United States Department of Labor
Employees' Compensation Appeals Board

S.S., Appellant	)	
and	)	**Docket No. 10-490**
	)	**Issued: December 22, 2010**
DEPARTMENT OF VETERANS AFFAIRS, VETERANS HEALTH ADMINISTRATION, Bronx, NY, Employer	)	

Appearances:
Alan J. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On December 16, 2009 appellant filed a timely appeal from the Office of Workers' Compensation Programs' decision dated October 21, 2009, which found that she did not sustain an injury in the performance of duty. 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 to establish that she sustained a traumatic injury in the performance of duty on November 28, 2008.

FACTUAL HISTORY

On January 9, 2009 appellant, then a 46-year-old certified nurse assistant, filed a traumatic injury claim alleging that on November 28, 2008 she injured her right shoulder and low back while turning and pulling patients. She stopped work on November 29, 2008. The employing establishment controverted the claim, noting that there were "different stories about

what happened." It advised that appellant stated that it was a recurrence of an old injury and noted that one of her physicians referred to an August 2007 injury. The employer stated that she was under a physician's care for a fall, that she did not notify it about the fall and a recurrence claim was denied because the original injury was denied.[1]

In a January 9, 2009 statement, Coreen Simmons, an employing establishment nurse and workers' compensation program manager, stated that appellant provided dissimilar accounts as to how her injury occurred. She noted that appellant was not on duty on Saturday, November 29, 2008, as she called in sick. Ms. Simmons asserted that appellant did not report her condition to her supervisor. She noted that appellant filed a claim for an August 12, 2007 injury, which was denied. Appellant subsequently filed a recurrence claim on December 10, 2008, which was denied, after which she filed a new traumatic injury claim.

The Office received diagnostic reports including a November 2, 2007 cervical spine electromyography (EMG) and nerve conduction study (NCS) from Dr. Jacob Nir, a physiatrist, who noted bilateral C6 cervical radiculopathy. A November 2, 2007 lumbar spine EMG revealed right S1 lumbar radiculopathy/right sciatica. A November 17, 2008 right shoulder x-ray report from Dr. Elliott Walm, a radiologist, was unremarkable. A November 22, 2008 right shoulder magnetic resonance imaging (MRI) scan, read by Dr. Charles Blatt, a Board-certified radiologist, showed small joint effusion with fluid surrounding the biceptal tendon that was consistent with traumatic bursitis. A November 30, 2008 lumbosacral spine MRI scan by Dr. Blatt revealed a degenerated disc at L4-L5 and mild spinal stenosis secondary to a congenital abnormality.

In a September 3, 2008 report, Dr. Chaula Patel, a Board-certified internist, released appellant to return to work on September 4, 2008. She advised that appellant had been unable to work since September 1, 2008 due to right shoulder pain. In a December 2, 2008 report, Dr. Patel diagnosed shoulder bursitis and low back pain. Appellant complained of chronic pain which was getting worse due to an injury which occurred on August 12, 2007 at work. Dr. Patel advised that appellant could not work full time due to pain. As of December 2, 2008, she advised that appellant could not work until further notice.

In a December 2, 2008 report, Dr. Emancia Neil, a Board-certified family practitioner, advised that appellant was under her care for low back pain. On December 12, 2008 she listed a history of treating appellant since December 4, 2007 for depression, stress and insomnia. In a January 6, 2009 disability certificate, Dr. Lucas Bottcher, a chiropractor, found appellant disabled since December 8, 2008.

By letters dated January 30 and February 2, 2009, the Office advised appellant that additional factual and medical evidence was needed. It noted that the employing establishment had controverted her claim.

