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

| | | |
|---|---|---|
| **M.A., Appellant** | ) | |
| **and** | ) | **Docket No. 19-0616** |
| | ) | **Issued: April 10, 2020** |
| **DEPARTMENT OF VETERANS AFFAIRS, VETERANS ADMINISTRATION MEDICAL CENTER, East Orange, NJ, Employer** | ) | |

*Appearances:*
*Appellant, pro se*
*Office of Solicitor,* for the Director

*Case Submitted on the Record*

## DECISION AND ORDER

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

### ***JURISDICTION***

On January 16, 2019[1] appellant filed a timely appeal from a July 20, 2018 merit decision of the Office of Workers' Compensation Programs (OWCP).[2] Pursuant to the Federal Employees'

[1] Under the Board's *Rules of Procedure*, an appeal must be filed within 180 days from the date of issuance of an OWCP decision. An appeal is considered filed upon receipt by the Clerk of the Appellate Boards. *See* 20 C.F.R. § 501.3(e)-(f). One hundred and eighty days from July 20, 2018, the date of OWCP's last decision was January 16, 2019. Because using January 22, 2019, the date the appeal was received by the Clerk of the Appellate Boards, would result in the loss of appeal rights, the date of the postmark is considered the date of filing. The date of the U.S. Postal Service postmark is January 16 2019, rendering the appeal timely filed. *See* 20 C.F.R. § 501.3(f)(1).

[2] Appellant timely requested oral argument before the Board. 20 C.F.R. § 501.5(b). By order dated February 21, 2020, the Board exercised its discretion and denied the request, finding that the arguments on appeal could adequately be addressed based on the case record. *Order Denying Request for Oral Argument*, Docket No. 19-0616 (issued February 21, 2020). The Board's *Rules of Procedure* provide that an appeal in which a request for oral argument is denied by the Board will proceed to a decision based on the case record and the pleadings submitted. 20 C.F.R. § 501.5(b).

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.[4]

## ***ISSUE***

The issue is whether appellant has met her burden of proof to establish an injury in the performance of duty on August 21, 2017, as alleged.

## ***FACTUAL HISTORY***

On August 29, 2017 appellant, then a 28-year-old nursing assistant, filed a traumatic injury claim (Form CA-1) alleging that, at 11:30 a.m. on August 21, 2017, she sustained injuries to her low back and right lower leg while in the performance of duty. She explained that she was guiding a resident in the bathroom who fell backward, and that she caught him to prevent him from falling. Appellant stopped work August 22, 2017. On the reverse side of the claim form, E.U., a nurse manager and appellant's supervisor, indicated that appellant was injured in the performance of duty and that his knowledge of the facts about this injury agreed with the statements of the employee.

In an August 25, 2017 statement, appellant indicated that she had ongoing pain in her left hip/pelvic area from a June 30, 2016 work-related injury to her lower back, which had started to affect her daily life activities.[5] She also noted that she was pregnant at the time of her claimed injury. Appellant explained that on August 21, 2017 she was assigned to transport a male resident to an employing establishment eye clinic. She denied being told that the resident could not stand. The injury occurred as appellant went to guide the resident in the bathroom stall out of his chair. He fell backward onto her and she caught him. Appellant indicated that she notified E.U. that day and explained what happened. E.U. told her that the resident could stand, but after the bathroom incident the resident could not stand. Appellant noted that it took two men to get the resident out of the chair and into a bed in the examination room. E.U. then told her to get help from whomever was there.

On August 25 and 28, 2017 appellant sought urgent care treatment for the August 21, 2017 incident. In an August 25, 2017 note, Dr. Kasnif Ramzan, a Board-certified family practitioner, diagnosed leg sprain and took appellant off work. In an August 28, 2017 note, Dr. Michael Tafoya, a Board-certified emergency medical practitioner, diagnosed right calf strain and right gluteal strain. He advised that appellant could work with restrictions.

[3] 5 U.S.C. § 8101 *et seq*.

[4] The Board notes that appellant submitted additional evidence on appeal. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id*.

[5] Under OWCP File No. xxxxxx356, OWCP accepted that appellant sustained a lumbar strain on June 30, 2016. Appellant returned to work in a full-time limited-duty position on July 5, 2016.

