



## ISSUE

The issue is whether appellant met her burden of proof to establish that she sustained a traumatic injury on February 15, 2011 in the performance of duty.

## FACTUAL HISTORY

On August 29, 2011 appellant filed a recurrence of disability claim alleging that on February 15, 2011 she sustained a recurrence of disability due to her September 1, 2005 and August 2, 2010 employment injuries.<sup>3</sup> Appellant stated that she returned to limited-duty work following her employment injury with a sit down job and lifting restriction of 10 pounds. Appellant was also restricted in her pushing and pulling and machine work. Appellant stated on February 15, 2011 her supervisor instructed her to label the machine for the casuals. Appellant stated that she attempted to perform this task for 15 minutes and developed neck pain. On March 18, 2011 Dr. A.G. Lipede, a surgeon, diagnosed serious work-related neck to left-hand condition.

OWCP also informed appellant by letter dated October 7, 2011 that her claimed recurrence of disability dated August 29, 2011 would be developed as a new traumatic injury occurring on February 15, 2011 under a separate claim number.<sup>4</sup> In a letter dated October 7, 2011, OWCP requested additional factual and medical information regarding appellant's February 15, 2011 traumatic injury claim.

By decision dated November 17, 2011, OWCP denied appellant's traumatic injury claim finding that she failed to submit sufficient factual and medical evidence to establish her claim.

Appellant requested reconsideration on September 12, 2012. In a statement, appellant noted that on February 15, 2011 she tried to work at the label machine, but her neck became uncomfortable after about 15 minutes. She stated that labeling required shifting her neck to reach the slots. While she stopped labeling, appellant continued to case for the remainder of her tour.

Appellant submitted a magnetic resonance imaging (MRI) scan dated July 18, 2008. The MRI scan demonstrated mild cervical spondylosis with no large disc protrusion. Electromyography (EMG) reports dated January 15, 2008 and February 16, 2010 found no cervical or lumbosacral radiculopathy. An MRI scan dated March 5, 2011 demonstrated nerve encroachment due to mild disc osteophyte complex at C6-7. A computerized tomography (CT) scan dated June 3, 2011 demonstrated disc herniation at C6-7 and moderate neural foraminal stenosis.

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<sup>3</sup> OWCP, in File No. xxxxxx191, accepted that on September 1, 2005 appellant sustained Achilles tendinitis causally related to factors of her federal employment. In File No. xxxxxx839, OWCP denied appellant's traumatic injury claim for neck, back and shoulder injuries.

<sup>4</sup> OWCP assigned claim number xxxxxx853 to this new traumatic injury, the subject of this appeal.

Dr. Brett A. Taylor, a Board-certified orthopedic surgeon, completed a report dated August 24, 2011. He noted appellant's six-year history of back and neck pain. Appellant described two work injuries: in 2005 she was pushing a 1,000-pound metal container that rolled back on her resulting in bilateral Achilles repairs; and in August 2010 a metal cage fell on her neck and shoulder. Dr. Taylor reviewed the CT and other diagnostic studies which demonstrated disc herniation at C6-7 but no cervical radiculopathy.

In a report dated April 12, 2012, Dr. Thomas K. Lee, a Board-certified orthopedic surgeon, noted appellant's work injury on February 15, 2011. He stated that appellant was casing mail for an hour and was then directed to process mail on the labeling machine. Dr. Lee stated that appellant reported performing this task for 15 minutes. The task required leaning slightly over to the right and also leaning her neck slight to the right and looking upwards. Appellant developed a pinching sensation on the left side of her neck and informed her supervisor that she could not perform this task. She continued to case mail for four hours. Appellant stated that her neck condition began in 2005 when she was pushing a bulk mail carrier weighing 1000 pounds. In 2008 she developed a stiff neck from processing mail. Dr. Lee reported his findings on physical examination and diagnosed left C6-7 herniated nucleus pulposus.

On May 3, 2012 Dr. Lee mentioned appellant's 2010 cage injury and attributed appellant's herniated disc to her February 15, 2011 traumatic injury. He stated that appellant had been labeling for 15 minutes which involved placing labels in four slots the lowest approximately 18 inches off the ground. Appellant demonstrated with her head flexed to the right at approximately 20 degrees and her torso flexed to the right at approximately 20 degrees. She stated that when she was straightening her neck up she felt a pulling he left levator. Dr. Lee diagnosed left C6-7 herniated disc with myelopathy.

In a separate report dated May 3, 2012, Dr. Lee stated that appellant had a history of increased symptoms related to her C6-7 herniation in relation to the work incident of February 15, 2011. He stated:

“From the mechanics of the activity as she demonstrated this work activity would be sufficient to place increased load on the C6-7 disc. She had evidence of annular defect and protrusion at the time of the activity in question. It is my opinion that this mechanism is sufficient to cause an aggravation to her C6-7 disc annual tear and protrusion. On this basis, the C6-7 herniation is causally related to the work incident of February 15, 2011.”

