United States Department of Labor
Employees' Compensation Appeals Board

C.P., Appellant	)	
and	)	**Docket No. 21-0246**
	)	**Issued: July 16, 2021**
DEPARTMENT OF VETERANS AFFAIRS, VA MEDICAL CENTER, JOHN COCHRAN DIVISION, St. Louis, MO, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
PATRICIA H. FITZGERALD, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On December 10, 2020 appellant filed a timely appeal from a June 24, 2020 merit decision and a November 17, 2020 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[1] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.[2]

ISSUES

The issues are: (1) whether appellant has met her burden of proof to establish that a traumatic incident occurred in the performance of duty on December 18, 2019, as alleged; and

[1] 5 U.S.C. § 8101 *et seq.*

[2] The Board notes that, following the November 17, 2020 decision, appellant submitted additional evidence. 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.*

(2) whether OWCP properly denied appellant's request for reconsideration of the merits of her claim, pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On January 11, 2020 appellant, then a 64-year-old nurse assistant, filed a traumatic injury claim (Form CA-1) alleging that on December 18, 2019, when trying to reposition, turn, dress, and handle her assigned patients, she heard a "pop" in her back multiple times and felt pain in her lower back while in the performance of duty. She noted that she initially just ignored the pain. Appellant stopped work on December 23, 2019. On page two of the Form CA-1 appellant's supervisor, D.W., contended that appellant was not in the performance of duty at the time of the injury because she had provided conflicting accounts to different managers as to how and when her injury occurred.

In a return to work slip dated December 23, 2019, Dr. Mathew Nations, a Board-certified internist, released appellant to light-duty work with restrictions of no moving/turning patients and no activities involving heavy lifting.

On December 26, 2019 appellant was treated by Caitlin T. Phelan, a nurse practitioner, for an injury that was previously evaluated by her outside provider. Ms. Phelan returned appellant to work on December 26, 2019 with restrictions noted on a duty status report (Form CA-17) of even date. She noted a date of injury of December 20, 2019 on the Form CA-17 and that appellant reported back pain over the past year that worsened one week ago. Ms. Phelan diagnosed lumbar sprain and returned appellant to work with restrictions on December 26, 2019. In a January 10, 2020 visit, appellant reported that she was told to go to the employing establishment health unit because her supervisor was not providing light duty as she believed her condition was not work related. Ms. Phelan noted that, during the December 26, 2019 visit, appellant indicated that the date of injury was unknown, that this was not an "acute injury," and her current symptoms occurred over a period of one year. Ms. Phelan indicated that this description was different from appellant's statements during the January 10, 2020 visit where she alleged that her symptoms were the result of an injury that occurred on December 18, 2019 while lifting a heavy patient she felt her back "pop." Ms. Phelan noted that the January 9, 2020 magnetic resonance imaging (MRI) scan of the lumbar spine revealed generalized disc bulging at L4-5, left neural foramen narrowing, and bilateral facet osteoarthritis of L5-S1. She further noted that, due to the patient's current job duties, her condition would be exacerbated by moving/turning and lifting patients or equipment.

Dr. Sree Narra, a Board-certified family practitioner, treated appellant on January 7, 2020 and indicated that she could return to work with limitations on January 12, 2020. She recommended further imaging and evaluation. Dr. Narra advised that appellant could not move or turn patients and should avoid heavy lifting. She further noted that appellant requested to care for no more than six or seven patients a shift as this could exacerbate her condition.

In a letter dated January 14, 2020, P.D., an employing establishment workers' compensation specialist, challenged appellant's claim, asserting that she was providing conflicting accounts of how her injury occurred. P.D. referenced a January 10, 2020 note from Ms. Phelan, who indicated that on December 26, 2019 appellant reported that her date of injury was unknown and her symptoms occurred over the course of a year. However, on January 10, 2020 appellant

reported sustaining an injury at work on December 18, 2019. The workers' compensation specialist further indicated that a Form CA-17 report noted a date of injury of December 20, 2019.

In a development letter dated January 15, 2020, OWCP informed appellant that the evidence of record was insufficient to establish that she experienced the incident or employment factor alleged to have caused injury. It advised her of the type of factual and medical evidence necessary to establish her claim and provided a questionnaire for completion. OWCP afforded appellant 30 days to respond.