In a September 1, 2017 letter, E.U. controverted the claim. He advised that appellant was on light duty, and that she knew her lifting limitations. E.U. also advised that she knew all the residents as she came in contact with them daily. On August 21, 2017 appellant escorted a resident to the employing establishment's eye clinic. Her only responsibility was to accompany the resident to the eye clinic. Before her shift, appellant was instructed to ask staff at the eye clinic location to help should the resident need help. E.U. indicated that, when she spoke with him that day, she advised him that she was unable to help the resident to the bathroom because of her limited-duty status. He told appellant to ask the staff at the clinic to escort the resident to the bathroom and that she had confirmed that staff from the clinic took the resident to the bathroom. E.U. further indicated that, when she returned to the unit, she did not report an incident with the resident to either the charge nurse or the manager. There was also no documentation at the clinic involving an incident with the resident. E.U. noted that appellant took annual leave on August 22, 2017, but did not report an injury. Appellant also delayed medical treatment until August 25, 2017.

In September 13 and 27, 2017 attending physician's reports (Form CA-20), Dr. Joe VonGvorachoti, a Board-certified physiatrist, reported a history of a heavy male patient falling on appellant, who was reported as being six months pregnant, on August 21, 2017. In corresponding reports, he diagnosed S1 joint inflammation and lumbar disc displacement. Dr. VonGvorachoti requested physical therapy and found appellant totally disabled from work until October 11, 2017. An October 17, 2016 magnetic resonance imaging (MRI) lumbar spine scan, which noted minimal disc bulging at L3-4 through L5-S1, was provided.

In a development letter dated October 12, 2017, OWCP informed appellant that when the claim was first received it appeared to be a minor injury that resulted in minimal or no time lost from work, therefore, a limited amount of medical expenses had been administratively approved. However, the claim had now been reopened for merit review. It further advised appellant that the factual and medical evidence of record was insufficient to support her claim. OWCP advised her of the type of factual and medical evidence needed and provided a questionnaire for her completion. It afforded appellant 30 days to submit the requested evidence.

Appellant submitted disability slips dated October 11 and November 10, 2017 from Dr. VonGvorachoti.[6]

In a November 8, 2017 report, Dr. VonGvorachoti noted that on September 13, 2017 appellant presented for an initial examination and evaluation from an August 21, 2017 employment-related injury, which occurred when she was moving an obese patient who fell onto her. He diagnosed displacement of lumbar intervertebral disc and inflammation of sacroiliac joint.[7] Dr. VonGvorachoti noted that appellant prior work injury in June 2016 predisposed her to future back injuries and that she was pregnant, which put extra strain on her back. He indicated that a heavy patient falling on her was a potential mechanism for back injuries. Dr. VonGvorachoti

[6] OWCP received wage-loss compensation claims (Form CA-7) for the period October 6, 2017 onward.

[7] A September 1, 2016 lumbar MRI scan revealed disc bulges at L3-4 and L5-S1 and electromyogram/nerve conduction velocity tests conducted on March 29, 2017 were normal.

opined that the August 21, 2017 work incident aggravated conditions caused by the June 30, 2016 injury as well as any new low back pain.

In a November 10, 2017 statement, appellant indicated that the August 21, 2017 incident occurred when she was in the bathroom with a male resident, who weighed 150 to 160 pounds, who fell backward onto her when she was guiding him in the bathroom stall. She advised that there were no witnesses and that she reported the incident right away to her supervisor by telephone. Appellant submitted her cellphone record, which contained two one-minute calls at 12:42 p.m. and 12:47 p.m. to the nurse manager's telephone number.

In a November 20, 2017 development letter, OWCP advised appellant that additional evidence was needed to establish the factual basis of her claim as the factual evidence of record was conflicting. It afforded her 15 days to submit additional evidence.

In a November 27, 2017 statement in response to OWCP's development questionnaire, appellant advised that the resident she escorted on August 21, 2017 was a new patient for her and that she did not know his medical situation or plan of care. She noted that, since her June 30, 2016 injury, she does not come in direct contact or engage in personal patient care with any residents. With regard to the alleged August 21, 2017 employment incident, appellant indicated that she, not the clinical staff, had taken the resident to the restroom and that the injury took place in the restroom. She reiterated that she had telephoned her supervisor, E.U., promptly to report the incident, as indicated by the submitted telephone records. Appellant also reiterated that during the conversation E.U. told her that the resident could walk, but she had told him that the resident could not walk after the bathroom incident. She noted that, shortly after the bathroom incident, the resident went in for his examination and that two men from the clinical staff had to lift him onto the examination table. Appellant noted that, when E.U. told her to get help, the injury had already occurred. She also advised that her pain progressed so she sought medical treatment on August 25, 2017. Appellant noted filing "a C-3" on August 25, 2017, which was returned to her as it was the wrong jurisdiction.

