

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

L.O., Appellant)

and)

DEPARTMENT OF VETERANS AFFAIRS,)
FAYETTEVILLE VA MEDICAL CENTER,)
Fayetteville, AR, Employer)

Docket No. 20-0280
Issued: October 1, 2021

Appearances:
*Daniel Goodkin, Esq., for the appellant*¹
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge

JANICE B. ASKIN, Judge

PATRICIA H. FITZGERALD, Alternate Judge

JURISDICTION

On November 20, 2019 appellant, through counsel, filed a timely appeal from a September 10, 2019 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

¹ 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.

² 5 U.S.C. § 8101 *et seq.*

ISSUE

The issue is whether appellant has met her burden of proof to establish a traumatic incident in the performance of duty on June 8, 2018, as alleged.

FACTUAL HISTORY

On August 1, 2018 appellant, then a 67-year-old nurse, filed a traumatic injury claim (Form CA-1) alleging that on June 8, 2018 at approximately 2:30 p.m. she sustained four compound fractures of the vertebra thoracic/lumbar region when a patient pulled on her as she was rising from kneeling position to change a dressing, causing severe back pain while in the performance of duty. On the reverse side of the claim form, the employing establishment acknowledged that she was in the performance of duty when her injury occurred, but controverted her claim, reasoning that she did not follow facility policies and procedures as she did not report her injury until July 6, 2018. Appellant did not stop work.

By development letter dated August 7, 2018, OWCP informed appellant that it had received no evidence in support of her traumatic injury claim. It informed her of the type of evidence necessary to establish her claim and provided a questionnaire for her completion. By separate development letter of even date, OWCP also requested that the employing establishment provide comments from a knowledgeable supervisor regarding the accuracy of her statement relative to her claim. It afforded both parties 30 days to respond.

In a June 18, 2018 medical report, Dr. John Johnson, Board-certified in emergency medicine, noted that appellant injured her back doing yard work three weeks prior. He attached a June 18, 2018 diagnostic report from Dr. Julie Alford, a Board-certified radiologist, who performed an x-ray scan of appellant's thoracic spine, finding mild compression deformities of the T7 through 12 vertebral body and mild-to-moderate degenerative changes. In a separate diagnostic report of even date, Dr. Alford performed an x-ray scan of appellant's lumbar spine, observing mild compression deformities of the T9 through L3 vertebral bodies. Dr. Johnson also attached a June 18, 2018 diagnostic report in which Dr. Alford performed computerized tomography (CT) scans of the thoracic and lumbar areas of appellant's spine, revealing moderate compression deformities of L2 and 3 that were possibly acute and mild compression deformities at T12, L1, and L4 that were probably chronic.

In a June 19, 2018 medical report, appellant sought treatment at the emergency room with complaints of intractable lumbar back pain. Dr. Cynthia Brooks, Board-certified in internal medicine, observed that appellant had been performing yard work for the previous three weeks and started experiencing increased pain in her back. She recommended that appellant be admitted for further testing and an interventional kyphoplasty procedure. Dr. Brooks also noted appellant's history of osteoporosis. On evaluation and review of diagnostic studies, she observed moderate compression deformities of L2 and L3, noting that they were of uncertain age, but possibly acute. Dr. Brooks further found mild compression deformities of T12, L1, and L4, noting that they were of an uncertain age but likely chronic. She diagnosed multiple compression fractures of the lumbar and thoracic vertebra.

In a June 20, 2018 diagnostic report, Dr. Jordan Page, a Board-certified radiologist, performed a magnetic resonance imaging (MRI) scan of appellant's thoracic spine, prominent thoracic hyperkyphosis with low-grade scoliosis. In a separate diagnostic report of even date, he performed an MRI scan of her lumbar spine, revealing mild grade acute/subacute superior endplate compression fractures at T12, L1, L2, and L3 as well as mild lumbar disc degeneration.

On June 20, 2018 Dr. Ryan Birlew, a Board-certified radiologist, performed a kyphoplasty to treat appellant's compression fractures at T12, L1, L2, and L3.

In a June 23, 2018 diagnostic report, Dr. Jinna Chen, a Board-certified radiologist, performed a postoperative x-ray scan of appellant's thoracic spine, finding chronic appearing compression deformity of several vertebral segments with underlying low-to-moderate grade spondylosis. In a separate diagnostic report of even date, she performed a postoperative x-ray scan of appellant's lumbar spine, observing an interval kyphoplasty of the vertebral segments of T12, L1, L2, and L3. In another June 23, 2018 diagnostic report, Dr. Chen performed an x-ray scan of appellant's right hip, finding no apparent acute osseous injury.

