

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

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<b>S.H., Appellant</b>	)	
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<b>and</b>	)	<b>Docket No. 10-1697</b>
	)	<b>Issued: April 15, 2011</b>
<b>U.S. POSTAL SERVICE, POST OFFICE,</b>	)	
<b>Carol Stream, IL, Employer</b>	)	

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*Appearances:* *Case Submitted on the Record*  
*Alan J. Shapiro, Esq., for the appellant*  
*Office of Solicitor, for the Director*

**DECISION AND ORDER**

Before:  
RICHARD J. DASCHBACH, Chief Judge  
ALEC J. KOROMILAS, Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On June 14, 2010 appellant filed a timely appeal from a May 11, 2010 merit decision of the Office of Workers' Compensation Programs denying her claim for compensation. Pursuant to the Federal Employees' Compensation Act<sup>1</sup> 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 that she sustained a left shoulder and neck injury in the performance of duty on March 21, 2008.

**FACTUAL HISTORY**

On October 10, 2009 appellant, then a 29-year-old letter carrier, filed an occupational disease claim (Form CA-2) alleging that on March 21, 2008 she first became aware of her condition and first realized that the illness was caused or aggravated by her employment. She

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<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

failed to specify the nature of her injury or its relationship to her employment. On the reverse side of the form, the employing establishment indicated that appellant first reported her condition to her supervisor on June 25, 2009. Appellant stopped work on March 23, 2008 and returned to work on March 25, 2008. The employing establishment controverted the claim.

In an October 9, 2009 narrative statement, appellant reported that, on March 21, 2008, Sharon Christensen sent her out on route to carry mail which was beyond her restrictions, causing her to injure her left shoulder up to her neck area. She noted that she delayed in filing a claim because her supervisor refused to give her the claim form and because she did not know about the paperwork for an on-the-job injury. Appellant also stated that the Office accepted the new injury as a recurrence, claim number xxxxxx487.<sup>2</sup>

In a July 27, 2009 medical report, Dr. Verlina Cobb performed an impartial medical examination at the request of the Office in claim number xxxxxx487. It is of interest that, while Dr. Cobb noted appellant's medical history and found objective evidence for left shoulder tendinitis, she opined that it was likely degenerative and not traumatic because her conditions did not occur as a result of carrying a heavy weight over her shoulder but rather through repetitive overhead activity or more significant trauma. Dr. Cobb determined that the initial diagnosis from November 9, 2004 more likely reflected the work-related condition as a trapezius strain which had resolved over time because appellant had not carried mail for close to five years. She further reported that the location of appellant's pain, the base of the neck, trapezius, anterior chest and left axilla, corresponded to the diagnosis of shoulder impingement syndrome and rotator cuff tendinitis. Dr. Cobb recommended no further treatment and stated that appellant was capable of returning to work without restrictions other than pushing a cart if carrying a mailbag aggravated her left shoulder symptoms.

In an October 14, 2009 medical report, Dr. Jacob Salomon, a treating surgeon, stated that appellant had complaints of neck pain and pain radiating down her left shoulder and arm. He

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<sup>2</sup> The Board notes appellant has additional compensation claims which are distinct from the claim currently on appeal but have some relevance to factual matters. This is because the claims involve the same body parts and were being developed during a period close to this traumatic injury claim.

The following claims are not before the Board. Appellant had a previous traumatic injury to her left shoulder on November 3, 2004 while carrying mail that day in the performance of duty. The Office accepted that her injury resulted in left shoulder strain plus brachial neuritis/radiculitis of the left upper extremity, claim number xxxxxx487. Appellant submitted another traumatic injury notice alleging that on November 9, 2004 she was lifting a tub of mail which resulted in an injury to her left arm and left side of her neck, claim number xxxxxx295. The claim was accepted and combined with the prior claim and expanded to include left shoulder impingement, left rotator cuff tear, and complete rupture of left rotator cuff, claim number xxxxxx487. Appellant stopped work on November 9, 2004 and returned to restricted duty on April 15, 2005.

On August 16, 2008 appellant filed a claim for recurrence under claim number xxxxxx487. She stopped work on August 16, 2008 and underwent arthroscopic subacromial decompression and partial acromioplasty with clavicle resection on September 26, 2008, which the Office authorized as being related to the work injury which occurred on November 3, 2004. Appellant returned to work with restrictions on February 2, 2009 and stopped work on September 15, 2009.

