United States Department of Labor
Employees' Compensation Appeals Board

LILLIAN A. FERRARO, Appellant	)	
and	)	**Docket No. 04-1957**
	)	**Issued: December 17, 2004**
DEPARTMENT OF VETERANS AFFAIRS, MIAMI VETERANS ADMINISTRAION HOSPITAL, Miami, FL, Employer	)	

Appearances:
Lillian A. Ferraro, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chairman
MICHAEL E. GROOM, Alternate Member
A. PETER KANJORSKI, Alternate Member

JURISDICTION

On July 28, 2004 appellant filed a timely appeal from the Office of Workers' Compensation Programs' merit decisions of May 22, 2003 and April 30, 2004, denying her traumatic injury claim. Pursuant to 20 C.F.R. §§ 501.2 and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether appellant sustained a traumatic injury while in the performance of duty on January 7, 2003; and (2) whether appellant is entitled to continuation of pay.

FACTUAL HISTORY

On April 7, 2003 appellant, a 51-year-old dental hygienist, filed a traumatic injury claim (Form CA-1) alleging that on that date she incurred an injury to her left index finger after being "stuck by a dirty dental instrument." She submitted no documentation with her claim.

On April 14, 2004 the Office notified appellant that the evidence submitted was insufficient and advised her to provide additional documentation, including a diagnosis and a physician's opinion as to how her injury resulted in the diagnosed condition.

In response to the Office's request, appellant submitted several documents, including a personal statement dated April 14, 2003. She alleged that she became "very sick" from the human immunodeficiency virus (HIV) medications that were prescribed for her at her employer's clinic. She described symptoms of "back spasms, and diarrhea and nausea," which allegedly caused her to report in sick for a total of 26 hours between January 23 and March 26, 2003. She further contended that she was "depressed, stressed and very scared;" that she received no counseling for her acquired immunodeficiency syndrome (AIDS)-related injury; and that she received no guidance with regard to the reporting procedures. She also provided an unsigned progress note, dated January 7, 2003, from Andres Irizarry, a nurse practitioner at the employing establishment, reflecting that she was seen after reportedly being stuck with an instrument after working with an AIDS patient; that no blood was observed; and that she agreed to take a laboratory test and to start taking the drugs indivir and combivir at that time. Appellant's handwritten notes reflect her contention that the incident occurred because she was "shaken up" when her supervisor, Dr. Eugene Maciol, screamed at her to "shut up."

A memorandum dated April 23, 2003 from the employing establishment stated that, as a new employee, appellant was given an orientation package which included instructions as to procedures she should follow when injured at work. The memorandum further indicated that, although she was informed that she did not qualify for continuation of pay, she sought an exception based on her belief that she was given no guidance for filing a CA-1.

In a letter dated May 13, 2003, Dr. Maciol disputed appellant's version of the facts. According to him, during her clean-up process following a procedure involving an AIDS patient, appellant was stuck by an instrument and incurred a surface abrasion on her finger with no break in the skin. Her finger was red, he opined, from her constant rubbing during the episode. Dr. Maciol related that he and his staff provided ample support to appellant; that she consulted with a nurse practitioner with a specialty in immunology. Although she was prescribed certain HIV medications, she stopped taking them after only three days and took them intermittently thereafter. Therefore, he could not corroborate whether her time off from work coincided with the taking of her medicine. He also reported that, although he encouraged her to do so, appellant refused to fill out the accident forms.

By decision dated May 22, 2003, the Office denied appellant's claim stating that the evidence was insufficient to establish that she had sustained an injury under the Federal Employees' Compensation Act.[1] The Office stated that, although the evidence supported that the claimed incident occurred, there was no medical evidence providing a diagnosis that could be connected to the incident.

On June 5, 2003 appellant requested an oral hearing, which took place on February 24, 2004. At the hearing, appellant reiterated her version of the facts. She emphasized that Dr. Maciol was unsympathetic and berated her for calling in sick as a result of taking the

[1] 5 U.S.C. §§ 8101 *et seq.*

HIV medications. She was diagnosed with rhinitis as a result of working in a room containing mold and mildew and that "no one cared." She stated that she was fired for missing work, her last day being September 18, 2003.

Appellant introduced several documents into evidence at the hearing, including a letter dated September 24, 2003 and two notes dated March 19 and April 10, 2003 respectively from Dr. Ronald Molluzzo, a physician of unlisted specialty. None of the documents contained a specific diagnosis or indicated that appellant suffered from any condition related to the injury. The two notes stated only that appellant was distraught, depressed, worried about HIV infection and would benefit from time off from work. The letter, while identifying primarily statements she made to the doctor, referred to her stomach problems due to "harassments."

