

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

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<b>G.S., Appellant</b>	)	
	)	
<b>and</b>	)	<b>Docket No. 21-1346</b>
	)	<b>Issued: January 10, 2023</b>
<b>DEPARTMENT OF VETERANS AFFAIRS,</b>	)	
<b>JESSE BROWN VA MEDICAL CENTER,</b>	)	
<b>Chicago, IL, Employer</b>	)	
_____	)	

*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, Deputy Chief Judge  
VALERIE D. EVANS-HARRELL, Alternate Judge

**JURISDICTION**

On September 10, 2021 appellant filed a timely appeal from an August 13, 2021 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>1</sup> (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 that a traumatic injury occurred in the performance of duty on October 31, 2019, as alleged.

**FACTUAL HISTORY**

On November 5, 2019 appellant, then a 43-year-old medical support assistant, filed a traumatic injury claim (Form CA-1) alleging that on October 31, 2019 she sustained a back sprain when she assisted a man who fell near an elevator while in the performance of duty. She explained

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<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

that she felt a pop in her back when she attempted to help him and subsequently had an x-ray performed which demonstrated a sprain. On the reverse side of the claim form, J.R., an employing establishment supervisor acknowledged that appellant was in the performance of duty when injured and noted that his knowledge of the facts about the injury was consistent with her statements. Appellant stopped work on November 4, 2019 and returned to work on November 12, 2019.

In a medical report dated November 27, 2019, Dr. Joseph Rabi, a Board-certified physiatrist, related that appellant developed instant pain in her lower back and left leg after she experienced a pop in her back while assisting a client on October 31, 2019, while at work. On physical examination, she was noted to have reduced range of motion (ROM) in the lumbar spine, tender trigger points and a positive Kemp's test. Dr. Rabi noted that appellant continued to experience back pain, radiating into her left leg, aggravated by bending, lifting, carrying, pushing, and pulling. He diagnosed a lumbar disc herniation with left radiculitis spine contusion.

On November 30, 2019 Dr. Vikram Sobti, a Board-certified radiologist, performed a magnetic resonance imaging (MRI) scan of the lumbar spine, subsequent to low back pain related to an October 31, 2019 work injury. He provided impressions of mild multilevel spondylosis, broad-based herniations at L3-4 and L4-5 causing mild to moderate stenosis and straightening of normal lumbar lordosis indicating muscle spasm *versus* strain.

In physical therapy notes dated December 3, 2019 through January 13, 2020, Mitchel Bershader, a physical therapist, noted that appellant participated in four weeks of physical therapy for lower lumbar spine pain relating to an October 31, 2019 employment incident where she injured her back when she helped a fallen patient.

A December 11, 2019 note from Dr. Rabi related appellant's ongoing complaints of pain in her lower back, radiating into her left leg, which prevented her from sitting for extended periods. On physical examination Dr. Rabi continued to note reduced ROM of the lumbar spine, tender trigger points and positive Kemp's test.

In a June 23, 2021 development letter, OWCP informed appellant of the deficiencies of her claim. It advised her of the type of factual and medical evidence required and provided a questionnaire for her completion. OWCP afforded appellant 30 days to submit the necessary evidence.

Thereafter, OWCP received reports and return to work notes dated May 30 through July 17, 2018, from Dr. Howard Robinson, a Board-certified physiatrist, who noted that appellant had been in good health until February 2018 when she awakened with significant back pain. In follow-up notes dated July 21, 2020 through June 24, 2021, he noted ongoing complaints of worsening back pain radiating into appellant's left leg, prescribed medication and provided work restrictions. Dr. Robinson referenced a May 11, 2021 MRI study of the lumbar spine which revealed an enlarging herniated disc at the L4-5 level, severe left-sided foraminal stenosis and moderate right stenosis. He opined that these findings seemed to demonstrate worsening from prior studies.

In a letter of controversion dated July 12, 2021, the employing establishment informed OWCP that it was not challenging the diagnosis of a herniated lumbar disc or that the October 31,

2019 employment incident had occurred as alleged. Rather, it was controverting the claim only based on causal relationship.

In a duty status report (Form CA-17) dated July 28, 2021, an unidentifiable health care provider diagnosed an enlarged disc herniation at the L4-5 level and described the injury as occurring from assisting a patient who was falling in an elevator.

By decision dated August 13, 2021, OWCP denied appellant's traumatic injury claim, finding that the evidence of record was insufficient to establish that the claimed injury occurred in the performance of duty on October 31, 2019, as alleged. Consequently, it found that the requirements had not been met to establish an injury as defined by FECA.

