

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

T.B., Appellant

and

**DEPARTMENT OF VETERANS AFFAIRS,
DURHAM MEDICAL CENTER, Durham, NC,
Employer**

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**Docket No. 13-1823
Issued: March 20, 2014**

Appearances:

Daniel F. Read, Esq., for the appellant
Ashkea Herron McAllister, Esq., for the Director

Oral Argument December 12, 2013

DECISION AND ORDER

Before:

RICHARD J. DASCHBACH, Chief Judge
PATRICIA HOWARD FITZGERALD, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On July 30, 2013 appellant, through her representative, filed a timely appeal from the April 16, 2013 merit decision of the Office of Workers' Compensation Programs (OWCP), which denied her injury claim. Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 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 sustained a traumatic injury in the performance of duty on August 10, 2010, as alleged.

FACTUAL HISTORY

On or about August 11, 2010 appellant, a 46-year-old registered nurse, filed a traumatic injury claim alleging that she injured her left leg and shoulder, right hip and head as a result of a fall that occurred on August 10, 2010.

¹ 5 U.S.C. § 8101 *et seq.*

Jacqueline Rogers, a secretary at the occupational health office, described what happened:

“On August 10, 2010 [appellant] arrived at [o]ccupational [h]ealth office at approximately 12:45 pm. She was crying and very upset. Steve and I was in my office at the time we ask[ed] her to come in as she approached my office she stopped right at the wall in front of my desk. As [appellant] was standing there crying we asked her what was wrong and she mumbled something. We told her we could n[o]t understand her and she [stated] that they was messing with her, (we did n[o]t know who they was). [Appellant] was still crying hit her chest and leaning on the wall. I ask[ed] her if her chest was hurting and she shook her head yes. Steve went to get our [d]irector of [o]ccupational [h]ealth which is Robert Osman. As Steve was going to get Mr. Osman, [appellant] was suddenly falling forward so I grabbed her to keep her from falling forward so she would n[o]t hit her face on the front of my desk. I eased her down to the floor. Once Mr. Osman approached my office, [appellant’s] body was blocking the door and he asked Steve to get a wheel chair. We could not get the wheel chair in until we got her up and move[d] from the door. [Appellant] then started throwing up and pointing at her left leg. I ask[ed] her was that hurting she shook her head yes. Mr. Osman asked [appellant] a couple of questions she still would not answer him just kept hitting at her chest and crying. So Mr. Osman called the ER Mental Health doctor over and he ask[ed] her a couple of questions and she still was mumbling and crying. I help assist the ER Mental Health doctor to get her off the floor and into the wheel chair. I stayed by her side until the ER doctor start[ed] hooking her up to the monitors.”

Stephen Nix, the nurse to whom Ms. Rogers referred, stated:

“On August 10, 2010 at approximately 12:45 I was in Room F1177, Ms. Rogers’ office, when there was a knock on the door. When I opened the door, [appellant] was standing in the hall sobbing and rocking back and forth as she was hitting her chest with her right hand. I asked her to step inside the office for privacy and asked her what was wrong. She continued to sob and [stated], ‘They [a]re messing with me.’

“I asked [appellant] to sit down in the chair beside Ms. Rogers’ desk, but she shook her head no and continued to sob and hit her chest. She had her lower body leaning against the wall to the left as you walk into the office as she rocked her upper body back and forth. Since [appellant] was pounding her chest I asked her if she was having chest pains, as she had similar reactions in the past and had chest pains then. She shook her head yes and I told her that I needed to get her to the ER and she shook her head no as she continued to sob and rock back and forth. Again, I asked [appellant] to sit down and she refused. I then told Ms. Rogers that I was going to get Bob Osman, Physician Assistant who is the Director of Occupational Health.

“When Mr. Osman arrived he advised me to go get a wheel chair and advised Ms. Rogers that he was going to get the emergency mental health team to send someone over. Upon returning with the wheel chair, [appellant] was sitting on the floor with her legs under Ms. Rogers’ desk and appeared to be trying to throw up into the waste can between her legs. She was still sobbing. Ms. Rogers was at her side trying to comfort her.”

Appellant explained that before she went to Ms. Rogers’ office, she was in a meeting with the associate chief nurse for medicine/nursing education and the union president. She was threatened with suspension for seven calendar days for failing to complete competencies and with being reported to the state licensing boards for patient safety concerns. Appellant stated that she had completed all of the competencies she could within her restrictions, and she had performed all of the nursing duties within her restrictions. Further, she had not had any incident in which she jeopardized the safety of patients.² Appellant described what happened next:

“I became very upset to the point that when asked if I had any questions I could only raise my hand. I called my husband as I was experiencing shortness of breath (SOB) and chest pains (CP). I also told my charge nurse that I needed to go to employee health because I was having SOB and CP. I arrived at the employee health office very distraught and crying, informing Ms. Rogers and Mr. Nix that I was tired of those people bothering me.... I became dizzy, and I moved trying to grab the desk and fell to the floor. Ms. Rogers who was sitting at her desk got up and tried to help me however did not get there in time. I heard Ms. Rogers say that I needed to try to move my body from blocking the door. I was able to sit up and told Ms. Rogers that I had difficulty moving my left leg. I started vomiting brown emesis. I was given a trash can for emesis. Mr. Osmond gave me a wash cloth. I heard Mr. Osmond say he was going to get help before moving me because I hit my head.”

On September 24, 2010 OWCP denied appellant’s injury claim. It found that the evidence failed to establish that the August 10, 2012 events occurred as alleged. There were signed statements advising that she did not fall but, in fact, was assisted to the floor.