Appellant also submitted an occupational disease notice alleging that her exposure to walking worsened her bilateral foot problems. The Office accepted the aggravation of bilateral pes planus, claim number xxxxxx217.

reported that appellant had an original left shoulder injury from November 3, 2004 and was diagnosed with tendinitis. Appellant noted that on March 21, 2008 she was delivering mail and lifting packages when she experienced shoulder pain. Dr. Salomon stated that appellant underwent surgical repair of her left rotator cuff but continued to have pain in her left shoulder and neck area.<sup>3</sup> He reported that her neck pain dated back to her March 21, 2008 recurrence and diagnosed cervical disc disease. Dr. Salomon stated that appellant filed a new occupational injury form on October 10, 2009 because she was continuing to suffer with her neck pain. He opined that the cervical neck pain and bulging disc disease were related to her job injuries from November 3, 2004 as well as March 21, 2008.

By letter dated November 4, 2009, the employing establishment challenged appellant's claim for a work-related cervical condition which is the subject of this appeal. It asserted that this claim was not an occupational disease claim, but rather a recurrence. The employing establishment alleged that appellant refused suitable work and that she had not worked since September 16, 2009.

By letter dated November 12, 2009, the Office requested additional factual and medical evidence from appellant.

In a November 24, 2009 medical report, Dr. Salomon stated that appellant had filed a claim for her neck because of her past history of having left shoulder surgery for rotator cuff tear with chronic pain in her left shoulder which radiated into her neck. In this report, he opined that the repetitive use of her left extremity, turning her head and bending to reach for mail as a postal employee related to her neck pathology and left shoulder chronic postoperative symptoms.

By decision dated January 26, 2010, the Office denied appellant's claim finding that appellant did not establish fact of injury. It specifically noted that her claim was being denied pending the findings of the referee medical examination to be scheduled under claim number xxxxxx487 since both claims involved the same condition.<sup>4</sup>

On February 22, 2010 appellant requested review of the written record.

In a February 19, 2010 medical report, Dr. Salomon responded to an unspecified Office letter and reported that appellant's left shoulder and neck pain was a result of cervical disc disease and that she had a history in March 2008 of recurrent left shoulder pain. He stated that the cervical disc injury could not be directly attributed to her employment but that her employment aggravated her cervical disc disease and radiculopathy from carrying mail and excess weight on her left shoulder which resulted in pain and swelling. Dr. Salomon opined that the cervical disc disease was related to an original injury from carrying the mailbag on the left shoulder.

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<sup>3</sup> The Office authorized this surgery as being related to the work injury which occurred on November 3, 2004, claim number xxxxxx487.

<sup>4</sup> Regardless of the apparent qualification of this order, the hearing examiner did not alter the decision or elaborate on the referee medical examination mentioned in the order.

By decision dated May 11, 2010, the Office hearing representative affirmed the Office's January 26, 2010 decision which denied this claim. He noted that it was unclear whether appellant was alleging that her employment injury was caused or aggravated by her work duties on March 21, 2008 or by duties performed over the course of more than one work shift. In addition, the hearing representative noted that Dr. Salomon's reports were equivocal which opined that appellant's cervical condition was a recurrence of a previous injury, related to the traumatic incident on March 21, 2008 and also a result of occupational work duties.<sup>5</sup>

### **LEGAL PRECEDENT**

An employee seeking benefits under the Act 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 the Act; that the claim was filed within the applicable time limitation; that an injury was sustained while 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 on a traumatic injury or occupational disease.<sup>7</sup>

A traumatic injury means 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 the time and place of occurrence and member or function of the body affected.<sup>8</sup> An occupational disease is defined as a condition produced by the work environment over a period longer than a single workday or shift.<sup>9</sup> A recurrence of disability means an inability to work after an employee has returned to work, caused by a spontaneous change in a medical condition which had resulted from a previous injury or illness without an intervening injury or new exposure to the work environment that caused the illness.<sup>10</sup> A recurrence of a disability does not include a condition which results from a new injury, even if it involves the same part of the body previously injured or caused by renewed exposure to the causative agent of a previous occupational disease.<sup>11</sup>

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<sup>5</sup> The Board notes that appellant submitted additional evidence after the Office rendered its May 11, 2010 decision. The Board's jurisdiction is limited to reviewing the evidence that was before the Office at the time of its final decision. Therefore, this additional evidence cannot be considered by the Board. 20 C.F.R. § 10.510.2(c)(1); *Dennis E. Maddy*, 47 ECAB 259 (1995); *James C. Campbell*, 5 ECAB 35, 36 n.2 (1952). Appellant may submit this evidence to the Office, together with a formal request for reconsideration, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. § 10.606(b)(2).

<sup>6</sup> *Gary J. Watling*, 52 ECAB 278 (2001); *Elaine Pendleton*, 40 ECAB 1143, 1154 (1989).

<sup>7</sup> *Michael E. Smith*, 50 ECAB 313 (1999).

<sup>8</sup> 20 C.F.R. § 10.5(ee).

