

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of KAREN R. GALLAGHER-PHILLIPS and DEPARTMENT OF VETERANS
AFFAIRS, VETERANS ADMINISTRATION MEDICAL CENTER, Brecksville, OH

*Docket No. 03-1392; Submitted on the Record;
Issued October 17, 2003*

DECISION and ORDER

Before WILLIE T.C. THOMAS, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issue is whether appellant met her burden of proof to establish that she sustained an injury in the performance of duty on February 2, 2002.

On February 13, 2002 appellant, then a 50-year-old nurse, filed a notice of traumatic injury alleging that she sustained a right hip fracture when she assisted in restraining violent patients on two separate occasions on February 2, 2002. She described being called to a psychiatric crisis on February 2, 2002 at which time she held a patients' left shoulder with her right knee and restrained his left arm with her right hand. Appellant stated that 10 minutes later she then had to straddle another combative patient and hold his knees down with both her hands. In an undated statement, the nursing manager, Diane Dobek, stated that appellant reported her injury by telephone to the employing establishment on February 8, 2002 complaining that she was unable to walk on her right leg. She stopped work on February 7, 2002.

Appellant submitted medical evidence consisting of a bone scan request and a disability statement from Dr. Kenneth W. Chapman, a Board-certified orthopedic surgeon, who noted that appellant was disabled for work beginning February 4, 2002. In a report dated February 11, 2002, Dr. Chapman described that appellant had to struggle with a large male patient on February 2, 2002 whom she had to hold down and twist around. He described that on the same day she also had another patient "she had to hassle with," but did not really notice any pain in her right hip until the next morning. Dr. Chapman ordered a series of x-rays to ascertain whether appellant had an occult fracture. He reported that she had pain in the right side of her pelvis secondary to injury at work." Dr. Chapman also prepared a report on March 5, 2002, which diagnosed a right hip and thigh strain with sciatica. He listed the date of injury as February 2, 2002 and reiterated that appellant needed a bone scan. Dr. Chapman opined that appellant would be disabled for work until May 1, 2002.

In a letter dated February 21, 2002, the Office of Workers' Compensation Programs advised appellant of the factual and medical evidence required to establish her claim. The Office requested additional information, including a statement detailing how her injury occurred and a

physician's opinion supported by medical explanation as to how the reported work incident caused or aggravated the claimed injury.

On March 7, 2002 the employing establishment submitted two police reports and several statements indicating that it was controverting appellant's claim. The employing establishment advised that, based on the information it had received, while appellant had responded to a crisis message in Ward 52a, she was on the periphery of each to the two- patient incidents and did not become physically involved. A police report prepared by investigating officer, Eugene Bell indicated that he arrived on the ward and was directed to the day room by Ms. Anderson where he observed Ms. Blank, Ms. Hall and other staff members holding a patient identified as "Mr. M" on the floor. He did not state whether or not appellant was involved in restraining the patient.

The employing establishment undertook an investigation of the February 2, 2002 work incident by email correspondence. An email statement from Rosanne Anderson, a supervising nurse, related that she told appellant not to get involved in the incident in the TV day room on February 2, 2002 because she had appeared at work with a splint on her arm. Ms. Anderson maintained that two registered nurses, Pat Hall and Robert Blank, were holding down the patient and continued to hold him down until the police arrived. She denied that appellant straddled the knees of the patient. With respect to the second patient incident, she stated that appellant was in the doorway of the room while Mr. Bell and Mr. Blank were holding down the patients' upper torso and Jane Komar secured restraints on his arms. Ms. Anderson indicated that she and Charles DuBose, a housekeeper, held down the patient's lower torso while Ms. Hall put the restraints on the patient's feet.

In a statement received by the Office on March 14, 2002, Ms. Hall stated that during the first patient incident she was the one straddling the veteran's legs and holding him down and not appellant. She described that she had been hit by the patient but the supervisor, Ms. Anderson, would not let appellant take her place in restraining the patient because appellant had a splint on her arm. Ms. Hall also stated that appellant stood in the doorway during the entire time that the staff helped move the mattress around on the bed.

