United States Department of Labor
Employees' Compensation Appeals Board

S.P., Appellant	)	
and	)	**Docket No. 09-2316**
	)	**Issued: August 20, 2010**
DEPARTMENT OF HOMELAND SECURITY, TRANSPORTATION SECURITY ADMINISTRATION, Norfolk, VA, Employer	)	

Appearances:
David B. Oakley, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On September 21, 2009 appellant, through her attorney, filed a timely appeal from a June 10, 2009 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 September 21, 2007 in the performance of duty.

FACTUAL HISTORY

On October 2, 2007 appellant, then a 37-year-old transportation security screener, filed a claim alleging that she injured her right foot on September 22, 2007 moving bags in the screening area. She stopped work on September 23, 2007.

In a report dated September 23, 2007, Dr. W. Kent Schuele, Board-certified in family practice, diagnosed plantar fasciitis and sensory disturbances.[1] He found that appellant could return to light duty on October 3, 2003.

On October 1, 2007 Dr. Richard E. Wertheimer, a Board-certified neurologist, discussed appellant's history of pain and numbness of the right leg and foot beginning about four months prior. He stated, "She denied specific trauma to her back or right leg, but her job requires her to lift suitcases weighing as much as 75 pounds." Dr. Wertheimer diagnosed low back pain with pain sensory loss and weakness of the right lower extremity. He referred appellant for objective studies.

In a report dated October 10, 2007, Dr. Wertheimer evaluated appellant for increased back and leg pain radiating from her thigh to calf. He noted that an electromyogram was normal. Dr. Wertheimer diagnosed possible complex regional pain syndrome or deep vein thrombosis.[2]

In an undated statement received on November 6, 2007, Robert Cherry, a coworker, related that on September 21, 2007 he and appellant worked an hour loading bags weighing about 60 pounds each. The following day appellant told him that she was experiencing pain in her foot and leg.

On November 6, 2007 appellant, through her attorney, responded to the Office's request for additional information. She related that on September 21, 2007 two buses containing military personnel arrived to check in. Appellant worked an hour screening bags weighing about 60 pounds each. She stated:

> "By the next day, September 22, 2007, I began to experience intense pain in my right foot and leg. I experienced this pain in the presence of and reported my injury to a supervisor named Jason Quant on September 22, 2007. By September 23, 2007, the level of pain increased to the degree I was unable to work and sought medical treatment. My physicians have explained to me the above described incident on September 21, 2007 caused an injury to my back which manifested as pain and numbness in my right foot and leg. I am continuing to seek treatment for this injury, and additional information will be provided upon receipt."

In a decision dated November 16, 2007, the Office denied appellant's claim on the grounds that she failed to establish an injury on September 22, 2007 in the performance of duty. It found that she did not establish the occurrence of the alleged work incident due to inconsistencies in the evidence.

[1] In a follow-up report dated September 25, 2007, Dr. Schuele noted that appellant had begun to experience tingling from her thigh to her toes. On October 1, 2007 he indicated that appellant had a workers' compensation injury and needed a note for work.

[2] In an accompanying disability slip, Dr. Wertheimer found that appellant should remain off work until November 1, 2007.

In a report dated October 19, 2007, received by the Office on March 11, 2008, Dr. Richard D. Guinand, an osteopath, noted that on September 22, 2007 appellant lifted a large amount of luggage at work and that the "following date, she started experiencing pain that has gradually worsened in the ascended upper leg. The pain started in her right foot and has gone to her heel, ankle, knee and now her right hip, low back and even affecting her middle back." Dr. Guinand diagnosed lumbar radiculopathy and recommended diagnostic studies.[3]

On October 2, 2007 Dr. George H. Evancho, a podiatrist, evaluated appellant for the "gradual onset of pain and tenderness involving her right plantar fascial area." He discussed her history of standing extensively as part of her work duties. Dr. Evancho stated, "This is without history of any injury to the area, or any foreign body entry. [Appellant] also mentions some tingling and numbness involving her right upper extremity." He diagnosed likely plantar fasciitis.

On November 13, 2007 Dr. Evancho indicated that he initially treated appellant on September 27, 2007 for the "gradual onset of pain involving [the] right plantar fascii area.…" He noted that she slipped and fell on October 1, 2007 landing on her right foot.[4] Dr. Evancho diagnosed plantar fasciitis and tenosynovitis. Regarding causation, he noted that appellant "states she spends extensive time on her feet at [the employing establishment and] this could contribute to plantar fasciitis.

On November 28, 2007 Dr. Mark A. Bewley, a Board-certified orthopedic surgeon, related that appellant injured her left foot when tripped over tree roots. He diagnosed a left calcaneus anterior process fracture avulsion.[5]

On December 10, 2007 appellant, through her attorney, requested an oral hearing.