In a decision dated April 30, 2004, the hearing representative affirmed the May 22, 2003 decision. Finding that the evidence was sufficient to establish that appellant was stuck with a dental instrument on January 7, 2003, the Office determined the medical evidence insufficient to establish that she had sustained an injury resulting from that incident.

LEGAL PRECEDENT -- ISSUE 1

The Act provides for payment of compensation for disability or death of an employee resulting from personal injury sustained while in the performance of duty.[2] The phrase "sustained while in the performance of duty" is regarded as the equivalent of the coverage formula commonly found in workers' compensation laws, namely, "arising out of and in the course of employment."[3]

An employee seeking benefits under the Act has the burden of proof to establish the essential elements of 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 period 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] When an employee claims that she sustained a traumatic injury in the performance of duty, she must establish the "fact of injury," consisting of two components which must be considered in conjunction with one another. The first is whether the employee actually experienced the incident that is alleged to have occurred at the time, place and in the manner alleged. The second is whether the employment incident caused a personal injury, and generally this can be established only by medical evidence.[5]

[2] 5 U.S.C. § 8102(a).

[3] This construction makes the statute effective in those situations generally recognized as properly within the scope of workers' compensation law. *Charles E. McAndrews*, 55 ECAB ___ (Docket No. 04-1257, issued September 10, 2004); *see also Bernard D. Blum*, 1 ECAB 1 (1947).

[4] *Robert Broome*, 55 ECAB ___ (Docket No. 04-93, issued February 23, 2004).

[5] *Deborah L. Beatty*, 54 ECAB ___ (Docket No. 02-2294, issued January 15, 2003). *See also Tracey P. Spillane*, 54 ECAB ___ (Docket No. 02-2190, issued June 12, 2003); *Betty J. Smith*, 54 ECAB ___ (Docket No. 02-149, issued October 29, 2002). The term "injury" as defined by the Act, refers to a disease proximately caused by the employment. 5 U.S.C. § 8101 (5). *See* 20 C.F.R. § 10.5(q), (ee).

The claimant has the burden of establishing by the weight of reliable, probative and substantial evidence that the condition for which compensation is sought is causally related to a specific employment incident or to specific conditions of employment.[6] An award of compensation may not be based on appellant's belief of causal relationship.[7] Neither the mere fact that a disease or condition manifests itself during a period of employment nor the belief that the disease or condition was caused or aggravated by employment factors or incidents is sufficient to establish a causal relationship.[8] Simple exposure to a workplace hazard does not constitute a work-related injury entitling an employee to medical treatment under the Act.[9] However, although the Act does not authorize payment for preventative measures generally, section 10.303 of the Code of Federal Regulations permits but does not require the Office to authorize treatment where exposure to HIV has occurred.[10]

Causal relationship is a medical issue and the medical evidence generally required to establish causal relationship is rationalized medical opinion evidence. Rationalized medical opinion evidence is medical evidence that includes a physician's rationalized opinion on whether there is a causal relationship between the claimant's diagnosed condition and the established incident or factor of employment. The opinion must be based on a complete factual and medical background of the claimant, must be one of reasonable medical certainty and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the established incident or factor of employment.[11]

ANALYSIS -- ISSUE 1

The Board finds that appellant has failed to meet her burden of proof in establishing that she sustained a traumatic injury on January 7, 2003. The Office found that appellant had established the incident of January 7, 2003 when she was stuck by a dental instrument. However, she did not submit medical evidence which provided a diagnosis of any condition that could be connected to the incident. The Office hearing representative found that while the evidence was sufficient to establish that appellant had been stuck with a dental instrument on January 7, 2003, it was not sufficient to establish that she had any disability resulting from the event.

The Board finds that appellant has established that she was stuck by a dental instrument on January 7, 2003, but she has failed to establish the incident caused a personal injury. It is undisputed that appellant was working with an AIDS patient and that during the following clean-up procedures, she stuck her finger with a dental instrument. There is some disagreement as to the nature of the incident. Appellant stated that there was no blood and a tiny hole, while her

[6] *Katherine J. Friday*, 47 ECAB 591, 594 (1996).

[7] *Dennis M. Mascarenas*, 49 ECAB 215, 218 (1997).

[8] *Florencio D. Flores*, 55 ECAB ___ (Docket No. 04-942, issued July 12, 2004).

[9] 20 C.F.R. § 10.303(a).

[10] 20 C.F.R. § 10.313(b).

[11] *John W. Montoya*, 54 ECAB ___ (Docket No. 02-2249, issued January 3, 2003).

supervisor noted that he observed a surface abrasion with no break in the skin and no obvious blood and that the finger was red from constant rubbing. Appellant visited the employing establishment's nurse practitioner on the date of the incident and received and took medication due to possible exposure to the AIDS virus. There is no evidence to discount that appellant was stuck by a dental instrument as alleged.