In an August 25, 2017 state workers' compensation (Form C-3), appellant indicated that the injury occurred on the "10th floor in the men's restroom." She reported assisting the "patient in the bathroom stall at his chair when he fell back on me. I caught him."

In a December 5, 2017 statement, E.U. advised that appellant had been on light duty for one year prior to the August 21, 2017 incident and, even on light duty, she had interactions with the resident in question prior to the August 21, 2017 assignment. He indicated that she had not reported an injury on August 21, 2017 to any authority figures, but rather left for the day. E.U. also advised that appellant used sick leave on August 22, 2017 without reporting an injury.

By decision dated January 4, 2018, OWCP denied appellant's claim finding that the factual component of fact of injury had not been met. It found that the evidence was insufficient to establish that an employment incident occurred as alleged. OWCP concluded, therefore, that the requirements had not been met to establish an injury as defined by FECA.

On January 30, 2018 appellant requested an oral hearing before a representative of OWCP's Branch of Hearings and Review. During the June 5, 2018 hearing, she indicated that she

was working on a long-term demented unit/memory care ward and was initially told that the resident, who had dementia, could walk so she took him to the bathroom. Appellant later indicated that as "he got up, he fell back, and I caught him." She explained that she was in the bathroom stall with the resident, who fell backwards against her as she was positioned behind him. Appellant indicated that, when she called her manager to explain what happened, he told her to get help, but the accident had already occurred. She verified that she was on work restrictions when the incident occurred, that she was out of work the next day, and that she filed both federal and state compensation claim forms and sought medical treatment after the pain persisted. Appellant testified that she had not lifted the resident, rather he fell onto her and she caught him. She also testified that she returned to work in a full-time limited-duty capacity on April 24, 2018.

In a January 24, 2018 report, Dr. VonGvorachoti noted that a heavy/obese male patient fell on appellant in the bathroom. He indicated that such incident injured her lumbar discs and repeated his assessment of lumbar disc displacement and inflammation of sacroiliac joint. Dr. VonGvorachoti opined that appellant's back pain was causally related to her August 21, 2017 employment injury, which also exacerbated her previous employment injury of June 2016. He explained that a heavy patient falling on her is a potential mechanism for back injuries.

OWCP received additional medical reports and CA-7 claims for disability compensation. An April 27, 2018 Form CA-7 indicated that appellant returned to work on April 24, 2018 on "desk duty."

By decision dated July 20, 2018, an OWCP hearing representative affirmed OWCP's January 4, 2018 decision.

## ***LEGAL PRECEDENT***

An employee seeking benefits under FECA[8] 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 timely filed within the applicable time limitation of FECA,[9] that an injury was sustained in the performance of duty as alleged, and that any disability or medical condition for which compensation is claimed is causally related to the employment injury.[10] 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.[11]

[8] *Supra* note 3.

[9] *J.P.*, Docket No. 19-0129 (issued April 26, 2019); *S.B.*, Docket No. 17-1779 (issued February 7, 2018); *Joe D. Cameron*, 41 ECAB 153 (1989).

[10] *J.M.*, Docket No. 17-0284 (issued February 7, 2018); *R.C.*, 59 ECAB 427 (2008); *James E. Chadden, Sr.*, 40 ECAB 312 (1988).

[11] *R.R.*, Docket No. 19-0048 (issued April 25, 2019); *L.M.*, Docket No. 13-1402 (issued February 7, 2014); *Delores C. Ellyett*, 41 ECAB 992 (1990).

To determine if an employee sustained a traumatic injury in the performance of duty, OWCP begins with an analysis of whether fact of injury has been established.[12] Fact of injury consists of two components that must be considered in conjunction with one another. The first component is whether the employee actually experienced the employment incident that allegedly occurred.[13] The second component is whether the employment incident caused a personal injury.[14]

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.[15] Moreover, an injury does not have to be confirmed by eyewitnesses.[16] The employee's statement, however, must be consistent with the surrounding facts and circumstances and his or 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 validity of the claim.[17] 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 serious doubt on an employee's statement in determining whether *a prima facie* case has been established.[18]

## ***ANALYSIS***

The Board finds that appellant has met her burden of proof to establish that the August 21, 2017 employment incident occurred, as alleged.