In a report dated December 17, 2007, Dr. J. Abbott Byrd, III, a Board-certified internist, evaluated appellant for pain in her low back and lower extremity. He noted that she related "the onset of cervical, thoracic and lumbar pain on September 21, 2007 due to a work injury. [Appellant] was working as airport security for [the employing establishment] when she had to lift a bag that weighed about 60 pounds. She had the onset of her symptoms." Dr. Byrd reviewed the results of diagnostic studies and diagnosed possible lumbar radiculopathy secondary to retrolisthesis at L4-5 above a sacralized L5 based on a November 7, 2007 MRI scan study of the lumbar spine.

[3] A magnetic resonance imaging (MRI) scan study of the lumbar spine showed mild hypertrophic degenerative bony changes throughout with no evidence of disc protrusion, spinal stenosis or significant foraminal impingement. On November 2, 2007 Dr. Guinard discussed appellant's complaints of back pain and noted that an MRI scan of the spine was normal.

[4] The record indicates that on October 2, 2007 appellant received treatment for an injury to her right foot after a slip and fall.

[5] On December 19, 2007 Dr. Bewley performed a follow-up on appellant for her left foot anterior process calcaneus avulsion fracture. On January 30, 2008 he found that her fracture had healed.

On January 30, 2008 Dr. Byrd evaluated appellant for low back and pain in the right lower extremity radiating into the foot. He noted that a computerized tomography (CT) scan and myelogram performed January 14, 2008 revealed facet arthropathy at L4-5, retrolisthesis at L4-5 and a transitional L5-S1 segment with right assimilation joint. Dr. Byrd diagnosed "mechanical back pain probably due to retrolisthesis at L4-5 with facet symmetry above the transitional lumbosacral junction." He found that she should be off work.

On February 28, 2008 Dr. Byrd diagnosed cervical, lumbar and thoracic strain with possible radiculopathy and discogenic pain.[6] He provided the history of injury as lifting a bag in the course of her employment and checked "yes" that the condition was caused or aggravated by employment. Dr. Byrd opined that appellant was totally disabled beginning December 17, 2007.

At the hearing, held on March 17, 2008, appellant related that her workplace injury occurred on September 21, 2007 and that she filed a claim for the injury on September 22, 2007. She was unsure why September 22, 2007 was written as the date of injury on the claim form. Appellant sought medical treatment on September 21, 2007 and received a diagnosis of plantar fasciitis. The physician who indicated that she experienced pain and numbness beginning four months prior to October 1, 2007 had provided an inaccurate history of injury. Appellant's attorney noted that she sustained an injury to her left foot in November 2007 unrelated to the present claim.

In a June 5, 2008 decision, the hearing representative affirmed the November 16, 2007 decision. She found that appellant did not establish that the injury occurred in the manner alleged and that the medical reports failed to provide a rationalized opinion that a diagnosed condition was causally related to the alleged work incident.

In a progress report dated March 12, 2008, received by the Office on July 8, 2008, Dr. Byrd diagnosed retrolisthesis at L4-5 and recommended a decompression and fusion. A CT scan performed on April 3, 2008 revealed a full thickness left lateral annual tear at L4-5. On May 21, 2008 Dr. Byrd performed a lumbar decompression and fusion at L4-5.[7]

In form reports dated August 27 and November 26, 2008, Dr. Byrd diagnosed stenosis and checked "yes" that the condition was caused or aggravated by employment.[8] He explained that appellant had injured her lower back when she lifted a 60-pound bag working as an airport security screener. In a narrative report dated November 26, 2008, Dr. Byrd discussed appellant's complaints of mild numbness in the right leg. He found that she should continue limited-duty employment.

[6] In a January 30, 2008 duty status report, Dr. Byrd diagnosed cervical, thoracic and lumbar strain and found that appellant was unable to work.

[7] In a progress report dated June 25, 2008, Dr. Byrd noted that appellant reported improvement. On August 27, 2008 he found that appellant had improved and that she could resume limited-duty work. In a duty status report of the same date, Dr. Byrd listed work restrictions.

[8] In a duty status report dated November 26, 2008, Dr. Byrd listed permanent work restrictions.

On October 24, 2008 appellant, through her attorney, requested reconsideration. By decision dated June 10, 2009, the Office denied modification of its June 5, 2008 decision.

On appeal appellant's attorney described her history of injury. He noted that the hearing representative questioned the accuracy of her account of the events of September 21, 2007 in view of the history provided in an October 1, 2007 report from Dr. Wertheimer. Counsel contended that other medical reports referred to September 21, 2007 as the date of injury and that appellant had testified that the history in Dr. Wertheimer's report was a mistake. Appellant contends that she sustained an injury as alleged on September 21, 2007 and that the December 17, 2007 and January 30, 2008 reports of Dr. Byrd are sufficient to meet her burden of proof.

