

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of FRANCES DeVITO and U.S. POSTAL SERVICE,  
POST OFFICE, New York, NY

*Docket No. 03-158; Submitted on the Record;  
Issued March 4, 2003*

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DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON,  
MICHAEL E. GROOM

The issue is whether appellant sustained an injury in the performance of duty on or about January 14, 2000 as alleged.

On February 12, 2000 appellant, then a 57-year-old occupational health nurse, filed a claim asserting that she sustained an injury on the morning of January 14, 2000 when she “had to reach deep into her bottom file drawer because files packed too loose.” She stated that she felt something pull in her right leg at the thigh. The employing establishment controverted appellant’s claim. Her supervisor reported that she was unsure whether the date of injury was January 10, 11 or 12, 2000 stating: “[Appellant] alleges that she was not sure DOI was January 10, 11 or 12, 2000, but assumed it was January 11, 2000. Was also not sure of exact time or exact file cabinet where injury occurred.”

On January 25, 2000 appellant wrote the following:

“Approximately two weeks ago I pulled a muscle as I was filing charts at work, I am not sure of the exact time or date but the pain got gradually worse until [I] could not walk without extreme pain.

“I did not report the injury when it first occurred because the pain at first was very subtle and I was not sure of the extent of the injury. I reported the injury now because I am not sure if I can continue to work, as the pain is very severe.

“Therefore, even though the injury started on the job, I do not want to file a claim at this time and intend to use my own sick time if necessary.”

Appellant stopped work on January 25, 2000 and sought medical attention that day at the employing establishment's health unit. In a report dated February 22, 2000, Dr. Irene M. Chow, an osteopath, related the following history:

“About two weeks ago, she was filing charts and the file cabinet was too tight and from reaching those charts, she felt that her right leg was hurting from her buttocks, down to the knee; she had walked with a limp and used a cane to walk last week. [Appellant] then told the undersigned physician the following story on the same day (January 25, 2000): [She] could not remember the date and time of the alleged incident. [Appellant] took a long look at the calendar and decided that it was on a Tuesday, that it was about January 11, 2000 and that it was in the morning. She could not remember the time either and said that it may be about 3.00 a.m. [Appellant] said that she was filing charts either in the top or bottom filing cabinets; she could not remember which filing cabinet it was. She pulled a muscle in the right upper leg when she was filing. [Appellant] finished filing and worked the rest of the week. She said she took Tylenol for the pain but it did not help. [Appellant] said that she walked with a cane but it did not help.”

Dr. Chow noted that appellant's examination on January 25, 2000 was normal. She ambulated well without any assistive device, though there was snow outside that day. Appellant had mainly subjective complaints but was deemed fit for duty. Dr. Chow stated that appellant's absence from work January 26 to February 1, 2000 was unwarranted. He reported that appellant went to neurologist a few months earlier because she thought she was losing her memory.

On January 28, 2000 Dr. Michael Goldberg, a family practitioner, excused appellant from work from January 25 through January 31, 2000 due to a strained lower back.

On February 9, 2000 Dr. Barry D. Jupiter, an orthopedic surgeon, reported the following history: “[Appellant] was filing charts, about a week ago, when she felt a pain and pulling in her right buttock region and right leg. It began radiating further down her leg. [Appellant] began to get numbness and tingling below the knee. She denied any prior history of injury or pain in these areas. [Appellant] denied any prior back problems.”

On March 8, 2000 the Office of Workers' Compensation Programs requested that appellant submit additional information to support her claim. The Office noted that the employing establishment controverted her claim because it was untimely, she was unsure of the exact date and time of injury, gave conflicting reports on how she injured herself and continued to work without difficulty.

On March 24, 2000 appellant stated as follow:

“During the week of January 11 to January 14, 2000, I was filing folders in excess of what I normally file. The filing involved doing a lot of reaching overhead to file folders in the top drawers or reaching very low to file folders in the bottom drawers. Toward the end of the week, possibly about January 14, 2000, I remember feeling a pull in my right leg after reaching in one of the bottom drawers. The files in that bottom drawer were not stacked properly, therefore, I

had to reach down while bending, lift the files as a group and push them up into place in order to read the names on the folders.

“Although I felt the pull in my right leg, I continued to work. I thought the pain would go away on the weekend after rest. The pain did not go away but continued to get worse. I did not want to take off from work because I am the only Tour I nurse. I tried walking with a cane, took Tylenol and rested, but the pain continued. Finally, I could not take the pain any longer and I reported the injury to my supervisor as taking place the week of January 11, 2000.

“I seen the [employing establishment’s] medical officer on January 25, 2000, the day of my report and was given Motrin for pain. The medical officer said that since I had been working, that I could continue to work but the pain had me in tears even after taking Motrin. I then stayed out of work for about a week and went to see Dr. Michael Goldberg, MD. He told me he did not accept compensation cases but would give me something for the pain. He prescribed Indocin, which I had suggested because it had helped me once before when I suffered job-related pain after becoming stiff from the extreme cold temperature in the medical unit. I never put in a compensation claim for that injury because after taking medication and resting for about a week or two, I was fine.

“I also injured myself about a year ago, reaching into an ice cream bin in a grocery store. Again, after resting and taking Tylenol I was fine.

“However, with my present injury the Indocin was not helping. I then went to Dr. Barry Jupiter, MD.... He prescribed Celebrex 200 milligrams, once a day for the pain. The medication plus warm soaks relieved the pain enough for me to return to work. I continue to have some pain and, therefore, must move about very slowly. Dr. Jupiter said that he would provide physical therapy once I got approval and a claim number from [the] Office.”

