

the 6th floor and bounced up and down. She stopped work on February 26, 2004 and has not returned.

The Office received a February 27, 2004 authorization for examination and/or treatment (Form CA-16), for trauma to the nervous system and pain in the lower back, arm and legs by Dr. Burgess L. Berlin, a treating physician.¹ The employing establishment checked that there was doubt as to whether appellant's condition had been sustained in the performance of duty.

In a March 8, 2004 attending physician's report, Dr. Berlin diagnosed thoracic, cervical and lumbosacral myositis, bilateral carpal tunnel and bilateral shoulder tenderness. He concluded that appellant sustained injuries on February 26, 2004 as a result of an elevator dropping from the 13th floor to the 6th floor. Dr. Berlin checked "yes" to the question as to whether the conditions were caused or aggravated by her employment and noted the elevator dropping.

The Office received an employee health record which noted that appellant was seen on February 26, 2004 at 10:30 a.m. The report noted that appellant had been stuck on elevator No. 3 when it went from floor 13 to 6 and that she was "very shaken."

Appellant subsequently submitted a March 2, 2004 report by Dr. Berlin who diagnosed bilateral upper and lower extremity radiculopathy, a torn meniscus and bilateral carpal tunnel syndrome.

On March 25, 2004 the employing establishment controverted the claim. Specifically, it disputed whether the incident occurred as alleged. The employing establishment noted that the elevator appellant alleged was the cause of her injury had an elevator relay problem at 7:30 a.m. which "was repaired at 8:30 a.m. and returned to service without any further report of additional service problems."

In a letter dated April 13, 2004, the Office informed appellant that the evidence was insufficient to support her claim. The Office advised her as to what information should be contained in a medical report. Appellant was also informed that the employing establishment controverted her claim on the grounds that the elevator she claimed dropped had its relay problem repaired prior to the time that she alleged the incident occurred.

In response to the Office's April 13, 2004 request for evidence, appellant submitted medical and factual evidence including a February 26, 2004 accident report on an employing establishment form with a case number 2004-00197,² April 15, 2004 magnetic resonance

¹ Where an employing establishment properly executes a Form CA-16 which authorizes medical treatment as a result of an employee's claim for an employment-related injury, the Form CA-16 creates a contractual obligation, which does not involve the employee directly, to pay for the cost of the examination or treatment regardless of the action taken on the claim. *Tracey P. Spillane*, 54 ECAB 608 (2003). The period for which treatment is authorized by a Form CA-16 is limited to 60 days from the date of issuance, unless terminated earlier by the Office. See 20 C.F.R. § 10.300(c). The record is silent as to whether the Office paid for the cost of appellant's examination or treatment for the period noted on the form.

² The report was signed February 26, 2004 by Dr. Robert H.K. Eng, appellant's supervisor, and April 6, 2004 by June Pepe, safety officer.

imaging (MRI) scans of the cervical spine and lumbar spine, April 16, 2004 MRI scans of the left and right lower extremity, progress notes, disability notes and physical therapy notes. The accident report noted that appellant fell when the elevator she was in plunged and that she rang the call button. Her injury was characterized as a bruise/contusion with her ankles, buttocks, hips and both legs as the most affected parts. Under corrective action taken, the report noted an elevator maintenance problem. The safety office commented that a "FMS employee was contacted and elevator was evaluated. No further action by Safety." In a February 26, 2004 report of emergency treatment, Dr. Eng recommended that appellant "be relieved from duty for the remainder of day" and checked that it was due to illness. The April 15, 2004 MRI scan included a C5-7 small left paracentral disc herniation. The MRI scan of the left knee was normal while the right knee showed a probable medial collateral ligament sprain and mild proximal bone bruise. The lumbar MRI scan revealed L4-5 left foraminal disc herniation.

On a May 10, 2004 attending physician's report, Dr. Berlin diagnosed cervical and lumbar herniated discs, bilateral carpal tunnel syndrome and bilateral knee condition. He reported that appellant stated that she sustained injuries on February 26, 2004 when the elevator she was in dropped from the 13th floor to the 6th floor. Dr. Berlin checked "yes" to the question as to whether the conditions were caused or aggravated by her employment and noted the elevator dropping.

