

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of RHONDA PATTERSON and DEPARTMENT OF VETERANS AFFAIRS,  
VETERANS ADMINISTRATION MEDICAL CENTER, Palo Alto, CA

*Docket No. 03-1713; Submitted on the Record;  
Issued November 17, 2003*

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DECISION and ORDER

Before ALEC J. KOROMILAS, DAVID S. GERSON,  
MICHAEL E. GROOM

The issue is whether appellant sustained an injury in the performance of duty on January 31, 2002 as alleged.

On February 28, 2002 appellant, then a 48-year-old nursing assistant, filed a notice of traumatic injury alleging that on January 31, 2002 she injured her lower back while trying to keep a heavy patient from falling. The employing establishment controverted the claim stating that, at the time of the alleged incident, appellant was not to be working alone, she did not seek medical attention until February 9, 2002; she delayed in reporting the incident; and the employing establishment was unable to verify the incident with other employees or patients. Appellant notified her supervisor of the incident on February 5, 2002.

Appellant claimed that she did not seek immediate medical treatment after the incident because she did not feel the effects of the injury until a week later, when she started to have pain in her leg and experienced difficulty walking. She went to an emergency room for treatment. Dr. Phillip Harter, Board-certified in emergency medicine, noted that appellant was seen in the emergency room on February 9, 2002 and that she could return to work on February 17, 2002.

Appellant also alleged that she injured her lower back at work on November 19, 2001 while helping a patient back to his shower chair.

Dr. Norma Morrison, Board-certified family practitioner, diagnosed low back pain on February 21, 2002. In a report dated February 26, 2002, she noted the date and hour of injury as November 19, 2001. Dr. Morrison also indicated that appellant stated that she injured her back by returning a patient to his shower chair during a shower, after he tried to get up. Under subjective complaints she noted: "Onset of lower back pain January 31, 2002 after helping to lift." Dr. Morrison noted that appellant reported prior low back pain.

In a report dated December 5, 2001, Dr. Midori Nishimura diagnosed a chronic neck strain. In a December 19, 2001 report, he stated that appellant had been under the care of a physician from June 2001 to the present.

By letter dated April 5, 2002, the Office of Workers' Compensation Programs requested that appellant submit additional information, including a physician's narrative report to establish her claim.

In a report dated May 21, 2002, Dr. Alan T. Kawaguchi, a Board-certified orthopedic surgeon, stated that appellant injured her low back and neck in November 2001, while helping a patient from falling and that her pain started about a week after this incident. He indicated that appellant felt pain in the neck and low back on January 31, 2002 after trying to keep a patient from falling. He stated: "[Appellant] denies any obvious twisting maneuvers, but just felt pain. This time she has not had any treatment after this injury."

In a report dated October 9, 2002, Dr. Kawaguchi responded to the Office's questions concerning appellant's January 31, 2002 injury and opined that the injury that she claimed to have sustained on January 31, 2002 was consistent with the medical findings.

By decision dated May 9, 2002, the Office denied appellant's claim for compensation finding that she failed to establish that she sustained an injury on January 31, 2002 while in the performance of duty. Appellant subsequently requested an oral hearing.

At the oral hearing held on January 29, 2003, appellant claimed that on January 31, 2002 she was assisting other patients to the lunch area when she noticed that a patient was having difficulty walking. She stated that he was about 6 feet 3 inches in height and weighed over 200 pounds. Appellant could not remember his name or the names of the other patients in the vicinity, except for a patient named Mr. Williams. She stated that she was not familiar with the names of the other employees in the area because she had been moved to a new unit. Appellant noted that she did not seek medical treatment immediately after the incident because she did not have an immediate onset of pain and only started having symptoms approximately one week later.

By decision dated April 4, 2003, the Office hearing representative affirmed the May 9, 2002 decision, finding that appellant did not establish that she sustained an injury while in the performance of duty.

The Board finds that appellant has not established that she sustained injury on January 31, 2002 as alleged.

To determine whether an 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.<sup>1</sup> Second, the employee must

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<sup>1</sup> *John J. Carlone*, 41 ECAB 354 (1989).

submit sufficient evidence, generally only in the form of medical evidence, to establish that the employment incident caused a personal injury.<sup>2</sup>

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 the circumstances and her subsequent course of action. An employee has not met her burden of proof when there are such inconsistencies in the evidence as to cast serious doubt upon the validity of the claim.<sup>3</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>4</sup>

In this case, appellant has failed to establish that the alleged January 31, 2002 incident occurred at the time, place and in the manner alleged. She did not seek medical treatment until February 9, 2002, nine days after the alleged incident. When asked why she did not seek medical treatment immediately after the incident, she said that she did not feel the "effects" of the incident until a week later. Appellant also did not notify her supervisor of the incident until February 5, 2002.

The employing establishment controverted appellant's claim and noted that it was unable to verify the incident with other employees or patients. Appellant acknowledged that she could not remember the patient involved or the identities of other parties in the vicinity.

The medical evidence establishes that appellant previously experienced an injury on November 19, 2001, an incident described by Dr. Morrison and Dr. Kawaguchi. This casts doubt on the occurrence of an incident on January 31, 2002. Dr. Nishimura indicated that appellant had been under a physician's care since June 2001 and Dr. Kawaguchi stated that, in November 2001, appellant injured her back and neck while helping a patient from falling, an event similar to the incident claimed on January 31, 2002. Although some of the physicians of record mentioned an incident occurring on January 31, 2002 the physicians were relating a history from appellant made during their examination. None of the medical reports provided a history as detailed by appellant at the January 29, 2003 hearing.

In view of the inconsistencies in the evidence regarding how appellant sustained injury, the Board finds that there is insufficient evidence to establish that appellant sustained an incident in the performance of duty on January 31, 2002 as alleged.

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<sup>2</sup> *Id.*

<sup>3</sup> *Joseph A. Fournier*, 35 ECAB 1175 (1984).

<sup>4</sup> *Dorothy Kelsey*, 32 ECAB 998 (1981).

As such, the April 4, 2003 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC  
November 17, 2003

Alec J. Koromilas  
Chairman

David S. Gerson  
Alternate Member

Michael E. Groom  
Alternate Member