United States Department of Labor
Employees' Compensation Appeals Board

M.S., Appellant	)	
and	)	**Docket No. 14-1079**
	)	**Issued: June 29, 2015**
DEPARTMENT OF THE NAVY, STRATEGIC SYSTEMS PROGRAM, Mitchell Field, NY, Employer	)	

Appearances:
Roy C. Orlando, M.D., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On April 8, 2014 appellant, through her representative, filed a timely appeal of the October 18, 2013 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.[2]

ISSUE

The issue is whether appellant has met her burden of proof to establish an injury in the performance of duty on August 21, 2009.

[1] 5 U.S.C. §§ 8101-8193.

[2] Appellant's representative submitted additional medical evidence directly to the Board. However, the Board is precluded from considering evidence that was not in the case record at the time OWCP rendered its final decision on October 18, 2013. 20 C.F.R. § 501.2(c)(1).

FACTUAL HISTORY

This case was previously before the Board.[3] The relevant facts are as follows. At 10:20 a.m. on August 21, 2009, a coworker discovered appellant in an office cubicle unconscious and not breathing.[4] Another coworker administered basic first aid and cardiopulmonary resuscitation (CPR) until emergency medical services (EMS) arrived at 10:45 a.m. Appellant was subsequently transported to Winthrop University Hospital. Earlier that morning, she worked on her supervisor's computer. When appellant arrived in Martin Tai's office at 9:45 a.m., she advised him she was not feeling well and that she had an afternoon appointment with her physician. She then proceeded to work on Mr. Tai's computer for the next 25 minutes, completing the task at 10:10 a.m. Mr. Tai stated that when she left his office, she was alert, talking, and did not appear to be in distress.

Appellant's husband would later advise Mr. Tai that she passed out at home the previous evening (August 20, 2009), and while he offered to take her to the hospital, she declined. Her husband also indicated that earlier that morning (August 21, 2009) while still at home, appellant complained of feeling dizzy and lightheaded. Appellant's husband again suggested that she go to the hospital, which she declined. Instead, appellant went to work and scheduled a physician's appointment for later that afternoon.

As noted, a coworker discovered appellant at 10:20 a.m. A 911 call went out and another coworker performed CPR. The August 21, 2009 EMS report indicated that paramedics found appellant lying on the floor facing upward (supine).[5] Appellant was unconscious and had not been breathing (apneic) for approximately 10 minutes, according to coworkers. Her coworkers also advised the paramedic that she earlier complained of malaise and weakness and had scheduled a physician's appointment for later that afternoon. The EMS report noted that appellant's coworkers performed CPR and applied an automated external defibrillator (AED), but the AED did not produce a shock. The paramedic intubated appellant, provided oxygen and intravenous fluids, and monitored her vital signs, including heart rate and rhythm. While in route to the hospital, appellant began to have agonal respirations.

Upon arrival at Winthrop University Hospital, appellant's initial diagnosis was respiratory arrest, aspiration. Treatment records indicated that "food containing particles" were discovered in her 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 was hospitalized for a month prior to being transferred to an extended care nursing facility. She has been comatose since August 21, 2009.

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[3] Docket No. 12-461 (issued October 4, 2012).

[4] Appellant, then a 57-year-old information technology specialist, was discovered kneeling on the floor with her head and torso resting on the seat of an office chair.

[5] The report noted that the 911 call was received at 10:38 a.m. The EMS crew arrived on the scene at 10:43 a.m., and encountered appellant at 10:45 a.m. They departed the scene at 11:00 a.m., and arrived at the hospital at 11:08 a.m.

OWCP initially denied appellant's claim by decision dated November 17, 2009. Appellant's husband, and court-appointed guardian, requested reconsideration on the basis that appellant consumed food at an August 21, 2009 work-related meeting, which she later aspirated causing her injury. The employing establishment denied there was a work-related meeting and also denied having provided appellant any food on August 21, 2009. Moreover, it argued there was no evidence indicating that she consumed any food on-premises that morning. In response, appellant's husband stated that appellant did not have breakfast before leaving for work on August 21, 2009, and therefore, she must have eaten while at work. However, he did not address the possibility that she may have stopped during her commute to the office and perhaps purchased and consumed food prior to her arrival at work.

