

**K.J., Appellant**

**DEPARTMENT OF VETERANS AFFAIRS,  
VETERANS HEALTH ADMINISTRATION,  
Salem, VA, Employer**

### Case Submitted on the Record

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

## **FACTUAL HISTORY**

On May 17, 2012 appellant, then a 50-year-old nursing assistant, filed a traumatic injury claim (Form CA-1), alleging a left upper chest, left back and shoulder injury that day when a patient struck him with his fists on his front and back at 6:30 p.m. He notified his supervisor and first received medical care on May 17, 2012.<sup>2</sup> Appellant's supervisor noted on the claim form that this was a first aid injury.

By letter dated May 31, 2012, OWCP informed appellant that the evidence of record was insufficient to support his claim. Appellant was advised of the medical and factual evidence needed and was asked to respond to the questions provided in the letter within 30 days. OWCP also advised the employing establishment that if he was treated at an agency medical facility, the employing establishment must provide the treatment notes directly to OWCP.

OWCP received medical records from the employing establishment. In a May 17, 2012 Occupational Health/ER report, Dr. Bharatbhai G. Patel, Board-certified in internal medicine and an employing establishment physician, reported that appellant was seen at 8:18 p.m. with complaints of left chest, shoulder and neck pain after a psychiatric patient punched him. Upon physical examination, he noted no shoulder deformity, neck stiffness, spinal tenderness, bruise, ecchymosis or laceration. Dr. Patel diagnosed muscular sprain injury. He prescribed a soft cervical collar, naproxen and rest. A progress note dated May 18, 2012, advised that appellant was still recommended to rest. He was returned to full duty on May 21, 2012.<sup>3</sup>

By decision dated July 3, 2012, OWCP denied appellant's claim finding that the evidence did not establish that the incident occurred as alleged. It noted that the medical evidence submitted contained a diagnosis of "pain" and not a firm medical diagnosis. OWCP also found that the medical evidence was from a physician's assistant, who is not considered a physician under FECA.

By letter dated July 13, 2012, appellant requested reconsideration. He stated that he followed protocol and sought treatment at the employing establishment Occupational Health/ER on the night of the employment incident after he was assaulted by a patient. Appellant was taken off work on May 18, 19 and 20, 2012 and placed on light duty on May 21 and 22, 2012. He stated that he felt he should be compensated for the "loss of time" that occurred.

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<sup>2</sup> The Board notes that appellant has 13 other traumatic injury claims dated October 9, 2003 to March 1, 2012. The record before the Board contains no other information pertaining to his other claims.

<sup>3</sup> The signature on the progress notes is illegible.

By decision dated October 5, 2012, OWCP denied appellant's request for reconsideration finding that he did not raise any substantive legal questions or submit new and relevant evidence establishing fact of injury.<sup>4</sup>

### **LEGAL PRECEDENT -- ISSUE 1**

An employee seeking benefits under FECA has the burden of establishing 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 filed within the applicable time limitation; that an injury was sustained while in the performance of duty as alleged and that any disability or specific condition for which compensation is claimed are causally related to the employment injury.<sup>5</sup> These are the essential elements of each and every compensation claim regardless of whether the claim is predicated on a traumatic injury or occupational disease.<sup>6</sup>

In order to determine whether an employee actually sustained an injury in the performance of duty, OWCP begins with an analysis of whether fact of injury has been established. Generally, fact of injury consists of two components which must be considered in conjunction with one another. The first component to be established is that the employee actually experienced the employment incident which is alleged to have occurred.<sup>7</sup> The second component is whether the employment incident caused a personal injury and generally can be established only by medical evidence.

When an employee claims that he or she sustained an injury in the performance of duty he or she must submit sufficient evidence to establish that he or she experienced a specific event, incident or exposure occurring at the time, place and in the manner alleged. He or she must also establish that such event, incident or exposure caused an injury.<sup>8</sup> Once an employee establishes that he or she sustained an injury in the performance of duty, he or she has the burden of proof to establish that any subsequent medical condition or disability for work, for which he or she claims compensation is causally related to the accepted injury.<sup>9</sup>

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<sup>4</sup> The Board notes that appellant submitted additional evidence after OWCP rendered its October 5, 2012 decision. The Board's jurisdiction is limited to reviewing the evidence that was before OWCP at the time of its final decision. Therefore, this additional evidence cannot be considered by the Board. 20 C.F.R. § 510.2(c)(1); *Dennis E. Maddy*, 47 ECAB 259 (1995); *James C. Campbell*, 5 ECAB 35, 36 n.2 (1952). Appellant may submit this evidence to OWCP, together with a formal request for reconsideration, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. § 10.606(b)(2).

