United States Department of Labor
Employees' Compensation Appeals Board

N.O., Appellant	)	
and	)	**Docket No. 08-551**
	)	**Issued: July 17, 2008**
DEPARTMENT OF VETERANS AFFAIRS, VETERANS ADMINISTRATION MEDICAL CENTER, Washington, DC, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

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

JURISDICTION

On December 14, 2007 appellant, through counsel, filed a timely appeal from a November 29, 2007 decision of the Office of Workers' Compensation Programs denying her claim for a traumatic injury. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d), the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant established that she sustained a back injury in the performance of duty on March 14, 2005, as alleged.

FACTUAL HISTORY

On May 3, 2005 appellant, a 22-year-old nurse, filed a traumatic injury claim alleging that on March 14, 2005 she injured her lower back while aligning a patient in bed. She stopped work on May 2, 2005. The employing establishment controverted the claim. Ruth Cruz, nurse

manager, stated that appellant did not report the injury until six weeks after the fact and had been working since the alleged injury occurred.

In a May 11, 2005 letter, the Office informed appellant that the evidence was insufficient to support her claim. It advised her as to the medical and factual evidence to submit within 30 days. No evidence was submitted.

By decision dated June 13, 2005, the Office denied appellant's claim on the grounds that she had not established fact of injury as no medical or factual evidence was submitted. Thus, it found that March 14, 2005 incident did not occur as alleged or that an injury resulted therefrom.

On June 13, 2005 the Office received the May 24, 2005 duty status form and May 2, 2005 report of Dr. Nelson K. Henry, a treating Board-certified family practitioner, who diagnosed lumbar radiculopathy. Dr. Henry noted that appellant complained of lower back pain for about a month and that "[l]ifting on the job aggravates the pain. No history of injury to the back in the medical record." A physical examination revealed bilateral positive findings on straight leg raising and +2 bilateral patellar reflexes.

A May 10, 2005 MRI scan revealed no evidence of significant disc herniation or bulge at L1-4 and L5-S1, with a moderate-sized central disc protrusion at L4-5 causing mild mass effect upon the L5 nerve roots.

On May 24, 2005 Dr. Henry diagnosed an L4-5 herniated disc and released appellant to work with restrictions. He noted that she sustained a work injury on March 14, 2005 while assisting a patient in bed to proper alignment.

In a June 1, 2005 statement, appellant stated that she did not report the injury immediately as she was a new employee and did not understand the rules for filing a claim. She believed that the pain would go away after taking over-the-counter medication. Appellant stated that the patient she was caring for had been in an incorrect position in bed so she took action to correctly align the upper half of his body with the lower half. She noted that no one witnessed the incident and that she felt severe back pain at the time. Appellant did not report the injury to anyone at the employing establishment. On May 2, 2005 she related waking up to "a burning sensation going across her back" and she decided to consult Dr. Henry.

On June 5, 2006 appellant, through counsel, requested reconsideration and submitted a May 9, 2006 report from Dr. Neil Novin, a Board-certified general surgeon, who diagnosed a L4-5 herniated disc prior to an October 2005 surgery and post-laminectomy syndrome with left lower extremity and radiculopathy and left foot drop post surgery. Dr. Novin noted that appellant sustained a work injury on March 14, 2005 when she was "adjusting a patient and while doing so sustained a strain-type injury that caused significant back pain and spasm." He concluded that the March 14, 2005 incident was the direct cause of her lumbar pathology and emergency surgery. Dr. Novin stated that appellant had no preexisting lower extremity or lumbar conditions prior to the incident and a May 2005 MRI scan revealed a herniated lumbar disc.

By decision dated September 6, 2006, the Office denied modification of the June 13, 2005 decision.

In a letter dated August 27, 2007, appellant, through counsel, requested reconsideration. She contended that the July 19, 2005 automobile accident that occurred just prior to her arrival to work, did not break the chain of causation as it did not cause a worsening of her condition. Appellant also noted that she had been involved in two other automobile accidents on December 16, 2005 and September 8, 2006. She submitted medical and factual evidence from Dr. G. Hudson Drakes, a treating Board-certified physiatrist, and Dr. Guy W. Gargour, an examining Board-certified general neurologic surgeon.

