United States Department of Labor
Employees' Compensation Appeals Board

S.P., Appellant	)	
and	)	**Docket No. 10-431**
	)	**Issued: November 24, 2010**
DEPARTMENT OF LABOR, ENERGY EMPLOYEES' OCCUPATIONAL ILLNESS COMPENSATION PROGRAM, Chicago, IL, 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
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On December 7, 2009 appellant filed a timely appeal from a November 4, 2009 merit decision of the Office of Workers' Compensation Programs. 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 established that she sustained an injury in the performance of duty on July 1, 2008.

FACTUAL HISTORY

On February 2, 2009 appellant, a 40-year-old former workers' compensation claims examiner,[1] filed a traumatic injury claim (Form CA-1) in which she alleged that, during a

[1] The record reflects that appellant resigned on November 7, 2008.

training session on July 1, 2008, she fell down some stairs and sustained a right patella dislocation. She alleged that several coworkers witnessed her fall. Appellant stated that Susan Courtney, a coworker, took her to the dispensary where she received treatment. She also stated that Tom Pavelka, a coworker, "was aware I injured myself."

Appellant submitted notes documenting treatment she received at a health unit clinic on July 1, 2008, signed by a registered nurse. She told the nurse she used to work for the Ohio Bureau of Workers' Compensation (BWC) and while employed by the BWC she fractured the distal end of her right femur. Appellant stated that she previously had a problem with her left knee cap which was surgically corrected. She stated that she was having a similar problem with her right knee. Appellant told the nurse that her right kneecap was "displaced" after she fell down some stairs that day at work. The nurse recommended appellant see an "orthopedic doctor ASAP."

On February 12, 2009 Angela L. Graham, a coworker, reported that appellant told her about her previous employment experience as a special agent with the State of Ohio and that she sustained an employment-related knee injury while arresting a person. She stated that she did not see appellant fall on July 1, 2008, rather, appellant told her she fell.

On February 12, 2009 Ms. Courtney, a coworker, stated that in "early summer 2008" appellant came to her cubical "upset because she fell down a flight of stairs and injured her knee." She reported that she knew appellant had a previous knee injury. Ms. Courtney stated that she took appellant to the dispensary where a nurse wrapped her knee with a bandage.

On February 12, 2009 Hari R. Ender, a coworker, stated that she did not remember much about appellant's alleged July 1, 2008 injury. She recalled that appellant stated "she hurt her knee" and recalled that "maybe" appellant had an "old workers' comp[ensation] case." Ms. Ender reported that she was not present when appellant's injury occurred. She stated that appellant went to the clinic for most of the training session and was limping when she returned. Ms. Ender also stated that she did not recall appellant explaining how her injury occurred.

In an undated note, appellant argued that the nurse's treatment notes established that she sustained an injury after falling down some stairs because the nurse's notes "clearly indicate I needed to see an orthopedic surgeon ASAP." She explained that her physician, Dr. Jeffrey Shall, a Board-certified orthopedic surgeon, "relocating and I was not able to find him until October." Appellant stated that she was forced to resign because her right knee pain affected her job performance.

In an undated note, Cathy Buttolph, who is an assistant district director, stated that, on July 1, 2008, she was "advised" that appellant "twisted her right knee" during a training session. She stated that appellant told her that her knee "popped" while going down the stairs and was now "hurting." Ms. Buttolph advised appellant to file a federal workers' compensation claim but appellant was "insistent" that she did not want to. Appellant advised Ms. Buttolph that her knee injury was a "State Workers' Comp claim" and, further, that she did not want to start a new job with a new injury. She told Ms. Buttolph that her state-based claim had been "approved" and she was to undergo knee surgery in December 2008. Ms. Buttolph advised appellant that filing a claim would not affect her employment but appellant "was adamant that she did not want to file

a claim." She reported that "a week or two after July 1, 2008" appellant reported that her knee condition was back to where it was before she "twisted it."

