United States Department of Labor
Employees' Compensation Appeals Board

D.L., Appellant	)	
and	)	**Docket No. 10-1878**
	)	**Issued: June 8, 2011**
U.S. POSTAL SERVICE, POST OFFICE, Gainesville, FL, Employer	)	

Appearances:
Capp P. Taylor, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On July 8, 2010 appellant, through her representative, filed a timely appeal from a merit decision of the Office of Workers' Compensation Programs dated February 16, 2010. Pursuant to the Federal Employees' Compensation Act[1] 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 an injury in the performance of duty.

FACTUAL HISTORY

On April 18, 2009 appellant, then a 59-year-old distribution clerk, filed an occupational disease claim alleging that she developed carpal tunnel, right wrist, shoulder and arm conditions and insomnia in the performance of duty. She first became aware of her condition in 2005 and

[1] 5 U.S.C. § 8101 *et seq.*

its relation to her work on April 18, 2009. The employing establishment noted that appellant last worked on December 20, 2008.

Janit Thomas, a supervisor, controverted the claim. She noted that appellant had several prior claims which included File No. xxxxxx505, for a June 14, 2000 injury, which was denied, File No. xxxxxx345 for a June 28, 1986 injury, which was denied; and File No. xxxxxx752 for a June 1, 1989 injury which was denied. Ms. Thomas also referred to claim File No. xxxxxx782 for a November 21, 2008 claim that was denied. She explained that appellant was currently in a light-duty position but refused to work the assignment and that multiple other light-duty assignments had been offered to appellant. It appeared that the present claim was a combination of appellant's previous claims, as it encompassed all of her prior symptoms and injuries. In a letter dated April 24, 2009, Marion Rivers, an employing establishment health and resource management specialist, controverted the claim and noted that appellant previously filed a claim for the same injury, with different dates. Despite being offered various jobs within her work restrictions, appellant refused to work, clocked out and went home on leave without pay.

On April 27, 2009 the Office received a response from appellant and was advised that from June to September 2000 she ceased throwing mail. In September 2000, appellant began having right elbow pain and was diagnosed with lateral epicondylitis. In 2005, she was diagnosed with carpal tunnel syndrome. Appellant indicated that, in November of 2008, she was again diagnosed with carpal tunnel syndrome and underwent surgery on December 30, 2008.

In a letter dated May 11, 2009, the Office advised appellant that the evidence submitted was insufficient to establish her claim. It requested that she submit additional factual and medical evidence. The Office also noted that appellant had filed prior claims for right carpal tunnel syndrome, right shoulder pain and insomnia, with a date of injury of June 1, 1989. It requested that she explain if the conditions claimed under the present case were the same as the conditions claimed as having occurred in 1989.

On May 21, 2009 Sandra Jacobson, a manager from the employing establishment, controverted the claim. She indicated that she knew appellant for about 20 years and that appellant had numerous on-the-job injuries and other concerns for which she requested limited duty. Appellant cited a June 28, 1986 injury as the cause of her problems.[2] In September 2008, Ms. Jacobson determined that updated medical information was needed from limited-duty employees. On October 25, 2008 appellant submitted a request for light duty with an October 20, 2008 medical certification form which indicated that she could work three hours a

[2] Ms. Jacobson stated that appellant worked as a modified distribution clerk after a June 28, 1986 work injury, noting that her duties entailed manually casing mail at a modified distribution clerk. This work did not require reaching above her shoulders, she worked at her own pace and was provided breaks every two hours. Ms. Jacobson noted that on April 12, 1995 appellant's continuing compensation was terminated. Appellant requested and was given light-duty work, performing the same functions as her limited-duty assignment until June 2000 when her physician indicated that she could not "throw mail" for four weeks. She was assigned a job that did not involve repetitive motion and was allowed to work at her own pace. On August 1, 2000 appellant filed an occupational disease claim for "tennis elbow" due to repetitive mail casing but this was denied on April 23, 2001. Ms. Jacobson explained that, in May 2001, appellant again requested and was given light-duty work, performing the same functions as her limited duty. On November 21, 2008 appellant filed an occupational claim for a June 1, 1989 injury and it was denied on February 24, 2009.