Ms. Komar, a nursing assistant, prepared a handwritten statement on March 4, 2002. She related that with respect to the first incident she recalled seeing Mr. Blank, a police officer named Mr. Sparks, Ms. Hall, appellant and one other officer in the room while the patient was being lowered onto a bed and put in restraints. She recalled that the patient's head was at the foot of the bed so Ms. Hall suggested turning the mattress. At that point Ms. Komar described that Mr. Blank and "possibly" the one other office holding down the patient's right arm while she put the right arm in restraints. She stated that Mr. Sparks was holding down the patient's left arm while she put the left arm in restraints. Ms. Komar did not recall who was doing what at the foot of the bed.

On March 15, 2002 the Office received a statement from appellant. She acknowledged that she had been wearing a splint on her wrist prior to the alleged incidents of February 2, 2002 and stated that she would take it on and off during the course of the day, depending on how her arm felt. Appellant stated that Ms. Anderson knew about the splint.

In a statement dated March 18, 2002, Kathy Vanek noted that appellant was in the day room, when an argument broke out between two patients identified as Mr. "M" and Mr. "B." She stated that she was in the day room at the time because she was dispensing medication from a cart. After Mr. B was led out of the room by other staff, Ms. Vanek indicated that Mr. M threw a table at a television set and also pushed down a charge nurse, who was apparently Ms. Hall. Ms. Vanek recalled that she left the day room at one point to check on the proper medication dosage for the patient as listed on his chart. When she returned she then saw appellant assisting in holding Mr. M down on the floor.

In a decision dated March 29, 2002, the Office denied compensation on the grounds that appellant failed to establish fact of injury. The Office specifically determined that she failed to establish that she was injured at the time, place and in the manner alleged since the credible statements from Ms. Anderson and Ms. Hall indicated that she was not physically involved in either patient crises.

In an April 6, 2002 letter, appellant requested a hearing, which was held on October 22, 2002. At the hearing, she provided testimony with respect to her claim and submitted a statement from Mr. DuBose dated April 20, 2002, in which he stated that he witnessed appellant restraining the left arm and left shoulder of a patient on February 2, 2002. He noted that he also helped in that same restraint by holding down the patient's left leg. Mr. DuBose also related that appellant had straddled a patient in the day room, explaining that appellant relieved Ms. Hall, who had already been hit four times in the head. He stated that he was standing at the head of the patient at that time.

In a decision dated April 25, 2003, an Office hearing representative affirmed the Office's March 29, 2002 decision. The Office hearing representative agreed that the statements from Ms. Anderson and Ms. Hall were credible and established that appellant did not physically participate in the patient crises of February 2, 2002 as alleged.¹

The Board finds that appellant did not meet her burden of proof to establish that she sustained an injury in the performance of duty on February 2, 2002.

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

¹ The complete statement from Mr. DuBose dated April 20, 2002 was reprinted by the Office hearing representative in the April 25, 2003 decision and is incorporated by reference herein. The Board notes that the record before it only contains one page of his statement and, therefore, only the second patient incident is described. The Office hearing representative considered the statement from Mr. DuBose to be of little probative value because he appeared to repeat verbatim what appellant had stated and was able to describe in detail what appellant was wearing on February 2, 2002. The Office hearing representative found that the statement had been coached by appellant and, therefore, was not credible.

² See *Gary Watling*, 52 ECAB 278 (2001); *Michael E. Smith*, 50 ECAB 313 (1999).

establish that the employment incident caused a personal injury.³ The medical evidence required to establish causal relationship is usually rationalized medical evidence.⁴

The Office determined that appellant failed to establish the first component of fact of injury. The Office found the evidence insufficient to establish that she sustained an injury on February 2, 2002 at the time, place and in the manner alleged noting that statements provided by coemployees involved in the patient indicates of February 2, 2002 established that appellant did not become physically involved in restraining patients indicates the February 2, 2002 established that appellant did not become physically involved in restraining patients.

