United States Department of Labor
Employees' Compensation Appeals Board

B.H., Appellant	)	
and	)	**Docket No. 09-1230**
	)	**Issued: March 18, 2010**
U.S. POSTAL SERVICE, POST OFFICE, Lehigh Valley, PA, Employer	)	

Appearances:
Appellant, pro se
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 April 9, 2009 appellant filed a timely appeal from the February 25, 2009 decision of the Office of Workers' Compensation Programs which affirmed a July 3, 2008 decision that denied her 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 met her burden of proof to establish that she sustained a traumatic injury on April 20, 2008.

FACTUAL HISTORY

On April 20, 2008 appellant, then a 44-year-old casual clerk, filed a traumatic injury claim alleging that on April 19, 2008 she injured her low back as a result of moving a nutting truck away from the end of a flat sorter while in the performance of duty. She alleged that the machine was stuck and she had to push the "MTE (mail transport equipment)" to get it to run smoothly. Appellant stopped work on April 20, 2008. The employing establishment alleged that

she did not report any accident on "Saturday, April 21, [2008]" and worked all day without reporting anything to any supervisor, until "2100."[1]

An April 20, 2008 emergency room instruction sheet, issued at 10:59 p.m., noted that appellant should work modified duty.

Appellant also completed a second traumatic injury claim form on June 15, 2008, at the request of her supervisor as the date of injury was wrong. She listed the date of injury as April 18, 2008 and that her injury was due to a combination of moving a cart filled with tubs of mail and working really hard lifting heavy tubs and bending and working at too fast a pace. The Office also received a third copy of the claim form. The employing establishment noted that the date was changed.

In an April 20, 2008 emergency room report, Dr. Reynaldo Guerra, a family physician, noted that appellant came in with a chief complaint of back pain. He related that she hurt her back while lifting a heavy cart on April 20, 2008. On April 20, 2008 Dr. Kevin Weaver, a Board-certified family practitioner, noted that appellant reported an onset of pain on Friday. He diagnosed lumbar strain and possible lumbar radiculopathy. An April 30, 2008 magnetic resonance imaging (MRI) scan, read by Dr. Devang Gor, a Board-certified diagnostic radiologist, revealed a posterior disc bulge with a small central disc protrusion at L3-4, an incomplete annular tear involving the periphery of the small central disc protrusion and multilevel facet arthrosis.

In an April 25, 2008 letter, the employing establishment controverted the claim. In e-mail correspondence, appellant's supervisor noted that appellant indicated that she "just knew she did it here." She was unclear about when or where the accident actually happened. It noted that the person, appellant identified as a witness had, "stated [that] he was not working with her."

In an April 30, 2008 letter, appellant stated that her injury was caused by tasks that she performed at work. They included working at too fast a pace, repetitively lifting heavy tubs of mail and pushing heavy carts of mail. Appellant did not realize that she was "over-doing it." When she tried to explain what happened, her supervisor said that she must have done something. Appellant stated that she was "always lifting, moving, pushing heavy things, bending and that all of it contributed to my injury." She noted that she tried to move a heavy cart and felt a pull in her back. Appellant alleged that a coworker, Nicolai Berkovich, witnessed the event. She explained that Mr. Berkovich denied being present on April 19, 2008, therefore, the incident must have been on April 18, 2008. Appellant explained that she was not "thinking very well because of the pain." She noted that she was not sure if the cart incident caused her injury but she believed that it was due to repetitive lifting tubs, pushing heavy carts filled with mail and lifting heavy bags.

By letter dated May 22, 2008, the Office advised appellant of the factual and medical evidence needed to establish her claim.

[1] The Board notes that Saturday was April 19, 2008, not April 21, 2008.

In reports dated May 13, 20 and 27, 2008, Dr. Gene Levinstein, a Board-certified physiatrist, noted that appellant related that she sustained an injury at work on April 18, 2008. He provided appellant with an epidural steroid injection. Dr. Levinstein diagnosed residual low back pain, secondary to aggravation of lumbar spondylosis and facet degenerative joint disease (DJD).