In a June 2, 2005 report, Dr. Drakes diagnosed L5 radiculopathy, lumbosacral disease and L4-5 herniated nucleus pulposus (HNP). He reviewed an MRI scan which he stated showed a herniated lumbosacral disc. A physical examination revealed moderated exogenous obesity, moderate lumbosacral paraspinal muscle tenderness, 40 to 50 degrees bilateral leg raising and 35 to 40 degrees lumbosacral flexion.

In a June 12, 2005 report, Dr. Henry reported that appellant sustained an injury at work in March 2005 while lifting a patient. He stated that appellant had significant back pain since the injury which has affected her ability to work and daily living activities. A physical examination revealed 60 degrees bilateral leg raising and restricted lumbar range of motion. Dr. Henry diagnosed lumbar radiculopathy and noted appellant had been placed on light duty following a period of total disability from May 2 to 23, 2005.

Dr. Drakes reviewed a June 13, 2005 EMG test which showed moderate acute radiculopathy at L5 significantly more on the right than the left.

The record contains evidence that appellant was involved in an automobile accident on July 19, 2005 when her car was hit by a tractor trailer. She was treated in the emergency room at Howard University Hospital. On September 15, 2005 Dr. Henry stated that appellant was disabled from work for the period July 19 to September 19, 2005 as a result of the multiple trauma she sustained due to the July 19, 2005 automobile accident.

On August 1, 2005 Dr. Drakes diagnosed chest wall contusion, abdominal wall contusion, hip contusion, lumbar sprain, sacroiliac sprain and sprain of the hip and thigh. He reported normal cervical lumbar and thoracic range of motion.

On October 20, 2005 Dr. Gargour diagnosed "*cauda equine* syndrome including perineal numbness, bladder dysfunction and incontinence." He noted that a May 2006 lumbar MRI scan revealed a prominent L4-5 dis[c] rupture and the October 17, 2005 MRI scan showed "the same dis[c] is not totally extruded." Dr. Gargour recommended surgery due to her "emergent condition with the risk of paralysis and permanent loss of bladder function."

On October 25, 2005 Dr. Drakes noted appellant underwent emergency neurological surgery recently and that she was totally disabled beginning October 20, 2005.

Dr. Drakes, in a December 6, 2005 report, opined that appellant sustained an L4-5 herniated disc as a result of her repositioning a patient at work. He reported that as a result of the surgical intervention to relieve the lumbosacral spinal cord and nerve root pressure that she "now suffers numbness, weakness and functional immobility of the left lower limb." Dr. Drakes

opined that appellant was currently totally disabled and would not be able to return to her prior position as a nurse.

On March 28, 2006 Dr. Drakes opined that appellant "sustained significant pathology to the lumbosacral spine" in the form of an L4-5 herniated disc as a result of her repositioning a patient. He noted that appellant was "status post this very significant surgical intervention for relief of pressure on the spinal cord and nerve roots in the lumbosacral region." On April 24, 2006 Dr. Drakes opined that appellant might be able to return to light-duty work part time. In forms dated May 17 and June 16, 2006, he released appellant to part-time duty. Dr. Drakes noted March 14, 2005 as the date of injury and diagnosed L5 herniated nucleus pulposus, myelopathy and left drop foot.

On January 4, 2007 Dr. Drakes noted that appellant sustained an L4-5 lumbosacral herniated nucleus pulposus due to a work injury, which occurred while repositioning a patient. He noted that, as a result of the surgery to relieve the pressure on her lumbosacral nerve roots and spinal cord, she "now suffers significant numbness, weakness, and functional immobility of the left lower limb." Dr. Drakes did not believe appellant would be capable of returning to her duties as a floor staff nurse.

In a July 25, 2007 report, Dr. Drakes noted that a May 10, 2005 MRI scan revealed a L4-4 moderate central disc protrusion and mild central stenosis based upon. He related that appellant injured herself on March 14, 2005 while repositioning a patient. A physical examination revealed obesity and severe tenderness and spasms over the L4-5 lumbosacral joints. Based upon Dr. Drakes physical examination, medical and employment injury history and May 10, 2005 MRI scan, he diagnosed a "lumbosacral herniated nucleus pulposus at L4-5 probably more significant than the MRI scan suggested and lumbosacral disease resulting in radiculopathy." He reported that appellant had been in an automobile accident which "somehow exacerbated her low back problems and increased her symptoms to some degree." Dr. Drakes opined that appellant's neurological and functional conditions were directly caused by the March 14, 2005 employment injury. As to her October 2005 surgery, he opined that it had become necessary "primarily because of the work injury but might certainly have been exacerbated or contributed to by the auto[mobile] accident as discussed above."

