United States Department of Labor
Employees' Compensation Appeals Board

V.J., Appellant	)	
and	)	**Docket No. 13-1460**
	)	**Issued: January 7, 2014**
U.S. POSTAL SERVICE, POST OFFICE, Miami, FL, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
PATRICIA HOWARD FITZGERALD, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On June 5, 2013 appellant filed a timely appeal from the December 10, 2012 merit decision of the Office of Workers' Compensation Programs (OWCP) denying her claim for compensation for traumatic 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 has established that she sustained a traumatic injury in the performance of duty on February 23, 2012.

FACTUAL HISTORY

On April 25, 2012 appellant, then a 52-year-old city mail carrier, filed a traumatic injury claim (Form CA-1) alleging a torn muscle and abrasion with swelling and inflammation in her

[1] 5 U.S.C. § 8101 *et seq.*

left arm in the performance of duty on February 23, 2012. She stated that her injury occurred as a result of being pushed against a metal general parcel container by her supervisor, Timothy Price. Appellant listed Mike Jordan, Michelle Cooper-Wilson, Larry Murdock and Mr. Price as witnesses to the incident.

In a sheriff's office offense report dated February 23, 2012, a police officer stated that he had been dispatched to a hospital in reference to a battery complaint. Appellant stated that she had been battered by her supervisor, Mr. Price. She described the incident as occurring when her supervisor reached to get mail from the floor and bumped her, which caused her to strike a container with her left shoulder. When asked whether appellant thought Mr. Price had intended to strike her, she stated, "I think he meant to hit me and the incident wasn't reported."

In an x-ray report dated February 23, 2012, Dr. Jaime Toro, a Board-certified radiologist, concluded that appellant's left shoulder did not have a fracture or dislocation. The acromioclavicular joint was normal.

In a report dated March 12, 2012, Dr. Nicholas Sama, a Board-certified orthopedic surgeon, noted that appellant stated that her injury occurred as a result of an altercation with a coworker on February 23, 2012. He diagnosed a left rotator cuff tear and a left labral tear, noting upon examination that she had resolved abrasions over the lateral aspect of her shoulder and was unable to tolerate any kind of range of motion examination of her shoulder, elbow, forearm, wrist or hand. Dr. Sama reviewed a magnetic resonance imaging (MRI) scan that appellant provided and stated that it revealed significant acromioclavicular joint signal intensity suggestive of ligament hypertrophy as well as osteoarthritic changes, a high-grade tear of the supraspinatus tendon, increased thickness of the infraspinatus tendon and a tear of the glenoid.

In a report dated March 21, 2012, Dr. David R. Simpson, a Board-certified orthopedic surgeon, diagnosed left shoulder tendinitis and early complex regional pain syndrome. He asked appellant to explain the injury and she refused to answer any questions, instead presenting him with a handwritten note. Dr. Simpson could not understand exactly what the note stated, but he was able to determine that she was forced up against some type of mail container. Appellant complained of severe incapacitating pain when he lightly touched the skin of her left arm, forearm or hand. She refused to move the left arm at all or let him touch her, which made physical examination of her left shoulder impossible. Dr. Simpson examined the same MRI scan as Dr. Sama, noting that it was of poor quality and concluded that there was some tendinosis within the distal supraspinatus tendon, but no evidence of a full-thickness rotator cuff tear. He asserted that he had no way of explaining appellant's incapacitating symptoms because she would not let him near her.

In progress notes dated April 25, 2012, Dr. Simpson diagnosed a partial left rotator cuff tear, adhesive capsulitis of the left shoulder and a possible left labral tear. On physical examination of the left shoulder, he found 15 degrees of forward elevation and 15 degrees of abduction before there was considerable pain and inability to move the arm. Dr. Simpson also stated that appellant's left shoulder had 10 degrees of internal rotation and 0 degrees of external rotation. Appellant's range of motion of the left elbow, wrist and hand was unimpeded.

