United States Department of Labor
Employees' Compensation Appeals Board

A.B., Appellant	)	
and	)	**Docket No. 08-15**
	)	**Issued: April 16, 2008**
DEPARTMENT OF JUSTICE, METROPOLITAN DETENTION CENTER, Los Angeles, CA, Employer	)	

Appearances:
Thomas Martin, Esq., for the appellant
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 October 1, 2007 appellant, through her attorney, filed a timely appeal from a June 29, 2007 merit decision of the Office of Workers' Compensation Programs denying her traumatic injury claim. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant has established that she sustained an injury on July 31, 2004 in the performance of duty. On appeal, her attorney argues that the factual and medical evidence establishes that she sustained an injury to her back and right lower extremity on that day.

FACTUAL HISTORY

On August 2, 2004 appellant, then a 45-year-old physician's assistant, filed a claim alleging that she sustained a traumatic injury on July 31, 2004 to her left shoulder, right leg and

heel. She described the injury as occurring when an officer accidentally "pushed a food cart that bumped on my back."

On August 2, 2004 the employing establishment completed an authorization for examination and treatment (Form CA-16) with Dr. Randall L. Roberts, a chiropractor. A chiropractic radiologist interpreted August 2, 2004 x-rays of the cervical and lumbar spine obtained for Dr. Roberts as revealing subluxations at C4 on C5, C6 on C7 and T10-12 and L2-3. In an August 3, 2004 form report, Dr. Roberts diagnosed cervical and lumbar subluxations, a contusion of the left shoulder and sciatica. He described the history of injury as a food cart running into appellant's low back, right leg and right heel. Appellant was thrown into a prescription cart and hit her left shoulder. Dr. Roberts found that appellant could work light duty. He checked "yes" that his findings and diagnosis was consistent with her account of injury. In an August 4, 2007 form report, Dr. Roberts provided a history of a food cart hitting appellant's lower back and pushing her into a medication cart, causing her to fall over. He diagnosed a lumbar subluxation and sciatica and opined that she was disabled from employment from August 4 to September 13, 2004.

On August 27, 2004 the employing establishment related that a review of a surveillance video revealed that the food cart hit appellant on the lower leg and ankle but that she was not "struck in the lower back by the food cart nor did she fall over onto the medication cart."

In a statement dated September 30, 2004, appellant related that she was hit from behind on the right leg, ankle and heel by the food cart and that she "fell forward into the pill cart." She hit the medication cart with her shoulder. Appellant "heard a cracking sound" from her spine when she went forward. She experienced extreme pain. Appellant noted that she had a prior work injury for her left shoulder and upper and lower back under file number 132067250.

On October 13, 2004 Dr. Roberts indicated that appellant also experienced heel pain due to the injury. Appellant hit her left shoulder but not her neck on the prescription cart. Dr. Roberts diagnosed subluxations of the cervical and lumbar spine. He found that appellant was totally disabled.

In an undated statement, M. Diaz, a senior officer, related that on July 31, 2004 he accidentally pushed a food cart into appellant's right lower leg. He asked her twice if she was "okay" and she responded that she was. Officer Diaz told Operations Lieutenant Lane about the incident.[1]

On December 8, 2004 Dr. Rodriguez diagnosed a cervical and lumbar subluxation and found that appellant was disabled until approximately January 3, 2005.

[1] In another undated statement, S. Rodriguez, a senior officer, related a history of the incident substantially similar to that provided by Officer Diaz.

In a December 13, 2004 memorandum, a claims examiner reviewed the surveillance tapes provided by the employing establishment of the July 31, 2004 incident. He related:

> "At 07:29:06 am, the food cart being pushed by Officer Diaz hit the claimant in her right lower extremity. The claimant bent down and reached for her right lower extremity.
>
> "At 07:29:15 am, the claimant momentarily straightened up, placed both hands on the push bar of the medication cart. But she again stopped and reached for her right foot.
>
> "At 07:29:19 am, the claimant straightened up again and pushed her medication cart to her left towards the door leading to the B-range."