In a December 16, 2008 report, Dr. Patel noted lower back pain since the previous year that became worse on November 28, 2008. She advised that the right shoulder pain was

[1] The record reflects that appellant filed a claim for an August 12, 2007 fall in case File No. xxxxxx837. This was denied on January 23, 2008. This claim is not before the Board on the present appeal.

persistent but a little better. On January 12, 2009 Dr. Patel advised that appellant still had right shoulder pain and could not work. A December 12, 2008 EMG and NCS of the lumbar spine read by Dr. Nir revealed right lumbar radiculopathy at the L5-S1 level. In a February 5, 2009 attending physician's report, Dr. Bottcher diagnosed lumbar subluxation. He noted that appellant related that she positioned, lifted and cleaned patients and injured her lower back. Dr. Bottcher checked a box "yes" that her condition was work related and advised that she could not resume regular duty. The Office also received several nerve block notes dated January 6 to 29, 2009 from Dr. Ellen S. Ginsberg, a Board-certified anesthesiologist. Physical therapy records were also submitted.

In a February 25, 2009 statement, appellant explained that she injured her right shoulder and low back about 5:00 a.m. on Friday, November 28, 2008. She was turning and pulling patients when she felt her right shoulder pop. The pain in appellant's low back did not become apparent until after she finished her Friday morning shift. Before starting her Saturday morning shift, which ran from midnight to 8:00 a.m., she called in sick. Appellant denied stating that she was injured on Saturday or that she provided dissimilar accounts of her injury. On November 30, 2008 which was a Sunday, she had a lumbar spine MRI scan performed by Dr. Neil and read by Dr. Blatt. Dr. Neil advised appellant that she was not a workers' compensation physician and that she should see Dr. Patel. Appellant noted having right shoulder and low back pain since an original injury on August 12, 2008. She stated that she did not stop work after that injury but returned to light duty and continued having right shoulder and back pain. Appellant noted that Dr. Patel's December 2, 2008 report mistakenly did not refer to her November 28, 2008 injury and that he had treated her for a year due to her original injury. She alleged that the work incident on November 28, 2008 aggravated her prior right shoulder and low back conditions.

In a March 3, 2009 report, Dr. Patel advised that appellant could not work until further notice. In an undated attending physician's report, Dr. Nir diagnosed right lumbar radiculopathy. Appellant related that while working she lifted and cleaned a patient and injured her back. Dr. Nir checked a box "yes" that the condition was work related and referred to her injury of August 12, 2007. He advised that it was undetermined when appellant could return to work. On March 6, 2009 Dr. Nir noted that she was being examined for injuries sustained in a November 28, 2008 work accident. He diagnosed right L5-S1 radiculopathy, right sciatica and bilateral C5-6 radiculopathy.

In a March 11, 2009 decision, the Office denied appellant's claim finding that the medical evidence did not establish that the incident of November 28, 2008 caused any new medical conditions or aggravated her preexisting back and shoulder conditions.

Appellant's representative requested a hearing, which was held on July 9, 2009. At the hearing, appellant testified that, on November 28, 2008, she manually turned a 200-pound patient and injured her right shoulder and low back. An April 3, 2009 EMG from Dr. Nir was reported as normal. He noted an impression of bilateral cervical radiculopathy of C5-6, particularly on the right. In a July 10, 2009 report, Dr. Neil noted that appellant was seen in November 2008 and an MRI scan was ordered for back pain. In a November 28, 2008 report, Dr. Bottcher noted findings of neck, mid back and low back pain that radiated down the leg. He diagnosed lumbar radiculopathy, lumbar subluxation and low back pain. On December 9, 2008 Dr. Bottcher

treated appellant for injuries sustained in a December 9, 2008 work-related accident. He recommended NCS. In a December 11, 2008 NCS report, Dr. Bottcher noted normal findings.

Appellant received several nerve block treatments from February 13 to July 1, 2009 from Dr. Ginsberg, who noted initially seeing appellant on December 16, 2008 for injuries sustained on November 28, 2008. She related that she was at work attempting to lift up a patient when she experienced severe back pain. Dr. Ginsberg noted a past history of right shoulder and neck injury on August 12, 2008. She diagnosed lower back pain and right leg pain and opined that "the injuries the patient sustained were a direct producing cause of the diagnosis." As a result of the November 28, 2008 incident, appellant sustained severe injuries to her musculoskeletal and neurological systems.