Additional evidence included an April 9, 2010 report from appellant's primary care physician, Dr. Harish C. Sood, a Board-certified internist, who indicated that appellant suffered pulmonary arrest on August 21, 2009 after aspirating food while at work.

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

Relying on Dr. Wein's opinion, OWCP denied modification of its November 17, 2009 findings by decision dated October 15, 2010.

On June 27, 2011 appellant's husband requested reconsideration on her behalf.

Dr. David C. Henke, a Board-certified internist with a subspecialty in pulmonary disease, provided a June 2, 2011 report. He identified several possible causes for appellant's August 21, 2009 collapse, which included aspiration, cardiac arrhythmia, pulmonary embolus, and seizure. However, because of appellant's current comatose state and the lack of witnesses, Dr. Henke stated that he could not determine the "primary or most proximate insult producing ... hypoxia...." He further noted that "aspiration at the time of [appellant's] collapse ... would have contributed to her hypoxia and anoxic brain injury."

In a report dated August 11, 2011, Dr. Nicholas J. Shaheen, a Board-certified internist with a subspecialty in gastroenterology, 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." 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. 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 timespan -- the presence of food in her mouth at the time of her collapse was "in all likelihood eaten while she was at work."[6]

OWCP again denied modification by decision dated October 4, 2011, which appellant's husband appealed to the Board. Oral argument was held on May 15, 2012.

[6] Appellant's husband advised Dr. Shaheen that she went to work at 7:00 a.m. However, the September 30, 2009 Form CA-1 indicates that appellant's regular work hours were 7:15 a.m. to 3:45 p.m., Monday through Friday.

In an October 4, 2012 decision, the Board affirmed OWCP's October 4, 2011 decision denying modification.[7] Appellant's representative argued that her August 21, 2009 anoxic brain injury should be covered under the "personal comfort" rule because she had consumed food on-premises, which she either choked on causing respiratory arrest or subsequently threw-up and aspirated when she collapsed due to an unspecified medical condition. In either instance, the food appellant allegedly consumed on-premises compromised her breathing, which in turn led to her anoxic brain injury. The then-current record was at best speculative with respect to whether she consumed food at work on the morning of August 21, 2009. Accordingly, the Board found 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.

The Board also rejected an alternative theory of liability under the "human instincts" doctrine. Appellant's representative argued that having been informed that appellant was not feeling well, Mr. Tai and/or the employing establishment should have closely monitored her in advance of her scheduled medical appointment. Had the employing establishment done so, the extent of appellant's brain injury could have perhaps been minimized. The Board found that under the circumstances, the employing establishment acted appropriately both before and after discovering appellant unconscious on August 21, 2009.

On July 26, 2013 OWCP received appellant's latest request for reconsideration. Appellant's representative, Dr. Orlando, submitted a copy of the August 21, 2009 EMS report.[8] OWCP also received treatment records from Winthrop University Hospital, including an August 21, 2009 admission history and physical examination, an August 22, 2009 cardiac consultation report, an October 9, 2009 report identifying various diagnoses, and an October 21, 2009 discharge summary. All four documents included handwritten annotations where "food" and/or "vomitus" was mentioned. Additionally, Dr. Orlando, a Board-certified internist with a subspecialty in gastroenterology, prepared a July 16, 2013 report. He reviewed appellant's "past medical history," and other medical records, including the August 21, 2009 EMS report, Dr. Wein's September 29, 2010 report, and Dr. Shaheen's August 11, 2011 report. Dr. Orlando disagreed with Dr. Wein's opinion that appellant suffered cardiac arrest. He also found that absent evidence that appellant left work between 7:15 a.m. and 10:20 a.m., any food particles present in her mouth at the time of her August 21, 2009 collapse had to have been eaten while she was at work. Dr. Orlando explained that, based on his clinical experience, normal gastric emptying of a meal consisting of solids and liquids would be expected to be complete by two hours. According to him, appellant's medical records exhibited no symptoms or signs of delayed gastric emptying in the days preceding her collapse in that she had no history of nausea, vomiting, or early satiety. Dr. Orlando further indicated that in the absence of any medical evidence to the contrary, it was evident that appellant had normal gastric emptying, which was her status on the day she collapsed.