In a narrative statement dated April 25, 2012, appellant described the alleged incident. She stated that she was holding the front bar of a general parcel container when Mr. Jordan grabbed the side of the container. Mr. Price then pushed his body against appellant, which pushed her into the metal container. Appellant then reached down and Mr. Price violently agitated the flat baskets in the container, causing them to strike her hand and arm. She also asserted that her left arm was hit against the metal container.

A special agent with the employing establishment interviewed Mr. Price on May 14, 2012. Mr. Price denied that he had pushed, hit or shoved appellant on February 23, 2012. He requested that she move her general parcel container because it was behind her casing station. When appellant refused, Mr. Price requested that Mr. Jordan move the container. Appellant grabbed onto the container and pulled back, stating that there were things in the container that she needed such as her buckets. Mr. Price attempted to retrieve the buckets, but appellant tried to pull them out of his hand and he let go. Appellant stated that Mr. Jordan witnessed the incident. Mr. Jordan reported that Mr. Price did not strike her. Appellant delivered her route for two hours before coming back. When she was requested to fill out documentation concerning the incident, she refused. Appellant submitted a traumatic injury claim on April 25, 2012.

The special agent conducted several interviews with appellant's coworkers on May 17, 2012 regarding the February 23, 2012 incident. Mr. Murdock, a coworker, stated that appellant's supervisor was approximately 75 to 100 hundred feet away from appellant when he told her to move a general parcel container. Mr. Jordan subsequently moved the container. He never heard appellant cry out in pain or state that she was hurt until she was called in for an investigative interview, at which point she stated that Mr. Price had hit her.

Susan Halstead, a coworker, stated that Mr. Price approached appellant and stated that she could not have equipment on the floor and that she needed to put it back. Appellant refused, at which point Mr. Price asked Mr. Jordan to move the general parcel container. A tug-of-war ensued between Mr. Jordan and appellant, but at no time did Mr. Price make physical contact with her, as there was some distance between them. Ms. Halstead never heard appellant state that she was hurt during the incident and never saw Mr. Price step toward her.

Myriam Rivera, a coworker, stated that Mr. Price asked appellant to move a general parcel container and that she refused to follow his order. Mr. Price then asked Mr. Jordan to move the container. Ms. Rivera did not hear appellant cry in pain or note that she had been hurt, but later overheard appellant asking Mr. Jordan whether he had seen Mr. Price hit her. Mr. Jordan replied that he had not. Ms. Rivera stated that she did not observe any violence.

Lora Cooper, a coworker, stated that she saw appellant and the Mr. Price talking, but that she did not see him strike or push appellant.

Nancy Mooney, a coworker, stated that Mr. Price was speaking with appellant and telling her that she could not have a general parcel container covering her case due to safety concerns. Mr. Price asked Mr. Jordan to move the general parcel container and appellant stated to Mr. Jordan, "If you grab that you will hurt me." He then walked away without touching her or pushing her case. Ms. Mooney witnessed appellant yelling about a safety hazard at the time

Mr. Jordan walked away, but did not hear her yell that she was hurt. She asserted in a sworn statement that Mr. Price and appellant did not make physical contact.

Andrew Moir, a manager for customer service, stated that he heard Mr. Price request that appellant move the general parcel container. Mr. Price then asked Mr. Jordan to move the container, but appellant held on to it and stated that her stuff was in it. Appellant became loud, but did not indicate in any way that she was in pain. Mr. Moir stated that he did not see everything that transpired, but that he did not hear her indicate that she was injured in any manner. When appellant was called in for an investigative interview, she left for the restroom for several minutes and when she returned she stated that Mr. Price had hit her and that Mr. Jordan had witnessed the incident. Mr. Moir stated that Mr. Price did not hit, pull or push appellant.

Mr. Jordan, asserted in a sworn statement that Mr. Price asked appellant to move a general parcel container. He grabbed the container and so did she. Mr. Price then asked appellant to remove the buckets in the container and she refused. He attempted to remove the buckets himself, but she grabbed them from him. Mr. Jordan asserted that there was no physical contact between appellant and Mr. Price and that Mr. Price had not pushed, hit or touched her in any way.

