

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

V.S., Appellant

and

DEPARTMENT OF VETERANS AFFAIRS,
VETERANS ADMINISTRATION MEDICAL
CENTER, Ann Arbor, MI, Employer

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**Docket No. 09-1475
Issued: January 27, 2010**

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
DAVID S. GERSON, Judge
COLLEEN DUFFY KIKO, Judge

JURISDICTION

On May 26, 2009 appellant filed a timely appeal from the April 21, 2009 decision of the Office of Workers' Compensation Programs denying her claim for a June 10, 2008 work injury. 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 an injury in the performance of duty on June 10, 2008.

FACTUAL HISTORY

On July 31, 2008 appellant, then a 52-year-old practical nurse, filed a traumatic injury claim (Form CA-1) alleging that on June 10, 2008 she sustained injury to her back and legs while assisting a patient who had fallen onto one knee. She stated that she told the patient that he should stand on the count of three, but that he sat on the floor when she attempted to lift him.

Appellant stopped work on July 19, 2008. Tracie Sockow, appellant's supervisor, indicated on the same form that she could not say whether the claimed injury occurred in the performance of duty because appellant did not report the incident until July 31, 2008 after unrelated disciplinary action had been instituted against her.¹

The employing establishment noted that appellant had been notified on July 3, 2008 of a proposed removal action for failing to properly care for a patient and for being absent without leave. On August 29, 2008 appellant was advised that she would be terminated from the employing establishment. On August 28, 2008 the Office requested that she submit additional factual and medical evidence in support of her claim.

Appellant submitted an August 27, 2008 report of Dr. Alexandra Theisen, an attending Board-certified physical medicine and rehabilitation physician, stated that appellant was a poor historian who reported having slight low back pain for years which was aggravated if she did something strenuous. She stated that another physician told her that she had arthritis in her back secondary to carrying twins 20 years ago. Dr. Theisen indicated that appellant then stated that her current complaints were related to a work incident on June 10, 2008 when a gentleman had gone down to the ground and she had her arm under his armpit to assist him back up. Appellant told the patient that he should stand on the count of three, but on the count of three he purposely sat down. Dr. Theisen stated that upon asking appellant to characterize her back pain prior to June 10, 2008 she had a hard time describing it. She noted that appellant showed her the report of a July 28, 2008 magnetic resonance imaging (MRI) scan which indicated that the July 28, 2008 report stated that there was previous MRI scan testing on April 18, 2007 but that the radiologist did not comment as to whether there was a difference between the two test findings. Dr. Theisen concluded by stating that appellant had a history of anxiety and low back pain and that she presented with worsening back pain after trying to move a patient at work. She noted that she would not alter appellant's medications as she was not certain how honest appellant was about her medication intake. Appellant also submitted a July 16, 2008 work excuse slip from a nurse practitioner which requested that her time off work be extended until her appeal meeting had occurred.

In an October 1, 2008 decision, the Office denied appellant's claim that she sustained a work injury on June 10, 2008. It found that she established the occurrence of a work incident in that she helped to lift a patient on June 10, 2008, but determined that she did not submit sufficient medical evidence to establish that she sustained a specific condition due to that incident.

Appellant submitted various documents: including a December 4, 2006 report from Dr. Jayson Greenberg, an attending Board-certified otolaryngologist; prescription refill requests from 2006 to 2008; diagnostic testing from 2007; clinic notes dated between November 2006 and September 2008 (including those dated June 5, July 7, 16 and 31 and August 15, 2008) of

¹ On July 31, 2008 appellant also filed an occupational disease claim (Form CA-2) in which she alleged that she sustained depression and stress from harassment. This claim was denied under a separate claim file and is not the subject of the present appeal.

Dr. Stephen Arntz, an attending Board-certified family practitioner;² May 2, 2007 and July 23, 2008 reports from Dr. Harish Rawal, an attending Board-certified neurosurgeon; and an October 8, 2008 report from Dr. Theisen which mentioned the claimed June 10, 2008 injury. Appellant also submitted a December 5, 2008 statement in which she further described the June 10, 2008 incident.

Appellant requested a hearing before an Office hearing representative. At the February 18, 2009 hearing, she testified that she had another back injury at work in 2007 but that she did not report it. Appellant indicated that prior to 2007 she was taking medication for intermittent back pain. She testified that she did not immediately report her claimed June 10, 2008 injury because she thought that she would lose her job and she also claimed that she told Dr. Arntz and Dr. Rawal about her June 10, 2008 injury. Appellant asserted that she did not file the present claim in response to the discipline actions that the employing establishment was taking. She asserted that a coworker witnessed her June 10, 2008 injury and alleged that Ms. Sokoff tended to make allegations that were untrue.