In a June 26, 2018 diagnostic report, Dr. Jeff Ondr, a Board-certified radiologist, performed CT scans which returned negative for CT evidence of multilevel vertebroplasty of the lower thoracic and lumbar areas of the spine. In an August 14, 2018 response to OWCP's questionnaire, appellant recounted the events of the alleged June 8, 2018 employment incident. She explained that at approximately 2:30 p.m. or 3:00 p.m. she had gotten on her knees to help a patient and when she finished, informed him that she tended to get up slowly. The patient proceeded to grab appellant's right forearm and pull it upwards, causing her to experience severe lower back pain shooting into her neck. Once appellant was standing the pain persisted. She told her clerk what happened and she then notified her supervisor. Appellant's supervisor assigned someone to help her finish her shift. Appellant used ice and medication to treat her symptoms, but it did not alleviate her pain and muscle spasms. She later went to the emergency room when her pain continued. Appellant asserted that she never had back pain or muscle spasms affect her work attendance in her 11 years of service in her position. She further indicated that she did not have any similar disabilities and that she rarely missed work.

On August 20, 2018 OWCP received a response from J.C., a nurse manager on behalf of the employing establishment, acknowledging that, to the best of her knowledge, appellant's statement was accurate. She asserted, however, that appellant did not report her injury at the time it occurred; rather appellant notified her by phone following a back surgery. Appellant had already been off work for several weeks when she called. J.C. immediately advised appellant to inform the human resources department for further recommendations on how to proceed, since she had not immediately reported her injury. She confirmed that appellant was performing her duties as a nurse on the date of the alleged injury. J.C. also submitted a position description of appellant's duties as a nurse.

In an August 22, 2018 letter, the employing establishment indicated that it attached a medical report from Dr. Shirin DeSilva, Board-certified in internal medicine, in which she opined that appellant's condition was not work related.

In the August 15, 2018 medical report, Dr. DeSilva related that appellant informed her that on June 8, 2018 between approximately 2:30 p.m. and 3:30 p.m. she had gotten on her knees to remove an unna boot from a patient. Appellant finished and informed the patient that she tended to get up slowly. The patient then grabbed appellant's right arm and pulled it upward as he leaned back on a gurney to assist her. Appellant reported that she then experienced severe pain in her lower back, shooting up to the neck. She indicated that she notified a clerk, who informed her manager, J.C., and J.C. assigned another nurse to help complete appellant's shift. Dr. DeSilva related that appellant treated her back pain with rest, ice, and medication before she called off work on June 11, 2018 to visit her primary care physician. She later went to the emergency room on June 18, 2018 as her pain persisted where diagnostic studies revealed compression fractures in her lumbar and thoracic region. Dr. DeSilva recounted that appellant was then sent to the hospital where she underwent a kyphoplasty on multiple levels of her back. Appellant asserted that she did not have back pain, muscle spasms, or arthritis affecting her work attendance prior to her injury. Dr. DeSilva reviewed medical evidence relating to appellant's treatment following the alleged June 1, 2018 employment incident and other relevant statements from her coworkers. She noted that J.C. contended that she was not informed about appellant's injury until after appellant underwent surgery. Dr. DeSilva noted that on August 2, 2018 B.D., a clerk, informed her that on June 8, 2018 appellant advised that she thought she pulled a muscle in her back. She did not report the incident to anyone else. Also S.C., the wife of the patient involved in the alleged employment incident, informed her on August 15, 2018 that appellant had been complaining of back pain a few days prior due to appellant having pulled a muscle in her pelvic area. S.C. denied that her husband pulled appellant up, instead offering that he held his arm out as a grab bar and that appellant pulled on his arm to help herself stand up. Dr. DeSilva opined that it was less likely than not that appellant's condition was caused by the alleged June 8, 2018 employment incident, noting that appellant had severe preexisting osteoporosis and osteopenia due to appellant's Lupus condition and age that predisposed her to compression fractures as well as preexisting back pain that began while she was gardening. She opined that, even if the patient had pulled appellant up, such a maneuver would not have caused a lumbar compression fracture. Dr. DeSilva concluded that the weight of the evidence suggested that appellant did not report her injury in a timely manner and that appellant did not appear to have a back issue on June 8, 2018 that was in any way unusual.

