

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of MACHELLE RUDOLPH and DEPARTMENT OF VETERANS AFFAIRS,  
MEDICAL CENTER, Los Angeles, Calif.

*Docket No. 97-210; Submitted on the Record;  
Issued March 15, 1999*

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DECISION and ORDER

Before GEORGE E. RIVERS, DAVID S. GERSON,  
A. PETER KANJORSKI

The issue is whether appellant has established that she sustained an injury in the performance of duty on May 12, 1994 as alleged.

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 his subsequent course of action. An employee has not met his burden of proof when there are such inconsistencies in the evidence as to cast serious doubt upon the validity of the claim.<sup>1</sup> Such circumstances as late notification of injury, lack of confirmation of injury, continuing to work without apparent difficulty following the alleged injury and the 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>2</sup>

The Board finds that appellant has not established that she sustained an injury in the performance of duty on May 12, 1994 as alleged.

On her claim form appellant claims that she sustained a stress fracture to her left foot at 9:30 a.m. in the following manner: "While working at the metal detection unit, I lifted a heavy suitcase off the desk, placing it onto the x-ray machine. I heard my left foot crack loudly, then severe pain followed." There are several inconsistencies concerning the filing of this claim form. Appellant listed the date of this notice as May 12, 1994, but it obviously was not prepared on that date, as the witness statement on this form is dated July 15, 1994. This also casts serious

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<sup>1</sup> *Joseph A. Fournier*, 35 ECAB 1175 (1984).

<sup>2</sup> *Dorothy Kelsey*, 32 ECAB 998 (1981).

doubt upon appellant's March 23, 1995 statement that she prepared this form within one week of the injury and submitted it to her supervisor. Appellant's account of the filing of her claim is also contradicted by the August 9, 1995 statement of her witness, coworker and boyfriend that he picked up a claim form on July 14, 1994 and attempted to file it shortly after that. The July 14, 1994 date of filing would precede by one day the date appellant was terminated by the employing establishment for excessive absences. The time of the injury, 9:30 a.m., also seems contrary to appellant's statement that there were no other employees in the metal detection unit at the time of her injury because she was the lunch relief person.

This person who signed appellant's claim form as a witness did not actually witness the alleged May 12, 1994 injury, but stated that appellant told him of it on the date it occurred. He also stated that he viewed her foot that evening and that it did not look like it did that morning, in that it was swollen and discolored. His statement that he told her to go see the employing establishment personnel physician the next day contradicts appellant's statement that she reported the injury to her supervisor on the date it occurred and that he referred her to the employing establishment's personnel physician.

Appellant did see a physician's assistant at the employing establishment health unit on May 13, 1994, the day after the alleged employment injury. The report of this visit, however, does not support an employment injury on May 12, 1994 as alleged. Not only do the reports of this visit not mention an injury on the previous day, but the report of employee's emergency treatment indicates appellant was examined or treated for illness as opposed to injury. The health record states that appellant's surgery site was hurting more than expected and that she was walking more than she should. The May 13, 1994 health unit reports do not support appellant's claim that she injured her left foot on May 12, 1994 by lifting a heavy suitcase.

The medical reports from Dr. John Carbone, appellant's attending podiatrist, also lend little support to appellant's claim that she injured her left foot on May 12, 1994 by lifting a heavy suitcase. In a report dated May 17, 1994, Dr. Carbone, who performed a bunionectomy on appellant's left foot on March 10, 1994, listed a history of pain and swelling of the left foot for five to seven days and of inability to tolerate standing at work. The diagnosis in this report was possible stress fracture/overuse. Dr. Carbone's diagnosis on a May 17, 1994 x-ray referral slip and on a May 17, 1994 certificate of disability was "postop[eration] bunionectomy." Despite his preparation of several reports during the intervening months, Dr. Carbone's first mention of the employment injury as described by appellant is in his December 22, 1994 report.

Appellant also continued to work after her alleged May 12, 1994 employment injury, working on May 13, 14 and 15, 1994. Appellant did not report the alleged May 12, 1994 employment injury when she requested sick leave for May 17, 1994 on May 15, 1994, or when she submitted Dr. Carbone's certificate of disability to the employing establishment's assistant chief of the police and security service on May 17, 1994.

The above inconsistencies in the evidence cast serious doubt that appellant sustained an injury on May 12, 1994 as alleged. Appellant has not met her burden of proof.

The decision of the Office of Workers' Compensation Programs dated September 26, 1995 is affirmed.

Dated, Washington, D.C.  
March 15, 1999

George E. Rivers  
Member

David S. Gerson  
Member

A. Peter Kanjorski  
Alternate Member