United States Department of Labor
Employees' Compensation Appeals Board

J.W., Appellant	)	
and	)	**Docket No. 11-1655**
	)	**Issued: May 18, 2012**
U.S. POSTAL SERVICE, SCOTTSDALE HOPI STATION, Scottsdale, AZ, Employer	)	

Appearances:
Gordon Reiselt, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
RICHARD J. DASCHBACH, Chief Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On July 8, 2011 appellant, through her attorney, filed a timely appeal from the May 16, 2011 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.

ISSUE

The issue is whether appellant met her burden of proof to establish an injury in the performance of duty on February 22, 2006.

FACTUAL HISTORY

On August 16, 2006 appellant, then a 53-year-old customer service supervisor, filed a traumatic injury claim alleging that she sustained injury on February 22, 2006 at 11:15 a.m. due

[1] 5 U.S.C. §§ 8101-8193.

to a motor vehicle accident that occurred in the performance of duty.[2] The portion of the claim form to be completed by the supervisor was completed and signed by Mr. Pierce, the acting station manager. Appellant stopped work on February 22, 2006.

The record contains a February 22, 2006 accident report completed by a police officer from Scottsdale, AZ, advising that appellant's vehicle ran into the rear of a motor vehicle stopped for a red light shortly before 11:00 a.m. Appellant was traveling at a speed of 40 to 50 miles per hour and failed to apply the brakes.[3]

In an August 16, 2006 letter, Jane Bermijo, an injury compensation specialist, controverted the claim contending that appellant's injury did not occur in the performance of duty. She indicated that appellant was not performing any assigned duties or engaged in any activity related to her employment at the time of the accident.

In an undated statement, Susan Service, a customer service supervisor, noted that appellant was not feeling well on February 22, 2006 and Mr. Pierce took her to his office to call her husband to pick her up and take her home for the day. Mr. Pierce instructed appellant to stay seated in his office until her husband arrived. After he left for a meeting, appellant left his office and walked around the workroom floor. Ms. Service had a conversation with appellant at about 10:45 a.m. in the restroom. Appellant then left the premises in her privately-owned motor vehicle, leaving her cell phone and purse behind and missing her husband by 10 to 15 minutes. Ms. Service stated that appellant's husband arrived at about 11:00 a.m. and she assisted him in looking for appellant in the building and parking lot but it was observed that her vehicle was gone. Appellant's husband left the premises to look for appellant and later learned she had been injured in a motor vehicle accident that occurred on route to their home.

In a September 29, 2006 decision, OWCP denied appellant's claim, finding that she did not sustain a work-related injury on February 22, 2006 as the accident did not occur in the performance of duty. It noted that she left her work premises due to a nonwork-related medical condition and was thereafter involved in a motor vehicle accident. The evidence failed to establish that appellant was engaged in any activity reasonably incidental to her employment at the time of the accident.

Appellant requested reconsideration of her claim. Counsel argued that appellant's injury occurred in the performance of duty because the employing establishment failed to render adequate assistance under the "human instincts" doctrine. He contended that the human instincts doctrine, recognized in a line of cases starting with *Mildred Drisdel*,[4] established a duty for the employer to provide reasonable medical care or other assistance as an emergency may require so that an affected employee may have her life saved or avoid further bodily harm to herself or

[2] Appellant indicated that she sustained multiple right ankle and foot fractures which necessitated surgical repair. She also had to undergo a splenectomy and partial liver removal. Appellant noted that various people had an opportunity to observe her on February 22, 2006 between 8:00 a.m. and 11:00 a.m. including Tony Pierce, Donna McClellan, Craig Anderson and others.

[3] Other evidence of record indicates that the accident occurred about seven miles from appellant's workplace.

