, OWCP's August 20, 2012 decision shall be modified to reflect the above-noted findings.

[17] *See Victor J. Woodhams*, *supra* note 11.

ORDER

IT IS HEREBY ORDERED THAT the August 20, 2012 decision of the Office of Workers' Compensation Programs is affirmed as modified.

Issued: March 4, 2013
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board