

U.S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of PEARLINE MORGAN and VETERANS ADMINISTRATION,
VETERANS ADMINISTRATION MEDICAL CENTER, Waco, Tex.

*Docket No. 96-1401; Submitted on the Record;
Issued April 1, 1998*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
BRADLEY T. KNOTT

The issue is whether appellant has met her burden of proof in establishing that she sustained an injury in the performance of duty.

On July 10, 1995¹ appellant filed a notice of traumatic injury and claim for continuation of pay/compensation (Form CA-1) alleging that on July 10, 1995² she injured her back while she was bending down to pass out the patient trays.³ On the reverse side of the form, the employing establishment noted the date of injury as July 9, 1995, a date appellant was not on duty. The employing establishment also noted that appellant did not report on July 10, 1995 that she injured her back on July 9, 1995 until making the claim. The employing establishment signed the form on November 9, 1995.

In a report of contact (VA Form 119) dated July 10, 1995, Ms. Georgina Hertzna, the charge nurse on duty at the employing establishment noted that on July 10, 1995 appellant left to go to employee health without asking for a supervisor's slip to see a physician at approximately 7:50 a.m. right after morning report. Appellant returned between 9:30 a.m. and 10:00 a.m. with a restriction sheet requiring light duty. Ms. Hertzna did not know how appellant injured herself as appellant had not provided her with any information.

¹ The Board notes that originally the day was noted as "25" and that "10" was written over in the date of notice section.

² The Board notes that the day was originally noted as "25", then it was crossed out and a "9" was written which was crossed out and "10" written over in the section noting the date the injury occurred.

³ Appellant filed a claim for a recurrence of disability which was denied by the Office of Workers' Compensation Programs on October 5, 1995. The claim for disability is not contained in the record, but the denial of the claim was submitted by the employing establishment in contesting appellant's present claim.

In a treatment sheet dated July 10, 1995, M. McClellan, R.N., noted appellant “came to clinic to report re-occurrence (sic) of back problems - injury in ‘88.” There is no mention of appellant injuring her back on July 10, 1995.

The record contains duty sheets for the period July 9 to 22, 1995 which indicate that appellant did not work on July 9, 1995.

In a report dated October 23, 1995, Dr. Becker noted that appellant has had back problems since she injured her back in 1982 in an employment-related injury. Dr. Becker also noted that appellant injured her back again in 1992 and that she “most recently injured it about two months ago, was tried on light duty.” He diagnosed “chronic low back pain secondary to degenerative arthritis and degenerative dis[c] disease of her lumbar spine.”

In a note dated October 24, 1995, Dr. Becker diagnosed degenerative disc disease of the lower LS spine and recommended that appellant not bend or stoop or lift more than forty pounds.

In a letter dated November 17, 1995, the employing establishment noted that appellant initially filed a CA-2a form for her back pain which was denied by the Office. The employing establishment then noted:

“Appellant did not complete the CA-1 until November of 1995. At first she stated that the injury occurred on July 25, 1995. Then she reported to her supervisor and informed him that the injury occurred on July 9, 1995, and she made a change to the CA-1. [Appellant] did not even work on July 9, 1995. On November 16, 1995, she came to Human Resources Management Service and advised me that the injury occurred on July 10, 1995. [She] then changed the date on the CA-1 and initialed the form by her change (in red ink).”

In an attending physician’s report (Form CA-20) dated November 8, 1995, Dr. Gary L. Becker, a Board-certified orthopedic surgeon, diagnosed degenerative arthritis of spine. Dr. Becker first saw appellant on October 23, 1995 and noted that appellant had reinjured her back about two months ago.

By letter dated November 30, 1995, the Office requested appellant to supply additional information as to how her injury occurred on July 10, 1995.

In an undated response, appellant noted that on July 7, 1995 at about 12:30 p.m. she injured her back while passing out lunch trays. She stated she had to bend down and up while pulling the trays out of the cart. Appellant then stated that there had been a coffee spill on the floor which she slipped on, but “caught self before hit the floor” and that she then cleaned the spill and continued to hand out trays. She stated the pain began Friday night and it lasted the weekend until the morning of Monday, July 10, 1995.