In an April 21, 2009 decision, the Office hearing representative affirmed the Office's October 1, 2008 decision as modified to reflect that appellant's claim for a June 10, 2008 work injury was denied because she did not establish the occurrence of a work incident on June 10, 2008. The Office hearing representative found that inconsistencies in appellant's reporting of the incident cast doubt on the validity of her claim.

LEGAL PRECEDENT

An employee who claims benefits under the Federal Employee's Compensation Act³ has the burden of establishing the occurrence of an injury at the time, place and in the manner alleged, by a preponderance of the reliable, probative and substantial evidence.⁴ An injury does not have to be confirmed by eyewitnesses in order to establish the fact 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.⁵ An employee has not met 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.⁶ 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

² In his reports, Dr. Arntz mostly discussed appellant's feelings of depression and stress and an injury to her forearm. Appellant later indicated that she sustained a forearm injury on April 23, 2008 which she did not report to the employing establishment. Dr. Arntz made no mention of a June 10, 2008 injury. In the July 31, 2008 report, he provided the diagnosis of "chronic low back pain, radiculopathy."

³ 5 U.S.C. §§ 8101-8193.

⁴ *William Sircovitch*, 38 ECAB 756, 761 (1987); *John G. Schaberg*, 30 ECAB 389, 393 (1979).

⁵ *Charles B. Ward*, 38 ECAB 667, 670-71 (1987); *Joseph Albert Fournier, Jr.*, 35 ECAB 1175, 1179 (1984).

⁶ *Tia L. Love*, 40 ECAB 586, 590 (1989); *Merton J. Sills*, 39 ECAB 572, 575 (1988).

determining whether a *prima facie* case has been established.⁷ 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 or persuasive evidence.⁸

ANALYSIS

On July 31, 2008 appellant filed a traumatic injury claim alleging that on June 10, 2008 she sustained injury to her back and legs while assisting a patient that had fallen onto one knee. The Board finds that appellant has not established the occurrence of an employment incident on June 10, 2008 as alleged and therefore has not established that she sustained a work injury on that date. There are such inconsistencies in the record as to cast doubt on the validity of appellant's claim. Appellant's account is refuted by strong and persuasive evidence, including late reporting to the employing establishment and medical personnel.⁹

Appellant did not file her claim until more than a month and a half after the claimed June 10, 2008 injury, at which point she had been notified of the proposal to terminate her from employment for cause.¹⁰ Her course of action after the claimed injury was inconsistent. While appellant claimed that she was injured on June 10, 2008, she did not seek medical attention for the claimed injury until August 27, 2008 when she saw Dr. Theisen, an attending physical medicine and rehabilitation physician. Therefore, she did not seek medical care until two and a half months after the claimed injury. Appellant did not adequately explain this long delay. She saw Dr. Arntz, an attending family practitioner, on July 7, July 15, July 31, and August 15, 2008, and Dr. Rawal, an attending neurosurgeon, on July 23, 2008, but neither of these doctors mentioned that she injured her back on June 10, 2008.¹¹ Moreover, appellant continued to work regular duty from the date of the claimed injury until she stopped work over a month later on July 19, 2008. She testified that her claimed injury was witnessed, but no witness statement was received to verify appellant's account.

For these reasons, appellant has not established that she sustained a work injury on June 10, 2008 as alleged and the Office properly denied her claim.

⁷ *Samuel J. Chiarella*, 38 ECAB 363, 366 (1987); *Henry W.B. Stanford*, 36 ECAB 160, 165 (1984).

⁸ *Robert A. Gregory*, 40 ECAB 478, 483 (1989); *Thelma S. Buffington*, 34 ECAB 104, 109 (1982).

⁹ *See supra* notes 5 through 8.

¹⁰ Moreover, appellant filed the present claim simultaneously with a claim for alleged harassment against the employing establishment.

¹¹ Appellant alleged that she told both Dr. Arntz and Dr. Rawal about the claimed injury, but there is no evidence in the record to support this assertion. In a July 31, 2008 report, Dr. Arntz provided the diagnosis of "chronic low back pain, radiculopathy. However, he made no mention of a June 10, 2008 injury in any of his reports and the record reveals that appellant had degenerative disease of the back and experienced back pain for some time prior to June 10, 2008.

CONCLUSION

The Board finds that appellant did not meet her burden of proof to establish that she sustained an injury in the performance of duty on June 10, 2008.

ORDER

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

Issued: January 27, 2010
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board