### **LEGAL PRECEDENT**

An employee seeking benefits under FECA<sup>2</sup> 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,<sup>3</sup> 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.<sup>4</sup> 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.<sup>5</sup>

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. The first component is that 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. The second component is whether the employment incident caused a personal injury and can be established only by medical evidence.<sup>6</sup>

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. 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

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<sup>2</sup> *Id.*

<sup>3</sup> *F.H.*, Docket No. 18-0869 (issued January 29, 2020); *J.P.*, Docket No. 19-0129 (issued December 13, 2019); *Joe D. Cameron*, 41 ECAB 153 (1989).

<sup>4</sup> *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).

<sup>5</sup> *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).

<sup>6</sup> *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).

medical treatment may, if otherwise unexplained, cast serious doubt on the employee's statements in determining whether a *prima facie* case has been established.<sup>7</sup> 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.<sup>8</sup>

### ANALYSIS

The Board finds that appellant has met her burden of proof to establish a traumatic incident in the performance of duty on October 31, 2019, as alleged.

As noted, an employee's statement alleging that an injury occurred at a given time and place, and in a given manner is of great probative value and will stand unless refuted by strong or persuasive evidence.<sup>9</sup> In her Form CA-1 dated November 5, 2019, appellant alleged that she sustained an injury to her back on October 31, 2019, when she assisted a patient who fell near an elevator while in the performance of duty. Appellant has provided a consistent description of the October 31, 2019 employment incident to her treating physician. On November 27, 2019 Dr. Rabi noted her history of injury of injuring her back while trying to assist a patient who had fallen near the elevator she had entered at work on October 31, 2019. He diagnosed a lumbar disc with left radiculitis spine contusion. A November 30, 2019 MRI scan report of the lumbar spine also noted an October 31, 2019 date of injury and provided impressions of mild multilevel spondylosis, broad-based herniations at L3-4 and L4-5 and straightening of normal lumbar lordosis. December 3, 2019 through January 13, 2020 physical therapy notes indicate appellant was treated for lower back pain related to an October 31, 2019 employment incident where she injured her back helping a patient who had fallen.

Additionally, the employing establishment twice acknowledged that appellant was injured in the performance of duty on October 31, 2019, as alleged. On the reverse side of the claim form, appellant's supervisor acknowledged that appellant was injured in the performance of duty on October 31, 2019, and that his knowledge of the facts of the injury was consistent with her statements. Furthermore, in a letter dated July 12, 2021, the employing establishment informed OWCP that it was not challenging the diagnosis of a herniated lumbar disc or that the October 31, 2019 employment incident had occurred, as alleged. Rather, it was controverting the claim only based on causal relationship.

The Board thus finds that the evidence of record is sufficient to establish that the October 31, 2019 employment incident occurred in the performance of duty, as alleged.

As appellant has established that the October 31, 2019 employment incident factually occurred as alleged, the question becomes whether the incident caused an injury.<sup>10</sup> As OWCP found that she had not established fact of injury, it has not evaluated the medical evidence. The

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<sup>7</sup> *C.M.*, Docket No. 20-1519 (issued March 22, 2021); *Betty J. Smith*, 54 ECAB 174 (2002).

<sup>8</sup> *See M.C.*, Docket No. 18-1278 (issued March 7, 2019); *D.B.*, 58 ECAB 464, 466-67 (2007).

<sup>9</sup> *See id.*

<sup>10</sup> *See M.H.*, Docket No. 20-0576 (issued August 6, 2020); *M.A.*, Docket No. 19-0616 (issued April 10, 2020); *C.M.*, Docket No. 19-0009 (issued May 24, 2019).

case must, therefore, be remanded for consideration of the medical evidence of record.<sup>11</sup> 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 October 31, 2019 employment incident.

**CONCLUSION**

The Board finds that appellant has met her burden to that the October 31, 2019 incident occurred in the performance of duty, as alleged. The Board further finds that the case is not in posture for decision with regard to whether the medical evidence of record is sufficient to establish an injury causally related to the accepted October 31, 2019 employment incident.

**ORDER**

**IT IS HEREBY ORDERED THAT** the August 13, 2021 decision of the Office of Workers' Compensation Programs is reversed in part and set aside in part, and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: January 10, 2023  
Washington, DC

Alec J. Koromilas, 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

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<sup>11</sup> *M.H., id.; S.M.*, Docket No. 16-0875 (issued December 12, 2017).