

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

L.S., Appellant)

and)

DEPARTMENT OF LABOR, ENERGY)
EMPLOYEES' OCCUPATIONAL ILLNESS)
COMPENSATION PROGRAM,)
Denver, CO, Employer)

Docket No. 10-594
Issued: June 21, 2011

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

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
 COLLEEN DUFFY KIKO, Judge
 JAMES A. HAYNES, Alternate Judge

JURISDICTION

On December 30, 2009 appellant filed a timely appeal from the July 10, 2009 decision of the Office of Workers' Compensation Programs denying her claim. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review the merits of the case.

ISSUE

The issue is whether appellant sustained an injury in the performance of duty on October 23, 2008, as alleged.

On appeal appellant contended that the Office ignored witness statements and medical evidence in denying her claim.

FACTUAL HISTORY

On November 7, 2008 appellant, then a 56-year-old senior claims examiner, filed a traumatic injury claim alleging that, on October 23, 2008, while she was reviewing claims and

revising recommended decisions at her desk, she felt a stinging and burning sensation on her legs. She noted that when she looked at her legs they had numerous red welts on them that were not there when she showered that morning. Appellant contended that five other workers in her area have recently experienced the same symptoms. The employing establishment controverted the claim, contending, "It has not been determined to be in pod."

In a statement dated October 31, 2008, appellant noted that on October 23, 2008 she noticed dark, reddened, pimple like marks appearing on her right ankle, left leg and from the ankle running along the shin bone to above the knee and on her abdomen accompanied by a rash. She stated that on October 29, 2008 dermatologists at the University of Colorado diagnosed mite infestation following observations of erythematous papules on appellant. Appellant indicated that the employing establishment had an exterminator put stick paper on the floor. She further noted that Karen Morman came to her office at least twice between the period August 4 through 18, 2008 to complain that something was biting her in her work area and had shown appellant her legs. Appellant also noted that she was aware of other examiners on both sides of the building since at least July 2008 complaining of stinging and burning sensations as well as welts on their skin.

By letter dated November 17, 2008, the Office asked that appellant submit further information.

A medical report dated October 29, 2008 by Dr. David Norris, a physician Board-certified in dermatology and dermatological laboratory immunology, indicated that appellant was examined and there were several erythematous papules grouped together in anterior lower legs and a few on the abdomen. He noted that the lesions were not pruritic. Dr. Norris listed his assessment as infestation by mites. He noted, "It is possible that the office is infested with bird mites, wh[ich] can be present in the ventilation system."

In a statement dated November 13, 2008, appellant stated that she filed a claim because several employees, including herself, were experiencing stinging and biting sensations and welts and rashes on their skin that appeared while at work. She contended that, when she submitted medical evidence, the district regional director did not properly investigate. Appellant argued that placing sticking paper on the floor was not a sufficient response and contended that the suspected bugs are microscopic. She contended that the ventilation system had not been tested and the situation with the biting bugs continued at the workplace.

In a September 2, 2008 memorandum, received by the Office on November 24, 2008, the regional director indicated that on August 5, 2008 complaints were received regarding alleged insects at the office. He indicated that building management responded the same day and indicated that there were no signs of any fleas or other insect infestations and unless they were provided with medical evidence to the contrary, it was determined that no additional inspection was required. The memorandum continued that following additional complaints on August 18, 2008 an exterminator was hired and that after multiple visits to the office, the exterminator had been unable to find any signs of fleas or other types of bugs with the exception of a fungus gnat, which does not bite. The regional director indicated that, based on the report, the office did not have fleas or other bugs present and the matter was considered resolved.

In an October 29, 2008 attending physician's report, received on November 24, 2008, Dr. Norris noted that he observed several erythematous papulei on appellant's lower extremities and abdomen. Under diagnosis, he wrote, "suspect bird mite infestation." In response to the question as to whether Dr. Norris believed that the condition was caused or aggravated by an employment activity, he checked "yes" and explained, "As several coworkers have similar symptoms, the work area or ventilation system could be infested." In remarks, he wrote "Suspect bird mite infestation. Those are too small to be seen by naked eye. Recommend evaluation of workplace, including ventilation system and appropriate extermination. Suspect that infestation came from workplace."

In a November 5, 2008 statement, received on November 24, 2008, Teresa R. Peterson indicated that she had a conversation with appellant on October 24, 2008 at which time appellant indicated that she was bitten by something on her legs the day before.

