

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

A.D., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Harker Heights, TX, Employer**

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**Docket No. 15-0732
Issued: September 29, 2015**

Appearances:

*Alan J. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director*

Case Submitted on the Record

DECISION AND ORDER

Before:

CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
COLLEEN DUFFY KIKO, Judge

JURISDICTION

On February 6, 2015 appellant, through counsel, filed a timely appeal from an October 24, 2014 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.

ISSUE

The issue is whether appellant met her burden of proof to establish a traumatic injury in the performance of duty on August 21, 2013.

On appeal counsel asserts that the October 24, 2014 decision is contrary to fact and law.

¹ 5 U.S.C. §§ 8101-8193.

FACTUAL HISTORY

On August 22, 2013 appellant, then a 37-year-old rural carrier associate, filed a Form CA-1, traumatic injury claim, alleging that she injured her chest wall and right shoulder the previous day while loading mail from the workroom floor into her vehicle. She stopped work that day. Gwendolyn B. Colon, the supervisor of customer services, signed the form. A form question was checked "yes," indicating the employing establishment's knowledge of the facts about the injury and agreed with the statements of the employee. The claim form included an appended unsigned note stating that it appeared that appellant changed her story after she saw the doctor.

In a September 4, 2013 letter, OWCP informed appellant of the evidence needed to support her claim. In the same letter, the employing establishment was asked to provide treatment notes if she received medical treatment at the employing establishment.

Appellant provided an August 22, 2013 statement noting that on August 21, 2013 she began casing mail at approximately 8:00 a.m. She had a discussion with her immediate supervisor, Susan O. Clarkston, about her schedule and route, and then returned to casing mail. Appellant stated that she then began loading her postal vehicle and had shoulder and chest pain. She called employee assistance and was told to go to the hospital. Ms. Colon drove appellant to the hospital. In an undated statement, appellant related that she was seen at the emergency department at Scott and White Memorial Hospital where she was told that she likely had a muscle strain from loading the vehicle.

Scott and White Memorial Hospital emergency department discharge instructions dated August 21, 2013 indicated that care was provided by Dr. T. Russell Jones, Board-certified in emergency medicine, and Dr. Kellen Alstatt, a resident physician, with a discharge diagnosis of noncardiac chest pain.

Dr. Thomas Martens, an osteopath, in his report dated September 17, 2013, noted that appellant was first seen on August 29, 2013 for evaluation of right side chest pain that reportedly was incurred by loading trays of mail at work on August 21, 2013. Appellant complained of radiating pain on the right side of her chest up to her right shoulder, especially when lifting. Examination demonstrated decreased cervical and right shoulder range of motion. Dr. Martens recommended a right shoulder magnetic resonance imaging (MRI) scan and prescribed physical therapy and medication. He stated that appellant was removed from work on August 29, 2013. Dr. Martens diagnosed right shoulder internal derangement and right chest wall strain and opined that the injury occurred while appellant was loading mail trays at work. In duty status reports dated August 29, September 5, 19, and 23, 2013, he advised that appellant could not work. A September 24, 2013 right shoulder MRI scan showed normal labrum, no rotator cuff tear, minimal supraspinatus tendinopathy, and subtle subacromial/sub deltoid bursitis.

In correspondence dated September 27, 2013, the employing establishment controverted the claim. Sharon M. Faust, the senior health resource management specialist, stated that there was some conflict as to how the alleged injury occurred. She attached statements from Ms. Colon and Ms. Clarkston describing the events of August 21, 2013. Ms. Faust maintained that a reference to loading a vehicle as a cause of the injury was made only after appellant

obtained medical treatment and was told that she was not having a heart attack. Prior to that time, appellant thought she was having a heart attack because she was upset about her schedule.

In an August 22, 2013 statement, Ms. Colon advised that she was told on August 21, 2013 that appellant was having chest pains. She went over to appellant, who was crying, and asked appellant what was wrong. Appellant answered that she was having chest pains and had never had that type of pain before. She told her that she was having problems with Ms. Clarkston about scheduling which led to stress. Appellant described the pain as in her chest, the top part of her shoulder, and underneath her arm. Ms. Colon stated that she telephoned appellant's husband and then took her to the hospital.

