

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

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M.S., Appellant)	
)	
and)	Docket No. 09-497
)	Issued: September 21, 2009
DEPARTMENT OF VETERANS AFFAIRS,)	
VETERANS HEALTH ADMINISTRATION,)	
Akron, OH, Employer)	
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Appearances:
Alan J. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On December 10, 2008 appellant filed a timely appeal of the April 17 and October 16, 2008 decisions of the Office of Workers' Compensation Programs denying her claim for compensation. 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 met her burden of proof in establishing that she sustained a traumatic injury on May 4, 2006.

FACTUAL HISTORY

On May 11, 2006 appellant, then a 41-year-old lead clerk, filed a traumatic injury claim alleging that on May 4, 2006 she pulled the sacrum muscle in her low back after a chair rolled out from under her. She did not stop work.¹

Appellant submitted a May 8, 2006 report from Dr. Daniel Abood, a Board-certified internist, who noted her complaint of low back pain after an office chair rolled out from under her four days previously. Dr. Abood stated that appellant “did not fall but reached out quickly to grab [a] table causing sudden jarring injury to [her] low back.” He diagnosed back strain. An unsigned treatment note dated May 11, 2006 indicated that appellant went to sit down at work and her chair rolled out from under her.

The claim was treated as no time loss and remained dormant until March 10, 2008 when the employing establishment forwarded a March 5, 2008 notice of recurrence of disability. Appellant claimed that on February 26, 2008 she had a recurrence of disability due to the May 4, 2006 work injury.

On March 12, 2008 the Office advised appellant of the factual and medical evidence necessary to establish her claim and allowed her 30 days to submit such evidence.² In a March 19, 2008 statement, appellant described the May 4, 2006 incident. She indicated that she had no similar disc or low back symptoms before the alleged May 4, 2006 incident. Appellant also noted that she delayed seeking immediate medical attention because she thought she had pulled a muscle.

The record contains a November 21, 2005 report from Dr. Abood who noted appellant’s complaint of low back pain since “November 14, 2005” when a chair rolled out from under her and she struck her low back on a filing cabinet. Dr. Abood indicated that she had been in constant pain ever since. He diagnosed lumbosacral trauma and strain. In a May 31, 2006 report, Dr. Abood noted that appellant was returned to full duty after a May 8, 2006 examination. In a March 21, 2008 attending physician’s report, Dr. Kamel Muakkassa, a Board-certified neurosurgeon, diagnosed a herniated disc at L5-S1 with a large disc protrusion and severe spinal stenosis. He checked a box “yes” indicating that appellant’s condition was caused or aggravated by her employment activity. Dr. Muakkassa noted that appellant stated that she was injured at work.

In a decision dated April 17, 2008, the Office denied appellant’s claim for compensation. It noted discrepancies between appellant’s description of injury on May 4, 2006 and the history obtained by her attending physicians.

¹ Appellant noted that she stopped work for four days following the incident and returned to work on May 8, 2006. However, the employing establishment advised that appellant’s time card established that she did not take time off from work on the four days following the incident. Appellant worked her usual tour of duty of May 8, 2006.

² The Office also requested evidence to support appellant’s claim of a recurrence of the alleged May 4, 2006 injury.

On April 20, 2008 appellant requested an oral hearing. At the August 13, 2008 oral hearing, she stated that on May 4, 2006 she went to sit at her desk and the chair rolled from under her. Appellant grabbed her desk to brace the fall and fell on her buttocks as the chair moved away from her. She noted that only her right buttock hit the floor. Appellant indicated that there were no witnesses to the fall; however, she immediately notified her supervisor. She stated that she did not make a report at that time because she felt fine other than soreness. Appellant noted that Dr. Abood's report described her "jarring injury" as a result of grabbing a table and clarified that she fell to the floor. She described the incident to Dr. Abood in this manner but it was not reflected in his report. Regarding Dr. Muakkassa diagnosing herniated and ruptured discs, appellant asserted that the physician attributed these conditions to her fall in May 2006. She testified that she had a prior low back condition in 2005 for which she had received treatment in November 2005. Dr. Muakkassa reiterated that appellant missed work for four days following the May 4, 2006 incident and returned to work on May 8, 2006. The hearing representative kept the record open for 30 days to allow appellant to submit additional evidence.

In a May 25, 2006 attending physician's report, Dr. James Eley, Board-certified in family medicine, listed the date of injury as May 8, 2006 when an office chair rolled out from under appellant. He treated her on May 11, 2006 and diagnosed muscular low back strain and soft tissue tenderness. Treatment notes dated November 5, 2007 and February 27, 2008 noted appellant's complaint of low back pain. Appellant denied any unusual strain or specific injury precipitating her back pain. An August 18, 2008 report from Dr. Muakkassa noted that appellant was first seen on March 18, 2007 for low back and bilateral leg pain due to a work-related injury of May 2006. He advised that diagnostic testing revealed a disc protrusion at L5-S1 for which she underwent surgery on March 31, 2008.