On a June 5, 2008 Janice Guerriero, appellant's supervisor, noted that she interviewed appellant about the incident. Appellant was not sure when or where the injury occurred but noted that she was in terrible pain since Saturday. Ms. Guerriero questioned appellant as to why she worked a six-hour shift, running a machine in severe pain. Appellant responded that she had a "high pain tolerance, but it just got so bad I could n[o]t take anymore." Ms. Guerriero stated that appellant believed that she was injured on Saturday, because the next day "while she was working on her computer her legs were tingling and she felt numbness going down her legs." She completed the Form CA-1 for appellant and explained that a new form needed to be completed by appellant. Ms. Guerriero questioned appellant's witness, Mr. Berkovich, who indicated that he was not in the area on Saturday and did not see anything. She noted that appellant "started to back track saying she really doesn't know when or where she did it but she is sure that she did it at work."

In a statement dated June 19, 2008, appellant indicated that she was terminated for failing to report her accident in a timely manner, despite the fact that she reported her claim right away. She alleged that she was injured because she had to work at "too fast a pace while lifting and bending." Appellant stated that the incident involving the cart contributed to her condition.

In a July 3, 3008 decision, the Office denied appellant's claim on the grounds that she did not establish an injury, as alleged. It found that the evidence did not establish that the incident occurred at the time, place or manner alleged. The Office noted that appellant did not provide sufficient evidence to substantiate a traumatic injury on either April 18 or 19, 2008. It noted that she was unsure as to how the alleged injury occurred or the specific date or time.

On July 27, 2008 appellant requested a hearing that was held on December 4, 2008. At the hearing, appellant's husband indicated that the injury occurred on a Friday night, but that it was at the end of her shift, which overlapped into Saturday, so it may have been Saturday night. Appellant addressed the inconsistencies about the date of injury. She noted that the accident occurred near the end of her shift, but she was not sure whether it occurred before midnight on April 18, 2008 or after midnight on April 19, 2008. Appellant completed her shift, went home, took pain medication and went to bed. She worked the following day for a few hours but could not remember if she only worked a few hours because her back hurt or because there was not much work to do. On April 20, 2008 she informed her supervisor that she had injured herself.

Appellant provided a copy of her work calendar and noted that she was injured on Sunday, that she worked a partial shift and then her husband took her to the hospital. The calendar contained an annotation that she worked from 5:00 p.m. to 1:00 a.m. on April 19, 2008 and she was assigned to work 3:00 p.m. to 9:30 p.m. on April 20, 2008.[2]

[2] It actually indicated a.m.; however, this appears to be a typographical error.

By decision dated February 25, 2009, the Office hearing representative affirmed the July 3, 2008 decision.[3]

LEGAL PRECEDENT

An employee seeking benefits under the Federal Employees' Compensation Act[4] 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[5] and that an injury was sustained in the performance of duty.[6] These are the essential elements of each compensation claim, regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.[7]

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 the time, place and in the manner alleged.[8] In some traumatic injury cases, this component can be established by an employee's uncontroverted statement on the CA-1 form.[9] 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.[10]

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.[11] 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.[12] 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

[3] The hearing representative noted that appellant could file an occupational disease claim if she believed that her condition was caused by her duties over the course of several shifts at work in April 2008.

[4] 5 U.S.C. §§ 8101-8193.

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

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

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

[8] *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).

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

[10] *See id.* For a definition of the term "injury," *see* 20 C.F.R. § 10.5(ee).

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

[12] *Id*. at 255, 256.

medical treatment may, if otherwise unexplained, cast sufficient doubt on an employee's statements in determining whether a *prima facie* case has been established.[13] 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,[14] 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.[15]

ANALYSIS

Appellant alleged that she hurt her back while moving a cart and moving heavy tubs of mail while at work. There is no dispute that her job involves moving carts and tubs of mail. The question is whether the incident occurred on April 18, 19 or 20, 2008.

Appellant's initial claim form, completed by her supervisor, listed April 19, 2008 as the date of injury. The second claim form, completed by appellant, listed April 18, 2008 as the date of injury. During the hearing, appellant's husband explained that the injury occurred on a Friday night, but that it was at the end of her shift, which overlapped into Saturday, so it may have been Saturday night. Appellant also discussed the inconsistencies about the date of injury. She noted that the accident occurred near the end of her shift, but she was not sure whether it occurred before midnight on April 18, 2008 or after midnight on April 19, 2008. Furthermore, appellant noted that she completed her shift, went home, took pain medication and went to bed. She also indicated that she worked the following day for a few hours, but she could not remember if she only worked a few hours because her back hurt or because there was not much work to do that day. Appellant indicated that, on April 20, 2008 she informed her supervisor that she had injured herself. She also provided the Office with a copy of her work calendar.

