United States Department of Labor
Employees' Compensation Appeals Board

C.S., Appellant	)	
and	)	**Docket No. 14-704**
	)	**Issued: August 5, 2014**
U.S. POSTAL SERVICE, OAKLAND PERFORMANCE & DISTRIBUTION CENTER, Oakland, CA, Employer	)	

Appearances:
Hank Royal, for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
PATRICIA HOWARD FITZGERALD, Acting Chief Judge
ALEC J. KOROMILAS, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On February 11, 2014 appellant, through her representative, filed a timely appeal from a September 13, 2013 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 that she sustained an injury in the performance of duty.

FACTUAL HISTORY

On December 2, 2012 appellant, then a 33-year-old mail processing clerk, filed a Form CA-1 traumatic injury claim alleging that on August 19, 2012 she was pushing a pie-cart which

[1] 5 U.S.C. § 8101 *et seq.*

did not move because of a broken wheel and she injured her right thumb and wrist. On the front of the CA-1 form appellant's supervisor, D'arcy Bush, noted "This CA-1 [form] is to replace the CA-2 [form] that was turned in on the day of injury." Supervisor Bush also noted that the pie-cart was not broken; rather, it needed to be moved from the opposite end. Appellant's work hours were noted as being from 9:00 p.m. to 5:30 a.m.

The record reflects that, under file number xxxxxx379, OWCP denied appellant's claim of a June 25, 2012 injury with a broken pie-cart on the basis that the evidence of record was insufficient to establish that the event occurred as alleged.[2] Its original decision of August 13, 2012 was subsequently affirmed by February 14, 2013 and February 4, 2014 decisions. On August 19, 2012 at 4:20 a.m., appellant filed a recurrence claim alleging that, on August 18, 2012 at 9:40 p.m., she tried to move pie-cart number 4, but it did not move and the force hurt her hand. She indicated that machine number 20 has several broken pie-carts. Appellant noted that she would see a physician that day. On the recurrence claim form, the employing establishment indicated that the pie-cart in question could only be pushed from one side and that appellant had grabbed the pie-cart and tried to pull it.

In an August 19, 2012 report, Robert Valentine, a physician's assistant, indicated that on 9:54 p.m. appellant was evaluated for the following conditions: acute pain in right upper extremity (hand); tendinitis right hand (traumatic); and hyperextension injury right thumb proximal interphalangeal -- likely joint capsule disruption. He indicated that she should limit use of right hand until reevaluation.

In a report of August 27, 2012, Dr. William Ribeiro, an orthopedic surgeon, related a history of appellant trying to push a heavy solid steel cart of approximately 2,000 pounds with broken wheels forward when she hyperextended her right thumb. Appellant was seen at Eden Hospital emergency room on June 25, 2012, where she was told she had sustained a sprained thumb. Dr. Ribeiro noted that she returned to work after a week off on modified standby work duty. Appellant then returned to work a week later and continued to do her normal work of pushing the heavy cart using a finger brace she purchased at Wal-Mart. On August 18, 2012 while doing the same job pushing a broken cart, she again hyperextended her right thumb. Appellant noted that she reported the injury to her supervisor, who did nothing about it and appellant continues to do her same job. Dr. Ribeiro stated that the hyperextension injury to her right thumb was aggravated and she was seen at the emergency room at Alta Bates Hospital on August 19, 2012. He provided examination findings and diagnosed hyperextension injury to the right thumb with muscular contusion of the thenar eminence of the right thumb; and musculoligamentous strain of the right thumb, wrist and distal forearm.

In September 13 and October 1, 2012 progress reports, Dr. Ribeiro noted examination findings and found that appellant continued with symptoms in her right wrist and thenar eminence in the right thumb. While appellant had slight improvement in the pain, he stated that it was persistent and severe enough to cause use of medication. Dr. Ribeiro opined that appellant was temporarily totally disabled until her return to the clinic in four weeks.

[2] OWCP's determination was based on timekeeping records, an investigation report from the Postal Inspector General and sworn statements from coworkers and supervisors which were determined to refute appellant's statements.

In a December 3, 2012 letter, the employing establishment noted that appellant's claim for the June 25, 2012 injury was denied under claim number xxxxxx379 and that she had filed a CA-2 form, notice of recurrence, on August 19, 2012 at approximately 4:00 a.m. claiming that she reinjured her right thumb by moving pie-carts. Appellant also filed a CA-1 form traumatic injury claim for the August 19, 2012 injury, claiming that the CA-1 form was to replace the CA-2 form that was turned in on August 19, 2012 to Supervisor Bush.