While the record reflects anxiety on the part of appellant, there is no medical evidence of a diagnosed illness related to the incident. On January 7, 2003 she met with the employing establishment's nurse practitioner, Mr. Irizarry,[12] who recommended laboratory tests and prescribed HIV medications as a precautionary measure. The Board notes that Mr. Irizarry is not a "physician" as defined under the Act and his report is, therefore, of no probative value.[13] The Office specifically advised appellant to provide a diagnosis of any condition resulting from the accepted incident and a physician's opinion as to how it resulted in a diagnosed condition. In response, she submitted a letter dated September 24, 2003 and two notes dated March 19 and April 10, 2003 signed by Dr. Molluzzo. Neither the letter nor the notes contain the diagnosis of a medical condition related to the January 7, 2003 incident. The letter noted mold and mildew allegedly existing in the workplace as well as appellant's "stomach problems" as a result of harassments. Dr. Molluzzo mentioned appellant's "concern about an instrument stick from an infected patient" and her statement that she became depressed and sick due to this event. The notes indicate that she was distraught and worried about HIV, had symptoms of stress and would benefit from time off from work. Appellant also submitted blood test results which did not contain a diagnosis. All references to conditions related to alleged harassment or to mold and mildew are irrelevant to appellant's traumatic injury claim in that they are not related to the January 7, 2003 incident.[14] Further, Dr. Molluzzo never gave a specific diagnosis but rather rephrased appellant's opinion of her "depressed" and "sick" condition. His statement that appellant suffers from stress-related symptoms due to worrying about HIV falls short of a specific medical diagnosis and did not describe a causal relationship between the condition and the January 7, 2003 incident. The fear or possibility of a future injury does not constitute an injury under the Act.[15]

The only evidence of record to suggest that the January 7, 2003 incident caused injury is appellant's unsupported assertions. At the hearing held on February 24, 2004, appellant stated that the HIV medication "made her sick," giving her nausea and diarrhea. She reported that she also became sick from "mold and smell" in her "operatory" subsequent to the January 7, 2003 incident. She described feelings of depression as a result of alleged abusive treatment by her

[12] According to a statement made by Dr. Maciol, the aforementioned nurse practitioner had a specialty in immunology.

[13] Section 8101(2) of the Act provides as follows: "(2) 'physician' includes surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors, and osteopathic practitioners within the scope of their practice as defined by State law. The term 'physician' includes chiropractors only to the extent that their reimbursable services are limited to treatment consisting of manual manipulation of the spine to correct a subluxation as demonstrated by x-ray to exist, and subject to regulation by the secretary." *See Merton J. Sills*, 39 ECAB 572, 575 (1988).

[14] The hearing officer advised appellant that the issue of harassment or the condition related to exposure to mold and mildew should be addressed under a separate occupational injury claim.

[15] *Virginia Dorsett*, 50 ECAB 478, 482 (1999).

supervisor and other members of the staff. Although the hearing officer agreed to keep the record open for an additional 30 days so that she could provide additional medical documentation, appellant failed to submit any medical evidence.

Appellant has not submitted any rationalized medical opinion evidence. The medical evidence of record fails to provide a diagnosis or to relate a diagnosed condition to the January 7, 2003 incident. Accordingly, appellant has failed to satisfy her burden of proof.

LEGAL PRECEDENT -- ISSUE 2

Time limitations for making a claim for continuation of pay are provided by section 10.205 of the Code of Federal Regulations.[16] This regulation provides in pertinent part as follows:

"To be eligible for COP, a person must:"

* * *

"(2) File Form CA-1 within 30 days of the date of the injury.…"[17]

The Act authorizes continuation of pay of an employee who has filed a valid claim for traumatic injury.[18] However, if that claim is denied, the employee will be deemed ineligible for the payments and at his or her discretion, any payments previously made will be charged to sick or annual leave or deemed overpayments within the meaning of 5 U.S.C. § 5584.[19]

ANALYSIS -- ISSUE 2

The Board finds that appellant is not entitled to receive continuation of pay. Her claim for a traumatic injury was filed on April 7, 2003, for an incident which occurred on January 7, 2003. Appellant failed to file her claim within the 30-day statutory period and is, therefore, ineligible for continuation of pay. Furthermore, since her traumatic injury claim was denied, she is not entitled to receive continuation of pay.[20]

CONCLUSION

The Board finds that appellant has failed to meet her burden of proof in establishing that she sustained a traumatic injury in the performance of duty or that she is entitled to continuation of pay.

[16] 20 C.F.R. § 10.205.

[17] *Id.*

[18] 5 U.S.C. § 8118(a).

[19] 5 U.S.C. § 8118(d).

[20] 5 U.S.C. § 8118(d).

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' decisions of April 30, 2004 and May 22, 2003 are affirmed.

Issued: December 17, 2004
Washington, DC

Alec J. Koromilas
Chairman

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member