[4] 32 ECAB 82 (1980).

others. Counsel argued that it was unreasonable for Mr. Pierce not to call 911 and to leave appellant alone after she suffered a seizure, particularly since the safety plan had been followed on prior occasions when appellant had a seizure. He discussed a case, *Marianne Eick (George E. Eick)*,[5] in which the Board evaluated the facts of the case under the human instincts doctrine and found that an injury had not occurred in the performance of duty. Counsel asserted that the facts of *Eick* were distinguishable from those of the present case. In *Eick*, the manager had taken adequate steps to determine that the employee was coherent and capable of driving and making decisions about medical care. In the present case, there was evidence that appellant was incoherent and the employing establishment failed to carry out a safety plan which had been devised to deal with her particular medical condition.

In a February 26, 2006 statement, Pam Baker, a supervisor, stated that on February 22, 2006 at about 7:45 a.m. she heard a weird noise and looked to see three carriers standing around appellant who was having a seizure. She told appellant to take some deep breaths and she kept saying, "I'm okay." Ms. Baker gave appellant a banana because she thought she might be "crashing" due to a low sugar level given that she was diabetic. She advised that the seizure lasted about 30 seconds and after it stopped, Mr. Pierce escorted appellant to his office. Ms. Baker stated that she stood next to appellant "with my hand on the phone waiting to call 911" and indicated that appellant had suffered a longer-lasting seizure about three or four weeks prior. She called appellant's son who noted that he would call his father and see if he could get appellant home. Appellant's son called Ms. Baker back after he was unable to contact his father and asked if someone could "just bring her home." He stated that no one would be home when appellant arrived but noted that, whenever she had a seizure, she slept for many hours. Ms. Baker told appellant's son that she would try to get appellant home and then he stated, "Okay, I have to go to school." She saw appellant walk by her desk and go to the bathroom at about 10:30 a.m. and assumed she was going to lie down on a couch until her husband picked her up. Someone told Ms. Baker that appellant had spoken to her husband and that he was meeting her on the dock and taking her home. Ms. Baker saw appellant's husband walking to the back office at about 11:10 a.m. and she left work about 10 minutes later. She called appellant's home at about 1:30 p.m. and her son stated that appellant was not yet home. Ms. Baker learned that appellant might have left to drive herself home and that her husband arrived at the worksite after she left. She was subsequently advised that appellant had been in an accident in Scottsdale.[6]

In a July 16, 2006 statement, Donna McClellan, a coworker, advised that she was present on February 22, 2006 when appellant had a seizure at work. Several coworkers who were assisting appellant asked management to call 911 but they did not do so. A management official helped appellant to an office in order to wait for a family member. Ms. McClellan stated:

> "[Appellant] came back out of the office by herself with no one with her to keep an eye on her. I [saw] her wandering around and went to management to say that

[5] 40 ECAB 1056 (1989).

[6] In a brief February 23, 2006 statement, a coworker named Denise indicated that she spoke to appellant on February 22, 2006 at about 10:30 a.m. to 10:45 a.m. regarding the fact that her husband was picking her up and taking her home. The coworker stated that appellant stepped out of the office and walked toward the back of the building.

> [appellant] was wandering around on her own and should not be left alone, let alone walking around because she was stumbling along. [Appellant] had stopped at a few carrier cases and wandered to the dock doors. I repeated again to two supervisors [that appellant] was wandering around and should not be left on her own. I was ignored while they were making plans to go to lunch to make their schedules for the carriers. I walked away as [appellant] was still wandering around and went out the dock doors. Later that day as we were coming in from the street, management was asking the carriers if we [have] seen [appellant]. [Appellant] had left and no one had seen her. We later found out she was in an accident and was seriously hurt...."

In an undated statement, Ms. Service noted that on February 22, 2006 she arrived at work at about 10:25 a.m., and as she walked toward her office, noticed that Mr. Pierce was not in his office. After checking some paperwork in her office, she walked onto the workroom floor and saw appellant there. As the two walked together to the restroom, a coworker stated "you're still here" to appellant and she responded "yes, I'm waiting to go home." Ms. Service asked appellant if she was leaving early and she responded "yes, tough day." In the restroom, she asked appellant how her fitness-for-duty examination went the prior day and appellant responded that the examination never occurred because she got lost on the way. Ms. Service last saw appellant at about 10:40 a.m. when they had a brief exchange about the filing of a report. She stated, "In my conversations with [appellant] she seemed coherent; I would not have guessed that she had a seizure that morning. She was walking and talking fine."