In a November 13, 2008 memorandum, received on November 24, 2008, Barbara A. Warner indicated that on October 27, 2008 around 7:00 a.m., appellant showed me her legs which were very red and inflamed looking and had what looked like welts running up her skin. She noted that appellant requested leave later that day to go to a doctor.

In a December 23, 2008 decision, the Office denied appellant's claim as the evidence was not sufficient to establish that appellant had sustained an injury as defined by the Act. It noted that appellant failed to demonstrate that the established events occurred as alleged. The Office further indicated that there was no medical evidence that provided a diagnosis which could be connected to the claimed events.

On April 6, 2009 appellant requested reconsideration. In support of her request, she submitted several statements from her coworkers with regard to bites received by others. In a September 5, 2008 note, Eudocia Garcia, Jr., stated that on August 15, 2008 he recalled Karen Morman talking about how she was being eaten alive by fleas and that Kathryn A. Thompson laughed at what Karen was saying. He noted that as he continued work near Ms. Morman's work area he also began to feel like he was being bitten, mostly on his legs. In a note dated September 5, 2008, Ms. Thompson indicated that on several occasions in July and August 2008 she noted that Ms. Morman was suffering from dozens of small bites on her skin. In a September 5, 2008 note, Beatrice Calvert also indicated that she observed Ms. Morman with bite marks. In a statement with a facsimile date of October 1, 2008, Kristina Picher, a claims examiner, stated that she had her first bites in the second week of June and that, immediately after being bitten, there was a big red welt with a firey itch which did not go away for about two weeks. Ms. Picher stated that she knew it happened at work and could tell immediately when she was bitten and that the bite occurred in the afternoon. She noted that her last incident occurred two weeks ago. In an October 29, 2008 statement, Sonia Stovall noted that while working at Ms. Morman's desk she felt constantly irritated by something nipping at her ankles and a heightened feeling of general skin sensitivity with itchiness which made it very difficult to concentrate on her tasks.

In a December 24, 2008 report, Dr. Loren E. Golitz, a Board-certified dermatologist and dermatopathologist and Chief of Dermatopathology at the Auschutz Cancer Pavillion, noted

that a microscopic diagnosis taken on that date of spongiotic dermatitis with eosinophils, skin, left clavicle was consistent with an arthropod bite or nummular eczema.

In a February 5, 2009 report, Dr. Dexter S. Levy, a Board-certified internist, stated that appellant has been a patient in his office since 2002. He noted that she was seen in his office on October 27, 2008 at which time numerous papules were noted on her legs which she stated developed on October 23, 2008 due to something biting her while working in her cubicle. Dr. Levy noted that she was again seen on December 30, 2008 and dermatitis was noted predominantly on her upper torso from her neck to her waist. He noted that a copy of the biopsy report dated December 24, 2008 was reviewed in which spongiotic dermatitis with eosinophils was diagnosed as well as changes consistent with an arthropod bite or nummular eczema. He noted that he saw appellant that date and that her dermatitis was significantly improved as she has not been in the workplace for a few weeks. Based on current information, which he noted included appellant's history, physical examinations, biopsy results, Dr. Norris' report and Denver Public Health Investigation, the probable source of appellant's noncontagious dermatitis is arthropod bites at her workplace. He released appellant to return to work on February 9, 2009 on a different floor at the employing establishment where similar issues are not known to have been reported.

By decision dated July 10, 2009, the Office denied modification of its prior decision.

LEGAL PRECEDENT

An employee seeking benefits under the Federal Employees' Compensation Act¹ has the burden of establishing the essential elements of his or her claim, including the fact that an individual is an employee of the United States within the meaning of the Act, that the claim was timely filed within the applicable time limitation period of the Act, 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. These are the essential elements of each and every compensation claim regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.²

To determine whether a federal employee has sustained a traumatic injury in the performance of duty, it must first be determined whether the fact of injury has been established. There are two components involved in establishing the fact of injury. First, the employee must submit sufficient evidence to establish that she actually experienced the employment incident at the time, place and in the manner alleged.³ Second, the employee must submit evidence, in the form of medical evidence, to establish that the employment incident caused a personal injury.⁴

¹ 5 U.S.C. § 8122(a).

² *Id.*

³ *John J. Carlone*, 41 ECAB 345 (1989).

⁴ *Shirley A. Temple*, 48 ECAB 404 (1997).

