United States Department of Labor
Employees' Compensation Appeals Board

N.B., Appellant	)	
and	)	**Docket No. 17-1476**
	)	**Issued: January 4, 2018**
DEPARTMENT OF VETERANS AFFAIRS, VETERANS HEALTH ADMINISTRATION, Albuquerque, NM, Employer	)	

Appearances:
Carol Hebert, for the appellant[2]
Office of Solicitor, for the Director

Case Submitted on the Record[1]

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On June 22, 2017 appellant, through her representative, filed a timely appeal from a May 25, 2017 merit decision of the Office of Workers' Compensation Programs (OWCP).

[1] On her application for review (Form AB-1) appellant requested an oral argument pursuant to 20 C.F.R. § 501.5(b). By order dated November 17, 2017, the Board exercised its discretion and denied appellant's request finding that the appeal could be adequately addressed in a decision based on the review of the case as submitted on the record. *Order Denying Request for Oral Argument*, Docket No. 17-1476 (issued November 17, 2017).

[2] In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.; see also* 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

Pursuant to the Federal Employees' Compensation Act[3] (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 has met her burden of proof to establish a neck and back injury in the performance of duty on December 2, 2013, as alleged.

FACTUAL HISTORY

On November 16, 2016 appellant, then a 58-year-old nursing assistant, filed a traumatic injury claim (Form CA-1) alleging that at 3:45 a.m. on December 2, 2013, she lifted a patient who weighed over 300 pounds, causing injury to her neck and back. She did not stop work. On the reverse side of the claim form, appellant's manager, L.E., indicated that appellant was not injured in the performance of duty. He indicated that the medical documents were dated one year after the claimed injury and appellant did not report the injury within 30 days.

Various medical reports accompanied the claim. In a report dated December 11, 2014, Dr. Robert Mickelsen, an emergency medicine physician, treated appellant in an emergency room for degenerative joint disease, increasing left arm numbness, and chest tightness. Appellant reported being status post lung resection for cancer. A magnetic resonance imaging (MRI) scan dated December 11, 2014 revealed disc protrusions at C3-4 and C4-5 resulting in deformation of the ventral thecal sac and cervical spinal cord, and foraminal narrowing at C5-6 and C6-7. A myocardial perfusion imaging test revealed no abnormalities. An electrocardiogram was normal. Dr. Mickelsen diagnosed arm and chest pain, left arm numbness, hypertension, hypothyroidism, and gastrointestinal prophylaxis. He admitted appellant for observation to rule out transient ischemic attack.[4]

Appellant was treated by a nurse practitioner on January 29, March 26, and August 19, 2015 for increasing neck pain, left arm radiculopathy, numbness, and tingling which began more than one month earlier. She reported that she may have injured her neck at work, but could not be sure. On May 22, 2015 appellant reported increased facet pain at C4-7 and the nurse practitioner ordered bilateral cervical facet injections at those levels. She was treated on August 19, 2015 for lumbar spine tenderness and was diagnosed with lumbosacral spondylosis without myelopathy and disorder of the sacrum. On March 22, 2016 appellant was seen for new back pain and radicular pain after an injury at work. On May 5, 2016 she was treated for radiating pain from the lumbar spine to the right foot and right thigh which began more than one month earlier. Appellant related being injured doing patient care at work and noted reporting the injury to the human resources department. The nurse practitioner diagnosed degeneration of the lumbar/lumbosacral intervertebral disc.

[3] 5 U.S.C. § 8101 *et seq.*

[4] Also included with the medical evidence were several diagnostic test reports from December 2014 to September 2016.

In an April 17, 2015 report, Dr. Robert E. Zuniga, a Board-certified anesthesiologist, noted treatment for degeneration of cervical intervertebral disc and cervical radiculopathy. He provided a C7-T1 intralaminar epidural steroid injection and cervical epidurogram and diagnosed cervical radiculopathy.