In an August 24, 2018 letter, Dr. Rodney Donham, Board-certified in internal medicine, noted appellant's history of osteoporosis and lupus and explained that he previously treated her for a mild back strain and right groin pain that began about a week earlier after working in the yard. Appellant was able to perform her yard work until June 11, 2018 when she was seen by his associate for complaints of back pain after a patient she was caring for grabbed her arm aggressively to help her up from the floor. At that time, she experienced sudden neck and low back pain and treated her symptoms conservatively until she presented in the emergency room and was found to have sustained fractures of the thoracic and lumbar vertebrae. Dr. Donham opined that these conditions were not consistent with appellant's previous injuries and appeared to be related to a new event.

In an attending physician's report (Form CA-20) of even date Dr. Donham indicated that appellant was injured on June 8, 2018 when she was removing an unna boot from a patient and he aggressively pulled her up. He checked a box marked "Yes" to note her history of osteoporosis and diagnosed thoracic and lumbar fractures. Dr. Donham checked a separate box marked "Yes" to indicate his opinion that appellant's condition was caused or aggravated by her employment

activity, reasoning that the pulling/jerking motion of change in position likely contributed to her vertebral fractures.

By decision dated September 20, 2018, 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 noted that there were conflicting accounts of the incident from appellant and S.C. and that, as a result, it appeared that appellant had given an incorrect history of the work incident to Dr. Donham. OWCP concluded, therefore, that the requirements had not been met to establish an injury as defined by FECA.

OWCP continued to receive evidence. In a November 19, 2018 narrative medical report, Dr. John Ellis, Board-certified in occupational medicine, related the events of the alleged June 8, 2018 employment incident in which appellant was rising off the floor and a patient grabbed her right arm to help her up from a squatting position, leaning backwards to do so. Appellant experienced a sudden acute pain in the mid and lower thoracic and upper lumbar areas of her spine. Dr. Ellis also reviewed her subsequent medical treatment and surgical procedures to treat her condition, diagnosing compression fractures of the T12 vertebrae, as well as the first, second, and third lumbar vertebrae. He opined that the alleged June 8, 2018 employment incident contributed to, aggravated and/or caused appellant's injury. In a medical note of even date, Dr. Ellis indicated that she was temporarily totally disabled from work.

On January 7, 2019 appellant requested reconsideration of OWCP's September 20, 2018 decision.

In a January 17, 2019 letter, appellant addressed the conflicting reports between herself and S.C. She explained that she was already sore from performing yard work recently and that S.C. was sitting behind and to the right of her and the patient tending to her infant grandson in a stroller. As appellant completed changing his unna boot and began to rise, she indicated that she looked to the lower bedrail and was unaware that he was going to attempt to help her up by taking hold of her left forearm and leaning backward to get leverage. She immediately felt pain in her lower back and requested that the patient let her go. Believing that, it to be a muscle spasm, appellant attempted to stretch to alleviate her pain and applied ice. She informed her clerk of the injury and that she did not believe that she would be able to see anyone else that day. Appellant assumed the clerk spoke to J.C. as she was told to use another nurse to assist her. She then detailed her subsequent home care before she called her physician on the following June 11, 2018. Appellant clarified that she was not trying to place blame on the patient or S.C. and suggested that she only stated what she stated because she thought they might be in trouble, questioning how much of the incident S.C. actually saw as she was behind keeping the infant entertained.

In a February 5, 2019 statement, B.D. indicated that on June 8, 2018 she was clerking for appellant and that appellant called the clinic saying that she could not see any more patients as she believed that she may have pulled a muscle in her back.

In a February 7, 2019 statement, S.S., appellant's coworker, explained that she carpooled to work with appellant, on June 8, 2018 and at the end of their shift that day, appellant requested that M.D., the alternative driver, drive them home as appellant had experienced severe pain in her lower back after a patient attempted to assist her in standing up. In a separate statement of even

date, M.D. concurred with S.S.'s account of the June 8, 2018 incident and further indicated that appellant was off from work the following week before going to the emergency room on June 18, 2018 due to pain appellant was experiencing in her back. In a separate February 7, 2019 statement, A.S., a nurse, explained that on June 8, 2018 she was asked by appellant to measure a patient for compression stockings as she had injured her back and was unable to do so.

In a February 12, 2019 statement, appellant further explained that she felt fine during the week of June 3 to 8, 2018. She admitted that she previously experienced pain in her left scapula region and right hip area, but asserted that she saw Dr. Donham, and that these symptoms had since resolved at that time. Appellant then detailed the alleged June 8, 2018 employment incident again, making conversation with the patient and S.C. about appellant's age and how she moved slower. The patient then took appellant's right arm and pulled her up, causing her to experience pain in her lower back. Appellant then explained her subsequent medical care and the days leading up to her filing her claim.

By decision dated May 22, 2019, OWCP denied modification of its September 20, 2018 decision.

