U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MARILYN ROBINSON and DEPARTMENT OF ENERGY, BONNEVILLE POWER ADMINISTRATION, Vancouver, WA

Docket No. 01-1168; Submitted on the Record;
Issued January 10, 2002

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
PRISCILLA ANNE SCHWAB

The issue is whether appellant sustained an injury while in the performance of duty on April 27, 1999.

On May 4, 1999 appellant, then a 49-year-old training specialist, filed a notice of traumatic injury alleging that on April 27, 1999 she hurt her right hip and leg as a result of "repeated high step and twisting to enter backseat of Chevy Tahoe vehicle during trip." Appellant was off work from May 4, 1999 until she was approved for light duty effective May 18, 1999. She has a left hip replacement.

The record indicates that on April 27, 1999, appellant went on a trip from Vancouver to Seattle, Washington with Lynn Marzette and James Myer. The purpose of the trip was to meet with representatives of the Boeing Company to review their computer based training program. Appellant left her work site in a government vehicle, Chevy Tahoe, about 8:30 a.m. and returned at 5:30 p.m. Mr. Marzette drove the vehicle.

Mr. Myer provided a May 4, 1999 statement indicating that he assisted appellant in and out of the vehicle and that she did not complain of any injury or discomfort during the ride. He further stated that he assisted appellant in placing and removing her personal belongings from the vehicle.

In a May 4, 1999 statement, Mr. Marzette related that they made one rest stop and one lunch break during the ride to Seattle during which time appellant was required to exit the vehicle, but she was assisted by Mr. Myer. He stated that appellant sat in the right rear passenger seat during the trip. The drive back to Vancouver from Seattle was nonstop. Mr. Marzette stated that appellant complained on the trip of being tired and that the trip was too long of a ride in a vehicle. He related that on May 3, 1999 appellant commented to her that she was not feeling well and that her right hip was causing excruciating pain. At that time, appellant told Mr. Marzette that the long trip and frequent entry/exits from the vehicle had resulted in a hip ailment. Appellant explained that she had undergone a left hip surgery/replacement in the past,

and that her current pain was similar to what she had experienced prior to surgery. Mr. Marzette stated that he told appellant to see a doctor as soon as possible.

Appellant was treated by Dr. Richard C. Zimmerman, a Board-certified orthopedic surgeon, on May 4, 1999. He apparently was her treating physician for her left hip condition. In an office note dated May 4, 1999, Dr. Zimmerman stated that x-rays of the hip showed some progression. He did not specify whether the x-rays pertained to the left or right hip. Dr. Zimmerman stated that appellant would need revision surgery but that, "most recently, she reached up and pulled the lower part of her back." He related that appellant was having low back pain which limited her range of motion on physical examination. With regard to her hip, he stated that appellant should walk with a cane and consider a total hip arthroplasty revision within the year. Dr. Zimmerman prescribed physical therapy for appellant's back pain and put her in off-work status.

In a Form CA-17 dated May 11, 1999, Dr. Zimmerman reported that appellant was disabled from work for approximately one week due to a right back injury sustained on April 27, 1999.

On June 29, 1999 the Office advised appellant of the factual and medical evidence required to establish her claim.

In a report dated July 29, 1999, Dr. Zimmerman noted that he was appellant's surgeon for her left hip surgery. He stated that he saw appellant on April 4, 1999, at which time he thought that she might require revision surgery. Dr. Zimmerman further reported that appellant complained of an injury to her lower back and demonstrated limited range of motion. He related that on June 22, 1999 appellant was concerned that her right hip might be going bad, but he reassured her that her right hip range of motion was still good. Dr. Zimmerman stated that appellant's lower back injury was unrelated to her left hip surgery.

In a decision dated August 12, 1999, the Office denied appellant's claim on the grounds that the medical evidence was insufficient to establish a causal relationship between the April 27, 1999 work incident and her alleged back strain and right hip condition.

On September 17, 1999 appellant requested reconsideration and submitted additional evidence.

In an August 26, 1999 report, Dr. Zimmerman stated that he hoped his prior letter of July 29, 1999 had cleared up that appellant was being treated for a right hip and low back injury, although she had a prior history of surgery on the left side. He opined that appellant injured her right hip and leg at work when she had to swing and twist out of a truck that she was driving. Dr. Zimmerman clarified that he had first examined appellant on May 4, 1999 and not April 4, 1999 as previously stated in his reports.

In a report dated September 1, 1999, Dr. Zimmerman noted that he had originally seen appellant on May 4, 1999, at which time she related that she was experiencing right lower back and right hip pain "that had come about after she had reached up and pulled the muscles in the lower part of the back." He indicated that he was totally dependent on the history provided by his patients in reaching his diagnoses. Dr. Zimmerman further noted that appellant told him that

she had to step up high into a truck and had to pull up with her arms. He concluded that appellant suffered from trochanteric bursitis and a lumbosacral strain, which were new injuries and not related to her "preexisting problems with her right hip." Dr. Zimmerman also noted that he was aware that appellant was taking Tai Chi classes. He specifically stated that appellant's trochanteric bursitis and a lumbosacral strain was related to her employment and not related to any off-work activity.

In a decision dated November 9, 1999, the Office vacated its prior decision but denied compensation on alternative grounds. Specifically, the Office determined that appellant failed to establish fact of injury.

On December 6, 1999 appellant by counsel filed a request for reconsideration and submitted witness statements from Paul D. Johnson, Steve Milistefr and Tammy Kelly, who stated that they had overhead appellant on April 26, 1999 trying to explain to her supervisor, Lynn Marzette, that she did not feel well and was not physically capable of going on a planned trip to Seattle the following day because she thought the long car ride and walking required in Seattle would compromise her hip condition.[1]

In a February 7, 2000 decision, the Office denied modification.

