

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

_____)	
L.B., Appellant)	
)	
and)	Docket No. 21-1100
)	Issued: May 12, 2023
DEPARTMENT OF VETERANS AFFAIRS,)	
EUGENE J. TOWBIN VA HEALTHCARE)	
CENTER, North Little Rock, AR, Employer)	
_____)	

Appearances:
Alan J. Shapiro, Esq., for the appellant¹
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
JANICE B. ASKIN, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On July 14, 2021 appellant, through counsel, filed a timely appeal from a June 29, 2021 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 injury in the performance of duty on April 21, 2020, as alleged.

FACTUAL HISTORY

On May 13, 2020 appellant, then a 54-year-old registered nurse, filed a traumatic injury claim (Form CA-1) alleging that, on April 21, 2020 at approximately 7:30 p.m., she sustained neck and back injuries when administering medication to a patient who grabbed her by the waist and jerked her on top of him while in the performance of duty.³ She noted that she used her left arm and hand to keep from hitting her head on the wall. Appellant explained that this was the second time this kind of incident occurred with the same patient. She indicated that a coworker witnessed the incident. On the reverse side of the claim form, the employing establishment acknowledged that appellant was in the performance of duty when her injury occurred, but controverted her claim, contending that she did not report her injury at the time of the incident and failed to submit any probative medical document containing a medical diagnosis. It also noted that she had reported the incident to the police. Appellant stopped work on April 24, 2020.

An April 24, 2020 magnetic resonance imaging (MRI) scan of the cervical spine demonstrated no spinal cord signal abnormality, but did demonstrate multilevel spondylosis with minimal acquired on congenital spinal canal stenosis at C5-6 and C6-7, and moderate multilevel neural foramina stenosis. An MRI scan of the thoracic spine of even date revealed no spinal canal stenosis, but demonstrated a T6-7 moderate size central disc protrusion with questionable abnormality, as well as additional multilevel disc protrusions.

In a May 8, 2020 note, Oliva Cox, an advanced practice registered nurse, noted that appellant was evaluated in her office. She recommended that appellant remain off work for up to four additional weeks.

In a May 21, 2020 development letter, OWCP informed appellant of the deficiencies of her claim. It advised her of the type of factual and medical evidence needed and provided a questionnaire for her completion. OWCP afforded appellant 30 days to submit the requested evidence.

On June 24, 2020 the employing establishment controverted appellant's claim, asserting that the police report indicated inconsistencies, including whether the patient was sitting or lying down, and the time of the alleged incident. It noted that, following the alleged incident, she completed the rest of her shift and did not seek medical care until April 24, 2020.

³ Appellant has a previously accepted August 5, 2011 traumatic injury claim for sprain of unspecified sites of left knee and leg, and sprain of lumbosacral joint (ligament) under OWCP File No. xxxxxx185. She subsequently filed a traumatic injury claim on November 18, 2020 alleging that she injured her back while in the performance of duty under OWCP File No. xxxxxx212. By decision dated January 8, 2021, OWCP denied her claim, finding that the evidence was insufficient to establish that a traumatic incident occurred as alleged. These claims have not been administratively combined by OWCP.

By decision dated June 25, 2020, OWCP denied appellant's traumatic injury claim, finding that she had not submitted sufficient evidence to establish that the incident occurred as alleged. Consequently, it found that she had not met the requirements to establish an injury as defined by FECA.

OWCP continued to receive evidence.

In a May 26, 2020 medical report, Dr. Andrew G. Cain, a pain medicine specialist, noted that appellant presented with back pain. He related that she had a history of neck and lumbar pain, which began in 2018 when she slipped out of a chair at work. Dr. Cain noted that appellant also sustained a motorcycle accident in May 2019. Appellant reported that her conditions worsened acutely on April 21, 2020 after being grabbed by a patient while at work. Dr. Cain noted complaints of aching, throbbing, stabbing, and burning lower back, lumbosacral, neck, and thoracic pain that radiated to the hips. He conducted a physical examination and reviewed appellant's diagnostic studies. Dr. Cain diagnosed protrusion of the thoracic intervertebral disc, lumbar spondylosis, and cervical spondylosis.