Appellant submitted notes dated December 8 and 30, 2008, in which Dr. Shall, a Board-certified orthopedic surgeon, diagnosed patellar dislocation and described the arthroscopic knee surgery appellant underwent to treat her knee. Dr. Shall noted that appellant's patella was dislocating laterally, not medially and recommended a medial patellofemoral ligament reconstruction.

On February 9, 2009 Dr. Shall diagnosed dislocated right patella and described the surgical procedure appellant underwent to reconstruct her right patellofemoral ligament. In a subsequent note dated February 26, 2009, he reviewed appellant's course of treatment. Dr. Shall also opined that appellant's condition was "directly" related to her claim.

On March 6, 2009 Ms. Bujakowski controverted appellant's claim. She asserted that the statements contained in appellant's CA-1 claim form were inaccurate, "highly exaggerated, if not misleading," and that the alleged employment incident did not occur. Ms. Bujakowski noted that, prior to being hired by the employing establishment, appellant had a workers' compensation claim pending with the State of Ohio's BWC for a right knee injury she sustained while she was an investigator. She stated that appellant told her that she settled her claim with the State of Ohio for approximately $75,000.00, which, appellant concluded, would cover the medical costs of the required knee surgery. Ms. Bujakowski reported that, on July 1, 2008, she was on scheduled leave.

Ms. Bujakowski stated that she interviewed 10 employees and none of them witnessed the alleged incident. She also noted that she advised appellant to file a CA-1 claim form and that doing so would not adversely impact appellant's job. Ms. Bujakowski reported that, from July 3, 2008, the date she returned from her vacation, until the date appellant resigned, appellant never complained of any knee problems associated with the alleged July 1, 2008 incident. She disputed appellant's allegation that she discouraged appellant from filing a claim or that she forced appellant to resign. Ms. Bujakowski reported that, following a counseling session, appellant resigned for personal reasons.

By decision dated March 16, 2009, the Office accepted that the July 1, 2008 incident occurred as alleged but denied the claim because the evidence of record did not demonstrate that the accepted employment incident caused a medically-diagnosed injury.

On March 30, 2009 appellant requested an oral hearing, which the Office conducted on September 17, 2009. She and her attorney were present and she offered testimony describing the July 1, 2008 incident and her history of injury. Appellant testified that when she began working for the employing establishment her knee condition was medically stable. She testified that the July 1, 2008 training session was on the ground floor of the employing establishment's building. During a break, appellant rode the elevator to the ninth floor to check her e-mail, after which she rode the elevator back to the street level, walked down some stairs, and this is when the alleged incident occurred. She explained that the elevator stops at the street level and to get to the ground level one has to walk down a set of stairs. Appellant described the incident as a "twisting

motion fall" during which she "fell" down one step, grabbed a railing and prevented herself from falling down the remaining stairs.

Appellant testified that she had a state workers' compensation claim for a right knee injury, with a December 1, 2005 date of injury, which was surgically repaired on March 6, 2006. She also alleged that she did not file her claim until after she resigned because a coworker told her she would "probably be fired" if she did so.

Appellant testified that she underwent another knee surgery on December 8, 2008, following which, her physician told her that she had cartilage damage that required additional surgery to repair a different ligament. She explained that she filed her claim after learning she required this additional right knee surgery. Appellant had this condition surgically repaired on February 23, 2009.

Appellant explained that she subsequently fell while riding in a service elevator with Terri Hlad, a coworker. She reasoned that this incident aggravated her "already hurting" right knee.

In reports dated May 7 and July 2, 2009, Dr. Shall reviewed appellant's history of injury and course of treatment. He also stated that it "appear[ed] as though" appellant's July 1, 2008 fall "aggravated a previously weak knee causing patellar subluxation and dislocation, then necessitating this final surgery and postoperative rehabilitation."

By decision dated November 4, 2009, the Office modified its March 16, 2009 decision, finding that the evidence of record did not demonstrate the alleged employment incident occurred as alleged.

LEGAL PRECEDENT

An employee who claims benefits under the Federal Employees' Compensation Act[2] 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.[3] 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.[4] An employee has not met his or her burden of proof in 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.[5] 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

[2] 5 U.S.C. §§ 8101-8193.