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“In summary, it is my opinion based on her history, clinical findings, imaging studies and physical findings that the February 15, 2011 accident caused an aggravation of her preexisting condition and is responsible for the current need for further treatment.”

By decision dated December 19, 2012, OWCP reviewed the merits of appellant's claim and denied modification of its prior decision. It found that the factual evidence was insufficient

to establish that appellant actually attempted to perform the duties of labeling or that to label an employee had to position their neck in the manner she alleged.

### **LEGAL PRECEDENT**

An employee seeking benefits under FECA<sup>5</sup> has the burden of establishing the essential elements of his or her claim by the weight of the reliable, probative and substantial evidence, including the fact that the individual is an “employee of the United States” within the meaning of FECA and that the claim was timely filed within the applicable time limitation period of FECA, that an injury was sustained in the performance of duty as alleged and that any disability or specific condition for which compensation is claimed is causally related to the employment injury.<sup>6</sup> These are the essential elements of each and every compensation claim regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.<sup>7</sup>

OWCP defines a traumatic injury as, “[A] condition of the body caused by a specific event or incident, or series of events or incidents, within a single workday or shift. Such condition must be caused by external force, including stress or strain which is identifiable as to time and place of occurrence and member or function of the body affected.”<sup>8</sup> To determine whether a federal employee has sustained a traumatic injury in the performance of duty, it must first be determined whether a “fact of injury” has been established. First the employee must submit sufficient evidence to establish that he or she actually experienced the employment incident at the time, place and in the manner alleged.<sup>9</sup> Second, the employee must submit sufficient evidence, generally only in the form a medical evidence, to establish that the employment incident caused a personal injury.<sup>10</sup>

With respect to the first component of fact of injury, the 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. An injury does not have to be confirmed by eyewitnesses in order to establish the fact 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. An employee has not met his burden of proof in establishing the occurrence of an injury when there are such inconsistencies in the evidence as to cast serious doubt upon the validity of the claim. 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 doubt on an employee’s statements in determining whether a *prima facie* case has been established. However, an employee’s statement alleging that an injury

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<sup>5</sup> 5 U.S.C. §§ 8101-8193.

<sup>6</sup> *Kathryn Haggerty*, 45 ECAB 383, 388 (1994); *Elaine Pendleton*, 41 ECAB 1143 (1989).

<sup>7</sup> *Victor J. Woodhams*, 41 ECAB 345 (1989).

<sup>8</sup> 20 C.F.R. § 10.5(ee).

<sup>9</sup> *John J. Carlone*, 41 ECAB 354 (1989).

<sup>10</sup> *J.Z.*, 58 ECAB 529 (2007).

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.<sup>11</sup>

### ANALYSIS

Appellant alleged that on February 15, 2011 her supervisor required her to label or work on the labeling machine for 15 minutes. She stated that she stopped performing this task after 15 minutes because it hurt her neck and that she cased mail for the 4 hours remaining on her shift. The Board finds that appellant has provided a consistent history of injury on her claim form, to Dr. Lee and in her narrative statement. She sought medical treatment within a month of the alleged employment incident. The Board further finds that there is no evidence refuting appellant's description of the February 15, 2011 employment incident. OWCP noted that appellant's supervisor had not supported her claim. The Board notes that there is no evidence refuting appellant's claim from the employing establishment. Appellant originally filed a claim for a recurrence of disability and OWCP found based on her description of the events of February 15, 2011 that her claim would more appropriately be developed as a new traumatic injury. The Board finds that appellant has established that the February 15, 2011 employment incident occurred as alleged.

The Board finds that Dr. Lee's reports are sufficient to require additional development of the medical evidence. He provided an accurate history of injury, diagnosis and an opinion that appellant's preexisting condition was exacerbated by the accepted employment incident. While his reports are not sufficient to meet appellant's burden of proof, they do raise an uncontroverted inference of causal relation between the employment incident of February 15, 2011 and an exacerbation of her diagnosed condition.<sup>12</sup>

On remand, OWCP should refer appellant for a second opinion evaluation to determine the causal relationship between her accepted employment incident and her diagnosed herniated cervical disc. After this and such other development as OWCP deems necessary, OWCP should issue a *de novo* decision.

### CONCLUSION

The Board finds that appellant has established a traumatic incident on February 15, 2011 and that she has submitted sufficient medical evidence to require additional development by OWCP.

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<sup>11</sup> *D.B.*, 58 ECAB 464, 466-67 (2007).

<sup>12</sup> *John J. Carlone*, 41 ECAB 354, 358-60 (1989).

**ORDER**

**IT IS HEREBY ORDERED THAT** the December 19, 2012 decision of the Office of Workers' Compensation Programs is set aside and remanded for further development consistent with this decision of the Board.

Issued: August 5, 2014  
Washington, DC

Patricia Howard Fitzgerald, Acting Chief Judge  
Employees' Compensation Appeals Board

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

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