<sup>9</sup> *Id.* at § 10.5(q).

<sup>10</sup> *Id.* at § 10.5(x).

<sup>11</sup> See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Recurrences*, Chapter 2.1500.3(b)(2) (May 1997).

When an employee claims that he sustained an injury in the performance of duty he must establish the “fact of injury,” namely, he must submit sufficient evidence to establish that he experienced a specific event, incident or exposure occurring at the time, place and in the manner alleged. He must also establish that such event, incident or exposure caused an injury.<sup>12</sup> Once an employee establishes that he sustained an injury in the performance of duty, he has the burden of proof to establish that any subsequent medical condition or disability for work for which he claims compensation is causally related to the accepted injury.<sup>13</sup>

To establish that an injury occurred as alleged, the injury need not be confirmed by eyewitnesses, but the employee’s statements must be consistent with the surrounding facts and circumstances and her subsequent course of action. In determining whether a case has been established, such circumstances as late notification of injury, lack of confirmation of injury, and failure to obtain medical treatment may, if otherwise unexplained, cast substantial doubt on the employee’s statements. The employee has not met her burden when there are such inconsistencies in the evidence as to cast serious doubt on the validity of the claim.<sup>14</sup>

To establish a causal relationship between the condition, as well as any attendant disability claimed, and the employment event or incident, the employee must submit rationalized medical opinion evidence based on a complete factual and medical background, supporting such a causal relationship.<sup>15</sup> Rationalized medical opinion evidence must be based on a complete factual and medical background of the claimant, must be one of reasonable medical certainty and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant. This medical opinion must include an accurate history of the employee’s employment injury and must explain how the condition is related to the injury. The weight of medical evidence is determined by its reliability, its probative value, its convincing quality, the care of analysis manifested and the medical rationale expressed in support of the physician’s opinion.<sup>16</sup>

### ANALYSIS

In this case, appellant filed an occupational disease claim on October 10, 2009 claiming that she first became aware of her condition and its relationship to her work duties on March 21, 2008. She failed to adequately describe the nature of the illness or disease. In an October 9, 2009 narrative statement, appellant reported that on March 21, 2008 she was carrying mail which caused her to injure her left shoulder and neck.

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<sup>12</sup> See generally *John J. Carlone*, 41 ECAB 354 (1989); see also 5 U.S.C. § 8101(5) (injury defined); 20 C.F.R. § 10.5(q) and (ee) (1999) (occupational disease or illness and traumatic injury defined). See *Victor J. Woodhams*, 41 ECAB 345 (1989) regarding a claimant’s burden of proof in an occupational disease claim.

<sup>13</sup> *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

<sup>14</sup> *Betty J. Smith*, 54 ECAB 174 (2002).

<sup>15</sup> See 20 C.F.R. § 10.110(a); *John M. Tornello*, 35 ECAB 234 (1983).

<sup>16</sup> *James Mack*, 43 ECAB 321 (1991).

Appellant indicated a belief that her condition was an occupational disease by filing a Form CA-2 but described a traumatic injury in her narrative statement. Her decision to delay filing her claim significantly hampers the ability of the Office to investigate the factual and medical evidence in her claim. The Board will treat this claim as a traumatic injury case because it appears that appellant is alleging an injury resulting from a single occurrence within a single workday.<sup>17</sup>

The Board finds that appellant failed to establish that she sustained a traumatic injury while in the performance of duty on March 21, 2008.

Appellant must establish all of the elements of her claim in order to prevail. Before the medical evidence submitted can be considered, she must prove her employment, the time, place and manner of injury, a resulting personal injury and that her injury arose in the performance of duty. The evidence received prior to the May 11, 2010 decision does not provide any detail regarding appellant's employment incident on March 21, 2008. Appellant submitted a nonspecific Form CA-2 and a brief narrative statement. She has not alleged with specificity the time and place of the incident, nor has she provided the sufficient detail needed to establish that the incident occurred in the manner alleged.<sup>18</sup>

In her October 9, 2009 narrative statement, appellant alleged that, on March 21, 2008, she was sent out on her route to carry mail that was beyond her restrictions and aggravated her condition, causing a new injury to her left shoulder and neck.<sup>19</sup> She provided no further, detailed account of her injury and presented no evidence regarding the specific mechanism of injury. Appellant stated that she delayed filing a claim because a supervisor refused to provide claim forms and because she did not know about the paperwork for dealing with an on-the-job injury. Because appellant has filed prior claims under the Act, the Board must conclude that appellant knew or should have known how to file another claim.