On October 16, 2015 Dr. Charles F. Pace, a Board-certified anesthesiologist, administered bilateral L3-4, L4-5 and L5-S1 lumbar facet joint injections with sedation and diagnosed lumbosacral spondylosis without myelopathy. On May 13, 2016 he performed right L4-5 lumbar transforaminal epidural steroid injections and diagnosed degeneration of lumbar and lumbosacral intervertebral disc. Similarly, on September 30, 2016 Dr. Pace provided a right L3-4, L4-5, and L5-S1 lumbar facet joint injections with sedation and diagnosed lumbosacral spondylosis without myelopathy.

Appellant was treated by a physician assistant on June 2 and 23, 2016 for increasing back pain with radiculopathy. She reported a gradual onset starting a year earlier. In the June 23, 2016 note, appellant reported falling onto her right knee on the previous day having sciatica pain. The physician assistant diagnosed lumbar disc degeneration, lumbosacral spondylosis without myelopathy, and chronic right S1 joint pain. On October 26, 2016 appellant presented with shooting right leg pain and piriformis pain. The physician assistant noted diagnoses and recommended a cane and lumbar injections.

In a December 2, 2016 letter, OWCP advised appellant to submit additional information including a comprehensive medical report from her treating physician which explained how the specific work factors or incidents identified by appellant had contributed to her claimed injury. It also requested that she respond to a development questionnaire to explain exactly how the claimed injury occurred.

By decision dated January 6, 2017, OWCP denied appellant's claim for compensation, finding that the evidence of record was insufficient to establish that the incident occurred as alleged.

On an appeal request form dated January 20, 2017, appellant requested a review of the written record by an OWCP hearing representative. She also submitted a January 19, 2017 letter in which she referenced the present claim, assigned File No. xxxxxx407, but also indicated that she was appealing a denial of her claim in File No. xxxxxx700.[5] Appellant asked that OWCP reconsider her claim.[6] She reported being injured on December 2, 2013 and March 5, 2016 while working as a nursing assistant. Appellant advised that she did not have sciatica nerve back pain until her March 5, 2016 work injury.

In a completed development questionnaire dated January 20, 2017, appellant responded that she was lifting and turning a patient that weighed over 300 pounds and experienced a stiff

[5] OWCP File No. xxxxxx700 is not before the Board on the present appeal.

[6] On February 14, 2017 OWCP noted receipt of appellant's reconsideration request and also her request for a review of the written record. It advised her that she could only pursue one appeal at a time and indicated that her claim would proceed with a review of the written record.

neck, pain, and weakness down her right arm. She indicated that she reported the injury to her supervisor, M.W., and that there were two witnesses to the injury in March 2016. Appellant noted sustaining injuries on December 2, 2013, August 22, 2014, December 17, 2015, and March 5, 2016 which she had reported to her supervisor. She indicated that before her work injury on December 2, 2013 she had no disability or symptoms.

Appellant submitted a December 11, 2013 report from a nurse practitioner who noted that appellant presented with right upper back pain which radiated down the arm with intermittent tingling in the right hand. She reported lifting a heavy patient onto a bed eight days prior and the next day she assisted another patient back into bed and thought that she pulled a muscle in her shoulder and neck. Appellant was treated and provided with one week of light-duty work. The nurse practitioner noted findings and diagnosed myofascial muscle pain and musculoskeletal strain, and provided a note for light duty for one week, trigger point injections, and heat and ice.

By decision dated May 25, 2017, an OWCP hearing representative affirmed the January 6, 2017 decision.

LEGAL PRECEDENT

An employee seeking benefits under FECA[7] has the burden of proof to establish 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 FECA, that the claim was filed within the applicable time limitation of FECA, that an injury was sustained in the performance of duty as alleged, and that any disability and/or specific condition for which compensation is claimed are causally related to the employment injury. These are the essential elements of each and every compensation claim regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.[8]

To determine whether a federal employee has sustained a traumatic injury in the performance of duty, it first must be determined whether fact of injury has been established. There are two components involved in establishing fact of injury. First, the employee must submit sufficient evidence to establish that he or she actually experienced the employment incident at the time, place, and in the manner alleged. Second, the employee must submit medical evidence to establish that the employment incident caused a personal injury.[9]

An employee's statement 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.[10] Moreover, an injury does not have to be confirmed by eyewitnesses. The employee's statement, however, must be consistent with the surrounding facts and circumstances and her subsequent course of action. An employee has not met his or her burden of proof to establish the occurrence of an injury when there are such inconsistencies in the evidence as to cast serious doubt upon the

[7] *Supra* note 3.