In a December 2, 2012 note, Supervisor Bush stated that appellant indicated that her lawyer told her to fill out a CA-1 form and that she did not fill out the date of injury as she could not remember it. The supervisor retrieved the CA-2 form and gave the date and appellant wrote August 19, 2012 on the CA-1 form.

In an undated note, appellant provided an account of the August 19, 2012 thumb injury. She related that, as she pushed the pie-cart, it did not move due to a broken wheel and her thumb bent all the way backward causing her to scream. Appellant indicated that she immediately told Supervisor Bush and was treated at the emergency department the day of the accident.

Additional progress reports from Dr. Ribeiro noted that temporary total disability was extended until appellant's return to the clinic in four weeks.

On February 5 and 6, 2013 appellant filed five CA-7 forms in which she claimed disability compensation benefits for the period August 27, 2012 through February 28, 2013.

By letter dated February 7, 2013, OWCP informed appellant that when her claim was received a limited amount of medical expenses was administratively approved as it appeared to be a minor injury with minimal or no lost time from work and the employing establishment did not controvert continuation of pay or challenge the merits of the case. It advised that her claim was now reopened for consideration as a claim for wage loss had been received and the merits of the claim have not been formally considered. Appellant was advised the evidence of record was insufficient to support her claim as no diagnosis of any condition resulting from the August 19, 2012 injury has been provided and the medical evidence did not contain a diagnosis in connection with the August 19, 2012 injury. She was advised of the medical and factual evidence needed and was afforded 30 days to respond.

In a January 18, 2013 treatment note, Dr. Richard A. Nolan, a Board-certified orthopedic surgeon, provided examination findings for a June 21, 2012 injury and sought authorization for electromyogram (EMG) and nerve conduction velocity (NCV) studies of the upper extremities. He also indicated that appellant remained temporary totally disabled for the next four weeks.

In a February 15, 2013 report, Dr. Nolan indicated that appellant sustained two separate injuries to her right thumb. He indicated that she initially injured herself on June 21, 2012 and was in process of pushing the pie-cart when the two back wheels locked, causing a hyperextension injury to her right thumb. Dr. Nolan noted that this injury occurred at approximately 10:15 p.m. and appellant went to the Eden Hospital Medical Center, where she was diagnosed with a bad sprain. He indicated that she was placed in a soft cast, given a sling and placed off work for 10 days. Dr. Nolan noted that appellant was not able to get medical attention due to the failure to get approval from the Department of Labor for that injury. He

noted that she returned to her regular work activities, wearing a thumb spica orthosis that she got from Wal-Mart. Dr. Nolan indicated on August 19, 2012 at approximately midnight, that appellant was in the process of pushing the pie-cart when the wheels again locked, resulting in hyperabduction of the thumb, even while it was in the brace. He noted that she reported the injury and went to the Alta Bates Medical Center Emergency Room, where she was evaluated. Dr. Nolan noted that appellant was seen in the office on August 27, 2012 with the diagnoses of: hyperextension injury to the right thumb with muscular contusion of the thenar eminence and musculoligamentous strain of the right thumb, wrist and distal forearm. He indicated that she was off work until September 12, 2012 and followed up on September 13 and October 1 and 29, 2012. Dr. Nolan noted that appellant returned to her regular work activities using the thumb spica wrist brace as her case was not accepted and treatment would not be paid for. He noted that she was seen on December 24, 2012 and placed off work until January 20, 2013. Dr. Nolan noted subsequent follow-up visits and that appellant was continued on temporary total disability. He provided examination findings and record view. Dr. Nolan diagnosed radial wrist tendinitis, traumatic, right; de Quervain's tendinitis, right; rule out collateral ligament sprain, radial and ulnar, thumb carpometacarpal joint, right; carpal tunnel syndrome, right; and rule out ganglion cyst, radial volar wrist, right. He stated that appellant sustained two injuries to her right thumb while in the course of her work duties, which involved a visit to two medical centers. Dr. Nolan noted that both these visits were documented on the electronic medical record and do not reflect positively on either institution due to the limited examination and diagnosis documentation. However, he opined that the treatment was appropriate. Dr. Nolan noted that, since appellant's injury was not accepted, there was a significant interruption in treatment, resulting in her continuing her work activities and in the extension of her symptoms. He opined that her right upper extremity symptoms are consistent with the history of the injury, *i.e.*, that the sudden, unexpected hyperextension of the thumb and wrist while pushing the wheeled pie-cart and that her findings on repeat examination are consistent with the mechanism of injury. Dr. Nolan opined that the interruption in the treatment was inappropriate and untimely and has resulted in an extension of appellant's overall symptoms, including problems in the volar aspect of the metacarpophalangeal joint at the level of the volar pad as well as in the radial and ulnar collateral ligaments of the thumb metacarpophalangeal joint. In addition, there is tendinitis of the radial flexors of the wrist and a history consistent with the development of a ganglion cyst. Dr. Nolan also stated that the findings of the history and physical examination are consistent with a median nerve irritation/compression and an EMG/NCV was needed. He opined that current treatment of the thumb with the thumb spica wrist immobilizer was appropriate. Dr. Nolan opined that appellant was temporarily totally disabled until March 5, 2013.