night, one hour each walking, standing and sitting using a "special chair" which she asserted that her physician had recommended beginning in 1986. She refused to accept the light-duty job offer. On October 31, 2008 appellant returned with another medical certification form, dated October 20, 2008, in which the physician listed her restrictions. Ms. Jacobson stated that appellant refused the light-duty job offer and provided a November 4, 2008 medical certification form which noted restrictions. She advised that appellant was offered a position in accordance with her restrictions but refused the light-duty job offer. On November 19, 2008 appellant provided an updated November 4, 2008 report from her physician who clarified that, "repetitive hand motion [cannot] exceed one hour with a full [workday]. This means no movement of arm, therefore no other job requiring the movement of arm should be performed." Ms. Jacobson advised that appellant continued to submit medical documentation which indicated that "repetitive hand motion cannot exceed one half hour with a full [workday]." Additionally, appellant refused to work, despite reporting for work nightly. Ms. Jacobson noted that when appellant was asked to work manual flats, which was within her restrictions, she refused. She indicated that appellant's last full day of work was October 8, 2008 at which time she was performing light-duty work in the tear-up operation.[3] Ms. Jacobson advised that appellant had not reported to work since December 20, 2008 and that she had refused the work offered to her. Thereafter, appellant requested leave or leave without pay. Ms. Jacobson advised that appellant would submit a new claim every time a prior claim was denied. She asserted that appellant's current claim was a combination of her previous claims as it encompassed all of her prior symptoms and injuries. Ms. Jacobson noted that appellant continued to provide the same medical information from the same physicians.

In a letter dated June 9, 2009, appellant stated that she lifted trays for one hour each day, reached over the shoulder for one hour and engaged in bending and lifting tubs from a general purpose container. She also sat and repetitively cased mail, processed tear ups and addressed envelopes. Appellant first became aware of her carpal tunnel disease on May 15, 2005 and that on April 18, 2009 she became aware that it was caused or aggravated by her employment. She noted that her conditions of right shoulder pain and insomnia were related to a 1989 injury and that her carpal tunnel was from March 2005. Appellant stated that she had included carpal tunnel with her previous claim but the "condition [was] not the same."

In a July 13, 2009 decision, the Office denied appellant's claim. It found that the medical evidence did not establish that her right upper extremity conditions were related to accepted work-related activities.

The Office received a July 8, 2009 statement from appellant. Appellant referred to a 1989 claim which was accepted for contusions to the back, head and a musculoskeletal strain. In December 1984, she had a chair pulled out from under her. Appellant contended that, prior to working for the employing establishment, she had no preexisting problems to her hands, neck, back or legs. She explained that her most recent job as a distribution clerk required her to

[3] Ms. Jacobson explained that this work involved repairing torn pieces of mail, using tape and/or damaged mail envelopes. Appellant was able to sit or stand, at her convenience while performing these duties, though she generally sat. These duties involved sedentary lifting of 10 pounds or less, with no pushing or pulling. Ms. Jacobson also indicated that appellant received two 15-minute breaks and one-half hour for lunch during her eight-hour shift.

repetitively lift, bend, twist and make motions with her right arm in a back and forth motion nearly constantly. Appellant alleged that she was on her feet performing these duties. She noted that her job required her to use her hands to tear up discarded mail and throw it away. Appellant explained that, in the latter part of 2008, the employing establishment wanted her to perform the job of standing and handling flats or trays of mail, but she could not perform these tasks because of her neck, right arm and low back.

On December 10, 2009 and January 8, 2010 appellant's representative requested reconsideration. He submitted additional evidence and referred to appellant's July 8, 2009 statement. The additional evidence included an October 14, 2008 report from appellant's treating physician, Dr. May Montrichard, a Board-certified family practitioner, who referred to work incidents from 1986 and 1990 and opined that appellant's carpal tunnel condition was caused by the repetitive activities of her position.

By decision dated February 16, 2010, the Office found that fact of injury was not established. It noted that adjudicating the present claim to only address work factors on and after the periods covered by appellant's prior claims. The Office noted that, since the filing of her last claim on November 1, 2008, appellant had not worked or been exposed to additional work factors. The current claim alleged the same conditions as the November 1, 2008 claim and was filed after the November 1, 2008 claim was denied. The Office found that, while appellant asserted that her recent job required repetitive lifting, bending, twisting motions with her right arm and standing on her feet, the factual evidence failed to establish the alleged work factors.