Appellant was treated in the emergency room by Dr. Ehab S. Morcos, a Board-certified anesthesiologist, on October 13, 2019 for radiating low back pain and left thigh numbness occurring over the last few weeks. Dr. Morcos noted appellant's history was significant for scoliosis. He diagnosed low back pain with radiculopathy and discharged her with pain medication.

On December 23, 2019 appellant was treated by Dr. Nations who noted acute-on-chronic back pain that began 11 months prior, but acutely worsened in the past week due to new work requirements. She worked as a nursing assistant and was recently assigned 10 patients instead of 5 during her shift. Appellant noted that the increased workload has increased her back pain to a degree that she could not turn and move patients in bed. She described the pain in the left paraspinal region of the lumbar spine, which was aggravated by moving patients and relieved with sitting down. Dr. Nations diagnosed left paraspinal musculoskeletal pain. He released appellant to light-duty work, with no moving or turning patients, and no heavy lifting. In an addendum note of even date, Dr. Patricia F. McKelvy, a Board-certified internist, noted appellant's 18-month history of left-sided low back pain, worse with activity. Findings on examination revealed mild paraspinal tenderness to touch on the left, negative straight leg raises, and no interosseous weakness or sensory deficit noted.

In a Form CA-17 report dated December 23, 2020, Dr. Narra noted appellant's injury occurred on December 18, 2019. She noted a diagnosis of bulging disc at L4-5 and advised that appellant could resume limited-duty work on January 6, 2020.

In a progress note dated December 24, 2019, Dr. Narra indicated that appellant worked as a nursing assistant and her new job duties required her to assist with 10 patients instead of 5. Appellant reported that the increased workload increased her back pain to a degree that makes it too difficult for her to turn patients and move them in bed. Dr. Narra ordered an MRI scan. On January 12, 2020 she requested a neurosurgical consultation. Dr. Narra diagnosed left-sided disc bulging at L4-5 with left neural foramen narrowing, scoliosis, and radiculopathy.

An MRI scan of the lumbar spine dated January 9, 2020 revealed left-sided disc bulging at L4-5 with left neural foramen narrowing, and scoliosis.

By decision dated March 20, 2020, OWCP denied appellant's traumatic injury claim, finding that the evidence of record was insufficient to establish that the injury and/or events occurred as she described. It explained that it was unclear from the evidence submitted when she actually sustained her claimed injury. Further, appellant did not provide a response to the questions

posed in the January 15, 2020 development letter. OWCP concluded, therefore, that the requirements had not been met to establish an injury as defined by FECA.

On April 1, 2020 appellant requested reconsideration.

In a statement dated March 27, 2020, appellant responded to OWCP's development letter. She indicated that her injury occurred on December 18, 2019, while she was performing her nursing assistant job. Appellant described injuring the left side of her lower back when assisting several patients. She indicated that recently her daily workload increased to 8 to 10 patients each 8 to 12-hour shift in a 40-hour workweek. On December 18, 2019 appellant had eight patients who weighed between 250 and 350 pounds. She was also tasked with dumping linen bags weighing up to 50 pounds. Appellant disputed having an 18-month history of left-sided low back pain and asserted that her injury occurred on December 18, 2019. She did confirm being treated in the emergency room in October 2019 with severe pain in her back and hip area and was evaluated and prescribed medication.

OWCP received additional medical evidence. In a February 10, 2020 note, Dr. Narra indicated that appellant was turning and repositioning patients and experienced back pain. An MRI scan revealed a bulging disc at L4-5. She opined that the bulging disc may be related to appellant's repositioning job duties.

Appellant also resubmitted evidence previously of record.

In an undated report of contact, received on April 7, 2020, D.W., appellant's supervisor, controverted appellant's claim. He indicated that on December 17, 2019 he had a meeting with appellant regarding her refusal to care for more than six patients during her shift. D.W. noted that appellant called in sick on December 19 and 23, 2019, but did not report an injury. Appellant reported to work on December 25, 2019 with a Form CA-17 report requesting light-duty work. D.W. questioned the validity of the claim, noting inconsistencies in the factual aspects of the claim.

By decision dated June 24, 2020, OWCP denied modification of the decision dated March 20, 2020.

On July 28, 2020 appellant requested reconsideration. In a separate statement, she indicated that she was not treated for her hip or back condition until October 13, 2019. On December 18, 2019 appellant described injuring her back when she was repetitively bending over caring for 8 to 10 patients, 3 that weighed between 250 and 350 pounds. At that time she did not realize that she injured her back and believed the pain would resolve. When her condition continued, appellant sought treatment on December 23, 2019.[3]

OWCP also received evidence previously of record.