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.⁵ An employee has not met his or her burden of proof in establishing the occurrence of an injury when there are such inconsistencies in the evidence as to cast serious doubt upon the validity of the claim.⁶ 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 as to whether a *prima facie* case has been established.⁷ 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.⁸

ANALYSIS

The question presented is whether the evidence establishes that the alleged incident, in this case insect bites, occurred in the performance of duty on October 23, 2008. In such cases, the Board looks carefully at the circumstances of the case, including the medical evidence, to determine if it is consistent with an insect bite at work. In *Linda Christian*,⁹ the employee felt a bite on her thigh at work but did not seek treatment for five days as she did not realize the seriousness of the injury. She did not see an insect or spider, nor did she initially report the incident to a supervisor. The Board found that appellant's claim was consistent with the facts of her case and her subsequent course of action and, therefore, an injury in the performance of duty was established. In *Doyle W. Ricketts*,¹⁰ the employee stated that on June 23, 1993 at work he felt soreness with a stinging sensation in his left heel and a small lump; he did not see an insect or spider. Appellant eventually saw his physician on August 23, 1993 and was diagnosed with a spider bite and infection. The Board found that his claim was consistent with the facts of the case and his subsequent course of action, noting that when a condition of employment puts the claimant in a position to be injured by a neutral risk, it is compensable.¹¹

In the present case, the Board also finds that appellant's claim of an insect bite is consistent with the facts and her subsequent course of action. Appellant alleged that she received bug bites by microscopic insects in the ventilation system. She noted that, on October 23, 2008, while reviewing claims and revising recommended decisions at her desk, she felt a stinging and burning sensation on her legs, and that when she looked at them she noted numerous red welts on

⁵ *M.H.*, 59 ECAB 461 (2008); *George W. Glavis*, 5 ECAB 363, 365 (1953).

⁶ *S.P.*, 59 ECAB 184 (2007), *Gus Mavroudis*, 9 ECAB 31, 33 (1956).

⁷ *M.H.*, *supra*, note 5.

⁸ *S.P.*, *supra* note 6.

⁹ 46 ECAB 598 (1995).

¹⁰ 48 ECAB 167 (1996).

¹¹ The Board noted that a neutral risk is a risk that is not distinctly associated with the employment or personal to the claimant. *Id.*

her legs that were not there when she showered that morning. Although appellant cannot definitely identify the offending creature, that in itself would not preclude establishment of the claim.¹² She submitted a statement wherein Ms. Peterson indicated that she had a conversation with appellant on October 24, 2008 at which time appellant indicated that she was bitten by something on her legs the day before, October 23, 2008, the alleged date of injury. Furthermore, Ms. Warner indicated that on October 27, 2008 she observed that appellant's legs were red and inflamed and looked like welts running up her skin. Appellant also submitted numerous statements by other employees indicating that they had been bitten by bugs or had noted others who were bitten by bugs while at work. In addition, appellant submitted a February 5, 2009 note from her treating physician, Dr. Levy, wherein he indicated that he saw appellant on October 27, 2008 at which time numerous papules were noted on her legs which appellant indicated developed on October 23, 2008 due to something biting her while working in her cubicle. Appellant sought further medical treatment on October 29, 2008 from dermatologists at the University of Colorado. An October 29, 2008 report electrically signed by Dr. Norris noted that there were several erythematous papules grouped together in anterior lower legs and a few on the abdomen and that it was possible that her office could be infested with bird mites which can be present in the ventilation system. He indicated that if they were bird mites, they would be too small to be seen by the naked eye and he recommended an evaluation of the workplace, including the ventilation system, and appropriate extermination. Appellant filed her claim on November 7, 2008. This consistent pattern of behavior, as evinced by appellant's statements, the statements of her coworkers, her treatment by a physician and her filing of the claim shortly after obtaining medical treatment indicate that appellant sustained an injury as alleged. Although the employing establishment stated that an exterminator was unable to identify any bugs other than a fungus gnat which was a nonbiting insect, these reports are not sufficient to contradict the statements by appellant and her coworkers. Thus, appellant has established that she sustained an injury in the performance of duty, in the form of insect bites, on October 23, 2008, as alleged.

The decision of the Office will be set aside regarding the finding of fact of injury and the case remanded to the Office for determination of the medical conditions and periods of disability related to appellant's October 23, 2008 employment injury.

CONCLUSION

The Board finds that appellant has established that she sustained an injury in the performance of duty on October 23, 2008, as alleged.

¹² See., e.g., *Doyle W. Ricketts*, *supra* note 10.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated July 10, 2009 is set aside and remanded for further proceedings consistent with this decision of the Board.

Issued: June 21, 2011
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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