LEGAL PRECEDENT

An employee who claims benefits under the Act[4] 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.[5] 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.[6] 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.[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, if otherwise unexplained, cast sufficient doubt on an employee's statements in determining whether a *prima facie* case has been established.[8] However, an employee's statement alleging

[4] 5 U.S.C. §§ 8101-8193.

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

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

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

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

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.[9]

To establish that an injury was sustained in the performance of duty in an occupational disease claim, a claimant must submit the following: (1) medical evidence establishing the presence or existence of the disease or condition for which compensation is claimed; (2) a factual statement identifying employment factors alleged to have caused or contributed to the presence or occurrence of the disease or condition; and (3) medical evidence establishing that the diagnosed condition is causally related to the employment factors identified by the claimant.[10]

ANALYSIS

The Board finds that appellant has not submitted sufficient evidence to establish that she developed carpal tunnel syndrome, right wrist, shoulder and arm conditions and insomnia in the performance of duty. Appellant has not established that the claimed work factors occurred as alleged commencing November 21, 2008. The Office adjudicated the present claim with regards to employment factors that after the periods covered in the prior claims. The most recent prior claim, November 21, 2008, pertained to lumbar radiculopathy, right carpal tunnel syndrome, myofascial pain in the upper and lower back, a right shoulder and arm condition and insomnia. In that claim, appellant attributed her conditions to lifting, bending, twisting and repetitive motions at work.

On April 18, 2009 appellant filed a new claim for an occupational disease, alleging her claimed conditions were caused by repetitive activities at work. The employing establishment denied that her position required her to perform any repetitive activities. Ms. Jacobson advised that appellant's last full day of work was October 8, 2008, at which time she was performing light duty and that she had not reported for work or performed any work since December 20, 2008. Appellant alleged on her claim form that she first became aware of her condition on April 18, 2009, it is unclear how this could have occurred, in light of the fact that she had not worked a full day of work since October 8, 2008 or performed any duties since December 20, 2008. On May 11, 2009 the Office requested additional factual and medical evidence from her, noting her prior similar claims. In response, appellant asserted that she was aware of her carpal tunnel condition in 2005 and that on April 18, 2009 she realized it was caused or aggravated by her employment. As noted, she had earlier filed for the same condition in 2008.[11] Ms. Jacobson's statement disputed that appellant performed any repetitive activities on or around November 21, 2008. She noted that appellant was allowed to work at her own pace and that she performed essentially no work duties of any sort after November 21, 2008 as she would report for work but refuse to perform her duties.

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

[10] *Solomon Polen*, 51 ECAB 341 (2000); *see also Victor J. Woodhams*, 41 ECAB 345, 352 (1989).

[11] Office procedures do not allow for filing duplicate claims. *See* Federal (FECA) Procedure Manual, Part 1 -- Mail and Files, *Creation of Cases*, Chapter 1.400.7 (February 2000) (provides for deleting duplicate cases).

The Board finds that there are such inconsistencies in the evidence as to cast serious doubt upon the validity of the claim. The record does not support that appellant was exposed to the claimed employment factors since November 21, 2008 based on the detailed statement from Ms. Jacobson. The Board finds that she had failed to establish that she performed the claimed work activities after November 21, 2008 to which she attributes her claimed conditions. Thus, appellant has failed to meet her burden of proof.[12]

On appeal, appellant's representative contended that there was no basis to dismiss appellant's statement or to dispute her description identifying her job duties. He also noted that the report of Dr. Montrichard supported that appellant's conditions were work related; however, she attributed her condition to work factors from 1986 and 1990. The Board notes that the present claim pertains to the period after the last claim, from November 2008. As appellant did not establish that she was exposed to any employment factors since November 21, 2008, that would have caused or contributed to the presence or occurrence of the alleged conditions, it is premature to address his medical reports as the employment factors were not established. Furthermore, it appears the representative is addressing matters regarding her earlier claims, which are not the subject of the present claim.[13]

CONCLUSION

The Board finds that appellant has not met her burden of proof in establishing that she sustained an injury in the performance of duty.

[12] As appellant has failed to establish that she was exposed to any employment factors since October 2008, it is not necessary to address the medical evidence. *See S.P.*, 59 ECAB 184 (2007).

[13] Should appellant wish to pursue any of her previous claims, she should contact the district Office that services her claim regarding what options might be available to her.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated February 16, 2010 is affirmed.

Issued: June 8, 2011
Washington, DC

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

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

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