

U.S. Department of Labor  
Office of Workers' Compensation Programs

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DECISION OF THE HEARING REPRESENTATIVE

In the matter of the claim for compensation, under Title 5, U.S. Code 8101 et seq., of Cynthia E. Clure, claimant; employed by the U.S. Postal Service. Case file: 06-2100828  
The hearing was held on October 26, 2004 in Atlanta, Georgia.

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The issue is whether the claimant has established that on November 13, 2003 she sustained an injury while undergoing a functional capacity evaluation in connection with a previously accepted work injury.

On December 14, 2001 the claimant, employed as a rural letter carrier by the U.S. Postal Service in Canton, Georgia, sustained an injury to her left shoulder and elbow in the performance of duty. Under case file 06-2049499, the Office accepted that as a result of her injury the claimant sustained left shoulder bursitis, left elbow sprain and left shoulder rotator cuff tear necessitating surgery. In order to evaluate the claimant's work capacity following surgery, a functional capacity evaluation was ordered and conducted on November 13, 2001.

On November 18, 2003 the claimant filed the instant Form CA-1, notice of traumatic injury, indicating that while doing lifting during the functional capacity evaluation on November 13, 2001 she felt severe pain in her left arm from the neck and shoulder area all the way down to her fingers.

Statements were received from the claimant and the employing agency.

On November 18, 2003 the claimant saw Kenneth J. Ricci, M.D., a primary care physician, who noted the original injury and the incident on November 13, 2001 and provided an assessment of left upper back, shoulder and elbow pain. Dr. Ricci completed Form CA-17 indicating work restrictions. Also received was a physician's report form dated November 26, 2003 from Jon Hyman, M.D., the claimant orthopedic surgeon, and MRI reports dated December 22, 2003 of the left shoulder and cervical spine.

On January 6, 2004 the Office issued a decision denying the claim for compensation on the basis that the requirements had not been met for establishing that the claimant sustained an injury as defined by the FECA.

The claimant requested an oral hearing, which was held on October 26, 2004 in Atlanta, Georgia. At the hearing the claimant was represented by Paul Felser, attorney at law. Also present at the hearing in an observer capacity was Martha Tharpe from the Postal Service.

Mr. Felser submitted into the record a copy of Dr. Hyman's office visit report dated November 26, 2003. He indicated that they attempted to obtain a follow-up report from Dr. Hyman, but were unsuccessful. Mr. Felser contended that the office report was sufficient to establish that the claimant sustained a new injury while undergoing the functional capacity evaluation.

The claimant discussed the functional capacity evaluation on November 13, 2003. She indicated that as part of the evaluation she was required to lift boxes but wasn't told how much the boxes weighed. The claimant stated that she lifted one of the boxes and as she turned her left arm "just gave out." She indicated that when she told the therapist what happened, she just wanted her to proceed but she refused. The claimant noted that she did not complete the lifting but did complete the rest of the evaluation.

The claimant stated that thought that if she put heat and ice on the arm it would be fine. She noted, however, that the pain did not go away. The claimant stated that there was confusion as to whether this was a new injury or a recurrence. She indicated that she went to Medical Associates and was then referred back to her specialist, Dr. Hyman. The claimant stated that she told Dr. Hyman what had happened and he told her that she probably restrained it. She noted that in his office report, Dr. Hyman does mention a deltoid strain during the FCE that should resolve within a week. The claimant further discussed the report from Dr. Hyman and subsequent problems in their patient/doctor relationship.

The claimant stated that she underwent additional diagnostic testing, which has been paid for under her original claim. She also indicated that she stopped work and is now receiving compensation under her prior claim. Mr. Felser noted that the present claim is for a small uncovered period for medical care and a small period of time where compensation may be involved.

I find that the claimant has provided sufficient additional evidence to establish that she sustained an injury as claimed on November 13, 2003.

An employee seeking benefits under the Federal Employee's Compensation Act has the burden of establishing the essential elements of his or her claim, including the fact 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.<sup>1</sup>

To determine whether an employee has sustained a traumatic injury in the performance of duty, it must first be determined whether a "fact of injury" has been established. First, the employee must submit sufficient evidence to establish that he actually experienced the employment incident at the time, place and in the manner alleged. Second, the employee must submit sufficient evidence, generally only in the form of medical evidence, to establish that the employment incident caused a personal injury.<sup>2</sup>

<sup>1</sup> Elaine Pendleton, 40 ECAB 1143 (1989).

<sup>2</sup> John J. Carlone, 41 ECAB 354 (1989).

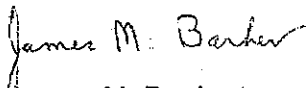
In its decision, the Office determined that the evidence established that the claimed event occurred, but found that there was no medical evidence that provided a diagnosis which could be connected to the event.

On November 18, 2003 the claimant saw Dr. Ricci, a primary care physician, whose report included an accurate history of the incident and an assessment of left upper back, shoulder and elbow pain. On November 26, 2003 the claimant saw Dr. Hyman, her orthopedic surgeon; however all that was received was an incomplete report form. The record now includes a copy of Dr. Hyman's report from the November 26, 2003 office visit. In his report, Dr. Hyman indicates that the claimant has "re-strained her shoulder (deltoid muscle) participating in the FCE." He then states that the claimant's "deltoid strain during the FCE should resolve within the week. It is a new injury and should not require any further care." The medical evidence of record now includes an accurate history, diagnosis and opinion relating the diagnosis to participating in the November 13, 2003 functional capacity evaluation. Accordingly, I find that such evidence is sufficient to establish that on November 13, 2003 the claimant sustained an injury as claimed resulting in a left shoulder/deltoid strain.

Dr. Hyman states that the deltoid strain should resolve within the week and should not require any further care. Absent any evidence to the contrary, Dr. Hyman's report establishes that the instant injury has resolved, with payable benefits limited to medical care and any time lost from work for the November 18, 2003 and November 26, 2003 office visits. Treatment and benefits thereafter should, and apparently have, been addressed under the claimant's original left shoulder injury claim, 06-2049499. Finally, the present claim should be doubled into the original left shoulder injury claim.

The decision dated January 6, 2004 is hereby reversed, and the claim accepted for the indicated condition and returned to the District Office for appropriate action consistent with the present decision.

DATED: JAN 6 2005  
WASHINGTON, D.C

  
James M. Bankert  
Hearing Representative  
For  
Director, Office of Workers'  
Compensation Programs