

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of BEVERLY J. STOKES and VETERANS ADMINISTRATION,
BATTLE CREEK VETERANS HOSPITAL, Mich.

*Docket No. 96-2110; Submitted on the Record;
Issued June 25, 1998*

DECISION and ORDER

Before MICHAEL J. WALSH, GEORGE E. RIVERS,
DAVID S. GERSON

The issue is whether appellant has established that she sustained an injury in the performance of her federal employment on April 2, 1995.

The Board has duly reviewed the case record and finds that appellant has not met her burden of proof in this case.

On April 5, 1995 appellant, a nursing assistant, filed a claim alleging that on April 2, 1995 she sustained a left-sided tricuspid injury when a total care patient kicked her face. Appellant was seen at the employing establishment's health clinic on April 5, 1995, by a physician's assistant. A progress note of that date indicates appellant's history as follows: "was kicked in right side of face April 1st. Some momentary dizziness, blurred vision, headache, noted that right upper molar was chipped/broken."

In a report dated April 20, 1995 a dentist, Matthew J. Vertin, reported that appellant was seen for complaint of a broken tooth which was sustained by a blow to her face while working in early April. Dr. Vertin explained that the prognosis for the tooth was poor as it had a fracture and infection, therefore extraction would be needed. In a report dated June 14, 1995 Dr. Stacey Vlachos, a dentist, reported that appellant was seen in his office on June 6, 1995 and was evaluated for possible restorative treatment. Dr. Vlachos noted that five extractions were to be performed and five osseous grafts would be placed in the sockets.

In a letter to the Office of Workers' Compensation Programs dated December 6, 1995, the employing establishment controverted appellant's claim. The employing establishment noted that there was a discrepancy regarding the date of injury as appellant had alleged April 2, 1995 on the claim form and reported April 1, 1995 to the employing establishment health clinic. The employing establishment also noted that appellant had been issued a form CA-16 for treatment with Dr. Warren, a dentist, on April 5, 1995. While appellant had been seen by Dr. Warren, appellant would not return the form CA-16 and would not continue treatment with Dr. Warren.

The employing establishment indicated that Dr. Warren's office had been contacted and had advised that appellant had x-rays taken which showed preexisting dental conditions.

By decision dated February 7, 1996, the Office denied appellant's claim on the grounds that fact of injury was not established. The Office noted that while it had requested that appellant submit Dr. Warren's findings and medical opinion regarding the cause of appellant's condition to the Office, appellant had not done so and therefore had not met her burden of proof.

On March 4, 1996 appellant requested that the Office reconsider the case. In support of the request for reconsideration appellant advised the Office that Dr. Warren had sent his report to the employing establishment. Appellant enclosed a medical release so that the Office could contact Dr. Warren, if necessary. Appellant also advised that she had discussed the discrepancy between the dates on her claim form and the employing establishment's health clinic records, but that she had been informed by employing establishment personnel that the discrepancy was not of importance.

The Office denied appellant's application for review by decision dated May 20, 1996.

The Board finds that appellant has not met her burden of proof in this case.

In a traumatic injury case, 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.¹

An employee has the burden of establishing the occurrence of an injury at the time, place, and in the manner alleged, by the preponderance of the reliable, probative, and substantial evidence. An injury does not have to be confirmed by eyewitnesses in order to establish the fact 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.² An employees' statement alleging that an injury occurred at a given time and manner is of great probative value and will stand unless refuted by substantial evidence.³

The only factual discrepancy of record is whether the alleged injury occurred on April 1 or 2, 1995. As there is no controversy as to whether appellant sustained a kick to the face by a patient, the inaccurate date on one of the records is not a sufficient basis to conclude that the alleged injury did not occur at all. Appellant has explained that she tried to correct the date on

¹ *Robert J. Krstyen*, 44 ECAB 227 (1992).

² *Joseph A. Fournier*, 35 ECAB 1175 (1984).

³ *Ruth M. Jackson*, 30 ECAB 917 (1979); *Bennie W. Butler*, 13 ECAB 156 (1961) and cases cited therein.

the employing establishment's records, but was told it was not of importance. The Board therefore finds that the alleged incident did occur as alleged.

The Board finds, however, that appellant has not established that her broken tooth, extraction and the restorative treatment was caused by this incident. The reports from the employing establishment's health unit, from Drs. Vertin and Vlachos merely record appellant's own statements regarding the cause of her tooth conditions. An award of compensation may not be based on surmise, conjecture, speculation or upon appellant's own belief that there is causal relationship between her claimed injury and her employment.⁴ Appellant has not submitted the necessary medical evidence which explains, with medical rationale, how the kick to her face caused the current dental condition, be that a fractured left tricuspid, or fractured tooth with surrounding infection. Such medical explanation is necessary in this case as the evidence of record indicates that appellant had a pre-existing dental condition and subsequent to the alleged injury underwent extraction and restoration of five teeth, not just the left tricuspid tooth. As appellant has not submitted sufficient medical evidence to establish that the employment incident caused a personal injury, the Office properly found that appellant had not established fact of injury.

The decisions of the Office of Workers' Compensation Programs dated February 7, 1996 and May 20, 1996 are hereby affirmed.

Dated, Washington, D.C.
June 25, 1998

Michael J. Walsh
Chairman

George E. Rivers
Member

David S. Gerson
Member

⁴ See *James W. Griffin*, 45 ECAB 774 (1994).