

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

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**L.M., Appellant**  
  
**and**  
  
**DEPARTMENT OF VETERANS AFFAIRS,  
VETERANS ADMINISTRATION MEDICAL  
CENTER, Bath, NY , Employer**  
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**Docket No. 10-599**  
**Issued: October 12, 2010**

*Appearances:*  
*Appellant, pro se*  
*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 January 5, 2010 appellant filed a timely appeal of a September 8, 2009 Office of Workers' Compensation Programs' merit decision denying her claim for an employment injury. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to consider the merits of the case.

**ISSUE**

The issue is whether appellant met her burden of proof to establish that she sustained in an injury in the performance of duty on October 4, 2008, as alleged.

**FACTUAL HISTORY**

On October 17, 2008 appellant, then a 63-year-old nursing assistant, filed a traumatic injury claim alleging on October 4, 2008 that he injured his lower back and left leg while lifting a patient from the floor. He and a coworker were lifting a patient and appellant was kneeling on the bed and lifted the patient under the left arm. Appellant's supervisor stated that investigation of the incident did not support appellant's statement as he was not assigned to this resident.

Appellant continued to work four hours of overtime and did not complain of pain. The Office requested additional factual and medical evidence by letter dated October 21, 2009. It allowed 30 days for a response.

On October 24, 2008 the employing establishment responded and stated that the witness contradicted appellant's description of events on October 4, 2008, but that appellant called in sick on October 5, 2008 and sought medical treatment. In a statement dated October 22, 2008, Sherri Ballam, a nursing assistant, stated that a patient crawled out of his bed on October 4, 2008 and was standing by the edge of his bed. She was helping the patient to return to his bed and stated, "[Appellant] assisted me by grabbing the back of the resident's pajamas and guiding him to the center of the bed. She was on the opposite side of the bed from the resident and had to just reach over to gently guide the resident as I lowered him to a sitting position on the bed." Ms. Ballam stated that appellant did not have to lift, pull or exercise any physical exertion during this incident and that he did not mention any pain during or after the procedure.

Dr. Alipio P. Encarnacion, a Board-certified internist, examined appellant on October 6 and 8, 2008 and noted that appellant reported pain in his left buttock and down his left leg for three days. Appellant had lifted a patient and developed left leg pains. Dr. Encarnacion stated that appellant was moaning and groaning on ambulation. He noted that, after appellant was prescribed pain medication, he stopped making noises and was able to put on his socks with no difficulty. Dr. Encarnacion diagnosed left leg pains probably secondary to sciatica or muscle strains and prescribed hydrocone as well as no work until October 13, 2008. On October 16, 2008 he advised that appellant should not work for an additional week. On October 23, 2008 Dr. Encarnacion noted that appellant was using a wheelchair due to leg pain, but could stand and walk around the wheelchair with no limping or difficulty. He noted that appellant reported low back pain with inconsistent limping on ambulation. Dr. Encarnacion stated, "Patient was informed that I am rather confused with his physical findings...."

Donna W. Wathews, a nurse manager, completed a statement on October 6, 2008 and noted that appellant came into work on that date to complete a computer course. She stated that she could see that appellant was in pain when he moved. Appellant did not state how he was injured or whether it was work related.

Appellant stated that he did not immediately feel pain on October 4, 2008, but later in the morning reported to the charge nurse that he was experiencing pain. In a statement dated October 12, 2008, he described the employment incident of October 4, 2008 noting that he helped Ms. Ballam lift a patient from the floor. Appellant stated, "I put my left leg on the bed and my right leg is on the floor. Ms. Shreei got his right arm to lift him up on to the bed. I got his left arm to lift him up on to the bed. We had to stop and turn our bodies in order to get him in to bed.... I said, 'Outch' as my leg twisted in the bed." (sic) He stated that he reported to Matt Messecar and Janie Harrington that he was not feeling well. Appellant denied working overtime and stated that his shift was 12 hours. He stated that after he went home he took pain medication for two days before seeking treatment on October 6, 2008.

In a decision dated November 21, 2008, the Office denied appellant's claim on the grounds that an injury within the meaning of the Federal Employees' Compensation Act was not demonstrated and that the factual evidence was insufficient to establish that an incident occurred

on the date, time and in the manner alleged. The Office explained that the inconsistencies in the factual presentation cast serious doubt as to the validity of the occurrence of the incident.

