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D.G., Appellant)	
)	
and)	Docket No. 13-870
)	Issued: July 16, 2013
DEPARTMENT OF VETERANS AFFAIRS,)	
HUDSON VALLEY HEALTH CARE SERVICE,)	
Castle Point, NY, Employer)	
)	

Case Submitted on the Record

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

On March 1, 2013 appellant, through her attorney, filed a timely appeal from September 6, 2012 and January 24, 2013 merit decisions of the Office of Workers' Compensation Programs denying her traumatic injury claim. Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

The issue is whether appellant sustained an injury on February 26, 2012 in the performance of duty, as alleged.

¹⁵ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On March 2, 2012 appellant, then a 34-year-old registered nurse, filed a traumatic injury claim alleging that she sustained a back strain on February 26, 2012 in the performance of duty. She related that while doing medical rounds on February 26, 2012 she experienced back pain. Appellant stopped work on February 28, 2012.

In a March 2, 2012 employing establishment clinic note, Dr. Malati Kollali, an internist, discussed appellant's history of back pain on February 25, 2012 while pushing a medical cart and providing patient care. He noted that she received treatment over the past year for a herniated disc.

In a report dated March 7, 2012, Dr. Niraj Sharma, a Board-certified physiatrist, evaluated appellant for low back pain radiating into the right extremity. Appellant's back pain began in October 2011 and got "very bad" on February 22, 2012. Dr. Sharma found that a magnetic resonance imaging (MRI) scan study revealed a right L5-S1 large disc herniation. He diagnosed low back pain with right lumbar radiculopathy and recommended epidural steroid injections and work restrictions.²

By letter dated August 1, 2012, OWCP notified appellant that it paid medical expenses as it appeared her injury was minor and caused no time off work. It would now adjudicate her case based on her request for surgical authorization. OWCP requested that appellant submit additional factual and medical information in support of her claim, including a detailed description of the circumstances surrounding the injury.

In a decision dated September 6, 2012, OWCP denied appellant's traumatic injury claim. It found that she did not establish that the February 26, 2012 work incident occurred at the time, place and in the manner alleged. OWCP further found that appellant did not submit medical evidence supporting a back condition due to the alleged February 26, 2012 employment incident.

In a report dated August 20, 2012, received by OWCP on November 9, 2012, Dr. John McNulty, a Board-certified neurosurgeon, related that he evaluated appellant on June 4, 2012 for back pain that started in October 2011 after she assisted a patient.³ On July 18, 2012 he performed a microdiscectomy. Dr. McNulty stated, "It is clear to me within a reasonable degree of medical certainty that [appellant's] disc herniation, causing her back and leg pain, was the direct result of her injury in October 2011."

² On March 14, 2012 Dr. Sharma diagnosed a right disc herniation and noted that he initially treated appellant for the condition on January 30, 2012. He found that she could perform limited-duty employment. On April 10, 2012 Dr. Sharma advised that appellant was currently performing limited duty and that she had a right disc herniation at L5-S1 with radiculopathy to the right foot. He diagnosed low back pain with lumbosacral radiculopathy and recommended steroid injections and possible surgery.

³ An MRI scan study performed on June 11, 2012 revealed a large disc herniation at L5-S1 "with near complete effacement of the right lateral recess and additional mass effect on the thecal sac." On July 16, 2012 Dr. McNulty admitted appellant to the hospital with severe back pain. He noted that she was hurt at work and diagnosed lumbosacral radiculopathy. On July 18, 2012 appellant underwent a right L5-S1 hemilaminectomy and microdiscectomy.

On October 31, 2012 appellant, through her attorney, requested reconsideration. Counsel asserted that on February 26, 2012 she aggravated an October 14, 2011 work injury, accepted under file number xxxxxx487 for lumbar strain. The employing establishment instructed appellant to file both a notice of recurrence of disability claim form and a claim for a new injury. Counsel stated that there was “no separate and specific medical condition suffered by the claimant on this February 26, 2012 date, other than the aggravation of her October 14, 2011 condition, by a very long and very demanding day at work.” He related that appellant experienced a recurrence of disability on June 6, 2012 due to her October 14, 2011 work injury. Counsel argued that OWCP erred in adjudicating the claim for an injury on February 26, 2012. He further asserted that appellant’s October 14, 2011 injury was “mischaracterized as a simple lumbar sprain.”

By decision dated January 24, 2013, OWCP denied modification of its September 6, 2012 decision. It found that appellant did not establish that the incident occurred as alleged. OWCP adjudicated the issue of whether she sustained a recurrence of disability in June 2012 due to her October 14, 2011 work injury under file number xxxxxx487.

On appeal, appellant’s attorney contends that appellant sustained an injury on October 14, 2011. On February 26, 2012 appellant’s work duties aggravated her October 2011 injury and the employing establishment erroneously instructed her to file a new injury claim. Counsel asserted that she did not sustain a separate injury on February 26, 2012 but a recurrence of disability in June 2012 due to the October 14, 2011 work injury under file number xxxxxx487. He also requested to expand her claim under file number xxxxxx487.