In a decision dated June 15, 2000, the Office denied appellant’s claim on the grounds that she failed to establish that an injury occurred as alleged.

Appellant requested a hearing before an Office hearing representative. At the hearing, which was held on September 14, 2000, appellant appeared and testified. She submitted a statement on September 22, 2000 addressing Dr. Chow’s February 22, 2000 report. Appellant explained, among other things, that on January 25, 2000 the nurse wrote what she perceived to be the cause and not what appellant actually told her.

In a decision dated November 21, 2000, the hearing representative affirmed the denial of appellant’s claim. The hearing representative found that fact of injury could not be established because appellant was not sure when the injury occurred, what part of the body she injured or how she injured herself. The factual history appellant provided to her physicians and to the Office was inconsistent. She was not able to clarify the date of injury in her testimony on September 14, 2000 and her history of how the injury occurred had varied throughout the case. Appellant testified that she was kneeling to reach the bottom cabinet when she twisted her leg

and felt pain, yet in her subsequent statement she provided a history of reaching into an upper cabinet and feeling pain in the back.

Appellant requested reconsideration and submitted additional evidence.

In a report dated February 14, 2001, Dr. Robert L. Hecht, a specialist in physical medicine and rehabilitation and a colleague of Dr. Jupiter, related the following: “To reiterate [appellant’s] injury, [she] reports that while at work in February of 2000, she was bent down filing, she was also lifting up the charts, when she developed pain the region of her right buttock, radiating down the right leg associated with numbness. She had also injured her back at that time as well, but the majority of her pain had been in the right buttock region.” Dr. Hecht reported a follow-up examination on April 9, 2001 “for a patient with persistent pain radiating down from the right buttock down the leg, secondary to a work accident in February of 2000.”

On November 13, 2001 Dr. Hecht offered his final narrative report:

“[Appellant] was initially seen in our office by Dr. Jupiter, my colleague, on February 9, 2000. [She] reported that she had a work injury about one month prior, while doing filing as a registered nurse. Dr. Jupiter’s note of February 9, 2000 says that the injury occurred about a week ago. This is an error.”

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“[Appellant] had a work injury on January 11 through January 14, 2000, while doing filing as a registered nurse. She developed sciatica, namely right buttock pain, radiating down the right leg. After a course of treatment, including physical therapy and anti-inflammatory medication, [appellant’s] condition has resolved.”

In a decision dated July 25, 2002, the Office reviewed the merits of appellant’s claim and denied modification of the November 21, 2000 decision. The Office found that appellant failed to explain adequately the reason she did not notify her supervisor or seek medical attention following the incident.

The Board finds that appellant has not met her burden of proof to establish that she sustained an injury in the performance of duty on or about January 14, 2000 as alleged.

A person who claims benefits under the Federal Employees’ Compensation Act<sup>1</sup> has the burden of establishing by a preponderance of the reliable, probative and substantial evidence the essential elements of her claim, including the fact that she sustained an injury at the time and in the place and manner alleged.<sup>2</sup> 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 her 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

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<sup>1</sup> 5 U.S.C. §§ 8101-8193.

<sup>2</sup> *Henry W.B. Stanford*, 36 ECAB 160 (1984); *Samuel L. Licker*, 4 ECAB 458 (1951).

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.<sup>3</sup>

The Board finds that there is too much factual uncertainty about the alleged injury to find that appellant has discharged her burden of proof. When she filed her claim on January 25, 2000 appellant was, by her own admission, unsure of the date of the injury or of the time it occurred. Further, according to her supervisor, she was unsure of the cabinet where the alleged injury took place. This is the earliest, most contemporaneous evidence in the case record documenting the injury alleged and it is indefinite with respect to date, time and place.

According to Dr. Chow, appellant referred to a calendar on January 25, 2000 and decided that the injury was on a Tuesday, that it was about January 11, 2000 and that it was in the morning. Dr. Jupiter reported on February 9, 2000, however, that appellant was filing charts "about a week ago" when she felt a pain and pulling in her right buttock region and right leg. On March 24, 2000 appellant explained that toward the end of the week of January 11, 2000, "possibly about January 14, 2000," she remembered feeling a pull in her right leg after reaching in one of the bottom drawers. This contrasts with her history two months earlier in Dr. Chow's office. Nor does this recollection explain Dr. Hecht's February 14, 2001 notation that appellant reported an injury "in February 2000." On April 9, 2001 he again reported that he was seeing appellant for persistent pain secondary to a work accident "in February 2000." In his final report of November 13, 2001, Dr. Hecht stated that Dr. Jupiter's February 9, 2000 note of an injury occurring "about a week ago" was in error, but he offered no explanation for the error or for his own notations of an injury occurring in February 2000.

Appellant has offered plausible explanations for not giving earlier notice of the injury, for not filing an earlier claim and for not seeking earlier medical attention. It is appellant's initial uncertainty about when and even where the injury occurred, coupled with her later, seemingly more definite but inconsistent accounts, that stands in the way of her claim. There is also conflicting evidence of whether appellant injured her back at the same time and whether she had a history of prior injury. The Board finds that the factual evidence in this case raises sufficient doubt that an injury occurred at the time, place and in the manner alleged. Appellant has not met her burden of proof.

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<sup>3</sup> *Carmen Dickerson*, 36 ECAB 409 (1985); *Joseph A. Fournier*, 35 ECAB 1175 (1984); see also *George W. Glavis*, 5 ECAB 363 (1953).

The July 25, 2002 decision of the Office of Workers' Compensation Programs is affirmed.

Dated, Washington, DC  
March 4, 2003

Colleen Duffy Kiko  
Member

David S. Gerson  
Alternate Member

Michael E. Groom  
Alternate Member