In an August 23, 2013 statement, Ms. Clarkston advised that she had a discussion with appellant that morning and that appellant was very upset and angry about a change in her delivery schedule. After a second discussion, appellant left the building to load her vehicle. She continued that Ms. Colon then informed her that appellant was having right arm and chest pain and she was taking her to the hospital. Ms. Clarkston stated that she overheard Ms. Colon say that appellant thought "it was stress."

The employing establishment scheduled appellant for a fitness-for-duty examination on October 3, 2013.

In an October 18, 2013 decision, OWCP denied the claim finding that fact of injury had not been established due to conflicting versions of how the claimed injury had occurred.

Appellant requested reconsideration. She stated that on August 21, 2013 she had approximately three feet of magazines and newspapers, four trays of letter mail, and approximately 50 large packages to deliver, and that as she began to load mail into her vehicle, she felt a sharp pain in her right chest and shoulder area which escalated as she continued to load mail. Ms. Colon then took appellant to the hospital.

Appellant resubmitted the August 29, 2013 attending physician's report from Dr. Martens. Dr. Martens diagnosed right shoulder internal derangement and right chest/pectoral strain, checked a form box "yes," indicating that the diagnoses were employment related, and advised that appellant could not work. On October 8, 2013 he again advised that she could not work.

In an October 9, 2013 report, Dr. H. Jay Hassell, an orthopedic surgeon, reported appellant's history of sharp and constant pain while loading trays of mail on August 21, 2013. Physical examination demonstrated right shoulder limitation of motion and joint line tenderness in the subacromial area. Dr. Hassell noted the MRI scan study and diagnosed bursitis, advising that appellant had a partial rupture of her subacromial bursa at the time of the incident. He injected her shoulder, prescribed medication, and advised that she could return to work.

An October 31, 2013 functional capacity evaluation demonstrated that appellant could perform in the light physical demand category for eight hours a day.

In correspondence dated November 6, 2013, Dr. Martens again related the history of injury as described by appellant. He opined that her supraspinatus tendinopathy, subacromial

bursitis, and right pectoral sprain were work-related injuries that occurred as she was loading her vehicle with packages and mail trays on August 21, 2013. Dr. Martens maintained that the constant lifting and stress on the shoulders caused inflammation/partial rupture of the right shoulder subacromial bursa and that excess pressure was applied to the supporting muscles causing a pectoral sprain on the right side of her chest.

In a merit decision dated November 21, 2013, OWCP denied modification of the October 18, 2013 decision, noting that the record contained multiple conflicting versions of how the claimed injury occurred.

Appellant requested reconsideration. In a December 11, 2013 statement, she maintained that her Form CA-1 claim had been tampered with because additional language was filled in after Ms. Colon signed it. In an undated statement, appellant's husband stated that she called him on August 21, 2013 to say she was going to the hospital because of chest pain that was radiating down her right shoulder and arm. He stated that his immediate thought was that she was having a heart attack, but she thought not because the pain started when she was loading her vehicle. The husband met appellant at the hospital where she was diagnosed with a chest muscle strain and was advised to follow-up with a physician before returning to work. Appellant's son also submitted a statement indicating that appellant texted him on August 21, 2013 to pick her up at work, but that when he called her back she related that she hurt her arm lifting mail and her boss was taking her to the hospital.

On November 6, 2013 Dr. Martens allowed appellant to resume modified duty on November 7, 2013, with no use of the right arm and a 15-pound lifting restriction, but on December 12, 2013 he kept her off work.

By letter dated January 10, 2014, Ms. Faust challenged the claim. She maintained that on August 21, 2013 appellant was upset about a schedule change. Appellant became so upset she thought she was having a stress-related heart condition, and did not claim that her injury was due to loading her vehicle until after she had medical treatment. Ms. Faust again attached the August 22 and 23, 2013 statements from Ms. Colon and Ms. Clarkston, respectively.

In correspondence dated January 18, 2014, appellant stated that the first medical appointment she could get after August 21, 2013 was on August 29, 2013. She stated that she did not think she was having a heart attack on August 21, 2013 and 911 was not called. Appellant agreed that she had a discussion with Ms. Clarkston but was not angry, and that Ms. Clarkston witnessed her loading her vehicle. She noted that question 35 on the Form CA-1 claim indicated that the employing establishment checked a form box "yes," indicating that the facts of injury agreed with the statements of the employee and that someone later appended that there was a conflict regarding the circumstances of how the injury occurred. Appellant reiterated that she sustained an injury while lifting trays of mail during this single shift.