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 and/or specific condition for which compensation is claimed are causally related to the employment injury.⁴ 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.⁵

To determine whether an employee sustained a traumatic injury in the performance of duty, OWCP must determine whether “fact of injury” is established. First, an employee has the burden of demonstrating the occurrence of an injury at the time, place and in the manner alleged, by a preponderance of the reliable, probative and substantial evidence.⁶ Second, the employee must submit sufficient evidence, generally only in the form of medical evidence, to establish a causal relationship between the employment incident and the alleged disability and/or condition

⁴*Alvin V. Gadd*, 57 ECAB 172 (2005); *Anthony P. Silva*, 55 ECAB 179 (2003).

⁵*See Elizabeth H. Kramm (Leonard O. Kramm)*, 57 ECAB 117 (2005); *Ellen L. Noble*, 55 ECAB 530 (2004).

⁶*David Apgar*, 57 ECAB 137 (2005); *Delphyne L. Glover*, 51 ECAB 146 (1999).

for which compensation is claimed.⁷ An employee may establish that the employment incident occurred as alleged, but fail to show that his or her disability and/or condition relates to the employment incident.⁸

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 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.⁹ 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.¹⁰ An employee has not met his or her burden of proof of 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.¹¹ 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.¹²

ANALYSIS

On March 2, 2012 appellant filed a traumatic injury claim alleging that she sustained back strain on February 26, 2012 while performing her medical duties. OWCP denied her claim finding that she did not establish that the specific incident occurred at the time, place and in the manner described.

The initial question presented is whether appellant established that the February 26, 2012 employment incident occurred as alleged. 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 statement must be consistent with the surrounding facts and circumstances and his or her subsequent course of action.¹³ An employee has not met his or her burden of proof when there are inconsistencies in the evidence sufficient to cast serious doubt on the validity of his or her claim.¹⁴

The Board finds that appellant has not established the occurrence of the alleged February 26, 2012 employment incident. By letter dated August 1, 2012, OWCP requested that

⁷Gary J. Watling, 52 ECAB 278 (2001); Shirley A. Temple, 48 ECAB 404, 407 (1997).

⁸*Id.*

⁹See Louise F. Garnett, 47 ECAB 639 (1996).

¹⁰See Betty J. Smith, 54 ECAB 174 (2002).

¹¹*Id.*

¹²Gregory J. Reser, 57 ECAB 277 (2005).

¹³See Betty J. Smith, *supra* note 11.

¹⁴See Linda S. Christian, 46 ECAB 598 (1995).

she submit a detailed description of what happened on February 26, 2012 that resulted in an injury. In response to its request for information, appellant's attorney indicated that she had not experienced a new work injury on February 26, 2012 but instead aggravated an existing injury on that date. He maintained that OWCP erred in adjudicating the claim for a traumatic injury on February 26, 2012. A traumatic injury, however, is defined as a "condition of the body caused by a specific event or incident, or series of events or incidents, within a single workday or shift."¹⁵ If appellant aggravated a preexisting condition due to work factors performed on February 26, 2012, that would constitute a new injury under FECA. She did not respond to OWCP's request that she provide a more account of the work incident alleged to have aggravated her condition. Appellant has the burden to submit a factual statement identifying the employment factors alleged to have caused the occurrence of the claimed disease or condition.¹⁶ The record contains no medical evidence providing a history of an injury occurring on February 26, 2012. On March 2, 2012 Dr. Kollali related that appellant complained of increased back pain on February 25, 2012. In a report dated March 7, 2012, Dr. Sharma related that her back pain worsened on February 22, 2012. On August 20, 2012 Dr. McNulty attributed her diagnosed condition of a herniated disc to an October 2011 work injury. There is no medical evidence providing a history of an injury on February 26, 2012 and appellant has not submitted a factual statement describing the events that caused an injury. Consequently, she has not met her burden of proof.

On appeal, appellant's attorney contends that the events on February 26, 2012 aggravated a prior employment injury. As discussed, appellant has not met her burden of proof to factual establish the occurrence of the February 26, 2012 incident. Counsel also asserts that OWCP erred in adjudicating her claim for a traumatic injury on February 26, 2012. As appellant filed a traumatic injury claim and alleged an injury caused by a specific event or incident or series of events or incidents, within a single workday or shift, OWCP properly adjudicated the claim as a traumatic injury.¹⁷ Appellant's attorney also raised arguments pertinent to an alleged recurrence of disability in June 2012 due to the October 14, 2011 work injury under file number xxxxxx487, a September 21, 2012 letter issued under that file number and a request to expand her claim under file number xxxxxx487. The only issue before the Board on this appeal, however, is OWCP's January 24, 2012 decision denying appellant's claim for a traumatic injury on February 26, 2012.¹⁸

Appellant 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 and 20 C.F.R. §§ 10.605 through 10.607.

¹⁵20 C.F.R. § 10.5(ee).

¹⁶*See C.G.*, Docket No. 13-292 (issued April 2, 2013).

¹⁷*Id.*

¹⁸ On May 21, 2013 the Board issued a decision affirming OWCP's December 19, 2012 decision finding that appellant did not establish a recurrence of disability on June 6, 2012 due to her October 14, 2011 work injury in file number xxxxxx487. *See D.G.*, Docket No. 13-612 (issued May 21, 2013).

CONCLUSION

The Board finds that appellant has not established that she sustained an injury on February 26, 2012 in the performance of duty.

ORDER

IT IS HEREBY ORDERED THAT the January 24, 2013 and September 6, 2012 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: July 16, 2013
Washington, DC

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

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

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