On May 23, 2012 the special agent interviewed Nena Sanders, a supervisor. She indicated that she was not present when the incident of February 23, 2012 occurred, but received a call from appellant about two hours after the incident, in which appellant stated that she could not finish her route. When appellant arrived, she was able to unload her vehicle with no difficulty and did not ask for assistance in unloading from Ms. Sanders or anyone else.

On May 29, 2012 the special agent interviewed Ms. Cooper-Wilson, a supervisor for customer service, who was not present when the incident of February 23, 2012 occurred, but she was called into the office during an investigative interview. Appellant stated that Mr. Price had hit her and Ms. Cooper-Wilson asked if she had witnesses. She advised that Mr. Jordan was her witness, but when he was called into the office for questioning, he stated that he had not seen Mr. Price hit her. Instead, Mr. Jordan asserted that appellant had grabbed something from Mr. Price. After appellant ended her shift early, Ms. Cooper-Wilson asked appellant if she wanted to file paperwork, but she walked away despite Ms. Cooper-Wilson's calls for her to wait.

On June 4, 2012 the special agent attempted to contact appellant by telephone, but did not succeed. The agent left a voice mail with contact information and requested that appellant contact her. As of June 8, 2012, appellant did not return the agent's call.

Investigative surveillance performed from May 11 through June 13, 2012 revealed that appellant was observed walking, sitting, standing, shopping, getting in and out of her vehicle and holding items with her left hand. On May 14, 2012 she was observed lifting two plastic recycling containers with her left hand without difficulty. On May 24, 2012 appellant was observed unloading a plastic box with both hands from her vehicle to her house. On May 25, 2012 she was observed going to the bank, Home Depot and Wal-Mart without wearing a sling on her left shoulder, but she reported to work wearing a sling. On May 28, 2012 appellant was

observed unloading shopping bags using her left hand into her vehicle and from her vehicle to her residence. On May 31, 2012 she was observed carrying books with her left arm from her vehicle into her residence.

On June 25, 2012 OWCP requested additional factual and medical evidence from appellant, on the grounds that the factual and medical evidence submitted were not sufficient to support her claim. It afforded her 30 days to submit additional evidence. No further evidence was received.

By decision dated August 1, 2012, OWCP denied appellant's claim, finding that the evidence was not sufficient to support that the employment incident of February 23, 2012 occurred as alleged.

On August 27, 2012 appellant requested review of the written record by an OWCP hearing representative.

In a narrative statement dated August 27, 2012, appellant recounted the events of February 23, 2012 in substantially the same manner as in her April 25, 2012 statement. She noted that she had asked Ms. Cooper-Wilson and Ms. Moir to take a picture of her injuries, but that neither had a camera. Appellant also stated that Ms. Cooper-Wilson had told her that there was no paperwork that needed to be done, because it was available online and that she did not need paperwork to go to the hospital. She stated that she called Ms. Cooper-Wilson on February 24, 2012 and asked her if she needed to do anything further because she could not come in to work and that Ms. Cooper-Wilson replied that she needed to come in.

In a report dated February 29, 2012, Dr. Adolfo Colman, a Board-certified family physician, noted that appellant stated that her injury was the result of her manager pushing her against a large metal container, whereupon she tripped and landed over her left shoulder. His examination revealed anterior and lateral shoulder tenderness and a decreased range of motion, but no left shoulder bony deformity.

In a report dated March 7, 2012, Dr. Colman, diagnosed appellant with tendinosis of the left shoulder, tenosynovitis of the bicepts and tearing of the glenoid labrum. He noted that there was no complete rotator cuff tear, no significant subacromial-subdeltoid bursal collection and no significant joint effusion.

In a report dated April 6, 2012, Dr. Colman noted that appellant stated that she was still on physical therapy for a left shoulder rotator cuff injury. His examination revealed a diminished range of motion in the left shoulder and anterolateral shoulder tenderness.

In a progress note dated May 23, 2012, Dr. Colman diagnosed appellant with ulnar neuropathy of the right hand unrelated to direct trauma. In a progress note dated June 11, 2012, he stated that she may have carpal tunnel syndrome of the right hand and wrist. In a progress note dated July 6, 2012, Dr. Colman diagnosed appellant with bilateral carpal tunnel syndrome. Appellant also submitted physical therapy notes dated August 27, 2012, which were not countersigned by a physician.