Ms. Colon provided a January 20, 2013 statement in which she indicated that, after she signed the Form CA-1 claim, someone else appended the statement.

A September 24, 2013 cervical spine MRI scan showed multilevel spondylosis. Dr. Martens continued to find appellant unable to work. Appellant also submitted progress notes dated May 29, June 12, and July 14, 2014 which had illegible signatures.

In a July 21, 2014 statement, appellant described her daily job duties of casing mail and indicated that she transferred mail in plastic trays which weighed 20 to 40 pounds, placed them in a cart and, pushed the cart to the parking lot where she loaded her vehicle.

In a merit decision dated July 25, 2014, OWCP denied modification of the prior decisions. It stated that, because appellant initially believed her condition was due to stress, this cast doubt on the validity of her claim. OWCP noted that she did not explain why she reported to her supervisor that she believed the condition was stress related and not due to the specific lifting incident. It issued an amended decision on July 31, 2014 because appeal rights had not been included in the July 25, 2014 decision.

On August 5, 2014 appellant again requested reconsideration.² She attached an employing establishment accident report dated August 21, 2013, completed by Ms. Colon. In answer to a form question regarding the employee's activity prior to the accident, the report stated "talking with supervisor and loading vehicle," and noted that appellant had complained of chest and upper arm pain and was taken to the hospital.

Appellant also submitted an October 23, 2013 fitness-for-duty examination, completed for the employing establishment by Dr. Gary Williams.³ Dr. Williams stated that appellant reported sharp pain when she was lifting a tray of mail on August 21, 2013. He provided right shoulder examination findings and diagnosed right bicipital tendinitis and right subacromial bursitis, finding the former diagnosis clinically apparent, with localized tenderness, restricted range of motion, and marked pain. Dr. Williams reviewed functional capacity evaluation findings and advised that appellant could not perform the full duties of a rural carrier associate and should be able to return to full duties in one to three months.

In an August 26, 2014 report, Dr. Martens reiterated his findings and conclusions.

In correspondence dated September 10, 2014, Ms. Faust continued to maintain that the evidence submitted showed a conflict as to how the alleged injury occurred.

In a merit decision dated October 24, 2014, OWCP denied modification of its July 31, 2014 prior decisions, again stating that the claim included discrepancies regarding fact of injury.

LEGAL PRECEDENT

An employee seeking benefits under FECA 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

² Appellant also submitted a number of Form CA-7, claims for compensation.

³ Dr. Williams' credentials could not be ascertained.

limitation period of FECA, that an injury was sustained in the performance of duty as alleged and that any disability and/or specific condition for which compensation is claimed are causally related to the employment injury. Regardless of whether the asserted claim involves traumatic injury or occupational disease, an employee must satisfy this burden of proof.⁴

OWCP regulations, at 20 C.F.R. § 10.5(ee), define 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.⁵ To determine whether an employee sustained a traumatic injury in the performance of duty, OWCP must determine whether “fact of injury” is established. First, an employee has the burden of demonstrating the occurrence of an injury at the time, place, and in the manner alleged, by a preponderance of the reliable, probative, and substantial evidence. Second, the employee must submit sufficient evidence, generally only in the form of medical evidence, to establish a causal relationship between the employment incident and the alleged disability and/or condition for which compensation is claimed. An employee may establish that the employment incident occurred as alleged, but fail to show that his or her disability and/or condition relates to the employment incident.⁶

An injury does not have to be confirmed by eyewitnesses in order to establish the fact that an employee sustained an injury while in the performance of duty. The employee’s statements, however, must be consistent with the surrounding facts and circumstances and his or her subsequent course of action.⁷ 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 cast doubt on an employee’s statements in determining whether he or she has established a *prima facie* claim for compensation. The 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 and persuasive evidence.⁸

ANALYSIS

OWCP denied appellant’s claim for injury, finding that she had not established the August 21, 2013 incident at the time, place, or in the manner alleged. It found that the record included discrepancies regarding fact of injury. The Board, however, finds that the evidence of record is sufficient to establish that a lifting incident occurred as alleged on August 21, 2013. There are not sufficient discrepancies in the case record regarding appellant’s claimed August 21, 2013 injury to cast doubt on the fact that a work incident occurred on that date as alleged.⁹ Appellant’s claim of an August 21, 2013 injury has not been refuted by strong or

⁴ Gary J. Watling, 52 ECAB 278 (2001).