LEGAL PRECEDENT

An employee seeking benefits under the Federal Employees' Compensation Act[9] 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.[10] 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.[11]

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.[12] 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 condition for which compensation is claimed.[13] 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.[14]

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

[9] 5 U.S.C. §§ 8101-8193.

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

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

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

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

[14] *Id.*

actually experienced the employment incident which is alleged to have occurred.[15] 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.[16] 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.[17] 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.[18] 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.[19]

ANALYSIS

The Office found that appellant did not establish the occurrence of the September 21, 2007 work incident. The Board finds, however, that the evidence is sufficient to establish that she experienced the incident at the time, place and in the manner alleged.

On October 2, 2007 appellant filed a claim alleging that on September 22, 2007 she sustained an injury to her right foot moving bags in the screening area. She subsequently explained that the date of injury was September 21, 2007 and that September 22, 2007 was the date that she notified her supervisor of her injury. On November 6, 2007 appellant described in detail her work while screening luggage on September 21, 2007 for two bus loads of military personnel. She experienced considerable pain in her right foot and leg the following day. Appellant's pain increased such that she was unable to work beginning September 23, 2007. In a statement received November 6, 2007, Mr. Cherry, a coworker, confirmed that on September 21, 2007 he and appellant had lifted heavy bags weighing about 60 pounds and that the next day she told him that she had foot and leg pain.

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.[20] The employing establishment did not challenge that appellant lifted bags weighing about 60 pounds each for an hour on September 21, 2007. Appellant stopped work and sought medical treatment two days after the incident. A coworker confirmed that he and appellant lifted bags on September 21, 2007 weighing about 60 pounds and that the next day she complained of pain in her foot and leg. While the medical evidence contains some variability in the history of

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

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

[17] *Id*.

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

[19] *Gregory J. Reser*, 57 ECAB 277 (2005).

[20] *Allen C. Hundley*, 53 ECAB 551 (2002).

injury, the evidence establishes that appellant lifted luggage on September 21, 2007 as alleged.[21] The issue, consequently, is whether the medical evidence establishes that appellant sustained an injury due to lifting luggage on September 21, 2007.

The Board finds that appellant has not established that the September 21, 2007 employment incident resulted in an injury. The determination of whether an employment incident caused an injury is generally established by medical evidence.[22] In a report dated September 23, 2007, Dr. Schuele diagnosed plantar fasciitis and sensory disturbances of uncertain etiology. He indicated that the date of onset of the plantar fasciitis was June 25, 2007. Dr. Schuele found that appellant could return to light duty on October 3, 2003. He did not, however, address the cause of the diagnosed condition or relate the condition to lifting luggage at work on September 21, 2007. 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.[23]

On October 1, 2007 Dr. Wertheimer discussed appellant's history of pain and numbness of the right leg and foot beginning about four months ago. He noted that her work duties including lifting heavy suitcases. Dr. Wertheimer diagnosed low back pain with pain, sensory loss and weakness of the right lower extremity. On October 10, 2007 he evaluated appellant for increased back and leg pain radiating from her thigh to calf. Dr. Wertheimer diagnosed possible complex regional pain syndrome and to exclude deep vein thrombosis. In an accompanying disability slip, he found that appellant should remain off work until November 1, 2007. Dr. Wertheimer, however, did not provide a firm medical diagnosis or specifically address causation. His reports are of diminished probative value on the issue of causal relationship.[24] Further, Dr. Wertheimer provided a history of appellant experiencing pain beginning four months prior to October 2007 rather than after the September 21, 2007 work incident.

On October 19, 2007 Dr. Guinand described appellant's history of experiencing pain beginning in her right foot and ascending up the leg after lifting a large amount of luggage at work on September 22, 2007. He diagnosed lumbar radiculopathy and recommended diagnostic studies. As he did not directly address causation, Dr. Guinand's report is insufficient to meet appellant's burden of proof.[25]

On October 2, 2007 Dr. Evancho evaluated appellant for the "gradual onset of pain and tenderness involving her right plantar fascial area." He noted that her pain developed over time without a history of injury and that she stood as part of her work duties. Dr. Evancho diagnosed likely plantar fasciitis. As he did not attribute appellant's plantar fasciitis to lifting luggage on September 21, 2007, his report is of little probative value. Additionally, Dr. Evancho relied upon

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

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

[23] *A.D.*, 58 ECAB 149 (2006); *Conrad Hightower*, 54 ECAB 796 (2003).

[24] *Id*.