By decision dated December 14, 2004, the Office denied appellant's claim on the grounds that she did not establish fact of injury. The Office found that the evidence showed that the food cart hit her right lower extremity on July 31, 2004 but did not strike her in the back. Appellant also was not pushed into the medication cart and did not hit her shoulder on the medication cart. The Office found that the medical evidence failed to show an injury to the lower extremity causally related to the July 31, 2004 incident.

On January 11, 2005 Dr. John B. Dorsey, a Board-certified orthopedic surgeon, noted that on July 31, 2004 appellant was struck on the right leg with a food cart. Subsequent to the incident, appellant experienced back and right lower extremity pain. Dr. Dorsey listed findings on examination. He noted that appellant had a previously low back injury at work in November 2002. Dr. Dorsey diagnosed a lumbosacral sprain/strain with a herniated nucleus pulposus at L5-S1 by history, right lower extremity radiculopathy due to her back condition and plantar fasciitis of the right foot. He found that appellant could perform her regular employment duties. In a supplemental report dated December 5, 2005, Dr. Dorsey reviewed the medical records. He noted that a March 11, 2005 magnetic resonance imaging (MRI) scan study of the lumbar spine showed a mild disc bulge at L5-S1 and a March 21, 2005 MRI scan study of the cervical spine showed mild disc bulging.

At the hearing, held on April 5, 2006, appellant related that she injured her back when she fell forward after she was hit by the cart. She noted that she saw the video surveillance and "may have lost balance." Appellant indicated that she bruised her left shoulder on the medication cart. She was off work from August 4, 2004 until March 15, 2005.

By decision dated June 1, 2006, an Office hearing representative affirmed the December 14, 2004 decision. He determined that the evidence established that a food cart struck appellant on July 31, 2004 in the right lower leg but did not show that she was pushed into the medication cart. The hearing representative stated, "The surveillance video is consistent with the claimant's testimony that she was struck in the lower extremity, but contradicts her statement that she was pushed or jolted forward. She has attributed her spinal condition to being pushed forward into the medication cart, but the evidence does not support that the incident occurred in that manner." He found that the medical evidence was insufficient to show that appellant sustained a medical condition as a result of being struck in the right lower leg.

On May 25, 2007 appellant, through her attorney, requested reconsideration. She submitted a July 11, 2006 report from Dr. Dorsey. Appellant provided a history of being struck by a food cart from behind in the right leg which "caused her to go forward with resultant injury to her lower back." Dr. Dorsey noted that appellant received treatment subsequently from Dr. Roberts and a Dr. David Wall. He asserted:

> "Based upon my review of the records and my examination of [appellant], it would not be unreasonable for an injury to have occurred as so described by [her]. This may be a moot point in view of the fact that when I examined her in November 2005, I was of the opinion that she would be able to continue working as a physician's assistant without any restrictions.'
>
> "In my experience, patients are usually in the best position to determine whether or not they have been injured, and if a patient tells me she has been injured by a particular mechanism, I am inclined to believe that patient."

Dr. Dorsey noted that the records established that appellant sustained an injury for which she required treatment.

By decision dated June 29, 2007, the Office denied modification of the June 1, 2006 decision.

LEGAL PRECEDENT

An employee seeking benefits under the Federal Employees' Compensation Act[2] 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 filed within the applicable time limitation; that an injury was sustained while 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.[3] These are the essential elements of each and every compensation claim regardless of whether the claim is predicated on a traumatic injury or an occupational disease.[4]

To determine whether an employee sustained a traumatic injury in the performance of duty, the Office must determine whether "fact of injury" is established. First, an employee has the burden of demonstrating the occurrence of an injury at the time, place and in the manner alleged, by a preponderance of the reliable, probative and substantial evidence.[5] Second, the employee must submit sufficient evidence, generally only in the form of medical evidence, to establish a causal relationship between the employment incident and the alleged disability and/or

[2] 5 U.S.C. §§ 8101-8193.