⁵ 20 C.F.R. § 10.5(ee) (1999, 2011); Ellen L. Noble, 55 ECAB 530 (2004).

⁶ *Supra* note 5.

⁷ M.H., 59 ECAB 461 (2008).

⁸ *Id.*

⁹ See C.S., Docket No. 08-1585 (issued March 3, 2009).

persuasive evidence.¹⁰ Whether appellant believed the pain was due to stress or due to lifting is not relevant to the fact that pain occurred when she was casing mail. The Board finds that appellant has established a work incident on August 21, 2013 while loading her postal vehicle.

The most contemporaneous evidence regarding the incident is the accident report completed by Ms. Colon on the date of injury. In that report, in answer to a form question regarding the employee's activity prior to the accident, the report stated, "talking with supervisor and loading vehicle." It indicated that appellant complained of chest and upper arm pain and was taken to the hospital. Ms. Colon also submitted an August 22, 2013 statement in which she related that appellant told her she was having problems with Ms. Clarkston about scheduling and this led to stress, which perhaps caused the chest and arm pain. This statement, however, does not contradict the accident report which indicated that appellant was both talking with a supervisor and loading a vehicle prior to the claimed injury.

Appellant was taken to the hospital by Ms. Colon and, while the record does not contain the emergency department report and merely contains discharge instructions, this provides a discharge diagnosis of noncardiac chest pain.

OWCP places great emphasis on the fact that appellant did not file a claim until August 22, 2013, the day after the claimed injury. On the claim form, appellant alleged that she injured her chest wall and right shoulder the previous day while loading a vehicle from the workroom floor to her vehicle. The claim was signed by Ms. Colon on August 22, 2013. Ms. Colon indicated by a check mark, "yes," that the employing establishes knowledge of the facts about the injury agreed with the statements of the employee and/or witnesses.

On August 23, 2013 Ms. Clarkston related that she had a discussion with appellant on the morning of August 21, 2013 and that appellant was very upset and angry about a change in her delivery schedule, and that, after a second discussion, appellant left the building to load her vehicle. She stated that Ms. Colon then informed her that appellant was having right arm and chest pain and she was taking her to the hospital. Ms. Clarkston stated that she overheard Ms. Colon say that appellant thought "it was stress." Thus, she acknowledged that appellant left to load her vehicle.

There is no requirement that a claim be filed on the date of injury,¹¹ and filing a claim one day later after receiving a medical diagnosis does not constitute a significant discrepancy. It is not relevant whether appellant thought she was having a heart attack or pain due to stress, and that the pain turned out to be caused by a muscle strain. A reasonable person with chest pain would seek medical treatment for a definitive diagnosis, which appellant did in this case.

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 and persuasive

¹⁰ *Id.*

¹¹ Section 10.100(b) of OWCP regulations provides that for injuries sustained on or after September 7, 1974, a notice of injury must be filed within three years of the injury. 20 C.F.R. § 10.100(b).

evidence.¹² Appellant timely filed her claim the day following the August 21, 2013 incident. The Board finds that the evidence submitted in this case is sufficient to establish that she experienced the August 21, 2013 work incident at the time, place, and in the manner alleged. Appellant stopped work immediately after the incident and sought medical treatment. She provided a generally consistent history of injury to physicians, the employing establishment, and to OWCP. Under the circumstances of this case, the Board finds that appellant's recitation of the facts has not been refuted by strong or persuasive evidence, and that there are not sufficient inconsistencies as to cast serious doubt on her version of the employment incident.¹³ Consequently, appellant has established the occurrence of the August 21, 2013 work incident.

As OWCP has not yet evaluated the medical evidence, the case will be remanded to OWCP for evaluation of the medical evidence to determine whether she sustained a medical condition and/or disability due to the accepted August 21, 2013 work incident. After such further development deemed necessary, OWCP shall issue an appropriate decision.¹⁴

CONCLUSION

The Board finds that this case is not in posture for decision.

¹² *Supra* note 8.

¹³ *Id.*

¹⁴ *L.S.*, Docket No. 13-1742 (issued August 7, 2014).

ORDER

IT IS HEREBY ORDERED THAT the October 24, 2014 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded to OWCP for proceedings consistent with this opinion of the Board.

Issued: September 29, 2015
Washington, DC

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

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board