In an October 18, 2013 decision, OWCP denied modification of its October 4, 2011 decision.

[7] The Board's October 4, 2012 decision is incorporated herein by reference.

[8] The two-page EMS report was not part of the record when appellant's case was previously before the Board.

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 a personal injury.[11]

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, convenience and relaxation, eating meals and snacks on-premises, or taking authorized coffee breaks.[12]

An 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 his or her own care.[13] 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 employer's failure contributed to the claimed condition.[14]

ANALYSIS

The current issues and arguments are essentially unchanged since the last time this case was before the Board. Appellant's representative, Dr. Orlando, continues to argue that appellant consumed food at work on the morning of August 21, 2009, which was reportedly discovered in her mouth following her collapse. According to appellant's representative, the noted "food,"

[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).

[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). 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).

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

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

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

"food containing particles," and/or "vomitus" made it difficult for appellant to breathe, and thus, caused or contributed to her anoxic brain injury.

The Board notes that the August 21, 2009 EMS report made no mention of food, vomitus, or anything food-related having been discovered in appellant's mouth prior to her being intubated. The additional Winthrop University Hospital treatment records submitted on reconsideration included references to "history of possible aspiration," "[patient] found [with] food in mouth," "aspirated ... food," and "[p]neumonitis due to inhalation of food or vomitus." Assuming *arguendo* appellant was discovered with food, food containing particles, or vomitus in her mouth when she collapsed at work on August 21, 2009, the question remains as to when and where she ingested the food.

The current record lacks direct evidence that appellant consumed a Jamaican meat pie or any other type food while at work on the morning of August 21, 2009.[15] Appellant's husband indicated that she had not eaten breakfast at home that morning. However, he did not account for the possibility that she may have stopped for food prior to her arrival at work that day. Additionally, while attempting to bolster Dr. Shaheen's opinion regarding normal gastric emptying, appellant's representative alluded to the possibility that appellant left work between 7:15 a.m. and 10:20 a.m. and consumed food off-premises. As the Board noted in its prior decision, 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 appellant collapsed.

Absent direct evidence, one is left to deduce that appellant consumed food on-premises based on her normal gastric emptying timeframe. Both Dr. Shaheen and appellant's representative, Dr. Orlando, indicated that two hours was the expected timeframe for normal gastric emptying following a meal consisting of solids or solids and liquids. Because appellant was at work for approximately three hours prior to collapsing, her representative argued that she must have eaten during that timeframe based on the food or vomitus discovered in her mouth. The Board previously found that Dr. Shaheen's August 11, 2011 report lacked probative value because of its generic nature. Dr. Shaheen had not personally examined appellant and it was unclear whether he had even reviewed any of appellant's medical records. The Board likened his ostensibly generic analysis to a medical text or treatise, and concluded that his report lacked evidentiary value with respect to appellant's particular circumstances.

In his July 16, 2013 report, Dr. Orlando attempted to resuscitate Dr. Shaheen's opinion by incorporating additional information specific to appellant's habitus. He found it noteworthy that appellant's "past medical history" did not include either digestive or nondigestive disease. Dr. Orlando also noted that she did not take any medications that would result in delayed gastric emptying. He further explained that appellant's medical records exhibited no symptoms or signs of delayed gastric emptying in the days preceding her collapse. Most notably, there was no history of nausea, vomiting, or early satiety. The Board notes that the current medical record dates back to August 21, 2009. Thus, it is unclear upon what records Dr. Orlando relied in

[15] Appellant's husband previously represented that, while in the emergency department on August 21, 2009, he noted that his wife's clothing was stained with what he believed to be a Jamaican meat pie. *M.S.*, Docket No. 12-461 at 5, n.11 (issued October 4, 2012).

describing appellant's past medical history and her signs and symptoms in the days preceding her collapse. Accordingly, the record does not substantiate Dr. Orlando's representation of appellant's "past medical history."[16] As such, Dr. Orlando's July 16, 2013 opinion lacks probative value regarding appellant's two-hour normal gastric emptying timeframe

When the case was previously on appeal, the Board thoroughly reviewed the then-current medical record. The relevant findings have been incorporated herein. Accordingly, the Board need not reiterate or revisit those earlier findings. The Board's findings regarding the medical reports addressed in the previous Board's decision are not subject to additional review.[17]

The evidence submitted since OWCP's October 4, 2011 decision similarly fails to establish that appellant's 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.