[3] *Anthony P. Silva*, 55 ECAB 179 (2003).

[4] *See Ellen L. Noble*, 55 ECAB 530 (2004).

[5] *Delphyne L. Glover*, 51 ECAB 146 (1999).

condition for which compensation is claimed.[6] An employee may establish that the employment incident occurred as alleged, but fail to show that his or her disability and/or condition relates to the employment incident.[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 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.[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 occurrence of an employment incident is of great probative force and will stand unless refuted by strong or persuasive evidence.[12]

ANALYSIS

The Board finds that appellant has established that she was struck from behind by a food cart on July 31, 2004. She has not established that the food cart struck her on the back or pushed her forward into the medication cart. Appellant indicated on her August 2, 2004 claim form that a food cart bumped her on the back. She alleged an injury to her left shoulder, right leg and heel. In a statement dated September 30, 2004, appellant asserted that the food cart struck her from behind causing her to fall into the medication cart and strike the cart with her shoulder. 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.[13] The employing establishment controverted appellant's allegation that she was hit in the back by the medication cart and was pushed forward. An Office claims examiner reviewed surveillance

[6] *Gary J. Watling*, 52 ECAB 278 (2001); *Shirley A. Temple*, 48 ECAB 404, 407 (1997).

[7] *Id.*

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

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

[10] *Id*.

[11] *Linda S. Christian*, 46 ECAB 598 (1995).

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

[13] *Caroline Thomas*, 51 ECAB 451 (2000).

tapes of the incident provided by the employing establishment. He found that Officer Diaz hit appellant in the right lower extremity with a food cart. Appellant bent down, reached for her right leg, straightened up and then reached for her right foot. A hearing representative also reviewed the surveillance video. He found that the video established that appellant was struck in the right lower leg with a food cart but not that she was pushed into the medication cart. The Board finds that the record contains sufficient evidence to cast doubt on the validity of her allegation that she was struck in the back or pushed into the medication cart.[14] Appellant has established that she was struck in the right lower extremity with the food cart. The issue, consequently, is whether the medical evidence establishes that she sustained an injury as a result of this incident.

The Board finds that appellant has not established that the July 31, 2004 employment incident resulted in an injury. The determination of whether an employment incident caused an injury is generally established by medical evidence.[15] Appellant submitted evidence from Dr. Roberts, a chiropractor. In assessing the probative value of chiropractic evidence, the initial question is whether the chiropractor is a physician as defined by 5 U.S.C. § 8101(2). A chiropractor is not considered a physician under the Act unless it is established that there is a subluxation as demonstrated by x-ray to exist.[16] A chiropractic radiologist interpreted x-rays performed on August 2, 2004 for Dr. Roberts as showing subluxations at C4 to C7, T10 to T12 and L2-3. In form reports dated August 3 and 4, 2004, Dr. Roberts diagnosed a lumbar subluxation. As Dr. Roberts diagnosed a spinal subluxation based upon x-ray evidence, he is considered to be a "physician" under the Act.

On August 3, 2004 Dr. Roberts described the history of injury as a food cart running into appellant's low back, right leg and right heel. Appellant was thrown into a prescription cart and hit her left shoulder. Dr. Roberts diagnosed cervical and lumbar subluxations, a contusion of the left shoulder and sciatica. He checked "yes" that his findings and diagnosis was consistent with her account of injury. On August 4, 2004 Dr. Roberts found that appellant sustained an injury when a food cart hit her lower back and pushed her into a medication cart.[17] The chiropractor diagnosed a lumbar subluxation and sciatica. Dr. Roberts determined that she was disabled from employment from August 4 to September 13, 2004. He checked "yes" that the condition was caused or aggravated by the described employment activity. The Board has held, however, that when a physician's opinion on causal relationship consists only of checking "yes" to a form question, without explanation or rationale, that opinion has little probative value and is insufficient to establish a claim.[18] Dr. Roberts' opinion is based on an inaccurate medical

[14] *See Betty J. Smith*, *supra* note 9.

