U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of SHIRLEY A. LITTLEDOG and DEPARTMENT OF HEALTH & HUMAN SERVICES, INDIAN HEALTH SERVICES, Browning, MT

Docket No. 98-1081; Submitted on the Record;
Issued September 14, 1999

DECISION and ORDER

Before MICHAEL J. WALSH, GEORGE E. RIVERS,
BRADLEY T. KNOTT

The issue is whether appellant has established that she sustained a back injury on February 13, 1995 in the performance of duty, causally related to factors of her federal employment.

On February 16, 1995 appellant, then a 51-year-old housekeeper/laundry machine operator, filed a claim alleging that, on February 13, 1995, she injured her lower back, hips and right knee when she picked up a 60-pound sack of wet linen. Appellant stopped work on the date of injury and returned to work on February 21, 1995. In support of her claim, appellant submitted two duty status reports dated March 7 and August 11, 1995 which noted that she had degenerative disc disease and needed to avoid lifting, bending, stooping or carrying bulky loads, and a supervisor's statement dated April 21, 1995 which noted that appellant was placed on light duty by her doctor's request.

By letter dated November 17, 1995, the Office of Workers' Compensation Programs requested further information including a rationalized medical report containing a diagnosis, a history of injury, and an opinion on causal relationship. Nothing further was submitted.

By decision dated April 16, 1996, the Office rejected appellant's claim finding that the evidence of record failed to establish that an injury was sustained as alleged. The Office accepted that the February 13, 1995 lifting incident occurred as alleged but found that a medical condition resulting from the incident was not supported by the record.

By letter dated April 30, 1996, appellant, through her representative, requested reconsideration, and in support submitted a January 5, 1996 report from Dr. Randy Rottenbiller, an employing establishment physician, which noted as history that appellant "began complaining of low back problems after lifting a heavy box at work. She denies having any symptoms of low back pain prior to that episode. She has, however, since that time had several other episodes of

low back pain in 1983 and again in February of 1995."[1] Dr. Rottenbiller diagnosed degenerative disc disease of the lumbar spine, and opined that "there is a relationship of her current condition to her employment, in that there was no evidence of degenerative disc disease prior to her injury. Since her job primarily consisted of a lot of work that is stressful to the low back, such as bending and picking up heavy bags of laundry, that with the wear and tear of these activities on the lumbar spine and discs, that this has led to the degenerative changes which we now see on x-ray and on MRI [magnetic resonance imaging] scan."

A May 24, 1996 report from Dr. Rottenbiller was additionally submitted which noted that appellant suffered a low back injury on the job in approximately 1979; and commented as follows:

> "This episode heralded the onset of a history of chronic low back pain. There was no history of any back symptoms or complaints prior to this time. She relates the initial episode as her lifting a heavy box at work, at which time she felt a pop in the back and that she had intermittent symptoms related to her low back ever since that time. She also had several exacerbations of this pain, again related to lifting activities … which required her to lift heavy bags of laundry on a regular basis … in 1983 and again in 1995."

Dr. Rottenbiller opined that appellant had chronic underlying degenerative disc disease of the lumbar spine which "may have been precipitated or aggravated by her occupational injury of 1979. This underlying condition could also have been aggravated or worsened by her ongoing occupational requirements of frequent lifting and bending."

An October 30, 1997 report from Dr. Rottenbiller gave appellant's current status of her degenerative disc disease of the lumbar spine but did not address causal relation and did not mention a traumatic injury of February 13, 1995.

By decision dated January 21, 1998, the Office denied modification of the April 16, 1996 decision finding that the evidence submitted is support was insufficient to warrant modification. The Office noted that Dr. Rottenbiller related appellant's low back problems to a 1979 box-lifting injury and was speculative regarding occupational contribution to her degenerative disc disease. It further found that none of the submitted reports mentioned a February 13, 1995 lifting incident or injury.

The Board finds that appellant has failed to establish that she sustained a back injury on February 13, 1995 in the performance of duty, causally related to factors of her federal employment.

[1] This is appellant's second appeal before the Board. In the prior appeal, Docket No. 95-2950, for low back injury occurring on October 24, 1979, appellant alleged a dislocated disc from lifting a box of supplies. She further alleged a recurrence in 1983 and another on February 15, 1995, causally related to the 1979 injury. The Board found that appellant failed to establish her claim and issued the decision on October 22, 1997 with a denial of a petition for reconsideration issued on February 19, 1998.

To determine whether a federal 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.[2] 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.[3]

In this case, the Office accepts that appellant experienced the employment incident at the time and place and in the manner alleged. However, appellant has submitted insufficient medical evidence to establish that the employment incident caused a personal injury.

Dr. Rottenbiller related appellant's current degenerative disc disease problems to her 1979 box-lifting injury, and noted that she experienced exacerbations or recurrences in 1983 and in February 1995 related to other lifting incidents. However, in none of his reports did Dr. Rottenbiller mention or identify an incident occurring on February 13, 1995. Dr. Rottenbiller also opined that there was a relationship of her current condition to her employment, in that there was no evidence of degenerative disc disease prior to her 1979 injury. This opinion, however, does not support that appellant sustained a medical condition or injury on February 13, 1995 as alleged. Further, Dr. Rottenbiller speculated that appellant's chronic degenerative disc disease could have been aggravated by her ongoing bending and lifting requirements, but this opinion is of diminished probative value as it is facially speculative[4] and clearly does not support that appellant sustained a low back injury on February 13, 1995 as alleged. As no further medical evidence establishing that appellant sustained an identifiable low back injury on February 13, 1995 was submitted, appellant has failed to establish her claim.

[2] *John J. Carlone*, 41 ECAB 354 (1989). To establish that an injury occurred as alleged, the injury need not be confirmed by eyewitnesses, but the employee's statements must be consistent with the surrounding facts and circumstances and his subsequent course of action. In determining whether a *prima facie* case has been established, such circumstances as late notification of injury, lack of confirmation of injury, and failure to obtain medical treatment may, if otherwise unexplained, cast sufficient doubt on a claimant's statements. The employee has not met this burden when there are such inconsistencies in the evidence as to cast serious doubt on the validity of the claim. *Carmen Dickerson*, 36 ECAB 409 (1985); *Joseph A. Fournier*, 35 ECAB 1175 (1984); *see also George W. Glavis*, 5 ECAB 363 (1953).

[3] *Id.* For a definition of the term "injury," see 20 C.F.R. § 10.5(a)(14).

[4] *See Connie Johns*, 44 ECAB 560 (1993); *Theodas Reed*, 38 ECAB 488 (1987).

Accordingly, the decision of the Office of Workers' Compensation Programs dated January 21, 1998 is hereby affirmed.

Dated, Washington, D.C.
September 14, 1999

Michael J. Walsh
Chairman

George E. Rivers
Member

Bradley T. Knott
Alternate Member