On May 25, 2012 appellant submitted a Form CA-7 claim for compensation for intermittent leave without pay, leave buyback and other wage loss, including overtime.

In an emergency patient record dated February 25, 2012, Dr. Joseph Zarlengo, a Board-certified physician of emergency medicine, noted that appellant had limited use of her left arm and pain with palpation to the left humeral area. He also noted that she stated that she was pushed into a piece of metal equipment by a supervisor and that she had pain in the left shoulder area.

In a time analysis form dated May 25, 2012, appellant stated that she was disabled for work between February 23 and June 1, 2012.

By decision dated December 10, 2012, an OWCP hearing representative affirmed the decision of August 1, 2012. He found that appellant had not met her burden of proof to establish that a left shoulder injury occurred at work on February 23, 2012 because she had not provided a witness statement supporting her allegation, whereas other personnel present at the incident had stated to investigators that Mr. Price had not touched her.

LEGAL PRECEDENT

An employee seeking benefits under FECA[2] has the burden of establishing the essential elements of his or her claim, including the fact that the individual is an "employee of the United States" within the meaning of FECA, that the claim was timely filed within the applicable time limitation period of FECA, that an injury[3] was sustained in the performance of duty as alleged and that any disability or medical condition for which compensation is claimed is causally related to the employment injury.[4]

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. A fact of injury determination is based on two elements. 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. Second, the employee must submit sufficient evidence, generally only in the form of medical evidence, to establish that the employment incident caused a personal injury. An employee may establish that the employment incident occurred as alleged but fail to show that his or her condition relates to the employment incident.[5]

[2] *Id*.

[3] OWCP's regulations define a traumatic injury as a condition of the body caused by a specific event or incident, or series of events of 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. 20 C.F.R. § 10.5(ee).

[4] *T.H.*, 59 ECAB 388, 393 (2008); *see Steven S. Saleh*, 55 ECAB 169, 171-72 (2003); *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

[5] *Id*. *See Shirley A. Temple*, 48 ECAB 404, 407 (1997); *John J. Carlone* 41 ECAB 354, 356-57 (1989).

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.[6] 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 or her subsequent course of action.[7] An employee has not met his or her burden of proof of 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.[8] 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.[9] 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 or persuasive evidence.[10]

ANALYSIS

On April 25, 2012 appellant filed a traumatic injury claim alleging that she sustained a left shoulder injury on February 23, 2012 as a result of being pushed against a metal general parcel container by her supervisor, Mr. Price. OWCP denied her claim finding that she had not established that the specific incident occurred at the time, place and in the manner described.

The initial question presented is whether appellant established that the February 23, 2012 employment incident occurred as alleged. The Board finds that there are such inconsistencies in the evidence as to cast serious doubt upon the validity of her claim that she sustained an injury on February 23, 2012. The record contains evidence that calls into serious question appellant's account of the events of that date.

In a narrative statement dated April 25, 2012, appellant described the alleged incident. She stated that she was holding the front bar of a general parcel container when Mr. Jordan grabbed the side of the container. Mr. Price then pushed his body against appellant, which pushed her into a metal container. Appellant then reached down and Mr. Price violently agitated the flat baskets in the container, causing them to hit her hand and arm. In the same statement, she also asserted that her left arm was hit against the metal container itself.

A special agent for the employing establishment conducted interviews of appellant's coworkers present at the time of the alleged incident. Five coworkers asserted that they were present and witnessed the alleged incident. Each witness asserted that Mr. Price did not make

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

[7] *Charles B. Ward*, 38 ECAB 667, 670-71 (1987); *Joseph Albert Fournier, Jr.*, 35 ECAB 1175, 1179 (1984).

[8] *Tia L. Love*, 40 ECAB 586, 590 (1989); *Merton J. Sills*, 39 ECAB 572, 575 (1988).

[9] *Samuel J. Chiarella*, 38 ECAB 363, 366 (1987); *Henry W.B. Stanford*, 36 ECAB 160, 165 (1984).