Additional progress reports from Dr. Nolan were received. In a February 28, 2013 progress note, he diagnosed de Quervain's stenosing tenosynovitis and that appellant remained temporarily totally disabled until April 1, 2013.

In a March 6, 2013 statement, appellant's attorney clarified some points under claim number xxxxxx379.

By decision dated March 13, 2013, OWCP denied appellant's claim on the grounds that fact of injury had not been established. Specifically, it found that she did not respond to the factual questions regarding the claimed injury and, thus did not establish the factual component of fact of injury.

On April 11, 2013 appellant requested a hearing before OWCP's Branch of Hearings and Review, which was scheduled for July 24, 2013. On July 23, 2013 appellant's representative requested a review of the written record.

Additional progress notes from Dr. Nolan indicated that appellant was totally disabled until April 1, 2013 and could return to modified work effective April 1, 2013. In a March 14, 2013 note, he indicated that the date of injury in the initial claim had been corrected from June 21 to 25, 2012. A copy of Dr. Nolan's February 15, 2013 report noting the initial date of injury of June 25, 2012 was provided.

In a July 30, 2013 statement, appellant's attorney indicated that appellant was injured on August 19, 2012 at work and there is no doubt on how the injury occurred. He stated that she believed that this was a recurrence of her June 25, 2012 injury and filed a Form CA-2 under claim number xxxxxx379, which had been denied. Appellant's attorney indicated that he told appellant to file a CA-1 form as this was a new injury, one that happened during a single work shift. He advised her to file a CA-1 form based on the date of injury and provide an explanation why it was being filed late. Appellant's attorney noted that the December 2, 2012 CA-1 form states that "This CA-1 [form] is to replace the CA-2 form that was turned in on day of injury with [Supervisor] Bush." He also argued that, since appellant's work shift is from 9:00 p.m. to 5:30 a.m., her work shift includes both August 18 and 19, 2012. A copy of the accident/injury/investigation worksheet for the June 25, 2012 injury was submitted.

By decision dated September 13, 2013, an OWCP hearing representative affirmed OWCP's March 13, 2013 decision. The hearing representative found that the employing establishment did not dispute that the claimed incident actually occurred but stated that the pie-cart was not broken. However, as appellant provided conflicting evidence without explanation regarding when the alleged incident actually occurred, the time and date of the claimed incident could not be determined and fact of injury was not established. The hearing representative indicated that the instant claim was doubled with claim number xxxxxx379.

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 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 are causally related to the employment injury.[3] These are the essential elements of each and every compensation claim regardless of whether the claim is predicated on a traumatic injury or an occupational disease.[4]

In order to determine whether an employee actually sustained an injury in the performance of duty, OWCP begins with an analysis of whether fact of injury has been established. Generally, fact of injury consists of two components, which must be considered in

[3] *Gary J. Watling*, 52 ECAB 278 (2001); *Elaine Pendleton*, 40 ECAB 1143, 1154 (1989).

[4] *Michael E. Smith*, 50 ECAB 313 (1999).

conjunction with one another. The first component to be established is that the employee actually experienced the employment incident which is alleged to have occurred.[5] The second component is whether the employment incident caused a personal injury and generally can be established only by medical evidence.

When an employee claims that he sustained an injury in the performance of duty he must submit sufficient evidence to establish that he or she experienced a specific event, incident or exposure occurring at the time, place and in the manner alleged. He or she must also establish that such event, incident or exposure caused an injury.[6] Once an employee establishes that he or she sustained an injury in the performance of duty, he or she has the burden of proof to establish that any subsequent medical condition or disability for work, for which he or she claims compensation is causally related to the accepted injury.[7]

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 his or 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 his or her burden when there are such inconsistencies in the evidence as to cast serious doubt on the validity of the claim.[8]

ANALYSIS

OWCP determined that appellant failed to submit sufficient evidence to establish that she experienced the employment incident at the time, place and in the manner alleged. It found that she submitted conflicting evidence without explanation regarding when the alleged incident occurred, so the time and date of the claimed incident could not be determined.

