

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

---

In the Matter of SHARON A. BROWN and DEPARTMENT OF VETERANS AFFAIRS,  
VETERANS ADMINISTRATION MEDICAL CENTER, Bronx, NY

*Docket No. 97-2803; Submitted on the Record;  
Issued July 27, 1999*

---

DECISION and ORDER

Before MICHAEL J. WALSH, GEORGE E. RIVERS,  
WILLIE T.C. THOMAS

The issue is whether appellant has established that she sustained an injury in the performance of duty on November 25, 1996.

In the present case, appellant filed a traumatic injury claim (Form CA-1) alleging that on November 25, 1996 she injured her back while in the performance of duty.<sup>1</sup> By decision dated February 5, 1997, the Office of Workers' Compensation Programs denied appellant's claim on the grounds that fact of injury was not established.

The Board has reviewed the record and finds that appellant has not established that she sustained an injury in the performance of duty on November 25, 1996.

An employee seeking benefits under the Federal Employees' Compensation Act<sup>2</sup> has the burden of establishing that he or she sustained an injury while in the performance of duty.<sup>3</sup> 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. The second component is whether the employment incident caused a personal injury and generally this can be established only by medical evidence.<sup>4</sup>

---

<sup>1</sup> The Board notes that on the back of appellant's claim form the employing establishment noted that the date of injury was November 27, 1996.

<sup>2</sup> 5 U.S.C. §§ 8101-8193.

<sup>3</sup> *Melinda C. Epperly*, 45 ECAB 196, 198 (1993); *see also* 20 C.F.R. § 10.110(a).

<sup>4</sup> *John J. Carlone*, 41 ECAB 354 (1989).

In a report dated December 10, 1996, the employing establishment stated that appellant did not report for work on November 25, 1996, and, although she was on duty on November 26 and 27, 1996, she did not report a work-related injury as having occurred on November 27, 1996 as required by agency policy.

By letter dated December 30, 1996, the Office advised appellant that she needed to submit additional information regarding her claim for compensation, including an explanation regarding her work status on November 25, 1996, the date she alleged she was injured, in consideration of the employing establishment's reference to her nonwork status on that day.

In a narrative report dated July 24, 1997, appellant stated that she reinjured her back on November 27, 1996, that she never claimed that she injured her back on November 25, 1996; and that her supervisor incorrectly placed that date on appellant's claim form.<sup>5</sup>

The Board finds that appellant has not met her burden of proof in establishing that she sustained an injury to her back in the performance of duty on October 24, 1995, as alleged.

An employee who claims benefits under the Act<sup>6</sup> has the burden of establishing the occurrence of an injury at the time, place and in the manner alleged, by a preponderance of the reliable, probative and substantial evidence.<sup>7</sup> An injury does not have to be confirmed by eyewitnesses in order to establish the fact 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.<sup>8</sup> An employee has not met 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.<sup>9</sup> 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 sufficient doubt on an employee's statements in determining whether a *prima facie* case has been established.<sup>10</sup> However, an employee's statement alleging that an injury occurred at a given time and in a given manner is of great probative value and will stand unless refuted by strong or persuasive evidence.<sup>11</sup>

---

<sup>5</sup> Dr. Henry N. Hall, appellant's treating chiropractor, noted in his November 29, 1996 medical report that appellant had injured her back on August 26, 1996 which had resolved. Appellant also referred to that incident in her July 24, 1997 narrative report.

<sup>6</sup> 5 U.S.C. §§ 8101-8193.

<sup>7</sup> *William Sircovitch*, 38 ECAB 756 (1987); *John G. Schaberg*, 30 ECAB 389 (1979).

<sup>8</sup> *Charles B. Ward*, 38 ECAB 667 (1987); *Joseph Albert Fournier, Jr.*, 35 ECAB 1175 (1984).

<sup>9</sup> *Tia L. Love*, 40 ECAB 586 (1989); *Merton J. Sills*, 39 ECAB 572 (1988).

<sup>10</sup> *Samuel J. Chiarella*, 38 ECAB 363 (1987); *Henry W.B. Stanford*, 36 ECAB 160 (1984).

<sup>11</sup> *Robert A. Gregory*, 40 ECAB 478 (1989); *Thelma S. Buffington*, 34 ECAB 104 (1982).

In the instant case, appellant filed a traumatic injury claim on March 6, 1996, alleging an employment-related injury to her back on November 25, 1996. The record shows that appellant was reported by the employing establishment to be absent without leave on that day, that she worked on November 26 and 27, 1996 without incident and without reporting the alleged November 25, 1996 incident. The employing establishment also reported that appellant failed to report the incident until December 2, 1996, one week later. Although appellant in a July 24, 1997 statement stated that her supervisor incorrectly stated that appellant injured herself on November 25, 1996, and that the correct date of injury was November 27, 1996, the record indicates that appellant noted that the incident occurred on November 25, 1996, but that the supervisor noted November 27, 1996 on the reverse side of the form. The Office cannot accept fact of injury if there are such inconsistencies in the evidence as to cast serious doubt as to whether the specific event or incident occurred at the time, place and in the manner alleged or if the evidence establishes that the specific event or incident to which the employee attributes the injury was not in the performance of duty.<sup>9</sup>

Moreover, to establish fact of injury, appellant must also submit medical evidence establishing a diagnosed injury causally related to the incident of November 25, 1996. A review of the medical evidence indicates that the evidence submitted is not sufficient to meet appellant's burden of proof. The only medical evidence of record are reports from her treating chiropractor and treating physician. Dr. Hall, her treating chiropractor, stated in a November 29, 1996 report that appellant related that she sustained a work-related injury on November 27, 1996, and that he initially treated her on November 29, 1996 for low back pain.<sup>12</sup> Appellant also submitted two medical reports from Dr. Ellen Ginsberg, her treating physician and Board-certified in anesthesiology, dated December 4, 1996 and January 9, 1997, who stated in both reports that appellant related that her back injury occurred on November 27, 1996.<sup>13</sup> These reports are insufficient to establish fact of injury as having occurred on November 25, 1996 as appellant alleged in her claim form, as they do not provide an accurate factual history of appellant's injury and merely diagnose a condition without providing a rationalized medical opinion establishing a causal relationship between the alleged incident and her medical condition.

The evidence of record raises a substantial question as to the November 25, 1996 incident alleged by appellant and is insufficient to establish fact of injury. The Board finds that appellant has failed to establish the incident alleged in this case.

---

<sup>12</sup> The Board notes that the report is dated November 27, 1996 but identifies treatment rendered as having occurred on November 29, 1996.

<sup>13</sup> The Board notes that in Dr. Ginsberg's December 4, 1996 medical report, the number 7 in the date of injury of November 27, 1996 appears to be superimposed over an illegible number. The date of injury on the January 9, 1997 report is, however, clearly November 27, 1996.

The decision of the Office of Workers' Compensation Programs dated February 5, 1997 is affirmed.<sup>14</sup>

Dated, Washington, D.C.  
July 27, 1999

Michael J. Walsh  
Chairman

George E. Rivers  
Member

Willie T.C. Thomas  
Alternate Member

---

<sup>14</sup> The Board notes that subsequent to the Office's February 5, 1997 decision, appellant submitted additional evidence. The Board has no jurisdiction to review this evidence for the first time on appeal. 20 C.F.R. § 501.2(c); *James C. Campbell*, 5 ECAB 35 (1952).