

**United States Department of Labor  
Employees' Compensation Appeals Board**

E.R., Appellant	)	
	)	
and	)	Docket No. 07-1240
	)	Issued: September 26, 2007
DEPARTMENT OF VETERANS AFFAIRS,	)	
NEBRASKA WESTERN IOWA HEALTH	)	
CARE SYSTEM, Grand Island, NE, Employer	)	
	)	

*Appearances:*  
*Appellant, pro se*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

DAVID S. GERSON, Judge  
MICHAEL E. GROOM, Alternate Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On April 4, 2007 appellant filed a timely appeal from a February 21, 2007 decision of the Office of Workers' Compensation Programs that denied her occupational disease claim. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the claim.

**ISSUE**

The issue is whether appellant met her burden of proof in establishing that she developed an occupational disease in the performance of duty.

**FACTUAL HISTORY**

On November 3, 2006 appellant, then 57-year-old practical nurse, filed an occupational disease claim alleging that she developed nerve damage in her upper thoracic and neck region in the performance of duty. She first became aware of her condition and first connected it to her employment on May 7, 2005, the same date on which she injured her thoracic and lumbar

regions.<sup>1</sup> Appellant stated that, when she presented to her doctor on May 12, 2005, the first thing she complained of was neck pain. She explained that she did not include neck pain in her previous claims because she was confused due to anti-depressants, muscle relaxers and narcotic pain medications. Appellant stopped work on May 10, 2005 and returned on May 14, 2005. After a new injury on August 16, 2005 she eventually returned to work, but stopped again by October 1, 2005.

Appellant explained that she strained her upper neck and back on May 7, 2005, while dressing a patient in bed. She reiterated that she informed her doctor of her neck pain on May 12, 2005. Appellant explained that when she filled out her initial claim form after the May 7, 2005 injury, she reported only her back injury: "I did not specifically state my neck was traumatized as well. But it is all connected. It is perfectly normal for my neck to be involved."

On December 19, 2006 the Office requested additional information concerning appellant's occupational disease claim.

Appellant provided an undated statement that was received on January 16, 2007. She explained that she injured both her back and neck on May 7 and August 16, 2005 and also during physical therapy and work hardening on November 7, 2005 that was ordered by her physician. Appellant stated that her condition was aggravated by a number of factors, including her physical therapy session, the requirement that she perform tasks for which she was not trained and her supervisors' failure to respect her work restrictions following August 16, 2005. She also submitted an undated statement on January 24, 2007. Appellant contended that her neck condition was caused or aggravated by her job duties, including walking on tile-covered concrete floors for extended periods of time, pulling, pushing, turning and repositioning both bedridden patients and heavy equipment in order to provide various services, physically assisting patients with their showers, using a "Hoyer Lift," moving patients' belongings and furniture and transferring patients from beds to wheelchairs. She was engaged in transferring a patient from a bed to a wheelchair on August 16, 2005, when the patient began to fall. Appellant injured her neck and back in her attempt to prevent him from falling. After she reported her injury to her supervisor and sought medical attention, she was verbally harassed and required to perform tasks outside her physical restrictions. Appellant believed her condition was aggravated when she was required to perform work beyond the physical restrictions recommended by her doctor.

In a January 24, 2007 report, Dr. Anne K. Morse, a Board-certified internist, explained that an October 4, 2005 magnetic resonance imaging (MRI) scan revealed evidence of degenerative changes at the L1-2 level with mild central stenosis and moderate foraminal narrowing. She noted appellant's history of back injury and treatment with other physicians<sup>2</sup> which indicated that appellant did complain of neck pain and which one physician attributed to traction performed during physical therapy. Dr. Morse offered appellant treatment with epidural steroid injections, which was refused. Appellant also declined an offer of light duty with the

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<sup>1</sup> The record reflects that appellant filed two other claims concerning her thoracic and lumbar injuries. The claims were assigned Office file numbers 112030908 and 112029594. These files are not before the Board in the present appeal.