Appellant submitted several reports from April 2006 in which Dr. Guillermo M. Estrada, an attending Board-certified neurologist, advised that appellant had a history of diabetes and epilepsy. Dr. Estrada stated that appellant had a seizure at work on February 22, 2006 and might have had another seizure when she was driving home on that date. On July 5, 2006 Dr. Carolyn Barlow, an attending osteopath and Board-certified family practitioner, stated that appellant had a history of seizure disorder that was not problematic until she had a seizure while driving and had a motor vehicle accident from which she sustained a right ankle fracture and surgery, partial liver resection and splenectomy. The emergency room reports from February 22, 2006 noted that appellant was unable to provide any history secondary to her confusion. Appellant was able to answer some questions but appeared to be in a post-seizure state.

In a September 25, 2007 letter, counsel argued the fact that appellant left the worksite without her purse or identification showed that she was in a confused state at the time.

On December 11, 2007 OWCP requested that the employer respond to a series of questions regarding the handling of appellant's medical situation on February 22, 2006, the nature of any emergency medical plans in place and the handling of prior instances of medical distress. Linda Hartshorn, a health manager for the employing establishment, responded to OWCP's questions. On February 22, 2006 an employee reported that there was something wrong with appellant and her managers responded immediately because they were aware that she had a medical condition that predisposed her to seizures. Ms. Hartshorn stated that the employer had instructed employees to call 911 in case of a medical emergency and that this procedure would have been followed if the employees present had any reason to believe that appellant was having a medical emergency. Appellant told employees that she was okay and both her husband

and son were contacted but they gave no indication that she needed to be transported to a hospital. Management had no reason to believe that appellant was unable to care for herself and it exercised reasoned judgment in asking her to stay in Mr. Pierce's office until her husband arrived. Ms. Hartshorn stated that, when appellant had seizures in the past, Donna Fay, the station manager, took appellant to her office, made her comfortable and made arrangements with a family member to pick her up and drive her home.

In a February 14, 2008 decision, OWCP denied appellant's claim. It found that management acted reasonably on February 22, 2006 given that appellant stated that she was fine and her behavior was observed to be normal.

In statements to the record, appellant noted that she might have told Ms. Baker that she was okay immediately after her seizure, but such a brief, generic statement did not mean she was not in medical distress or not in need of immediate medical care. After about 10:30 a.m., she was able to make contact with her husband. Appellant only told her husband, "I'm sick come and get me."[7] Mr. Pierce did not stay in the room while she made this call. He came back into the office and asked if appellant's husband was coming and left after he got an affirmative response. Appellant stated that Mr. Pierce never spoke to her husband or any other family member to explain her medical condition. Due to her confused state, she forgot that she had called her husband and she took her car keys to drive away. On at least one prior occasion when appellant had a seizure at work, the employing establishment had called 911. Appellant did not understand why 911 was not called or why she was left alone by Mr. Pierce.

In an undated statement, appellant's husband advised that she contacted him at about 10:30 a.m. on February 22, 2006 and asked him to pick her up at work because she had a seizure. He asserted that, when appellant had experienced a previous seizure at work, management officials called 911 and he visited her at the hospital.

In a March 11, 2009 decision, OWCP denied appellant's claim. It found that appellant's managers had acted reasonably in handling her medical situation on February 22, 2002. There was no evidence that her motor vehicle accident had a relationship to her medical condition on that date.

In a September 23, 2010 decision, the Board remanded the case to OWCP for further development. The Board noted that the question of why appellant apparently was left alone at about 10:30 a.m. on February 22, 2006 had not been adequately developed. Moreover, the question of her level of coherence needed to be further addressed.[8]

On remand, OWCP obtained additional witness statements. It contacted the employing establishment to obtain a telephone number for Mr. Pierce and was informed that he had retired. Jeff Day, the postmaster at appellant's workplace on February 22, 2006, provided a statement noting that the employing establishment did not have Mr. Pierce's contact information. Mr. Day indicated that coworkers stated that on February 22, 2006 appellant did not fall down or convulse

[7] Appellant indicated that it took several attempts to recall the proper number due to her confused state.

