U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ROSALYN K. WIMBERLEY and DEPARTMENT OF THE AIR FORCE, ROBINS AIR FORCE BASE, Ga.

Docket No. 96-1961; Submitted on the Record;
Issued June 17, 1998

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,
BRADLEY T. KNOTT

The issue is whether appellant has established that she sustained an injury in the performance of duty on April 17, 1991.

On March 8, 1994 appellant, then a 43-year-old equipment specialist, filed a claim for a back injury sustained on April 17, 1991 when she fell down slippery steps while on a temporary duty assignment (TDY). Appellant related, "I slipped with both feet out from under me at the same time landing squarely on my rear end and bounced down in that position for four or five steps to the bottom of the stairs."

In a statement accompanying her claim, appellant related that after she returned from TDY to her worksite she reported the injury to her supervisor, Mr. Byron Cotton. Appellant related that she experienced soreness but insufficient pain to warrant seeing doctor until December 1991, and explained that she did not initially associate the pain with her April 1991 fall. Appellant further stated that she was injured in an automobile accident in 1986 and was released from care with no further complaints in 1989.

In a statement dated October 4, 1994, Mr. Cotton, appellant's supervisor at the time of the alleged injury, related that appellant informed him of her fall immediately after she returned from TDY and that he spoke to a witness who verified that the incident occurred. Mr. Cotton stated that appellant "did have pain problems prior to going to the doctor in Dec[ember] of 1991 but neither of us associated the incident [on TDY] as a possible cause as the problems came and went."

By decision dated July 5, 1994, the Office of Workers' Compensation Programs denied appellant's claim on the grounds that she did not established fact of injury. The Office further denied appellant's request for reconsideration by decision dated September 23, 1994, on the grounds that the medical evidence was insufficient to establish that her current condition was

causally related to the injury which occurred three years prior. In merit decisions dated August 17, 1995, and April 11, 1996, the Office denied appellant's requests for reconsideration.

The Board finds that the case is not in posture for a decision.

An employee seeking benefits under the Federal Employees' Compensation Act[1] 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 the Act, and that the claim was timely filed within the applicable time limitation period of the Act [2] and that an injury was sustained in the performance of duty.[3]

In a traumatic injury claim, in order to determine whether an employee actually sustained an injury in the performance of duty, it must first be determined whether "fact of injury" has been established. 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. 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.[4]

In the present case, appellant has established that an employment incident occurred on April 17, 1991 when her feet slipped out from under her on slippery stairs and she bounced down four or five steps on her posterior. Appellant's supervisor confirmed that she reported the incident to him upon returning from TDY. He also stated that he spoke with a witness who verified the occurrence of the described incident. Appellant delayed seeking treatment after the incident but explained the delay by indicating that the pain was initially not severe. An employee's statement alleging that an incident occurred at a given time and manner is of great probative value and, as appellant's statements are not refuted by any strong or persuasive evidence, they are sufficient to establish that the April 17, 1991 incident occurred as alleged.[5]

Appellant submitted medical evidence that, while generally supportive of her claim, is currently insufficient to establish that the April 17, 1991 incident caused her current back condition of a herniated thoracic disc.[6]

In an initial consultation report dated September 1, 1992, Dr. Darla R. Totten, a neurologist, discussed appellant's history of a neck injury due to a motor vehicle accident and "a

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[1] 5 U.S.C. §§ 8101-8193.

[2] *Joe D. Cameron*, 41 ECAB 153 (1989).

[3] *James E. Chadden Sr.*, 40 ECAB 312 (1988).

[4] *Robert J. Krstyen*, 44 ECAB 227 (1992).

[5] *Thelma S. Buffington*, 34 ECAB 104 (1982).

[6] Appellant first sought treatment after the April 17, 1991 employment incident from Dr. Vance. In chart notes dated December 9, 1991, Dr. Vance stated that appellant complained of stabbing pain in her back. In a chart note dated January 29, 1992, Dr. Vance treated appellant for back and neck pain. Dr. Vance did not relate a history of the April 17, 1991 fall.

fall, slipping backwards down slippery steps in the spring of 1991." Dr. Totten diagnosed vascular type headaches probably due to cervical muscle strain.