On August 15, 2000 appellant filed a request for reconsideration, stating as follows:

> "I was injured by the repeated entry and exit from the vehicle because there was no accommodation for me to safely and easily enter and exit the extra height vehicle, and if the manager had not coerced me to make the trip, the injury would not have happened.… The facts are that I injured myself by repeatedly stepping too high, lifting and twisting my body to enter the truck. Getting out of the truck also placed stress and strain on the right side of by back right hip and leg. It was not a simple maneuver, due to my height and left hip condition."

In support of her reconsideration request, appellant also submitted character references and additional medical evidence.[2]

In a decision dated December 22, 2000, the Office denied modification of its prior decision.

The Board finds that this case is not in posture for decision.

[1] In a November 29, 1999 statement, Marsha Williams noticed that for a week prior to and after April 27, 1999 that appellant was having obvious difficulty with her mobility. She related that appellant told her that she was experiencing pain and spasms in right hip similar to what she experienced prior to having surgery on her left hip.

[2] The character witness statements were from appellant's supervisor and a fellow coworker. Neither individual had been present at the date of the alleged work injury, but they attested to appellant's integrity and veracity.

An employee seeking benefits under the Federal Employees' Compensation Act[3] has the burden of establishing the essential elements of his or her claim including the fact that the individual is an "employee of the United States" within the meaning of the Act, that the claim was timely filed within the applicable time limitation of the Act, 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.[4] These are essential elements of each compensation claim regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.[5]

In order to determine whether an employee has sustained a traumatic injury in the performance of duty, the Office begins with an analysis of whether a "fact of injury" has been established. There are two components involved in establishing fact of injury which must be considered. First, the employee must submit sufficient evidence to establish that he actually experienced the employment incident at the time, place and in the manner alleged.[6] Second, the employee must submit sufficient evidence, generally only in the form of medical evidence, to establish that the employment incident caused personal injury.[7] The medical evidence required to establish causal relationship, generally, is rationalized medical opinion evidence.[8]

The Office in the present case determined that appellant failed to submit sufficient evidence to establish that she experienced the employment incident at the time, place and in the manner alleged. 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.[9] Nor can the Office find fact of injury if the evidence fails to establish that the employee sustained an "injury" within the meaning of the Act.

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, as alleged, but the employee's statements must be consistent with surrounding facts and circumstances and her subsequent course of action.[10] 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

[3] 5 U.S.C. §§ 8101-8193.

[4] *Joe D. Cameron*, 41 ECAB 153 (1989); *Elaine Pendleton* 40 ECAB 1143 (1989).

[5] *Delores C. Ellyett*, 41 ECAB 992 (1990); *Victor J. Woodhams*, 41 ECAB 345 (1989).

[6] *Elaine Pendleton, supra* note 4.

[7] *Id*.

[8] *Id*.

[9] *Elaine Pendleton, supra* note 4.

[10] *See Gene A. McCracken*, 46 ECAB 593 (1995); *Joseph H. Surgener*, 42 ECAB 541 (1991).

obtain medical treatment may cast doubt on an employee's statements in determining whether he or she has established his or her claim.[11]

In this case, the Office considered appellant's description of the work incident and her injury to be less than credible to establish her claim. The Office noted that, while she alleges an injury date of April 27, 1999, appellant waited until May 4, 1999 to file her claim. The Office also points to inconsistencies in the medical treatment notes from appellant's treating physician regarding the mechanics of the injury.

The Board, however, is not persuaded. First, the fact that appellant waited to file her claim is not inconsistent with her description of progressing low back pain in the week that followed her car trip. Appellant's supervisor acknowledges that appellant complained that the ride was too long on April 27, 1999. There is also a witness statement of record indicating that appellant showed difficulty with her ambulation after the trip.

Contrary to the Office's finding, although Dr. Zimmerman has not consistently described the motions involved when appellant was entering and exiting the government-owned truck, stating that she had pain due to "reaching up and pulling" and then relating that appellant had to "swing and twist" out of a truck, his treatment notes at least corroborate appellant's allegation that she was injured on April 27, 1999. It is obvious that one would have to both reach up and pull to get into the back seat of a truck and that in exiting a truck one might also have to swing and twist the torso. While Dr. Zimmerman's May 4, 1999 records identify the exact date of injury, he reported that appellant was there for treatment of back pain and also diagnosed a back strain consistent with "reaching up and pulling." In subsequent reports he clarified that he relied on appellant's description of injury as the cause of her back pain. The question of whether or not the physician's description of the details of the work incident is sufficient to form a rationalized opinion goes to the issue of causal relationship and not fact of injury.

Furthermore, although appellant did not make verbal complaints about having to get in and out of the truck during the trip on April 27, 1999, this alone fails to dispute that appellant could have strained her back getting in and out of the truck as alleged and simply experienced delayed symptoms of pain in her back that evening or the next day. Since appellant's statement regarding an incident is given great weight[12] and in the absence of probative evidence refuting the incident as alleged, the Board finds that appellant has established an employment incident on April 27, 1999.

Consequently, the Board concludes that appellant has established fact of injury. The remaining issue to be addressed by the Office on remand is causal relationship.

[11] *See Constance G. Patterson*, 41 ECAB 206 (1989).

[12] *Thelma Rogers*, 42 ECAB 866 (1991).

The December 22, 2000 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further consideration consistent with this opinion.

Dated, Washington, DC
January 10, 2002

David S. Gerson
Member

Willie T.C. Thomas
Member

Priscilla Anne Schwab
Alternate Member