In a June 3, 2020 medical report, Dr. Frederick G. Nagel, Board-certified in emergency medicine, noted that appellant presented with lumbar and thoracic pain following an assault at work on April 21, 2020. He indicated that she had been unable to work since the incident. Dr. Nagel noted that appellant's back pain was a chronic problem that started more than a year ago and the problem occurred daily and had been gradually worsening. He related that the symptoms were aggravated by bending, position, lying down, sitting, standing, and twisting. Dr. Nagel noted that appellant had a history of cervical disc disorder, low back pain, lumbosacral disc disease, and neck pain. He conducted a physical examination and diagnosed protrusion of the thoracic intervertebral disc and lumbar spondylosis. In an attending physician's report (Form CA-20) of even date, Dr. Nagel noted that appellant was sexually assaulted by a patient at work and diagnosed lumbar/thoracic spondylosis.

In a June 9, 2020 report, Ms. Cox noted that appellant presented with a sharp, shooting pain in her back. Appellant related that she had been experiencing cervical pain since her motorcycle accident in 2016 and then after being attacked at work in April 2020. Ms. Cox conducted a physical examination and diagnosed cervical radiculopathy, neck pain, lumbar arthropathy, chronic bilateral low back pain without sciatica, paresthesia, neuroforaminal stenosis of the thoracic spine, protrusion of the thoracic intervertebral disc, and chronic pain syndrome.

In a June 11, 2020 medical report, Dr. Snodgrass noted that appellant was previously injured on January 31, 2019 and subsequently reinjured on April 21, 2020 when a patient reached up and grabbed her around the waist and pulled her onto the bed. Appellant filed a police report for assault on April 22, 2020. She believed that this incident was an aggravation of her January 31, 2019 injury. Dr. Snodgrass noted that appellant presented with consistent lumbar/thoracic pain and cervical pain and indicated that she had stopped work since April 23, 2020. He related that she underwent neck surgery in May 2019. Dr. Snodgrass diagnosed lumbar/thoracic spondylosis and opined that the described employment incident and the physical examinations findings supported that the employment incident was the direct cause and aggravation of appellant's conditions. In a duty status report (Form CA-17) of even date, he provided work restrictions and diagnosed lumbar/thoracic spondylosis.

On March 30, 2021 appellant, through counsel, requested reconsideration. Counsel submitted an April 24, 2020 police report.

In the April 24, 2020 police report, appellant related that she had filed a disruptive behavior report on April 22, 2020 addressing the alleged April 21, 2020 incident where a patient grabbed her by the waist in a sexual manner. She alleged that, at or about 9:10 p.m. on April 21, 2020 she was administering medication to a patient in his assigned room and thereafter when she instructed him to lay down in bed, he grabbed her around the waist with both of his arms and laid back, pulling her on top of him, saying, “I missed you” and “I am glad you are back.” Appellant noted that she immediately told the patient to never touch her like that again. She related to an unidentified coworker that she had ongoing lower back pain, which she believed that was aggravated by the incident. The same coworker offered to call the police, but appellant declined the offer, noting that she felt that the presence of the police would agitate the patient. She believed that the incident was sexual in nature and that it was not the first negative incident she experienced with the same patient. Appellant further noted that the patient, on or about April 8, 2020, had referred to her as “lover” and had attempted to follow her into the copy room.

Several unidentified coworkers contended that appellant had a history of “boundary issues” with the patient in question and that the patient seemed to be infatuated with her. They noted that appellant claimed that she had been assaulted by the patient on April 21, 2020 when he grabbed her by the waist and attempted to pull her onto the bed. One of her coworkers further related that they were present on the date of the alleged incident and appellant seemed shaken up a little after the incident had occurred. The criminal investigator concluded that the alleged incident occurred on April 21, 2020 at approximately 9:10 p.m., and noted that due to the inconsistencies in appellant’s story, no charges were filed.

By decision dated June 29, 2021, OWCP denied modification of its June 25, 2020 decision. It noted that appellant had not responded to its development questionnaire.

LEGAL PRECEDENT

An employee seeking benefits under FECA⁴ 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

⁴ *Supra* note 1.

⁵ *S.S.*, Docket No. 19-1815 (issued June 26, 2020); *S.B.*, Docket No. 17-1779 (issued February 7, 2018); *Joe D. Cameron*, 41 ECAB 153 (1989).

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 if an employee has sustained a traumatic injury in the performance of duty, OWCP begins with an analysis of whether fact of injury has been established.⁸ Generally, 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 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 are of great probative value and will stand unless refuted by strong or persuasive evidence.¹³

ANALYSIS

The Board finds that appellant has met her burden of proof to establish a traumatic incident in the performance of duty on April 21, 2020, as alleged.