[10] *D.B.*, 58 ECAB 464, 466-67 (2007); *Robert A. Gregory*, 40 ECAB 478, 483 (1989).

physical contact with appellant and their accounts of the incident were consistent. Witnesses Mr. Murdock, Ms. Halstead, Ms. Rivera, Ms. Mooney and Mr. Moir stated that they did not hear appellant indicate in any way that she had been injured. Although appellant had called upon Mr. Jordan to recount the events of February 23, 2012, in a meeting on that day, witnesses to that meeting asserted that he had stated that there was no physical contact between Mr. Price and appellant. Ms. Sanders did not witness the incident, but stated that she had seen appellant unloading her vehicle later the same day without difficulty or asking for help. Investigative surveillance, gathered between May 11 and June 13, 2012, revealed that appellant used her left arm apparently without difficulty in a variety of tasks, such as lifting containers, shopping bags and books. It also revealed that she did not wear her arm sling on May 25, 2012 when she went to the bank, Home Depot and Wal-Mart, but that she reported to work that day wearing a sling. Appellant's account of the February 23, 2012 incident is inconsistent both with the accounts of coworkers interviewed in the course of investigation and inconsistent with her own observed behavior.

Appellant's own account of the events of February 23, 2012 is also internally inconsistent. In her narrative statement dated April 25, 2012, she asserted that Mr. Price caused the flat baskets inside the general parcel container to hit her hand and arm. Yet in the same statement, appellant also asserted that her left arm was hit against the metal container itself. In her narrative statement dated April 25, 2012, she asserted that Mr. Price violently agitated the flat baskets in the container when she stooped to pick-up mail from the floor. Yet in the sheriff's office offense report dated February 23, 2012, appellant stated that Mr. Price had reached over a general parcel container to retrieve mail from the floor, which caused her to strike the container with her left shoulder.

Further, doubt is cast upon the factual aspects of appellant's claim by the fact that she did not file a traumatic injury claim for the alleged February 23, 2012 work injury until two months later, on April 25, 2012. Appellant did not adequately explain why she delayed so long in filing her claim. She asserted that Ms. Cooper-Wilson had told her that filing was unnecessary on February 23, 2012 because she could do so online and that on February 24, 2012 Ms. Cooper-Wilson had told her to come into work in order to file her claim. In an interview dated May 17, 2012, Ms. Cooper-Wilson asserted that appellant had walked away from her when she asked whether appellant wanted to file a claim despite her calls for appellant to wait. Appellant's explanation for delay is not consistent with Ms. Cooper-Wilson's May 17, 2012 interview and not consistent with her claimed injury, insofar as that injury would prevent her from filing a claim.

On appeal, appellant advances several arguments. She asserts that Mr. Price admitted that there was physical contact in his May 17, 2012 interview. Mr. Price did state that appellant pulled a bucket out of his hand when he attempted to retrieve it from her container, but did not state that he pushed her with his body as alleged by her. Appellant asserts that Ms. Cooper-Wilson stated that Mr. Jordan admitted that there was physical contact in her May 17, 2012 interview. Ms. Cooper-Wilson did state that appellant had grabbed something from Mr. Price, but did not state that he pushed her as alleged by appellant. Appellant asserts that she did not receive any interviews or follow ups to an investigation by the employing establishment. The special agent from the employing establishment attempted to contact her on June 4, 2012 and did not receive a response.

Although an employee's statement alleging that an injury occurred at a given time and in a given manner is generally accorded great probative value, there is strong and persuasive evidence refuting appellant's account of the events of February 23, 2012.[11] The Board finds that she has not established the occurrence of the February 23, 2012 work incident as alleged and therefore has not established that she sustained an injury on February 23, 2012 in the performance of duty.

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 meet her burden of proof to establish that she sustained an injury on February 23, 2012 in the performance of duty.

ORDER

IT IS HEREBY ORDERED THAT the December 10, 2012 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 7, 2014
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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

[11] *See Robert A. Gregory*, 40 ECAB 478, 483 (1989); *Thelma S. Buffington*, 34 ECAB 104, 109 (1982).