The Board finds, however, that there is sufficient evidence of record from which to conclude that an employment incident occurred as appellant alleged during her shift encompassing August 18 and 19, 2012. Appellant's work hours are from 9:00 p.m. to 5:30 a.m. and the record reflects that she worked the August 18 and 19, 2012 nightshift. Near the close of her shift on August 19, 2012 at 4:20 a.m., she filed a recurrence claim under claim number xxxxxx379 alleging that at 9:40 p.m. (near the start of her shift) on August 18, 2012, she tried to move pie-cart number 4, but when it did not move, the force hurt her hand. Appellant sought medical treatment on August 19, 2012 and, in his August 27, 2012 report, Dr. Ribeiro noted a work incident of August 18, 2012. As this was an alleged new injury, she subsequently filed a CA-1 form on December 2, 2012 alleging that on August 19, 2012 she was pushing a pie-cart

[5] *Elaine Pendleton, supra* note 3 at 1143 (1989).

[6] *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).

[7] *See Elaine Pendleton, supra* note 3.

[8] *Betty J. Smith*, 54 ECAB 174 (2002).

with a broken wheel and she injured her right thumb and wrist. Supervisor Bush noted on the form that "This CA-1 [form] is to replace the CA-2 [form] that was turned in on the day of injury." Supervisor Bush stated in her December 2, 2012 note that appellant did not fill out the date of injury as she could not remember it and explained that she had provided the date from the CA-2a form from claim number xxxxxx379, which she wrote on the CA-1 form as August 19, 2012. While appellant injured herself at 9:40 p.m. on August 18, 2012, it is clear that she did not remember the exact date or time of the claimed injury when she filed the traumatic injury claim months later and relied on the advice of her supervisor who mistakenly provided the August 19, 2012 date. When she provided the history of injury to Dr. Nolan on February 15, 2013, she provided the August 19, 2012 date of injury. The evidence establishes that appellant had an employment-related incident during her overnight work shift on August 18 and 19, 2012. Appellant's statement regarding an incident and supporting statements by her supervisor establish employment incident during her scheduled work shift on August 18 and 19, 2012.[9]

The next question is whether this incident caused an injury.[10] The August 19, 2012 report of Mr. Valentine, a physician's assistant, has no probative medical value in establishing that appellant sustained a medical condition causally related to the August 18 and 19, 2012 employment incident as a physician's assistant is not considered to be a physician as defined under FECA.[11]

In his August 27, 2012 report, Dr. Ribeiro stated that appellant aggravated a hyperextension condition of her right thumb on August 18, 2012. He diagnosed hyperextension injury to the right thumb with muscular contusion of the thenar eminence of the right thumb; and musculoligamentous strain of the right thumb, wrist and distal forearm. Dr. Nolan, in his February 15, 2013 report, noted that on August 19, 2012 appellant was in the process of pushing the pie-cart when the wheels locked and she had hyperabduction of the thumb, even while it was in a brace from a previous injury. He diagnosed radial wrist tendinitis, traumatic, right; de Quervain's tendinitis, right; rule out collateral ligament sprain, radial and ulnar, thumb carpometacarpal joint, right; carpal tunnel syndrome, right; and rule out ganglion cyst, radial volar wrist right.

The reports from Dr. Ribeiro and Dr. Nolan establish the incident of August 18 and 19, 2012. However, because OWCP denied appellant's claim on the grounds that she did not establish fact of injury, it never reviewed the evidence to determine whether the medical evidence submitted in support of her claim established causal relationship. The Board will therefore set aside OWCP's September 13, 2013 hearing representative's decision and remand

[9] In this case, the employing establishment did not dispute that the claimed incident occurred, rather it asserted that the pie-cart was not broken.

[10] 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 time and place of occurrence and member or function of the body affected. 20 C.F.R. § 10.5(ee).

[11] *See* 5 U.S.C. § 8101(2); *Allen C. Hundley*, 53 ECAB 551 (2002).

the case to OWCP for a review of the medical evidence.[12] OWCP shall make a finding on whether the medical opinion evidence is sufficient to establish that the August 18 and 19, 2012 work incident caused appellant's diagnosed conditions and shall issue an appropriate final decision on her entitlement to compensation.

CONCLUSION

The Board finds that this case is not in posture for decision. The weight of the factual evidence establishes that the incident occurred as alleged. OWCP must now determine whether the medical opinion evidence establishes that this incident caused an injury.

ORDER

IT IS HEREBY ORDERED THAT the September 13, 2013 decision of the Office of Workers' Compensation Programs is set aside and the case remanded for further action consistent with this opinion.

Issued: August 5, 2014
Washington, DC

Patricia Howard Fitzgerald, Acting Chief Judge
Employees' Compensation Appeals Board

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

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

[12] Due to the disposition of this case, appellant's arguments on appeal will not be addressed. The Board notes that no supportive argument was provided in this case even though appellant's attorney indicated that appellant would be providing supportive argument.