Appellant recounted in her Form CA-1 that she injured her neck and back on April 21, 2020 when a patient grabbed her by the upper waist and jerked her on top of him. On the reverse

⁶ *M.H.*, Docket No. 19-0930 (issued June 17, 2020); *R.C.*, 59 ECAB 427 (2008); *James E. Chadden, Sr.*, 40 ECAB 312 (1988).

⁷ *S.A.*, Docket No. 19-1221 (issued June 9, 2020); *L.M.*, Docket No. 13-1402 (issued February 7, 2014); *Delores C. Ellyett*, 41 ECAB 992 (1990).

⁸ *S.C.*, Docket No. 20-0733 (issued August 3, 2021); *E.M.*, Docket No. 18-1599 (issued March 7, 2019); *T.H.*, 59 ECAB 388, 393-94 (2008).

⁹ *R.K.*, Docket No. 19-0904 (issued April 10, 2020); *Elaine Pendleton*, 40 ECAB 1143 (1989).

¹⁰ *Y.D.*, Docket No. 19-1200 (issued April 6, 2020); *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).

¹² *J.P.*, Docket No. 21-0310 (issued August 13, 2021); *L.D.*, Docket No. 16-0199 (issued March 8, 2016); *Betty J. Smith*, 54 ECAB 174 (2002).

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

side of the claim form, the employing establishment acknowledged that she was in the performance of duty at the time and date of the alleged incident. Further, appellant has provided a consistent description of the April 21, 2020 employment incident to her treating medical providers. Dr. Cain, in his May 26, 2020 report, related that she was injured when a patient grabbed her at work on April 21, 2020. Dr. Nagel, in his June 3, 2020 reports, also noted that appellant was assaulted by a patient at work on April 21, 2020. Similarly, Ms. Cox, in her June 9, 2020 report, recounted that appellant was attacked at work in April 2020, and Dr. Snodgrass, in his June 11, 2020 report, noted that on April 21, 2020 a patient reached up and grabbed appellant around the waist and pulled her onto him on a bed. Moreover, an April 24, 2020 police report related that appellant had advised the investigating officers that she was injured on April 21, 2020 when a patient grabbed her around the waist with both arms and pulled her on top of him and that a disruptive behavior report had been filed with the employing establishment that following day. One of appellant's coworkers, who was present on the date of the alleged employment incident, also noted that she appeared to be visibly shaken following the incident. The investigator concluded that the alleged employment incident had occurred on April 21, 2020 at approximately 9:10 p.m.

The employing establishment subsequently controverted appellant's claim in a letter dated June 24, 2020 noting inconsistencies in her description of the incident. However, as stated above, 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.¹⁴ Appellant's account of the incident is consistent with the surrounding facts and circumstances and her subsequent course of action does not cast doubt on the validity of her claim.¹⁵ The Board, therefore, finds that she has established that the employment incident occurred, as alleged, on April 21, 2020. Appellant has, thus, established the first component of fact of injury.¹⁶

As appellant has established that the April 21, 2020 employment incident factually occurred as alleged, the question becomes whether this incident caused or aggravated an injury. The Board will, therefore, set aside OWCP's June 29, 2021 decision and remand the case to OWCP for consideration of the medical evidence. Following this and other such further development as deemed necessary, it shall issue a *de novo* decision addressing whether appellant has met her burden of proof to establish an injury causally related to the accepted April 21, 2020 employment incident.¹⁷

CONCLUSION

The Board finds that appellant has met her burden of proof to establish that an employment incident occurred in the performance of duty on April 21, 2020, as alleged. The Board further finds that this case is not in posture for decision with regard to whether the medical evidence of

¹⁴ *Id.*

¹⁵ *T.G.*, Docket No. 20-1549 (issued August 3, 2021); *L.F.*, Docket No. 19-1275 (issued October 29, 2020).

¹⁶ *See M.F.*, Docket No. 19-0578 (issued January 26, 2021).

¹⁷ On remand, OWCP should consider administratively combining OWCP File Nos. xxxxxx185 and xxxxxx212 with the current claim.

record is sufficient to establish an injury causally related to the accepted April 21, 2020 employment incident.

ORDER

IT IS HEREBY ORDERED THAT the June 29, 2021 decision of the Office of Workers' Compensation Programs is reversed and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: May 12, 2023
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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