In response to appellant’s account of events, Ms. Rogers explained that appellant did not talk but gestured with her hands, which caused Mr. Nix to ask if she had chest pain. Appellant then nodded her head yes. The only words she spoke were something like “those people were bothering me,” and she stated this before she came into the employee health office.

Ms. Rogers added that, when Mr. Nix left the office, she was already in front of her desk in front of appellant. “[Appellant] did not fall to the floor but started to lean forward at which time I placed my hand on her upper chest and my other hand around her shoulders and I [stated] ‘come on [appellant] go down to the floor with me.’” Her back was against the wall, and she bent her knees and slid down to a sitting position, then extending her legs to the front. “At no time did I state that [appellant] had fall and hit her head.” Further, at no time did appellant state to her that she was having difficulty moving her leg.

² Appellant indicated that she had filed an emotional condition claim concerning this matter.

Mr. Nix confirmed that Ms. Rogers did not state that appellant had fallen or struck her head.

Mr. Osman also confirmed that Ms. Rogers never told him, or Mr. Nix while in his presence, that appellant had fallen and hit her head. He stated that appellant was already sitting up when he arrived, and she did not report having difficulty moving her left leg. “To the contrary, we were unable to elicit any coherent response from [appellant] at all, and she was moving her left leg freely, at times repeatedly flexing and extending her leg, in essence bumping it on the floor.” Mr. Osman added that appellant did not vomit brown emesis. She did appear to be intentionally gagging, but she produced only saliva. Mr. Osman denied saying that he was going to get help before moving her since she had hit her head.

On April 18, 2011 OWCP denied modification of its previous decision. It found that there were too many direct witness statements that did not agree with her version of events, either that she actually fell or that she struck her head on a desk.

On April 16, 2013 OWCP again denied modification of its prior decisions. It found that evidence did not establish exactly what happened in the employee health office, nor did it clarify the discrepancies that were outlined in the prior decisions. Appellant’s representative conceded that appellant could not remember exactly how she fell. A witness supported that she did not fall to the floor or strike her head on the desk. The initial medical reports were discrepant about what had occurred and whether she had sustained any injury.

Appellant’s representative argues on appeal that, although appellant cannot remember exactly how she fell, the circumstantial evidence together with medical opinion and clinical findings support her claim.³

LEGAL PRECEDENT

FECA provides compensation for the disability of an employee resulting from personal injury sustained while in the performance of duty.⁴ An employee seeking benefits under FECA has the burden of proof to establish the essential elements of his or her claim. When an employee claims that he or she sustained an injury in the performance of duty, he or she must submit sufficient evidence to establish that he or she experienced a specific event, incident or exposure occurring at the time, place and in the manner alleged. He or she must also establish that such event, incident or exposure caused an injury.⁵

To establish that an injury occurred as alleged, the injury need not be confirmed by eyewitnesses, but the employee’s statements must be consistent with the surrounding facts and circumstances and her subsequent course of action. In determining whether a *prima facie* case has been established, such circumstances as late notification of injury, lack of confirmation of injury,

³ Appellant’s representative briefed his arguments and presented them to the Board during the December 12, 2013 oral argument. The circumstantial evidence need not be repeated here.

⁴ 5 U.S.C. § 8102(a).

⁵ *John J. Carlone*, 41 ECAB 354 (1989).

and failure to obtain medical treatment may, if otherwise unexplained, cast sufficient doubt on a claimant's statements. The employee has not met this burden when there are such inconsistencies in the evidence as to cast serious doubt on the validity of the claim.⁶

ANALYSIS

Appellant claims that she sustained an injury on August 10, 2010 as a result of a fall at work, but she is not the most reliable source of information as her memory is not clear. She was distraught and apparently became dizzy in the employee health office. Appellant did not recall the events of that day.

Ms. Rogers was in the room with appellant and unequivocally explained that appellant did not fall or strike her head against her desk. To the contrary, she assisted appellant to a sitting position on the floor.

Ms. Rogers' account of what happened on August 10, 2010 stands as the best evidence. It establishes that the incident did not occur as alleged. Appellant has failed to establish that she fell and struck a desk at the time, place and in the manner alleged. The Board finds that she has not met her burden to establish fact of injury. Accordingly, the Board will affirm OWCP's April 16, 2013 decision.

Appellant's representative emphasizes circumstantial evidence to establish that appellant fell. Even the assertion that appellant cannot remember "exactly how she fell" assumes that a fall occurred. The most probative factual evidence establishes that she did not fall. Inferences to the contrary that might be drawn from the circumstantial evidence are insufficient, in the Board's judgment, to outweigh the evidence provided by Ms. Rogers, who witnessed what happened.⁷

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

CONCLUSION

The Board finds that appellant has not met her burden to establish that she sustained a traumatic injury on August 10, 2010, as alleged. The incident aspect of fact of injury is not established.

⁶ *Carmen Dickerson*, 36 ECAB 409 (1985); *Joseph A. Fournier*, 35 ECAB 1175 (1984). See also *George W. Glavis*, 5 ECAB 363 (1953).

⁷ The Board notes that the "relative circumstances" doctrine is a tool that can aid in establishing the element of causal relationship, but it must first be established that the work incident or exposure occurred as alleged. See generally *Lorraine Thomsen (Immanuel H. Thomsen)*, 5 ECAB 417 (1953) (a qualified medical opinion may be accepted when the relative circumstances strongly suggest a cause and effect relationship between the medical condition and the conditions of employment); *Raymond J. Schmitt*, 3 ECAB 69 (1949).

ORDER

IT IS HEREBY ORDERED THAT the April 16, 2013 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 20, 2014
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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