<sup>5</sup> *Gary J. Watling*, 52 ECAB 278 (2001); *Elaine Pendleton*, 40 ECAB 1143, 1154 (1989).

<sup>6</sup> *Michael E. Smith*, 50 ECAB 313 (1999).

<sup>7</sup> *Elaine Pendleton*, 40 ECAB 1143 (1989).

<sup>8</sup> See generally *John J. Carlone*, 41 ECAB 354 (1989); see also 5 U.S.C. § 8101(5) (injury defined); 20 C.F.R. § 10.5(q) and (ee) (1999) (occupational disease or illness and traumatic injury defined). See *Victor J. Woodhams*, 41 ECAB 345 (1989) regarding a claimant's burden of proof in an occupational disease claim.

<sup>9</sup> *Supra* note 4.

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. In determining whether a case has been established, such circumstances as late notification of injury, lack of confirmation of injury and failure to obtain medical treatment may, if otherwise unexplained, cast substantial doubt on the employee's statements. 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.<sup>10</sup>

To establish a causal relationship between the condition, as well as any attendant disability claimed and the employment event or incident, the employee must submit rationalized medical opinion evidence based on a complete factual and medical background, supporting such a causal relationship.<sup>11</sup> The opinion of the physician must be based on one of reasonable medical certainty and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant. This medical opinion must include an accurate history of the employee's employment injury and must explain how the condition is related to the injury. The weight of medical evidence is determined by its reliability, its probative value, its convincing quality, the care of analysis manifested and the medical rationale expressed in support of the physician's opinion.<sup>12</sup>

### **ANALYSIS -- ISSUE 1**

In its July 3, 2012 decision, OWCP found that appellant did not establish that the incident occurred at the time, place and in the manner alleged. The Board finds, however, that the evidence of record is sufficient to establish that the May 17, 2012 incident occurred, as alleged.

Appellant alleged that he sustained an injury at work on May 17, 2012 when he was struck by a patient in his front and back. The May 17, 2012 Occupational Health/ER report from Dr. Patel is consistent in noting that appellant experienced left chest, shoulder and neck pain after he was punched by a psychiatric patient. Appellant provided a consistent account of the mechanism of the employment incident and reported it to his supervisor, filed a CA-1 form and sought medical treatment on that same date. Appellant's supervisor agreed with the facts alleged by appellant and the employing establishment did not controvert the claim. The Board finds that, given the above-referenced evidence, appellant has established that the incident occurred at the time, place and in the manner alleged.<sup>13</sup>

In the May 17, 2012 report, Dr. Patel reported that appellant complained of left chest, shoulder and neck pain after a psychiatric patient punched him. Upon physical examination, he noted no shoulder deformity, neck stiffness, spinal tenderness, bruise, ecchymosis or laceration. Dr. Patel diagnosed muscular sprain injury. Progress notes were also submitted noting appellant's treatment on May 18 and 21, 2012. While OWCP found that the evidence of record was prepared and signed by a physician's assistant, the Board finds that the May 17 and 18, 2012

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<sup>10</sup> *Betty J. Smith*, 54 ECAB 174 (2002).

<sup>11</sup> *See* 20 C.F.R. § 10.110(a); *John M. Tornello*, 35 ECAB 234 (1983).

<sup>12</sup> *James Mack*, 43 ECAB 321 (1991).

<sup>13</sup> *See Willie J. Clements*, 43 ECAB 244 (1991).

reports were from Dr. Patel.<sup>14</sup> The issue is whether the May 17, 2012 incident caused appellant's injury. Appellant submit rationalized medical evidence to establish that his diagnosed medical condition is causally related to the accepted May 17, 2012 employment incident.

While Dr. Patel's report establishes a diagnosis of muscular sprain injury, it is not sufficient to establish causal relation. He noted that appellant was struck by a psychiatric patient and complained of left chest, shoulder and neck pain. Dr. Patel failed to provide an adequate explanation of how the incident caused or contributed to any muscular sprain injury. He failed to address appellant's medical history or discuss any preexisting shoulder or chest conditions other than noting a prior history of human bite, chest wall pain and pain in the joint involving the shoulder region. Dr. Patel recounted the incident as described by appellant but did not offer a rationalized opinion on the issue of causal relationship.<sup>15</sup> Medical evidence that does not offer any opinion regarding the cause of an employee's condition is of limited probative value on the issue of causal relationship.<sup>16</sup> The opinion of a physician supporting causal relationship must rest on a complete factual and medical background supported by affirmative evidence, address the specific factual and medical evidence of record and provide medical rationale explaining the relationship between the diagnosed condition and the established incident or factor of employment.<sup>17</sup> Dr. Patel's report is insufficient to meet appellant's burden of proof.