[8] Docket No. 09-2275 (issued September 23, 2010).

or hit her head or have obvious physical injuries. Based on the information he had, appellant "stared off into space" and her hand twitched. Mr. Day stated that the seizure was transient and that appellant was conversant shortly thereafter and requested that the manager not call 911. He noted that the manager had the 911 number entered into her telephone but did not send the call because of appellant's worker's request not to call emergency services. Mr. Day indicated that appellant was taken to Mr. Pierce's office and that the first person contacted was appellant's son, who was not able to pick up his mother because he was going to school. The son questioned why the employing establishment could not bring her home and noted that she would probably be more comfortable on soft furniture. The employing establishment contacted appellant's husband and he agreed to come to the employer's address and pick up his wife. Mr. Day noted that appellant acknowledged Mr. Pierce's instruction to wait for her husband. Mr. Pierce had a meeting elsewhere and left appellant in his office, sitting down with the lights off. Mr. Day discussed the statements of Ms. Service who indicated that she saw appellant acting normally at the bathroom at approximately 10:25 a.m. He stated that his managers were not medically trained and that he believed that they acted appropriately by contacting the family and also having been told by appellant, who was conversant and apparently capable of meaningful interactions that she would wait for her husband. Mr. Day noted that appellant's son and husband indicated not to call emergency services. He stated that the employer had known for about three weeks that appellant had seizures and that she had failed to attend a fitness-for-duty examination. Mr. Day also noted that there was no nurse that worked at the station or in Scottsdale, AZ, at the time of appellant's seizure and there was no written emergency plan that appellant had with the employing establishment.

An OWCP senior claims examiner contacted Mr. Pierce, who indicated that Ms. Baker brought appellant into his office on the morning of February 22, 2006. Mr. Pierce stated that appellant was conversant and talking. He told appellant that he would call 911 but she indicated that she did not want 911 called. Appellant's son was contacted first and was not able to come and pick up appellant. The husband was subsequently contacted and he agreed but it would take him at least an hour to get to the station. Mr. Pierce related that the immediate care for appellant was to provide a comfortable place to sit, some water and a damp compress. He noted that appellant was able to understand and take direction and that he was with her for approximately 20 minutes. Mr. Pierce left his office at about 8:00 a.m. to 8:10 a.m. as he had a meeting of station managers to attend at the Main Post Office. He stated that his understanding with appellant was that she would stay there until her husband arrived. Mr. Pierce indicated that there were people at the station who could help appellant if needed, including Ms. Baker. He stated that there was no particular "plan" that he knew of to call 911 when these events occurred.

OWCP additionally contacted the Hopi Station and spoke with Craig Anderson, who indicated that he saw appellant on February 22, 2006. Mr. Anderson saw appellant in Mr. Pierce's office but he did not speak with her. He stated that she looked ill and was sitting in a hunched over position looking at the floor. In a memorandum dated October 13, 2010, Mr. Pierce noted that appellant had come to his office on February 22, 2006 and he told her not to leave until she felt better. He indicated that he could not hold appellant down to prevent her from leaving his office.

In a December 8, 2010 decision, OWCP found that appellant did not meet her burden of proof to establish that she sustained an injury in the performance of duty on February 22, 2006.

It found from the preponderance of the witness statements that appellant was acting normally after she suffered a brief seizure and that it was reasonable to direct her to rest in Mr. Pierce's office while waiting for her husband to pick her up.

By letter dated January 5, 2011, appellant, through counsel, wrote requesting a telephone hearing with an OWCP hearing representative. At the hearing, appellant described in detail the incidents which occurred in her workplace on February 22, 2006 and her contact with members of management. Her husband supplied additional testimony.

In a May 16, 2011 decision, OWCP's hearing representative affirmed the December 8, 2010 decision.