[25] *Id*.

a history of injury of pain developing over time rather than as a result of events at work on September 21, 2007. Consequently, his report does not support appellant's claim that she sustained a traumatic injury on September 21, 2007.[26]

In a form report dated November 13, 2007, Dr. Evancho indicated that he initially treated appellant on September 27, 2007 for the "gradual onset of pain involving [the] right plantar fascii area…." He noted that she slipped and fell on October 1, 2007 landing on her right foot. Dr. Evancho diagnosed plantar fasciitis and tenosynovitis. Regarding causation, he asserted that appellant "states she spends extensive time on her feet at [the employing establishment and] this could contribute to plantar fasciitis. While Dr. Evancho indicated that appellant related that standing at work contributed to plantar fasciitis, he did not provide an independent opinion regarding causation. A physician's report is of little probative value when it is based on a claimant's belief rather than the doctor's independent judgment.[27] Further, Dr. Evancho did not address the issue of whether appellant sustained an injury at work on September 21, 2007 due to lifting luggage.

On December 17, 2007 Dr. Byrd noted that appellant experienced cervical, thoracic and lumbar pain beginning September 21, 2007 after she lifted a bag while screening luggage. He diagnosed possible lumbar radiculopathy secondary to retrolisthesis at L4-5. On January 30, 2008 Dr. Byrd again diagnosed mechanic back pain probably due to retrolisthesis at L4-5 and found that she should remain off work. He did not, however, provide a firm diagnosis or provide a rationalized opinion relating the probable lumbar radiculopathy to the September 21, 2007 work injury. Without a firm diagnosis supported by medical rationale and an opinion regarding causation, the report is of little probative value.[28]

In a form report dated February 28, 2008, Dr. Byrd diagnosed cervical, lumbar and thoracic strain with possible radiculopathy and discogenic pain. He provided the history of injury as lifting a bag in the course of her employment and checked "yes" that the condition was caused or aggravated by employment. Dr. Byrd opined that appellant was totally disabled beginning December 17, 2007. 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.[29]

On March 12, 2008 Dr. Byrd diagnosed retrolisthesis at L4-5 and recommended a decompression and fusion. On May 21, 2008 he performed a lumbar decompression and fusion

[26] A traumatic injury is defined as a "condition of the body caused by a specific event or incident, or series of events or incidents, within a single workday or shift." 20 C.F.R. § 10.5(ee). An occupational disease is defined as a condition produced by the work environment over a period longer than a single workday or shift." 20 C.F.R. § 10.5(q).

[27] *Earl David Seale*, 49 ECAB 152 (1997).

[28] *Willie M. Miller*, 53 ECAB 697 (2002); *J.M.*, 58 ECAB 303 (2007); *Samuel Senkow*, 50 ECAB 370 (1999).

[29] *Deborah L. Beatty*, 54 ECAB 3234 (2003).

at L4-5. Dr. Byrd did not address causation and thus his opinion is insufficient to meet appellant's burden of proof.[30]

In form reports dated August 27 and November 26, 2008, Dr. Byrd diagnosed stenosis and checked "yes" that the condition was caused or aggravated by employment, noting that appellant had injured her lower back when she lifted a 60-pound bag working as an airport security screener. While Dr. Byrd attributed appellant's stenosis to lifting a bag at work, he did not provide any rationale for his opinion. As discussed, when a physician's opinion on causal relationship consists only of checking "yes" to a form question, without sufficient explanation or rationale, that opinion is of diminished probative value and insufficient to establish a claim.[31]

Counsel argued that the medical evidence of Dr. Byrd is sufficient to establish that appellant sustained an injury on September 21, 2007. As noted, Dr. Byrd did not provide a narrative description of the employment incident or a reasoned opinion on whether the September 21, 2007 incident caused or contributed to appellant's diagnosed medical condition.[32] Consequently, his reports are insufficient to meet her burden of proof.

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.[33] Appellant 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 employment factors caused or aggravated any diagnosed condition and present medical rationale in support of his or her opinion.[34] She 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 September 22, 2007 in the performance of duty causally related to factors of her federal employment.

[30] *See A.D.*, *supra* note 23.

[31] *Sedi L. Graham*, 57 ECAB 734 (2006); *Cecelia M. Corley*, 56 ECAB 662 (2003).

[32] *John W. Montoya*, 54 ECAB 306 (2003).

[33] *George H. Clark*, 56 ECAB 162 (2004); *Patricia J. Glenn*, 53 ECAB 159 (2001).

[34] *D.D.*, 57 ECAB 734 (2006); *Robert Broome*, 55 ECAB 339 (2004).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated June 10, 2009 is affirmed.

Issued: August 20, 2010
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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