In follow-up reports dated October 29, 1992 to January 31, 1994, Dr. Totten treated appellant for, *inter alia*, cervical muscle strain and fibromyalgia. In a follow-up report dated February 11, 1994, Dr. Totten diagnosed a thoracic disc herniation at T7-8, C6 radiculopathy, fibromyalgia and tension/vascular headache. Dr. Totten noted that appellant "relates once again that she did fall down a flight of stairs in 1991 and that she fell on her tail bone. She thinks that the stairs were slippery and that she bounced on her buttocks to the bottom of a flight of metal stairs."

In a report dated July 13, 1994, Dr. Totten related that she had treated appellant since her fall in April 1991, described the injury and her history of treatment, and stated that she "sustained a thoracic disc rupture as a result of her fall at work on April 17, 1991."[7]

In a report dated July 14, 1994, Dr. Peter O. Holliday, III, a Board-certified neurosurgeon, stated that he initially treated appellant in 1988 for pain in her neck radiating into her arm due to a motor vehicle accident in February 1987. Dr. Holliday stated that he again treated appellant in June 1989 and August 1991 for mild carpal tunnel syndrome, and that in May 1994 he performed a thoracic myelogram and post-myelogram computerized tomography (CT) scan on appellant which revealed a ruptured disc at T7-8. Dr. Holliday reported that at the time of his May 1994 examination appellant related the history of her fall at work in April 1991.

In a report dated June 7, 1994, Dr. Melvin D. Law, Jr., an orthopedic surgeon, treated appellant for severe thoracic pain and neck pain. He related:

> "The pain has been present since December of 1991, but has been extremely severe since December of 1993. She had an injury on April 17, 1991 when she fell on some metal steps and her feet shot out from under her. She landed on her buttocks and bounced about 4 or 5 steps to the bottom. Her pain has been getting progressively worse."

Dr. Law diagnosed a possible herniated T7-8 disc.

In a report dated June 21, 1994, Dr. Law diagnosed a "thoracic disc herniation at T7-8 causing mild spinal cord compression." He noted that nothing in appellant's history suggested a preexisting thoracic condition and opined:

> "I think that [appellant's] fall that she describes with her April 17, 1991 injury is responsible for her current pain complaints and thoracic disc herniation in that thoracic disc in themselves are extremely rare and when they do occur they are usually related to trauma."

The record indicates that appellant underwent a thorcoscopic diskectomy and fusion at T7-8 on November 18, 1994.

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[7] Dr. Totten subsequently clarified that she first treated appellant on September 1, 1992, at which time appellant reported the history of the April 1991 fall.

In a report dated May 6, 1995, Dr. Law, in response to questions posed by appellant's attorney, affirmed that an accident such as described by appellant on April 17, 1991 could cause a T7-8 herniated disc and stated that a review of the medical records corroborated the history related by appellant and his findings on examination.

In a report dated December 1, 1995, Dr. Law stated that appellant explained that she delayed seeking medical treatment until the pain grew worse.

In a report dated February 2, 1996, Dr. Law opined that appellant's 1987 motor vehicle accident was not responsible for her T7-8 disc herniation based on his review of the medical records.

The Board notes that the reports of Drs. Totten and Law are insufficient to establish that appellant's herniated disc was directly caused by her employment injury in view of their failure to provide medical rationale explaining how appellant could wait seven months before seeking treatment if her fall caused the diagnosed condition. However, since the reports support appellant's claim that such a fall can result in the type of disc herniation sustained by appellant, and there are no contrary reports of record, the reports of Drs. Totten and Law constitute sufficient evidence to warrant further development by the Office to determine the relationship between the fall at work and the disc herniation.[8]

The decisions of the Office of Workers' Compensation Programs dated April 11, 1996 and August 17, 1995 are set aside and the case is remanded to the Office for further development to be followed by a *de novo* decision in accordance with this decision of the Board.

Dated, Washington, D.C.
June 17, 1998

Michael J. Walsh
Chairman

Willie T.C. Thomas
Alternate Member

Bradley T. Knott
Alternate Member

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[8] *See John J. Carlone*, 41 ECAB 354 (1989).