By decision dated November 29, 2007, the Office denied modification of the September 6, 2006 decision.

LEGAL PRECEDENT

An employee seeking benefits under the Federal Employees' Compensation Act has the burden of proof to establish the essential elements of his claim including the fact that the individual is an employee of the United States within the meaning of the Act, that the claim was timely filed within the applicable time limitation period of the Act, that an injury was sustained in the performance of duty as alleged and that any disability or specific condition for which compensation is claimed is causally related to the employment injury.[1]

[1] *Robert Broome*, 55 ECAB 339 (2004); *see also Elaine Pendleton*, 40 ECAB 1143 (1989).

In order to determine whether an employee actually sustained an injury in the performance of duty, the Office 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 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.[2] An injury does not have to be confirmed by eyewitnesses in order to establish 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.[3] An employee has not met 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.[4] 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 doubt on an employee's statements in determining whether a *prima facie* case has been established.[5] However, an employee's statement regarding the occurrence of an employment incident is of great probative force and will stand unless refuted by strong or persuasive evidence.[6]

ANALYSIS

Appellant alleged that she sustained a traumatic injury on March 14, 2005. She explained that, while repositioning a patient in bed, she felt severe pain in her back. Appellant noted that no one witnessed the event and that she did not report it immediately as she did not understand the rules for filing a claim. She delayed seeking medical treatment as she believed over-the-counter medication would relieve her symptoms.

The employing establishment controverted appellant's claim. Ms. Cruz, appellant's supervisor, noted that appellant did not report the injury until six weeks after the fact and had been working since the alleged injury without apparent difficulty. It was not until May 2, 2005 that appellant's physician placed her off duty effective that date.

An injury does not have to be confirmed by eyewitnesses in order to establish that the employee sustained an injury in the performance of duty, but the employee's statements must be consistent with the surrounding facts and circumstances and her subsequent course of action. An employee has not met her burden of proof when there are such inconsistencies in the evidence as to cast serious doubt upon the validity of the claim.[7]

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[2] *See Louise F. Garnett*, 47 ECAB 639 (1996).

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

[4] *Paul Foster*, 56 ECAB 208 (2004).

[5] *Barbara R. Middleton*, 56 ECAB 634 (2005); *Linda S. Christian*, 46 ECAB 598 (1995).

[6] *Gregory J. Reser*, 57 ECAB 277 (2005).

[7] *D.B.*, 58 ECAB ___ (Docket No. 07-440, issued April 23, 2007); *Delphyne L. Glover*, 51 ECAB 146 (1999).

The record is devoid of any evidence that appellant mentioned her back condition or an injury to coworkers until she stopped work on May 2, 2005. Dr. Henry, a treating Board-certified family practitioner, noted in his May 2, 2005 report that lifting at work had aggravated her pain and that she had back pain for the past month. He indicated that there was no history of a back injury in the medical record. The report did not record a history of the March 14, 2005 incident, as alleged.

Appellant's delay in reporting the alleged March 14, 2005 injury and continued performance of her regular duties for approximately six weeks following the alleged incident cast serious doubt upon the validity of her claim. Moreover, the initial medical evidence from Dr. Henry does not support appellant's allegation that she sustained an employment-related injury on March 14, 2005. Although Dr. Henry mentioned the March 14, 2005 incident in subsequent reports, he did not address why it was not included in the initial report. Appellant also submitted reports by Drs. Drakes, Gargour and Novin, each of whom listed a March 14, 2005 injury date. However, these physicians did not begin treating appellant until three months to a year after the alleged incident. They do not explain why appellant continued to work for more than six weeks following the injury or why she did not seek treatment within a reasonable time following the alleged injury. For these reasons, the Board finds that appellant has not established the March 14, 2005 incident occurred, as alleged.

CONCLUSION

The Board finds that appellant failed to establish that she sustained an incident while in the performance of duty on March 14, 2005.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated November 29, 2007 is affirmed.

Issued: July 17, 2008
Washington, DC

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

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

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