The evidence submitted does not establish that appellant actually experienced an employment-related incident at a given time and place and in a given manner.<sup>20</sup> Appellant failed to describe the details of her injury and failed to provide supporting factual evidence to substantiate her claim. She did not provide corroborating facts either before or after the incident. Appellant never stated what her alleged work restrictions were. She failed to discuss how much weight she was carrying on March 21, 2008, the distances or other physical demands which she associated with her alleged incident. The employing establishment controverted the claim and indicated on the Form CA-2 that appellant delayed over a year before reporting her condition to

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<sup>17</sup> The Board finds no evidence in this claim of events or circumstances which would make this an occupational disease claim. Any consideration of a recurrence would not involve a new claim but a revisiting of a prior claim which was alleged to be the basis of the recurrence.

<sup>18</sup> *Paul Foster*, 56 ECAB 208 (2004).

<sup>19</sup> The record on appeal does not contain any reference to medical restrictions limiting appellant's work activity on or about March 21, 2008.

<sup>20</sup> *Dennis M. Mascarenas*, 49 ECAB 215, 218 (1997).

her supervisor on June 25, 2009. Appellant has not addressed this assertion of a substantial delay in reporting the incident.

The Board will review the medical evidence available to the Office at the time of its decision because this claim falls close in time to appellant's other claims which were also being developed by the Office. There is overlap of medical conditions and although appellant fails to establish an alleged incident, the medical reports are not irrelevant.

The earliest medical reports submitted by appellant date from July 2009 and she has not adequately explained this gap of 16 months from the date of the alleged incident. Her delay in seeking medical treatment makes it more difficult for any physician to determine whether there was a medically identifiable event on March 21, 2008. The absence of contemporaneous medical treatment for her neck and shoulder in the record weighs against appellant's statement of the time, place and manner of the alleged injury. An examination of the medical evidence does not clarify the factual deficiencies of her claim.

Appellant submitted a July 27, 2009 referee examination medical report from Dr. Cobb who noted objective evidence for left shoulder tendinitis, which was degenerative rather than traumatic. Dr. Cobb stated that the location of appellant's pain, the base of the neck, trapezius, anterior chest and left axilla, corresponded to the diagnosis of shoulder impingement syndrome and rotator cuff tendinitis and that appellant was capable of returning to work without restrictions. While her report provided a diagnosis, it does not support appellant's allegation that she hurt her shoulder and neck on March 21, 2008. Therefore, Dr. Cobb's medical report is not relevant in establishing appellant's factual basis to support her claim.

Medical reports dated October 14, 2009 to February 19, 2010 from Dr. Salomon noted by history that appellant was delivering mail and lifting packages when she experienced shoulder pain on March 21, 2008. He diagnosed her with cervical disc disease and opined that her injury was related to injuries of November 3, 2004 and March 21, 2008. Dr. Salomon also stated that the repetitive use of appellant's left extremity, turning her head and bending to reach for mail contributed to her neck pathology and chronic postoperative symptoms. He reported that carrying mail and excess weight on her left shoulder aggravated her cervical disc injury.

Dr. Salomon's diagnosis and opinion on causal relationship does not establish that the employment incident occurred at the time, place and in the manner alleged.<sup>21</sup> Based on the record, it appears that Dr. Salomon did not see appellant until almost a year and a half after the alleged incident. Further, his reports suggest that her neck and shoulder injury represented a recurrence of her November 3, 2004 injury, or that her neck pain was a residual of her shoulder surgery. Dr. Salomon's reports also state that carrying mail on March 21, 2008 and repetitive stress and trauma of carrying mail caused her condition. He has not distinguished the effects of these various factors. Appellant's medical condition may be complex in its cause and progress. Dr. Salomon's reports do not offer any rationalized opinion evidence on the occurrence or significance of the March 21, 2008 incident.

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<sup>21</sup> Tracey P. Spillane, 54 ECAB 608 (2003); Julie B. Hawkins, 38 ECAB 393, 396 (1987).

The Board has held that the mere fact that a condition manifests itself during a period of employment does not raise an inference of causal relation.<sup>22</sup> An award of compensation may not be based on surmise, conjecture, speculation or on the employee's own belief of causal relation.<sup>23</sup> Appellant failed to provide evidence to prove the fact of injury, its time, place and manner, and that the injury was causally related to her federal employment. The Office properly denied her claim for compensation.

**CONCLUSION**

The Board finds that appellant did not meet her burden of proof to establish that she sustained an injury in the performance of duty on March 21, 2008.

**ORDER**

**IT IS HEREBY ORDERED THAT** the May 11, 2010 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 15, 2011  
Washington, DC

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

Alec J. Koromilas, Judge  
Employees' Compensation Appeals Board

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

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<sup>22</sup> *Daniel O. Vasquez*, 57 ECAB 559 (2006).

<sup>23</sup> *D.D.*, 57 ECAB 734 (2006).