The Board has held that 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 the surrounding facts and circumstances and his or her subsequent course of action. 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 obtain medical treatment may, if otherwise unexplained, cast sufficient doubt on a claimant's statements in determining whether a *prima facie* case has been established. An employee has not met this burden when there are such inconsistencies in the evidence as to cast serious doubt upon the validity of the claim.⁵ However, an employee's statement alleging that an injury occurred at a given time and in a given manner is of great probative value and will stand unless refuted by strong or persuasive evidence.⁶

In this case, there are contradictory statements as to appellant's involvement in the patient incidents that occurred on the psychiatric ward on February 2, 2002. She alleged that she was injured when she helped restrain a patient while a mattress was being turned. Ms. Anderson, appellant's supervisor, and Ms. Hall, a fellow nurse, stated that appellant did not assist in this incident. Ms. Anderson told appellant that she could not participate because she had a splint on her arm. Ms. Hall noted that appellant was standing at the door of the room to her left and did not come near the bed to assist in turning the mattress for the patient identified as Mr. B.

To corroborate her claim, appellant introduced at the hearing a statement from Mr. Dubose, who allegedly witnessed the events of February 2, 2002, noting that he helped in restraining the patient's left leg and also witnessed appellant holding down the patient's left shoulder and left arm. The Board agrees with the Office hearing representative that Mr. DuBose's testimony is not credible. Mr. DuBose's statement consists of an almost verbatim account of appellant's description of the mattress turning incident and a recall of what appellant was wearing that day. This distracts from its credibility and renders the statement of diminished probative value. Based on the statements from Ms. Anderson and Ms. Hall, the Board finds that appellant has not shown that she was injured during the mattress-turning employment incident as alleged on her claim form.

³ *Id.*

⁴ *Michael E. Smith, supra note 2.*

⁵ *Irene St. John, 50 ECAB 521 (1999); Michael W. Hicks, 50 ECAB 325 (1999).*

⁶ *Robert A. Gregory, 40 ECAB 478 (1989).*

The Board also finds that appellant has failed to establish that she was involved in the patient crisis in the day room, at which time she contends that she straddled a patient and held down his legs with her hands. The statement of Mr. DuBose is in dispute with the statements made by Ms. Hall, that appellant was not helping to straddle a patient in the day room. Ms. Hall denied that appellant stepped in to relieve her after she had already been struck in the head.

The Board recognized in *Sharon J. McIntosh*⁷ that an Office hearing representative has discretion to weigh the evidence of record and render credibility determinations based on the witness testimony. The Office's Federal (FECA) Procedure Manual states:

“The [claims examiner] is responsible for determining the facts in a case by weighing the evidence which has been developed and drawing conclusions based on that evidence. When the relevant information has been received and the parties to the claim have had a chance to refute any disputed evidence, the [claims examiner] is ready to evaluate the evidence for credibility and validity.”⁸

In this case, the Board finds that the hearing representative exercised sound discretion and logic in drawing conclusions based on the factual information presented in this claim. The Office hearing representative reasonably rejected the testimony of appellant and statement of Mr. DuBose in favor of the statements provided by Ms. Hall and Ms. Anderson as to whether appellant was involved in the restraining of patients on February 2, 2002. The Office hearing representative rendered findings of fact consistent with the weight assigned that testimony, concluding that appellant failed to carry her burden of proof to establish fact or injury. As the weight of the credible evidence fails to establish that appellant was injured on February 2, 2002 at the time, place and in the manner alleged, the Board finds that appellant's claim for compensation was properly denied

⁷ 47 ECAB 754 (1996).

⁸ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Statement of Accepted Facts, Weighing Factual Evidence and Drawing Conclusions*, Chapter 2.809.10(a) (June 1995).

The decision of the Office of Workers' Compensation Programs dated April 25, 2003 is hereby affirmed.

Dated, Washington, DC
October 17, 2003

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member