On June 12, 2019 appellant, through counsel, requested reconsideration of OWCP's May 22, 2019 decision.

By decision dated September 10, 2019, OWCP denied modification of its May 22, 2019 decision.

LEGAL PRECEDENT

An employee seeking benefits under FECA³ has the burden of proof to establish the essential elements of his or her claim, including 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,⁴ 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.⁵ 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.⁶

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

³ *Supra* note 2.

⁴ *F.H.*, Docket No. 18-0869 (issued January 29, 2020); *J.P.*, Docket No. 19-0129 (issued April 26, 2019); *Joe D. Cameron*, 41 ECAB 153 (1989).

⁵ *L.C.*, Docket No. 19-1301 (issued January 29, 2020); *J.H.*, Docket No. 18-1637 (issued January 29, 2020); *James E. Chadden, Sr.*, 40 ECAB 312 (1988).

⁶ *P.A.*, Docket No. 18-0559 (issued January 29, 2020); *K.M.*, Docket No. 15-1660 (issued September 16, 2016); *Delores C. Ellyett*, 41 ECAB 992 (1990).

time, place, and in the manner alleged. The second component is whether the employment incident caused a personal injury and can be established only by medical evidence.⁷

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 his or her subsequent course of action.⁸ The employee has not met his or her burden when there are such inconsistencies in the evidence as to cast serious doubt on 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 the employee's statements in determining whether a prima facie case has been established.⁹ 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.¹⁰

ANALYSIS

The Board finds that appellant has met her burden of proof to establish a traumatic incident in the performance of duty on June 8, 2018, as alleged.

It is undisputed that on June 8, 2018 a patient attempted to assist appellant to stand up by pulling on her and that she immediately experienced pain in her back. As noted, 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.¹¹ Herein, appellant has consistently reported that on June 8, 2018 she experienced severe lower back pain shooting into her neck when her patient attempted to help her to her feet by grabbing her forearm and pulling her up. She submitted detailed accounts of the employment incident in her statements dated August 14, 2018 and January 17 and February 12, 2019 wherein she explained that on June 8, 2018 she was attempting to stand up slowly after placing an unna boot when her patient attempted to help her up by grabbing her forearm and leaning backwards to gain leverage. Appellant immediately screamed out in pain and informed B.D., that she had injured her back and that she would require assistance to complete her shift.

Appellant also submitted multiple statements from her coworkers, all noting that she had informed them that she injured her back at work on June 8, 2019. Specifically, S.S.' February 7, 2019 statement, confirmed that appellant informed her carpool group that she injured her back when a patient attempted to assist her up off the floor by pulling her up.

⁷ *T.H.*, Docket No. 19-0599 (issued January 28, 2020); *K.L.*, Docket No. 18-1029 (issued January 9, 2019); *John J. Carlone*, 41 ECAB 354 (1989).

⁸ *S.W.*, Docket No. 17-0261 (issued May 24, 2017).

⁹ *C.M.*, Docket No. 20-1519 (issued March 22, 2021); *Betty J. Smith*, 54 ECAB 174 (2002).

¹⁰ *See M.C.*, Docket No. 18-1278 (issued March 7, 2019); *D.B.*, 58 ECAB 464, 466-67 (2007).

¹¹ *Id.*

Furthermore, on the reverse side of the claim form, the employing establishment acknowledged that appellant was in the performance of duty when her injury occurred. Nurse manager J.C., in her August 20, 2018 response to OWCP's development letter acknowledged that, to the best of her knowledge, appellant's statement was accurate and she confirmed that appellant was performing her duties as a nurse on the date of the alleged injury.

Thus, the Board finds that appellant's statements stand and establish that an employment incident occurred on June 8, 2018, as alleged.

As appellant has established that the June 8, 2018 employment incident factually occurred as alleged, the question becomes whether the incident caused an injury.¹² As OWCP found that she had not established fact of injury, it did not evaluate the medical evidence. The Board, therefore, will set aside OWCP's September 10, 2019 decision and remand the case for consideration of the medical evidence of record.¹³ After this and other such further development as deemed necessary, OWCP shall issue a *de novo* decision addressing whether appellant has met her burden of proof to establish an injury causally related to the accepted June 8, 2018 employment incident.

CONCLUSION

The Board finds that appellant has met her burden of proof to establish a traumatic incident in the performance of duty on June 8, 2018, as alleged. The case is not in posture for decision with regard to the issue of causal relationship.

¹² *Id.*

¹³ *S.M.*, Docket No. 16-0875 (issued December 12, 2017).

ORDER

IT IS HEREBY ORDERED THAT the September 10, 2019 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: October 1, 2021
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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