On August 14, 2009 the employing establishment responded to appellant's hearing testimony. It advised that on November 28, 2008 appellant was assigned to 13 patients and 4 staff members were working. Appellant did not use the ceiling lift in the patient's room. The lifts were installed as a preventative measure to decrease musculoskeletal injuries. In a September 18, 2009 reply, appellant's representative noted that appellant testified truthfully and worked alone on the date of the incident.

By decision dated October 21, 2009, an Office hearing representative modified the October 11, 2009 decision to reflect that appellant had not established the occurrence of a work incident at the time, place and in the manner alleged. He also found that she had not established a medical condition causally related to any such incident.

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 timely filed within the applicable time limitation period of the Act[3] and that an injury was sustained in the performance of duty.[4] These are the essential elements of each compensation claim, regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.[5]

To determine whether a federal employee has sustained a traumatic injury in the performance of duty, it first must be determined whether the fact of injury has been established. There are two components involved in establishing the fact of injury. First, the employee must submit sufficient evidence to establish that he actually experienced the employment incident at

[2] 5 U.S.C. §§ 8101-8193.

[3] *Joe D. Cameron*, 41 ECAB 153 (1989).

[4] *James E. Chadden, Sr.*, 40 ECAB 312 (1988).

[5] *Delores C. Ellyett*, 41 ECAB 992 (1990).

the time, place and in the manner alleged.[6] In some traumatic injury cases, this component can be established by an employee's uncontroverted statement on the Form CA-1.[7] 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.[8]

An alleged work incident 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 his subsequent course of action.[9] A consistent history of the injury as reported on medical reports to the claimant's supervisor and on the notice of injury can also be evidence of the occurrence of the incident.[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 sufficient doubt on an employee's statements in determining whether a *prima facie* case has been established.[11] Although 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,[12] an employee has not met this burden when there are inconsistencies in the evidence such as to cast serious doubt upon the validity of the claim.[13]

ANALYSIS

Appellant alleged that on November 28, 2008 she was turning and pulling patients when she felt a pop in the right shoulder and felt pain in the back the next day. Her account of how the incident occurred was generally consistent. The hearing representative found that this incident did not occur as alleged. The employing establishment generally disputed the claim because appellant had a prior injury.[14] It also alleged that she provided varying accounts of her injury and did not use a lift to move the patient. The Board finds that there are not such inconsistencies in the evidence to cast serious doubt upon the validity of the claim. There is no dispute that on November 28, 2008 appellant was performing her duties, which included turning and pulling a

[6] *Julie B. Hawkins*, 38 ECAB 393, 396 (1987); *see* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Fact of Injury*, Chapter 2.803.2a (June 1995).

[7] *John J. Carlone*, 41 ECAB 354 (1989).

[8] *Id*. For a definition of the term "traumatic injury," *see* 20 C.F.R. § 10.5(ee).

[9] *Rex A. Lenk*, 35 ECAB 253, 255 (1983).

[10] *Id*. at 255-56.

[11] *Dorothy M. Kelsey*, 32 ECAB 998 (1981).

[12] *Id.*

[13] *Joseph A. Fournier*, 35 ECAB 1175 (1984).

[14] The mere fact that appellant had prior right shoulder problems does not preclude her from sustaining a separate work injury affecting the same area. *See Thelma Rogers*, 42 ECAB 866, n. 10 (1991).

patient in the performance of duty. The evidence of record supports the November 28, 2008 incident at order.