As was the case with the prior appeal, Dr. Orlando continues to represent that appellant's anoxic brain injury should be covered under FECA based on the employing establishment's negligence. He contends that a delay of up to 10 minutes in getting help contributed to the severity of appellant's injury.[18] Based on the current record, appellant was unaccounted for between 10:10 a.m., when she left Mr. Tai's office, and 10:20 a.m., when a coworker discovered her unconscious in an office cubicle. At that time, her coworkers called 911 and provided basic first aid and CPR until paramedics arrived at 10:45 a.m. As there is no clear evidence of the time appellant collapsed, Dr. Orlando's argument that a possible 10-minute delay in treatment contributed to appellant's anoxic brain injury is purely speculative.

Appellant's representative also reiterated that his belief that the August 21, 2009 injury should be covered under the "human instincts" doctrine. Dr. Orlando argued that appellant requested "emergency" medical leave from Mr. Tai to attend an afternoon medical appointment. Under the circumstances, Mr. Tai should have closely monitored her condition. The available facts do not support his characterization of events. When appellant arrived at Mr. Tai's office at 9:45 a.m., she informed him that she had not been feeling well and had scheduled a physician's

[16] A physician's opinion must be based on a complete factual and medical background. *Victor J. Woodhams*, 41 ECAB 345, 352 (1989).

[17] 20 C.F.R. § 501.6(d).

[18] In support of this argument, appellant's representative cited *Rudy C. Sixta, Jr.*, 44 ECAB 727 (1993). However, Dr. Orlando misinterpreted the Board's decision in that particular case. In *Rudy C. Sixta, Jr.*, the Board did not find that a delay in getting initial treatment contributed to the employee's injury. Instead, the Board noted that OWCP had not met its burden to rescind a March 1968 acceptance of the claim because the medical evidence it relied upon which it did not address the issue of whether a delay in treatment hastened the progression of the employee's condition, materially affected his condition, or aggravated it in any way. The employee was a Peace Corps member stationed in Colombia and there was an approximate two-month delay between the onset of symptoms and the time when he was evacuated back to the States for medical evaluation of a brain tumor, which OWCP accepted as having been aggravated by federal employment. The Board did not specifically find that the delay in treatment caused or contributed to the employee's October 12, 1967 injury, but merely that OWCP had not fully developed the medical record when it rescinded acceptance of the claim more than 20 years later. *Rudy C. Sixta, Jr., id*. at 731-32.

appointment for later that same day. She then proceeded to service his computer for the next 25 minutes. When she left his office at 10:10 a.m., appellant was alert, talking and in no apparent distress. Although soon afterwards she was discovered unconscious, there is nothing in the record to support Dr. Orlando's representation in the record of appellant having expressed a need for "emergency" medical treatment while she was in Mr. Tai's office. When appellant's coworker discovered her at 10:20 a.m., basic first aid and CPR was administered until paramedics arrived at 10:45 a.m. The Board finds that the employing establishment acted appropriately both before and after appellant was discovered unconscious at 10:20 a.m. on August 21, 2009. Accordingly, the employing establishment satisfied its duty under the "human instincts" doctrine.

The record does not establish that appellant was injured in the performance of duty on August 21, 2009. Although the exact cause of her August 21, 2009 collapse at work remains unclear, this does not shift the burden to OWCP to disprove an employment relationship.[19]

CONCLUSION

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

[19] *Judith J. Montage, supra* note 11.

ORDER

IT IS HEREBY ORDERED THAT the October 18, 2013 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 29, 2015
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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