Appellant requested reconsideration on June 4, 2008 and submitted a narrative statement dated June 1, 2009. He repeated his previous statement of October 12, 2008 noting that he had a little discomfort from the twist, “but I am a Marine and we do not let a little ache and pain get to us and keep us from working.” In a statement dated August 6, 2009, appellant disputed the employing establishment’s statement that he was not assigned to the same area as Ms. Ballam. He also accused Ms. Ballam of lying and stated that she was a large person who could not have aided the patient alone. Appellant stated that Ms. Ballam told him not to place his knee on the bed, and that they should use a lift, but the room was too small.

In a report dated October 16, 2008, Dr. Encarnacion, noted appellant’s history of injury on October 4, 2008 as described by appellant on October 12, 2008, but stated that appellant felt strain in his back during the lift. He diagnosed acute lumbar strain with left lower extremity pain and paresthesias. Dr. Encarnacion continued to support appellant’s disability for work on November 25, 2008.

Dr. Karen E. Mead, a Board-certified internist, on October 30, 2008 noted appellant’s history of injury as helping a nurse lift a patient. She reported that appellant “apparently knelt on the bed, lifting and twisted simultaneously experiencing severe back pain radiating down the left leg.” Dr. Mead diagnosed acute sciatica and noted that the usual duration of an exacerbation of sciatica is up to 90 days. A computerized tomography (CT) scan dated October 30, 2008 found rheumatoid arthritis, multilevel disc bulges, severe discogenic disease without spondylosis. Dr. Mead examined appellant on November 6, 2008 and again diagnosed acute sciatica. She found that appellant’s left ankle jerk was diminished, that appellant had tenderness over the left sciatic notch and that straight leg raising was equivocal. Dr. Mead reviewed appellant’s diagnostic testing which demonstrated L5-S1 diffuse disc bulge on the left and significant facet disease on November 24, 2008.

By decision dated September 8, 2009, the Office reviewed the merits of appellant’s claim and declined to modify that the November 21, 2008 decision denied modification.

### **LEGAL PRECEDENT**

The Office defines a traumatic injury 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. Such condition must be caused by external force, including stress or strain which is identifiable as to time and place of occurrence and member or function of the body affected.”<sup>1</sup> 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 actually experienced the employment

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<sup>1</sup> 20 C.F.R. § 10.5(ee).

incident which is alleged to have occurred.<sup>2</sup> The second component is whether the employment incident caused a personal injury and generally can be established only by medical evidence.

With respect to the first component of fact of injury, the employee 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. 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 subsequent course of action. An employee has not met his 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. 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. 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.<sup>3</sup>

### ANALYSIS

The Office found that appellant had not submitted sufficient factual evidence to establish that his alleged employment incident on October 4, 2008 occurred as alleged. Appellant submitted several factual statements asserting that he experienced either left leg or back pain lifting a patient with his coworker, Ms. Ballam. However, Ms. Ballam's description of the events of October 4, 2008 did not correlate with appellant's. She stated that appellant helped her to ease a standing patient on to his bed by guiding the patient with his pajama bottoms at the waist. Appellant alleged that he helped Ms. Ballam to lift a patient who had fallen to the floor by placing his left knee onto the patient's bed and lifting the patient by his left arm while Ms. Ballam lifted the patient by his right arm. Appellant stated that he had to twist his body and experienced a tinge of pain verbalizing "outch." (sic) Ms. Ballam stated that appellant did not mention any pain during or after the procedure and did not have to lift, pull or exercise any physical exertion during this incident.

Appellant sought medical treatment two days after the October 4, 2008 employment incident and variously described experiencing pain in either his left leg or in his back to his physicians. The nature of the pain described by appellant also varied among physicians as he reported slight pain or extreme pain in his back when describing the October 4, 2008 employment incident.

The Board finds that appellant has not submitted the necessary consistent factual evidence in describing his employment incident. Due to the varying descriptions offered by appellant and the disagreement in events between appellant and the eyewitness, the Board finds

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<sup>2</sup> *Elaine Pendleton*, 40 ECAB 1143 (1989).

<sup>3</sup> *D.B.*, 58 ECAB 464, 466-67 (2007).

that there are such inconsistencies in the evidence as to cast serious doubt upon the validity of the claim.

**CONCLUSION**

The Board finds that appellant has not submitted the necessary factual evidence to establish that the employment incident occurred in the manner alleged.

**ORDER**

**IT IS HEREBY ORDERED THAT** the September 8, 2009 decision of Office of Workers' Compensation Programs is affirmed.

Issued: October 12, 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