The Board finds that the medical evidence is insufficient to establish that the employment incident caused an injury. The medical reports of record do not establish that turning and pulling a patient on November 28, 2008 caused or aggravated her diagnosed medical conditions. Appellant provided several reports from Dr. Patel; however, she did not initially attribute appellant's condition or disability to the November 28, 2008 work incident. Rather, she attributed it to the prior August 12, 2007 incident. These reports do not address the November 28, 2008 incident as a cause of injury. In a December 16, 2008 report, Dr. Patel noted that appellant's low back pain had worsened on November 28, 2008. However, she did not offer any opinion as to whether the incident on that date was the cause of appellant's worsening pain. Dr. Patel did not address whether the incident had aggravated appellant's preexisting condition. Medical evidence that does not offer any opinion regarding the cause of an employee's condition is of limited probative value on the issue of causal relationship.[15]

In an undated attending physician's report, Dr. Nir diagnosed right lumbar radiculopathy and provided history of appellant injuring her back when she lifted and cleaned a patient. He checked a box "yes" indicating that the condition was work related but referred to her prior injury of August 12, 2007. This report is of limited probative value as it was not addressed to the incident on November 28, 2008. In a March 6, 2009 report, Dr. Nir noted that appellant was being examined for injuries sustained in a work-related incident on November 28, 2008. He diagnosed right L5-S1 radiculopathy, right sciatica and bilateral C5-6 radiculopathy. The Board notes that this report did not offer any rationale explaining how the November 28, 2008 incident caused or aggravated the diagnosed conditions.

In a July 1, 2009 report, Dr. Ginsberg noted that she initially saw appellant on December 16, 2008 for injuries sustained on November 28, 2008. Appellant related that she was attempting to lift up a patient when she felt severe pain. Dr. Ginsberg obtained a past history of a right shoulder and cervical injury on August 12, 2008. She diagnosed lower back pain and right leg pain and opined that "the injuries the patient sustained were a direct producing cause of the diagnosis." As a result of the November 28, 2008 incident, appellant sustained injuries to her musculoskeletal and neurological systems. While Dr. Ginsberg addressed the accepted incident, her brief reports did not adequately explain the causal relationship of how the incident contributed to appellant's preexisting low back as right shoulder condition. A physician's opinion on causal relationship between a claimant's disability and an employment injury is not conclusive simply because it is rendered by a physician. To be of probative value, the physician must provide rationale for the opinion reached. Where no such rationale is present, the medical opinion is of diminished probative value.[16]

[15] *S.E.*, 60 ECAB ___ (Docket No. 08-2214, issued May 6, 2009).

[16] *T.M.*, 60 ECAB ___ (Docket No. 08-975, issued February 6, 2009).

Appellant submitted reports of diagnostic testing. However, these reports do not address the employment injury of November 28, 2008 as a cause of the conditions at issue.[17]

The Office received several reports from Dr. Bottcher, a chiropractor. In a November 28, 2008 report, Dr. Bottcher diagnosed lumbar radiculopathy, lumbar subluxation and low back pain. However, the diagnosis was not based on an x-ray. Under section 8101(2), the term "physician" includes chiropractors only to the extent that their reimbursable services are limited to treatment consisting of manual manipulation of the spine to correct a subluxation as demonstrated by x-ray to exist.[18] In the absence of a diagnosis of subluxation based on x-rays, he is not a physician under the Act and his reports are of no probative medical value.[19]

The Office received physical therapy reports. Health care providers such as physical therapists are not physicians under the Act. Thus, their opinions on causal relationship do not constitute rationalized medical opinions and have no weight or probative value.[20]

For these reasons, appellant has not established that the November 28, 2008 employment incident caused or aggravated a specific injury.

CONCLUSION

The Board finds that appellant has not met her burden of proof in establishing that she sustained an injury in the performance of duty.

[17] *See supra* note 15.

[18] 5 U.S.C. § 8101(2); *D.S.*, 61 ECAB ___ (Docket No. 09-860, issued November 2, 2009).

[19] *See Michelle Salazar*, 54 ECAB 523 (2003).

[20] *Jane A. White*, 34 ECAB 515, 518 (1983).

ORDER

IT IS HEREBY ORDERED THAT the October 21, 2009 decision of the Office of Workers' Compensation Programs is affirmed, as modified.

Issued: December 22, 2010
Washington, DC

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

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

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