[15] *Lois E. Culver (Clair L. Culver)*, 53 ECAB 412 (2002).

[16] *Mary A. Ceglia*, 55 ECAB 626 (2004).

[17] The Board notes that the Office issued a Form CA-16. A properly executed Form CA-16 creates a contractual obligation, which does not involve the employee directly, to pay the cost of the examination or treatment regardless of the action taken on the claim. *See Elaine M. Kreymborg*, 41 ECAB 256, 259 (1989). The Office did not address this issue in its June 29, 2007 decision.

[18] *Deborah L. Beatty*, 54 ECAB 340 (2003).

history, that of appellant being pushed forward into a medication cart. Medical conclusions based on an inaccurate or incomplete factual history are of diminished probative value.[19]

On October 13, 2004 Dr. Roberts noted that appellant also experienced heel pain due to the injury. He diagnosed cervical and lumbar subluxations and found that she was totally disabled. On December 8, 2004 the chiropractor diagnosed a cervical and lumbar subluxation and found that appellant was disabled until approximately January 3, 2005. Dr. Roberts, however, did not address the cause of the subluxations. The Board has held that medical evidence that does not offer any opinion regarding the cause of an employee's condition is of diminished probative value on the issue of causal relationship.[20]

On January 11, 2005 Dr. Dorsey noted that on July 31, 2004 appellant was struck on the right leg with a food cart. Subsequent to the incident, she experienced back and right lower extremity pain. Appellant sustained a prior injury to her low back at work in November 2002. Dr. Dorsey diagnosed a lumbosacral sprain/strain with a herniated nucleus pulposus at L5-S1 by history, right lower extremity radiculopathy due to her back condition and plantar fasciitis of the right foot. He found that she could perform her regular employment duties. Dr. Dorsey, however, did not specifically relate the diagnosed conditions of lumbosacral sprain and a herniated disc at L5-S1 by history, right lower extremity radiculopathy and plantar fasciitis of the right foot to the described employment incident. As Dr. Dorsey did not address causation, his report is of little probative value on the issue of causal relationship.[21]

On July 11, 2006 Dr. Dorsey indicated that appellant was struck by a food cart in the right leg. She went forward and sustained an injury to her low back. Dr. Dorsey opined that based on his examination and record review, "it would not be unreasonable for an injury to have occurred as so described by [her]." He related that he believed a patient was in the best position to know if an incident caused an injury. Dr. Dorsey found that at the time of his November 2005 examination, appellant could work with no restrictions. He did not, however, provide a firm diagnosis of any condition and thus his opinion is not probative on the issue of causal relationship.[22] Additionally, Dr. Dorsey's opinion that it was not "unreasonable" for the injury to have occurred as described is speculative in nature and thus of diminished probative value.[23]

An award of compensation may not be based on surmise, conjecture, speculation, or upon appellant's own belief that there is a causal relationship between her claimed condition and his employment.[24] She must submit a physician's report in which the physician reviews those factors of employment identified by her as causing his condition and, taking these factors into consideration as well as findings upon examination and the medical history, explain how

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

[20] *Conrad Hightower*, 54 ECAB 796 (2003).

[21] *Id*.

[22] *See Samuel Senkow*, 50 ECAB 370 (1999).

[23] *Kathy A. Kelley*, 55 ECAB 206 (2004).

[24] *Patricia J. Glenn*, 53 ECAB 159 (2001).

employment factors caused or aggravated any diagnosed condition and present medical rationale in support of his or her opinion.[25] Appellant failed to submit such evidence and therefore failed to discharge her burden of proof.

CONCLUSION

The Board finds that appellant has not established that she sustained an injury on July 31, 2004 in the performance of duty.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated June 29, 2007 is affirmed.

Issued: April 16, 2008
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

[25] *Robert Broome*, 55 ECAB 339 (2004).