On July 26, 2004 the Office received reports dated May 19, 2003 and June 28, 2004 by Dr. Berlin. On May 19, 2003 Dr. Berlin concluded that appellant would be totally disabled for the period December 29, 2002 through May 20, 2003. Diagnoses included thoracic, lumbosacral and cervical myositis, bilateral shoulder bursitis, bilateral carpal tunnel syndrome, cervical herniated disc and lower extremity radiculitis. In the June 28, 2004 report, Dr. Berlin noted that appellant sustained multiple injuries when the elevator she was riding in dropped from the 13th to the 6th floor. He stated that she was "well prior to the accident." A physical examination on March 2, 2004 "revealed [appellant] to be in distress," she "had difficulty getting up from a seated position" and "turned her head and neck as a single unit." Physical findings also included spasms in the thoracic, cervical, decreased sensation in the median nerve of both hands, bilateral lower and upper extreme radiculopathy, bilateral shoulder tenderness, bilateral anteromedial knee joint line tenderness and lumbosacral muscles and marked limitation of lumbosacral and cervical range of motion. Dr. Berlin reported decreased sensation bilaterally over the median nerve and noted "evidence of bilateral upper and lower extremity radiculopathy." He diagnosed "a traumatically-induced subacromial bursitis and bicipital tendinitis rule out torn rotator cuff and impingement syndrome." X-ray interpretations showed decreased lumbosacral intervertebral disc space height and "reversal of normal cervical lordotic curve consistent with muscle spasm secondary to trauma." An MRI scan of the spine showed C5-6 and C6-7 disc herniations. An MRI scan of the left knee was normal while a scan of the right knee "revealed a ligamentous injury involving the medial collateral ligament." In conclusion, Dr. Berlin opined that appellant sustained multiple injuries as a direct result of the elevator dropping from the 13th floor to the 6th floor on February 26, 2004. These injuries included lumbar and cervical disc herniations, neck, back, bilateral shoulder and bilateral knee injuries.

On August 26, 2004 the Office received a February 25, 2004 elevator report which noted that elevator No. 3 had a relay problem on that date at 7:30 a.m. The report noted that the elevator was freed at 7:40 a.m. and resumed normal service at 8:30 a.m.

By decision dated September 4, 2004, the Office denied appellant's claim on the grounds that fact of injury was not established. The Office found that the incident did not occur as alleged and that the medical reports failed to explain how the diagnosed conditions were caused or aggravated by the alleged February 26, 2004 work incident.

In a letter dated September 14, 2004, appellant's counsel requested an oral hearing before an Office hearing representative which was held on June 27, 2005. Appellant testified that she was involved in an automobile accident in 2002 which resulted in her being out of work for two years. As a result of the accident she sustained injuries to her neck, arm, back and legs. Appellant testified that she returned to work for the employing establishment in January 2004.

In a response to the hearing transcript, the employing establishment reiterated its contention that the incident did not occur as alleged. It noted that no police report had been filed and a safety inspection of the elevator revealed no malfunction. In addition, the employing establishment stated that the safety manager and an engineer stated that appellant "would have multiple serious injuries" if she experienced the free fall of the elevator and would not have been "able to walk out of the elevator and proceed to walk up the stairs to the employee health on the 8th floor."

Following the hearing, appellant submitted additional medical and factual evidence, including emergency room records³ from February 29, 2004, an August 2, 2005 statement by appellant and evidence previously submitted. The records related that she reported her injury as occurring when the elevator she was riding in dropped from the 13th to the 6th floor.

By decision dated October 20, 2005, the Office hearing representative affirmed the denial of appellant's claim. She found Dr. Berlin's reports insufficient to support appellant's claim as they were based on an incomplete and inaccurate medical background. The hearing representative found that Dr. Berlin failed to note that he had been treating appellant for the conditions he diagnosed prior to the alleged February 26, 2004 work incident.

In a letter dated December 8, 2005, appellant's counsel requested reconsideration and submitted evidence in support of her request. The evidence included a January 27, 2005 report by Dr. Edwin M. Gangemi, a Board-certified physiatrist, who diagnosed cervical, thoracic and lumbar strains, cervical radiculitis, lumbar radiculitis, carpal tunnel syndrome, trochanteric bursitis and myofascial pain syndrome. Dr. Gangemi reported that appellant "sustained traumatic injury to her cervical, thoracic and lumbar spine during an elevator accident which occurred in February 2004." He noted that appellant's history included a 2000 automobile accident which caused lumbar injuries and appellant stated that she had been fine until the elevator incident.

By decision dated April 25, 2006, the Office denied modification.

³ The emergency room physician's signature is illegible as is the diagnosis.

LEGAL PRECEDENT

The Federal Employees' Compensation Act⁴ provides for payment of compensation for disability or death of an employee resulting from personal injury sustained while in the performance of duty.⁵ 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.⁶

An employee seeking benefits under the Act has the burden of proof to establish the essential elements of his 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 or specific condition for which compensation is claimed is causally related to the employment injury.⁷

In order to determine whether an employee actually sustained an injury in the performance of duty, the Office begins with an analysis of whether fact of injury has been established. Generally, fact of injury consists of two components which must be considered in conjunction with one another. The first component to be established is that the employee actually experienced the employment incident which is alleged to have occurred.⁸ An injury does not have to be confirmed by eyewitnesses in order to establish that an employee sustained an injury in the performance of duty, but the employee's statements must be consistent with the surrounding facts and circumstances and his or her subsequent course of action.⁹ An employee has not met her burden of proof in establishing the occurrence of an injury when there are such inconsistencies in the evidence as to cast serious doubt upon the validity of the claim.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 obtain medical treatment may, if otherwise unexplained, cast doubt on an employee's statements in determining whether a *prima facie* case has been established.¹¹ However, an employee's statement regarding the

⁴ 5 U.S.C. § 8101 *et seq.*

⁵ 5 U.S.C. § 8102(a).