LEGAL PRECEDENT

Under the human instincts doctrine, an employer 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 who as a result is helpless to provide for her own care. A failure, on the part of the employer, to satisfy this duty may be sufficient to establish a causal connection between an employee's condition and the employment if it is shown that such failure contributed to the condition for which compensation is claimed.[9] In *Eick*,[10] the Board found that the employing establishment acted reasonably when it did not provide medical care to appellant's husband and allowed him to drive away from the premises because, despite the fact that he did not appear well, he was found to be in a coherent state and had refused medical attention.[11] In *Jerry L. Sweeden*,[12] the Board held that the employer acted reasonably in response to the employee's seizures in that coworkers transported him to a hospital in a timely manner.

ANALYSIS

Appellant filed a claim alleging that she sustained injury on February 22, 2006 at 11:15 a.m. due to a motor vehicle accident that arose in the performance of duty. She claimed that the injury was covered under the human instincts doctrine because the motor vehicle accident would not have occurred if her employer had reasonably cared for her after she sustained a seizure on the work premises on the morning of February 22, 2006.

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 February 22, 2006. The evidence of record establishes that the employing establishment took reasonable efforts after she became ill at about 7:45 a.m. on the morning of February 22, 2006. Appellant was only momentarily incapacitated

[9] *Joseph J. Rotelli*, 40 ECAB 987 (1989).

[10] *Supra* note 5.

[11] The claimant's husband died of heart attack about a day after his supervisor last spoke to him and offered to provide him with transport to a medical facility.

[12] 41 ECAB 721 (1990).

when she suffered an apparent seizure and there is no credible evidence that, after a brief apparent seizure of about 30 seconds, she was rendered helpless to provide for her own care.

Witness statements reveal that immediately after the seizure appellant indicated that she was "okay," she was provided with a bottle of water, wet rag and banana. Mr. Pierce, the station manager, placed her in a darkened office with instructions to stay there pending the arrival of her husband to pick her up and take her home. He indicated that appellant was lucid when he spoke to her and that she answered in the affirmative when he asked her to rest in his office until her husband arrived. Mr. Pierce had to leave appellant to attend a meeting, but there was no indication when he left the office that she would not continue to rest comfortably in his office. Following her seizure, appellant repeatedly assured personnel that she was okay and, despite the fact that management was prepared to call 911, she advised that such an action was not necessary. Both appellant's son and her husband were contacted and neither individual provided any indication that it was necessary to contact emergency services. Witness statements reveal that several people spoke to appellant after her seizure and observed that she appeared lucid and engaged in normal conversations. Ms. Service, a customer service supervisor, indicated that she saw appellant at the bathroom and had a normal conversation with her at approximately 10:25 a.m. She had another normal conversation with appellant in the workroom at about 10:40 a.m., around the time appellant left the workplace to drive home.[13]

From the facts in the record, it appears that appellant was stable and waited for approximately two and a half hours in Mr. Pierce's office or another area of the workplace. It is not contested that appellant was not well, but rather the information in the file indicates that she was not in immediate need of emergency services. It should be noted that appellant's son indicated to management that after having these events appellant would be left alone in her room where she would rest. This is essentially what the employing establishment did by placing appellant in Mr. Pierce's office. It does not appear that she was unable to provide care for herself in that she was not unconscious or otherwise uncommunicative and she did not request emergency services. Moreover, there is no evidence that appellant was engaging in any activity incidental to her work at the time of her motor vehicle accident on February 22, 2006.

For these reasons, appellant did not establish that she sustained an injury in the performance of duty on February 22, 2006. She may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

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 February 22, 2006.

[13] Although it appears that appellant left her cell phone and purse behind when she exited the workplace, this circumstance alone would not show that she was not lucid or was unable to care for herself at that time. Ms. McClellan, a coworker, indicated that she saw appellant "stumbling along" at an unspecified time. However, her statement regarding appellant's condition is vague in nature and it does not appear that she spoke to appellant.

ORDER

IT IS HEREBY ORDERED THAT the May 16, 2011 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: May 18, 2012
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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