The Board notes that, on April 18, 19 and 20, 2008 the calendar reflects that appellant was slated to work shifts that spanned the course of two days as they were night or late afternoon shifts, which ran into the next day. Appellant explained the discrepancy in the dates, noting that she was not "thinking very well because of the pain" and also because her supervisor chastised her for not reporting it right away. She indicated that she was not sure if the cart incident caused her injury but she believed that it was caused by working too hard and repetitively lifting tubs, pushing heavy carts filled with mail and lifting heavy bags. Appellant also noted that she worked a partial shift on Sunday and then her husband took her to the hospital. The Board also notes that the contemporaneous April 20, 2008 medical records support that she related that she had pain on Friday, which would be April 18, 2008. The Board also notes that an April 20, 2008 report indicates that she hurt her back lifting a heavy cart on April 20, 2008. However, this report appears to be inaccurate, as the record clearly shows that appellant reported the injury on April 20, 2008 and she initially noted that the date was April 19, 2008. While the employing establishment controverted the claim and alleged that she worked all day and did not report an accident until April 21, 2008 this is incorrect. The record clearly reflects that the claim was

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

[14] *Id.*

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

filled out on April 20, 2008 and appellant indicated that the injury occurred on April 19, 2008. Appellant also explained that she initially worked with pain before stopping work and reporting the claimed injury. She also noted that she felt the pain while "she was working on her computer her legs were tingling and she felt numbness going down her legs." Appellant alleged that a coworker, Mr. Berkovich, witnessed the event but the employing establishment explained that he denied being present on April 19, 2008 or seeing anything. However, she explained that her claimed injury must have occurred on April 18, 2008 and that she did not overtly show her pain. Furthermore, there is no evidence to indicate that Mr. Berkovich was not present on Friday, April 18, 2008. The Board finds that, the first component of fact of injury, the claimed incident moving a cart and moving heavy tubs of mail, occurred as alleged on April 18, 2008.

The medical evidence is insufficient to establish that the employment incident caused an injury. The medical reports of record do not establish that moving a cart and moving heavy tubs of mail caused a personal injury on April 18, 2008. The medical evidence contains no firm diagnosis, no rationale or any explanation of the mechanism of injury regarding a specific employment incident on April 20, 2008.[16]

Appellant provided reports from Drs. Guerra, Weaver and Levinstein. However, they do not provide a specific opinion addressing whether any diagnosed condition was caused or aggravated by the incident on April 18, 2008. Dr. Guerra noted that appellant had a chief complaint of back pain and hurt her back after lifting a heavy cart. However, other than a diagnosis of pain, Dr. Guerra did not diagnose a specific condition or specifically address causal relationship by stating how a specific activity at work on April 18, 2008, caused or aggravated an injury. Further, the Board has held that a diagnosis of "pain" does not constitute the basis for the payment of compensation.[17]

Dr. Weaver diagnosed lumbar strain and possible lumbar radiculopathy. Additionally, Dr. Levinstein also diagnosed residual low back pain and noted that it was secondary to aggravation of lumbar spondylosis and facet DJD. However, the Board notes that they did not offer any opinion on causal relationship.[18] Likewise, a diagnostic report from Dr. Gor merely reported findings but did not provide an opinion regarding the cause of the reported condition.

Because the medical reports submitted by appellant do not address how the April 18, 2008 incident caused or aggravated a low back injury, these reports are of limited probative value and are insufficient to establish that the April 18, 2008 employment incident caused or aggravated a specific injury.

On appeal, appellant generally asserts that her injury occurred on the job. As noted above, the first component of fact of injury has been established. However, the medical reports

[16] *See George Randolph Taylor*, 6 ECAB 986, 988 (1954) (where the Board found that a medical opinion not fortified by medical rationale is of little probative value).

[17] *John L. Clark*, 32 ECAB 1618 (1981).

[18] *Linda I. Sprague*, 48 ECAB 386 (1997) (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).

are insufficient to establish that the April 18, 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 a traumatic injury in the performance of duty.

ORDER

IT IS HEREBY ORDERED THAT the February 25, 2009 decision of the Office of Workers' Compensation Programs is affirmed, as modified.

Issued: March 18, 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