<sup>2</sup> Appellant did not submit reports from the physicians referenced by Dr. Morse.

employing establishment. Dr. Morse noted that appellant's spinal stenosis and degenerative disc disease were preexisting conditions. She stated that "the natural history of spinal stenosis is that over time the disease progresses. The same is true of her degenerative disc disease. This is true whether one is sedentary or in a position of walking and lifting." Dr. Morse noted that appellant's described job duties, including lifting patients and using a Hoyer Lift, probably aggravated her degenerative disc disease and spinal stenosis but opined that appellant could work in a sedentary or light-duty position.

By decision dated February 21, 2007, the Office denied appellant's occupational disease claim on the grounds that the evidence did not establish that the claimed events occurred as alleged and that the medical evidence did not include a diagnosis that could be connected to the claimed events.

### **LEGAL PRECEDENT**

An employee seeking benefits under the Federal Employees' Compensation Act<sup>3</sup> has the burden of establishing the essential elements of his or 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 disabilities and/or specific conditions for which compensation is claimed are causally related to the employment injury.<sup>4</sup> These are the essential elements of each and every compensation claim regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.<sup>5</sup>

An occupational disease or injury is one caused by specified employment factors occurring over a longer period than a single shift or workday.<sup>6</sup> The test for determining whether appellant sustained a compensable occupational disease or injury is three-pronged. To establish the factual elements of the claim, appellant must submit "(1) medical evidence establishing the presence or existence of the disease or condition for which compensation is claimed; (2) a factual statement identifying the factors alleged to have caused or contributed to the presence or occurrence of the disease or condition; and (3) medical evidence establishing that the factors identified by the claimant were the proximate cause of the condition for which compensation is claimed or, stated differently, medical evidence establishing that the diagnosed condition is causally related to the factors identified by the claimant."<sup>7</sup>

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

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<sup>3</sup> 5 U.S.C. §§ 8101-8193.

<sup>4</sup> *Elaine Pendleton*, 40 ECAB 1143 (1989).

<sup>5</sup> *Victor J. Woodhams*, 41 ECAB 345 (1989).

<sup>6</sup> *D.D.*, 57 ECAB \_\_\_\_ (Docket No. 06-1315, issued September 14, 2006).

<sup>7</sup> *Michael R. Shaffer*, 55 ECAB 386, 389 (2004), citing *Lourdes Harris*, 45 ECAB 545 (1994); *Victor J. Woodhams*, *supra* note 5.

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.<sup>8</sup> 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.<sup>9</sup> An employee has not met his or her burden of proof of 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.<sup>10</sup> 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.<sup>11</sup> However, an employee's statement alleging that an injury occurred at a given time and in a given manner is of great probative force and will stand unless refuted by strong or persuasive evidence.<sup>12</sup>

### ANALYSIS

The Board finds that appellant did not meet her burden of proof in establishing that she developed an occupational disease in the performance of duty. Appellant's explanation of the circumstances of her alleged conditions cast significant doubt on the validity of her claim. Initially, she attributed her claimed occupational disease to dressing a patient on May 7, 2005. In her subsequent undated statement describing the circumstances of her alleged injuries and the job duties she believed contributed to her claim, appellant stated that she injured both her neck and her back on May 7 and August 16, 2005 and while undergoing physical therapy on November 7, 2005. However, appellant acknowledged that she did not report her claimed neck injury before November 3, 2006, despite having earlier completed claim forms for a back injury contemporaneous with the alleged May 7, 2005 events.<sup>13</sup> Despite allegedly sustaining multiple neck injuries in May and August 2005, she delayed filing a claim for a neck condition until November 3, 2006. Appellant attributed her delay to confusion caused by taking anti-depressants, muscle relaxers and narcotic pain medications. However, the Board notes that appellant was apparently able to file claims for her back injuries during the time that she states she was unable to properly file a claim for her neck condition. This fact calls into question appellant's explanation of why she delayed filing a claim for her alleged neck condition. Although her statement that she developed a neck condition in the performance of duty carries

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<sup>8</sup> See *Louise F. Garnett*, 47 ECAB 639 (1996).