⁶ 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 711 (2004); *see also Bernard D. Blum*, 1 ECAB 1 (1947).

⁷ *Robert Broome*, 55 ECAB 339 (2004); *see also Elaine Pendleton*, 40 ECAB 1143 (1989).

⁸ *See Louise F. Garnett*, 47 ECAB 639 (1996).

⁹ *See Betty J. Smith*, 54 ECAB 174 (2002).

¹⁰ *Paul Foster*, 56 ECAB ____ (Docket No. 04-1943, issued December 21, 2004).

¹¹ *Barbara R. Middleton*, 56 ECAB ____ (Docket No. 05-1026, issued July 22, 2005); *Linda S. Christian*, 46 ECAB 598 (1995).

occurrence of an employment incident is of great probative force and will stand unless refuted by strong or persuasive evidence.¹²

ANALYSIS

Appellant alleged that she sustained trauma to the nervous system, pain in the lower back, legs and arm in the performance of duty on February 26, 2004. The Office denied her claim after finding that she did not demonstrate that the specific event occurred at the time, place and in the manner described.

The initial question presented is whether appellant has established that the February 26, 2004 employment incident occurred as alleged. An injury does not have to be confirmed by eyewitnesses in order to establish that an employee sustained an injury in the performance of duty, but the employee's statement must be consistent with the surrounding facts and circumstances and her subsequent course of action.¹³ An employee has not met her burden of proof when there are inconsistencies in the evidence sufficient to cast serious doubt on the validity of her claim.

The Board finds that appellant has not established the occurrence of the February 26, 2004 employment incident. Appellant attributed her condition to the elevator she was riding in dropping from the 13th to the 6th floor. She promptly reported the incident. This is supported by a February 26, 2004 accident report, with a case number 2004-00197, signed by her supervisor and the safety officer and an employee health record which detailed the incident. The accident report noted that appellant fell when the elevator she was in plunged and she rang the call button. Her injury was characterized as a bruise/contusion with her ankles, buttocks, hips and both legs as the most affected parts. The employing establishment controverted appellant's claim on the grounds that the elevator she was riding in had a relay problem earlier in the morning which had been fixed. There is no record of appellant's telephone call to security staff reporting the incident or a report of any action by the security staff regarding a malfunctioning elevator. In addition, the employing establishment stated that the safety manager and an engineer related that appellant "would have multiple serious injuries" if she experienced the free fall of the elevator and would not have been "able to walk out of the elevator and proceed to walk up the stairs to the employee health on the 8th floor." Furthermore, if the elevator dropped from the 13th to the 6th floor as alleged by appellant there would have been mechanical evidence of the problem. There is no evidence that elevator No. 3 had a relay problem on February 26, 2004.

Moreover, the record is devoid of a medical report opining that appellant sustained any bruising or contusions on her body that would be consistent with a free fall of an elevator approximately seven flights. Appellant submitted various reports by Dr. Berlin in support of her claim. Dr. Berlin diagnosed thoracic, cervical and lumbosacral myositis, bilateral carpal tunnel and bilateral shoulder tenderness which he attributed to the elevator dropping from the 13th floor to the 6th floor on February 26, 2004. However, Dr. Berlin failed to address how the injuries he had been treating appellant for prior to the alleged employment incident might have affected her

¹² *Gregory J. Reser*, 57 ECAB ___ (Docket No. 05-1674, issued December 15, 2005).

¹³ *See Betty J. Smith*, *supra* note 9.

current conditions or how they might have been aggravated by the incident. Moreover, the record contains evidence that appellant sustained these injuries in a 2002 automobile accident which Dr. Berlin fails to mention in his history. The Board notes that a medical opinion based on an incomplete history is insufficient to establish causal relationship.¹⁴ Dr. Berlin's reports are insufficient to meet appellant's burden of proof to establish an employment-related incident due to his failure to provide any medical rationale explaining why her diagnosed conditions were caused or aggravated by the alleged February 26, 2004 employment incident and his failure to include a complete medical history in his reports.

Accordingly, the Board finds that appellant failed to establish that the February 26, 2004 employment incident occurred as alleged and, therefore, has not established an injury in the performance of duty. As appellant has not established the factual aspect of her claim, it is not necessary for the Board to consider the medical evidence of record.¹⁵

CONCLUSION

The Board finds that appellant has not established that she sustained an injury on February 26, 2004 in the performance of duty.

¹⁴ *M.W.*, 57 ECAB ___ (Docket No. 06-749, issued August 15, 2006).

¹⁵ *Alvin V. Gadd*, 57 ECAB ___ (Docket No. 05-1596, issued October 25, 2005).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated April 25, 2006 is affirmed.

Issued: August 1, 2007
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board