[8] *Gary J. Watling*, 52 ECAB 357 (2001).

[9] *T.H.*, 59 ECAB 388 (2008).

[10] *R.T.*, Docket No. 08-0408 (issued December 16, 2008); *Gregory J. Reser*, 57 ECAB 277 (2005).

validity of the claim. Circumstances such 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 doubt on an employee's statement in determining whether a *prima facie* case has been established.[11]

ANALYSIS

Appellant, a nursing assistant, filed a traumatic injury claim on November 16, 2016, alleging that, on December 2, 2013, she lifted a patient who weighed over 300 pounds, causing injury to her neck and back. The Board finds that appellant has not established that the claimed incident occurred as alleged, as there are inconsistencies in the evidence which cast serious doubt upon the validity of the claim.

Appellant did not stop work at the time of the alleged injury, nor did she seek immediate medical treatment. Rather, she continued to work without incident and sought medical treatment on December 11, 2013. Appellant did not immediately report an injury. She indicated in a statement dated January 20, 2017 that she reported the injury to her supervisor. However, appellant's supervisor noted on the Form CA-1 that he first received notice of the injury on November 16, 2016, nearly three years later. Appellant has not provided any corroborating evidence to support more contemporaneous notice.

The record has differing statements regarding how the claimed neck and back injury occurred. In a visit summary dated December 11, 2013, a nurse practitioner noted that appellant reported lifting a patient in the intensive care unit who weighed over 300 pounds, and the next day she assisted another patient back into bed and believed she pulled a muscle in her shoulder and neck. On the Form CA-1 appellant noted that on December 2, 2013 she lifted a patient who weighed over 300 pounds, which injured her neck and back. She did not mention any other incident. In a statement dated January 20, 2017, appellant noted that she was lifting and turning a patient who weighed over 300 pounds, causing injury to her right arm and neck with pain down the right arm. She advised that two people witnessed the incident, but she did not provide any statements from those witnesses. While an injury does not have to be confirmed by eyewitnesses in order to establish that an employee sustained an injury in the performance of duty, the employee's statement must be consistent with the surrounding facts and circumstances and her subsequent course of action. These notes do not relate a consistent history of injury.[12]

Appellant has not provided a clarifying explanation as to why she waited almost three years to file a claim after the alleged injury. She alleged the incident occurred on December 2, 2013, but she did not file a CA-1 claim form until November 16, 2016.

The circumstances regarding confirmation of the claimed incident and inconsistencies in the facts about how it occurred cast serious doubt upon the validity of the claim. For these

[11] *Betty J. Smith*, 54 ECAB 174 (2002).

[12] *See R.T.*, Docket No. 08-408 (issued December 16, 2008) (appellant did not establish that she sustained an injury in the manner alleged as her account of the incident was not supported by her coworker and the histories related to her physicians were inconsistent).

reasons, the Board finds that appellant has not established that the claimed incident occurred as alleged. As appellant has not established that the December 2, 2013 incident occurred in the performance of duty, as alleged, it is unnecessary for the Board to consider the medical evidence regarding causal relationship.[13] Consequently, she has not met her burden of proof in establishing her claim.

On appeal appellant asserts that she was not provided guidance and clear instruction on the process for filing a claim. The Board notes that on December 2, 2016 OWCP advised appellant of the type of information needed to establish her claim.

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 of proof to establish a neck and back injury in the performance of duty on December 2, 2013, as alleged.

ORDER

IT IS HEREBY ORDERED THAT the May 25, 2017 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 4, 2018
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board

[13] *See S.P.*, 59 ECAB 184 (2007).