[3] Appellant indicated: on December 19, 2019 she worked on ward 53N1; on December 20, 2019 she stayed home sick; she was off on December 21 and 22, 2019; and she sought medical treatment on December 23, 2019. She also submitted a copy of the June 24, 2020 decision with handwritten notes on the document.

By decision dated November 17, 2020, OWCP denied appellant's request for reconsideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under FECA[4] 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 period of FECA,[5] 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.[6] 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.[7]

To determine whether a federal employee has sustained a traumatic injury in the performance of duty, it must first be determined whether fact of injury has been established.[8] Fact of injury consists of two components that must be considered in conjunction with one another. First, the employee must submit sufficient evidence to establish that he or she actually experienced the employment incident at the time and place, and in the manner alleged.[9] Second, the employee must submit sufficient evidence to establish that the employment incident caused a personal injury.[10]

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.[11] The employee has not met his or her burden of proof to establish the occurrence of an injury when there are inconsistencies in the evidence that 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 serious doubt on an employee's statements

[4] 5 U.S.C. § 8101 *et seq.*

[5] *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).

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

[7] *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).

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

[9] *L.T.*, Docket No. 18-1603 (issued February 21, 2019); *Elaine Pendleton*, 40 ECAB 1143 (1989).

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

[11] *M.F.*, Docket No. 18-1162 (issued April 9, 2019); *Charles B. Ward*, 38 ECAB 667, 67-71 (1987).

in determining whether a *prima facie* case has been established.[12] An employee's statements 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.[13]

ANALYSIS -- ISSUE 1

The Board finds that appellant has met her burden of proof to establish that a traumatic incident occurred in the performance of duty on December 18, 2019, as alleged.

The record establishes that on December 18, 2019 appellant was performing her nursing assistant duties including repositioning, turning, dressing, and handling her assigned patients. At that time, appellant did not realize that she injured her back and ignored it believing that the pain would resolve. When her condition continued, she sought treatment on December 23, 2019. Although appellant's supervisor indicated that appellant was not in the performance of duty at the time of the injury and provided conflicting accounts of how her injury occurred, he did not refute that she was performing her nursing assistant duties including repositioning, turning, dressing, and handling her assigned patients as alleged on December 18, 2019.

The injuries appellant claimed are consistent with the facts and circumstances she set forth, her course of action, and the medical evidence she submitted. As noted above, the 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.[14] An employee's statements 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.[15] The Board, thus, finds that appellant has met her burden of proof to establish that the December 18, 2019 employment incident occurred in the performance of duty, as alleged.

As appellant has established that the December 18, 2019 employment incident factually occurred as alleged, the question becomes whether the incident caused an injury.[16] As OWCP found that appellant had not established fact of injury, it did not evaluate the medical evidence. The case must, therefore, be remanded for consideration of the medical evidence of record.[17] After such further development as deemed necessary, OWCP shall issue a *de novo* decision addressing

[12] *Betty J. Smith*, 54 ECAB 174 (2002); *L.D.*, Docket No. 16-0199 (issued March 8, 2016).

[13] *See M.C.*, Docket No. 18-1278 (issued March 7, 2019); *D.B.*, 58 ECAB 464, 466-67 (2007).

[14] *Supra* note 11.

[15] *Supra* note 13.

[16] *See M.A.*, Docket No. 19-0616 (issued April 10, 2020); *C.M.*, Docket No. 19-0009 (issued May 24, 2019).

[17] *S.M.*, Docket No. 16-0875 (issued December 12, 2017).

whether appellant has met her burden of proof to establish an injury causally related to the accepted December 18, 2019 employment incident, and any attendant disability.[18]

CONCLUSION

The Board finds that appellant has met her burden of proof to establish that a traumatic incident occurred in the performance of duty on December 18, 2019, as alleged. The Board further finds that the case is not in posture for decision regarding whether she has established an injury causally related to the accepted December 18, 2019 employment incident.

ORDER

IT IS HEREBY ORDERED THAT the June 24, 2020 decision of the Office of Workers' Compensation Programs is reversed in part, set aside in part. The November 17, 2020 decision of the Office of Workers' Compensation Programs is set aside as moot. The case is remanded for further proceedings consistent with this decision of the Board.

Issued: July 16, 2021
Washington, DC

Alec J. Koromilas, 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

[18] In light of the Board's disposition of Issue 1, Issue 2 is rendered moot.