It is undisputed that appellant was on limited-duty status and that she worked on a ward where the residents have dementia or long-term memory loss issues. It is also undisputed that she was assigned to transport a male resident to the employing establishment's eye clinic for examination on August 21, 2017.

Appellant consistently stated on her August 29, 2017 claim form, on the August 25, 2017 state workers' compensation form, in her narrative statements, and in her hearing testimony, that her injury occurred at approximately 11:30 a.m. on August 21, 2017 when assisting a male resident in the bathroom stall. She consistently explained that he fell backward onto her and she caught him. Appellant further indicated that she promptly notified the nurse manager, E.U., of her injury and explained what happened.

[12] *E.M.*, Docket No. 18-1599 (issued March 7, 2019); *T.H.*, 59 ECAB 388, 393-94 (2008).

[13] *L.T.*, 18-1603 (issued February 21, 2019); *Elaine Pendleton*, 40 ECAB 1143 (1989).

[14] *B.M.*, Docket No. 17-0796 (issued July 5, 2018); *John J. Carlone*, 41 ECAB 354 (1989).

[15] *A.R.*, Docket No. 18-0924 (issued August 13, 2019); *R.T.*, Docket No. 08-0408 (issued December 16, 2008); *Gregory J. Reser*, 57 ECAB 277 (2005).

[16] *L.A.*, Docket No. 17-0138 (issued April 5, 2017).

[17] *Id*.

[18] *See K.M.*, Docket No. 19-0367 (issued June 26, 2019); *L.D.*, Docket No. 16-0199 (issued March 8, 2016); *Betty J. Smith*, 54 ECAB 174 (2002).

E.U. acknowledged that appellant had called on August 21, 2017 and the telephone records support that two calls took place at 12:42 p.m. and 12:47 p.m., approximately one hour after the alleged incident. In her testimony before OWCP's hearing representative, appellant indicated that the incident occurred in the bathroom, with no witnesses present, and that the resident was then seen for his eye appointment. She indicated that two men from the eye clinic had to lift the resident onto the examination table. Appellant's narrative statements support that she told E.U. during her telephone conversation that the resident could not stand after the bathroom incident and that she had indicated that it took two men from the clinic to get the resident out of his chair and onto an examination room bed. While E.U. had advised her to get help, the evidence supports that the bathroom incident with the resident had already occurred.

The Board finds that appellant's consistent description of the incident are sufficient to establish that the August 21, 2017 employment incident occurred at the time, place, and in the manner alleged. Appellant provided a consistent account of the mechanism of injury that has not been refuted by evidence contained in the record.[19]

The Board finds, therefore, that appellant has met her burden of proof to establish that the August 21, 2017 employment incident occurred in the performance of duty, as alleged.

As appellant has established that the August 21, 2017 employment incident factually occurred, the question becomes whether this incident caused an injury.[20] The Board will, therefore, set aside OWCP's July 20, 2018 decision and remand the case for consideration of the medical evidence. Following this and other such further development as deemed necessary, OWCP shall issue a *de novo* decision addressing whether the medical evidence is sufficient to establish a condition causally related to the accepted employment incident.[21]

## ***CONCLUSION***

The Board finds that appellant has met her burden of proof to establish an incident in the performance of duty on August 21, 2017, as alleged.

[19] *A.R.,* Docket No. 18-0924 (issued August 13, 2019); *see S.W.,* Docket No. 17-0261 (issued May 24, 2017) (the Board found that OWCP improperly determined that the alleged employment incident did not occur when appellant provided consistent accounts of the claimed incident and there was no evidence to refute her detailed description); *see also J.L.,* Docket No. 17-1712 (issued February 12, 2018).

[20] *See C.M.,* Docket No. 19-0009 (issued May 24, 2019).

[21] *Supra* note 18; *see also Betty J. Smith,* 54 ECAB 174 (2002).

## ***ORDER***

**IT IS HEREBY ORDERED THAT** the July 20, 2018 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: April 10, 2020
Washington, DC

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

Patricia H. Fitzgerald, Alternate Judge
Employees' Compensation Appeals Board

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