<sup>9</sup> See *Gene A. McCracken*, 46 ECAB 593 (1995).

<sup>10</sup> See *Louise F. Garnett*, *supra* note 8.

<sup>11</sup> *Linda S. Christian*, 46 ECAB 598 (1995).

<sup>12</sup> *Constance G. Patterson*, 41 ECAB 206 (1989); *Thelma S. Buffington*, 34 ECAB 104 (1982).

<sup>13</sup> Furthermore, appellant's initial description of the cause of her claimed injury, dressing a patient on May 7, 2005, appears to be consistent with a claim for traumatic injury, not an occupational disease, as it appears that the incident occurred within one work shift. Compare 20 C.F.R. § 10.5(ee) (defines the term "traumatic injury") with 20 C.F.R. § 10.5(q) (defines the term "occupational disease").

significant probative weight, circumstances such as late notification of injury and lack of confirmation of injury, as here, raise serious doubts concerning the validity of appellant's claim.<sup>14</sup> The Board therefore finds that appellant's delay in filing her claim, in view of her more contemporaneous filing of other claims and cast doubt on appellant's explanation concerning her delay in filing and raise serious doubts concerning the validity of her claim.

The Board also notes that the medical evidence does not support a causal relationship between appellant's claimed neck condition and factors of her employment. Appellant stated that she sought treatment shortly thereafter and presented to her doctor on May 12, 2005 with complaints of neck and back pain; in fact, she states that neck pain was the very first thing she complained of. However, no report appears in the record to document that appellant indeed informed her doctor on May 12, 2005 that she incurred neck pain in the performance of duty. Dr. Morse stated, in her January 24, 2007 report, that appellant did complain of neck pain but her doctor attributed her complaints to traction performed during physical therapy. Appellant provided an undated statement describing some of the factors that she believed contributed to her claimed condition, including physically lifting patients and using a Hoyer Lift, working outside her recommended restrictions at her supervisors' orders, and a nonemployment incident in physical therapy, which Dr. Morse, in her January 24, 2007 report, indicated might have aggravated appellant's condition.<sup>15</sup> However, Dr. Morse did not diagnose a neck condition. She stated that appellant had degenerative disc disease with mild spinal stenosis and foraminal narrowing of the lumbar region, but did not identify any specific condition affecting appellant's neck. The Board also notes that Dr. Morse provided an equivocal opinion concerning causal relationship; she stated that appellant's degenerative disc disease and mild spinal stenosis were preexisting conditions and that appellant's back and neck conditions would have deteriorated regardless of her activity level. The Board has previously held that a medical opinion which is speculative or equivocal in nature is of limited probative value on the issue of causal relationship.<sup>16</sup> Accordingly, the Board finds that Dr. Morse did not provide sufficient rationale or support for appellant's claim that her alleged neck condition was caused or aggravated by her employment factors.

### CONCLUSION

The Board finds that appellant did not meet her burden of proof in establishing that she developed an occupational disease in the performance of duty.<sup>17</sup>

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<sup>14</sup> See *supra* notes 11, 12.

<sup>15</sup> Any matters pertaining to an injury claimed to have occurred during physical therapy authorized by the Office to treat an injury in a separate claim should be pursued under that separate claim. As noted, other claims are not before the Board on the present appeal.

<sup>16</sup> See *Leonard J. O'Keefe*, 14 ECAB 42, 48 (1962) (where the Board held that medical opinions based upon an incomplete history or which are speculative or equivocal in character have little probative value).

<sup>17</sup> The Board also notes that appeal No. 07-1239, which also pertains to appellant, is presently pending before the Board. Appeal No. 07-1239 will proceed to adjudication separately from the present appeal.

**ORDER**

**IT IS HEREBY ORDERED THAT** the February 21, 2007 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 26, 2007  
Washington, DC

David S. Gerson, Judge  
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge  
Employees' Compensation Appeals Board

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