[3] *D.B.*, 58 ECAB 464 (2007); *George W. Glavis*, 5 ECAB 363, 365 (1953).

[4] *M.H.*, 59 ECAB 461 (2008); *George W. Glavis, id.*

[5] *S.P.*, 59 ECAB 184 (2007); *Gus Mavroudis*, 9 ECAB 31, 33 (1956).

statements in determining whether a *prima facie* case has been established.[6] 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.[7]

Causal relationship is a medical issue and the medical evidence generally required to establish causal relationship is rationalized medical opinion evidence. Rationalized medical opinion evidence is medical evidence which includes a physician's rationalized opinion on whether there is a causal relationship between the employee's diagnosed condition and the compensable employment factors. The opinion of the physician must be based on a complete factual and medical background of the employee, must be one of reasonable medical certainty, and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the employee.[8]

ANALYSIS

Although the Office initially found that appellant's fall on July 1, 2008 occurred as alleged, the Office hearing representative modified this decision and found that appellant had not established that she fell down stairs at the employing establishment on July 1, 2008. The Board finds that appellant has established that she slipped down a stair, grabbed a railing and twisted her right knee on July 1, 2008 in the performance of duty.

The facts of the case establish that appellant had sustained a previous injury to her right knee while employed by a different employer. The fact that appellant had a previous injury, however does not rebut a finding that she also sustained an incident at work on July 1, 2008. Appellant has alleged and has testified that on July 1, 2008 she was walking down a flight of stairs when her right knee gave out, she slipped from the 5th to the 4th stair and twisted her knee as a result. The contemporaneous evidence establishes that a coworker accompanied appellant to the health unit immediately following this incident, and that appellant's knee was wrapped at the health unit, after she described her previous injury, as well as the new incident to the employing establishment nurse. There is no evidence contradicting appellant's description of the incident. The only point of controversion concerns appellant's use of the word "fell," when in fact "slipped" is the proper verb for description of the incident. The Board finds that appellant has established that she slipped down one step on July 1, 2008 in the performance of duty, grabbed a railing and stopped herself from falling down the remaining stairs, twisting her right knee in the process. The Board also finds, however, that appellant has not established that she sustained an injury as a result of this incident.

The only medical evidence of record which attempts to discuss the cause of appellant's current right knee condition is the reports from Dr. Shall. The evidence of record establishes that Dr. Shall performed arthroscopy and patellar chondroplasty for patella dislocation on December 8, 2008 and another procedure in February 2009. Dr. Shall's reports did not mention

[6] *M.H., supra* note 4; *John D. Shreve*, 6 ECAB 718, 719 (1954).

[7] *S.P., supra* note 5; *Wanda F. Davenport*, 32 ECAB 552, 556 (1981).

[8] *I.J.*, 59 ECAB 408 (2008); *Victor J. Woodhams*, 41 ECAB 345, 352 (1989).

the alleged July 1, 2008 incident until May 7, 2009; eleven (11) months after the alleged incident occurred. In this report, he stated that it "appear[ed] as though" appellant's July 1, 2008 fall "aggravated a previously weak knee causing patellar subluxation and dislocation, then necessitating this final surgery and postoperative rehabilitation." Dr. Shall, however, never reported a history which actually described the "July 1, 2008 fall" on the steps. Furthermore, use of the phrase "appear[ed] as though" indicates that his opinion is speculative and thus has little probative value.[9] Dr. Shall also offered no probative rationalized medical explanation as to how appellant's slip and knee twist on the stairs caused or aggravated her right knee condition.

CONCLUSION

The Board finds appellant has not established that she sustained an injury in the performance of duty on July 1, 2008.

ORDER

IT IS HEREBY ORDERED THAT the November 4, 2009 decision of the Office of Workers' Compensation Programs is affirmed as modified.

Issued: November 24, 2010
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

[9] Medical opinions which are speculative or equivocal in character have little probative value. *See Linda I. Sprague*, 48 ECAB 386 (1997).