By decision dated December 28, 1995, the Office denied appellant’s claim on the grounds that the evidence failed to establish that an injury was sustained. In the accompanying memorandum, the Office found that there was conflicting evidence regarding whether or not the claimed event, incident or exposure occurred at the time, place and in the manner alleged.

The Board finds that appellant did not meet her burden of proof in establishing that she sustained an injury in the performance of duty.

An employee seeking benefits under the Federal Employees' Compensation Act⁴ has the burden of establishing the essential elements of his or her claim,⁵ including the fact that the individual is an employee of the United States⁶ within the meaning of the Act,⁶ that the claim was timely filed within the applicable time limitation period of the Act,⁷ 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.⁸ These are the essential elements of each compensation claim regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.⁹

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 or she actually experienced the employment incident at the time, place and in the manner alleged.¹⁰ Second the employee must submit sufficient evidence to establish that the employment incident caused a personal injury.¹¹ An employee may establish that an injury occurred in the performance of duty as alleged but fail to establish that his or her disability and/or a specific condition for which compensation is claimed are causally related to the injury.¹² The Office cannot accept fact of injury if there are such inconsistencies in the evidence as to seriously question whether the specific event or incident occurred at the time, place and in the manner alleged, or whether the alleged injury was in the performance of duty.¹³

In the present case, appellant initially wrote July 25, 1995 as the date of her injury which she then changed to July 9, 1995 and then changed again to July 10, 1995. The employing establishment noted that appellant was not on duty on July 9, 1995 and that she did not file this report until November 1995. In the CA-2 form, appellant alleges that she injured her back on

⁴ 5 U.S.C. §§ 8101-8193.

⁵ See *Daniel R. Hickman*, 34 ECAB 1220 (1983); see also 20 C.F.R. § 10.110.

⁶ See *James A. Lynch*, 32 ECAB 216 (1980); see also 5 U.S.C. § 8101(1).

⁷ 5 U.S.C. § 8122.

⁸ See *Melinda C. Epperly*, 45 ECAB 196 (1993); *Elaine Pendleton*, 40 ECAB 1143 (1989).

⁹ See *Delores C. Ellyett*, 41 ECAB 992 (1990); *Victor J. Woodhams*, 41 ECAB 345 (1989).

¹⁰ See *John J. Carlone*, 41 ECAB 354 (1989).

¹¹ *Id.* For a definition of "injury," see 20 C.F.R. § 10.5(a)(14).

¹² As used in the Act, the term "disability" means incapacity because of an injury in employment to earn the wages the employee was receiving at the time of the injury, *i.e.*, a physical impairment resulting in loss of wage-earning capacity; see *Frazier V. Nichol*, 37 ECAB 528 (1986).

¹³ See *Elaine Pendleton*, *supra* note 7.

July 10, 1995 while passing out trays. According to a report by Ms. Hertzna, the charge nurse on duty on July 10, 1995, appellant left after the morning report at approximately 7:50 a.m. to go see a physician and that she returned later in the morning with a restriction sheet for light duty. Appellant did not inform Ms. Hertzna that she injured her back nor how she injured her back. The employing establishment noted that appellant had initially filed a recurrence of disability which the Office rejected. Appellant then filed a CA-1 with July 25, 1995 listed as the injury date and which appellant later changed to July 9, 1995. Appellant changed July 9, 1995 to July 10, 1995 as she had not worked on July 9, 1995. In her response for additional information from the Office, appellant stated that the injury had occurred on July 7, 1995 while she was passing out luncheon trays. Appellant stated that she was in pain throughout the weekend and when she came to work on July 10, 1995. Appellant's physician in reports dated in October 1995 notes that appellant most recently injured her back two months previously and diagnosed degenerative disc disease. Lastly, appellant has not included names of any persons who witnessed the injury or had any immediate knowledge of it.

In view of all these circumstances, appellant has failed to establish the alleged injury by a preponderance of the reliable, probative and substantive evidence at the time, place and in the manner as alleged.

The decision of the Office of Workers' Compensation Programs dated December 28, 1995 is hereby affirmed.

Dated, Washington, D.C.
April 1, 1998

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member

Bradley T. Knott
Alternate Member