In a September 8, 2008 letter, the employing establishment controverted the claim and noted that appellant's time cards revealed that she did not miss work on either May 4 or 5, 2006. Appellant was not scheduled to work on May 6 or 7, 2006. The employing establishment advised that appellant worked her usual tour of duty on May 8, 2006. Appellant presented to the employee health unit on May 8, 2006, when the employee health unit recorded that she was seen on that date by a nurse for an unspecified injury.

In a decision dated October 16, 2008, an Office hearing representative affirmed the April 17, 2008 decision finding that inconsistencies in the factual and medical evidence prevented acceptance of the May 4, 2006 incident at the time, place and in the manner alleged.

LEGAL PRECEDENT

An employee seeking benefits under the Federal Employees' Compensation Act³ has the burden of establishing 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 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. These are the essential elements of each

³ 5 U.S.C. §§ 8101-8193.

and every compensation claim regardless of whether the claim is predicated on a traumatic injury or an occupational disease.⁴

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. Second, the employee must submit sufficient evidence, generally only in the form of medical evidence, to establish that the employment incident caused a personal injury.⁵

An injury does not have to be confirmed by eyewitnesses in order to establish the fact that an employee sustained an injury while in the performance of duty. However, 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 cast doubt on an employee’s statements in determining whether he or she has established a *prima facie* claim for compensation. 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 and persuasive evidence.⁶

ANALYSIS

Appellant claimed a low back injury after a chair rolled out from under her on May 4, 2006. The Office found that appellant did not establish that the claimed work incident occurred, as alleged. The Board finds that appellant has not met her burden of proof to establish that the claimed injury occurred at the time alleged.

In her May 11, 2006 claim, appellant stated that her chair rolled out from under her on May 4, 2006. However, the evidence contains inconsistencies that cast doubt about this incident. In a March 19, 2008 statement, appellant stated that she injured her lower back at work on May 4, 2006 after a chair rolled out from under her causing her to fall onto the floor on her buttocks. A November 21, 2005 report from Dr. Abood described a similar incident occurring prior to that alleged in this claim. A May 8, 2006 report from Dr. Abood indicated that appellant was injured when a chair rolled out from under her four days prior. However, he noted that appellant “did not fall but reached out quickly to grab [a] table causing sudden jarring injury to [her] low back.” The unsigned treatment notes dated November 5, 2007 and February 27, 2008 noted appellant’s onset of low back pain prior to her treatment and surgery in March 2008. They noted that appellant denied any unusual strain and could not identify any injury precipitating her back pain. As noted, an employee’s statement must be consistent with the surrounding facts and circumstances in order to establish a *prima facie* claim for compensation.⁷ The May 25, 2006

⁴ *S.P.*, 59 ECAB ____ (Docket No. 07-1584, issued November 15, 2007); *Joe D. Cameron*, 41 ECAB 153 (1989).

⁵ *Id.*

⁶ *M.H.*, 59 ECAB ____ (Docket No. 08-120, issue April 17, 2008); *Louise F. Garnett*, 47 ECAB 639 (1996).

⁷ *See id.*

report of Dr. Eley listed the date of injury as May 8, 2006, which does not conform to the date alleged in this claim.

At the August 13, 2008 oral hearing, appellant addressed Dr. Abood's reference to a "jarring injury." She noted that she told the physician that she fell onto the floor after the chair rolled out from under her. Appellant provided no further evidence to explain the inconsistency with Dr. Abood's description of injury in his May 8, 2006 report or the date of injury listed by Dr. Eley. The remainder of the evidence of record does not specifically address whether the alleged incident of May 4, 2006 consisted of appellant falling onto the floor after a chair rolled out from under her. These inconsistencies regarding cast doubt on the claim.

Appellant also gave differing accounts of her history of low back problems. In a March 19, 2008 statement, she advised that she had no similar disc or low back symptoms before the alleged May 4, 2006 incident. However, the November 21, 2005 report from Dr. Abood listed her complaint of low back pain after a chair rolled out from under her on November 14, 2005 and she struck her low back on a filing cabinet. At the August 13, 2008 oral hearing, appellant noted only that she had a prior low back condition in 2005 for which she had received treatment in November 2005.

For these reasons, the Board finds that there are inconsistencies on the record that cast serious doubt on the validity of appellant's claim.⁸ Appellant has not met her burden of proof in establishing that the May 4, 2006 incident occurred as alleged.⁹

CONCLUSION

The Board finds that appellant did not meet her burden of proof in establishing that she sustained a traumatic injury on May 4, 2006 in the performance of duty.

⁸ *S.P.*, 59 ECAB ___ (Docket No. 07-1584, issued November 15, 2007) (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).

⁹ As appellant did not establish that the employment incident occurred at the time, place and manner alleged, the Board need not consider the medical evidence. *See S.P.*, *supra* note 8. Furthermore, any question regarding a recurrence of disability is premature as the original injury has not been accepted.

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' decisions dated October 16 and April 17, 2008 are affirmed.

Issued: September 21, 2009
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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