The remaining medical evidence of record is also insufficient to establish causal relationship between appellant's muscular sprain injury and the May 17, 2012 employment incident as the progress notes merely noted his complaints and treatment but failed to provide any opinion on causal relationship. Moreover, it is unclear if the progress notes were signed by a physician as they contain an illegible signature.<sup>18</sup> These notes lack probative medical value as the author(s) cannot be identified as a physician.<sup>19</sup>

In the instant case, appellant has established that the May 17, 2012 incident occurred as alleged. The record, however, is without rationalized medical evidence addressing a causal relationship. Thus, appellant has failed to establish his burden of proof.

The Board notes that OWCP's implementing regulations allow for authorization of medical treatment in emergency circumstances. While 20 C.F.R. § 10.300 explains that authorization of emergency medical treatment is usually provided by issuance of a Form CA-16,

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<sup>14</sup> The Board notes that OWCP's July 3, 2012 decision incorrectly noted that appellant did not provide a medical report from a physician.

<sup>15</sup> *Franklin D. Haislah*, 52 ECAB 457 (2001) (medical reports not containing rationale on causal relationship are entitled to little probative value); *Jimmie H. Duckett*, 52 ECAB 332 (2001).

<sup>16</sup> *C.B.*, Docket No. 09-2027 (issued May 12, 2010); *S.E.*, Docket No. 08-2214 (issued May 6, 2009).

<sup>17</sup> See *Lee R. Haywood*, 48 ECAB 145 (1996).

<sup>18</sup> Nurses, physician's assistants, physical and occupational therapists are not "physicians" as defined by FECA, their opinions regarding diagnosis and causal relationship are of no probative medical value. 5 U.S.C. § 8101(2) of FECA provides that the term "physician" includes surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors and osteopathic practitioners within the scope of their practice as defined by State law. See also *Roy L. Humphrey*, 57 ECAB 238 (2005).

<sup>19</sup> See *Ricky S. Storms*, 52 ECAB 349 (2001); *Morris Scanlon*, 11 ECAB 384, 385 (1960).

section 10.304 allows for authorization of emergency treatment, in the absence of a Form CA-16, in cases involving emergencies or unusual circumstances. Upon return of the case record, OWCP shall adjudicate whether appellant's treatment by the employing establishment occupational health/ER should be authorized.

Evidence submitted by appellant after OWCP's final decision cannot be considered by the Board. The Board's jurisdiction is limited to reviewing the evidence that was before OWCP at the time of its decision.<sup>20</sup> Appellant may submit additional evidence, together with a written request for reconsideration, to OWCP within one year of the Board's merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.606 and 10.607.

### **LEGAL PRECEDENT -- ISSUE 2**

To require OWCP to reopen a case for merit review under FECA section 8128(a), OWCP regulations provide that the evidence or argument submitted by a claimant must: (1) show that OWCP erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by OWCP; or (3) constitute relevant and pertinent new evidence not previously considered by OWCP.<sup>21</sup> Section 10.608(b) of OWCP regulations provide that, when an application for reconsideration does not meet at least one of the three requirements enumerated under section 10.606(b)(2), it will deny the application for reconsideration without reopening the case for a review on the merits.<sup>22</sup>

### **ANALYSIS -- ISSUE 2**

The Board finds that the refusal of OWCP to reopen appellant's case for further consideration of the merits of his claim, pursuant to 5 U.S.C. § 8128(a), did not constitute an abuse of discretion.

The issue presented on appeal is whether appellant met any of the requirements of 20 C.F.R. § 10.606(b)(2), requiring OWCP to reopen the case for review of the merits of the claim. In his July 13, 2012 application for reconsideration, appellant did not show that OWCP erroneously applied or interpreted a specific point of law. He did not advance a new and relevant legal argument. Appellant's argument was that his injury was employment related and that he followed proper protocol by seeking emergency treatment on the date of the incident.

The underlying issue on appeal involved fact of injury. To establish fact of injury, the remaining issue is whether appellant's diagnosed condition was causally related to the employment incident. Appellant's statement is duplicative of his allegations on appeal. He stated that he followed employing establishment protocol and was treated at the employing establishment's Occupational Health/ER on the night of the injury. Appellant stated that his lost wages should therefore be compensated. Whether he sustained an injury causally related to the May 17, 2012 employment incident is a medical issue which must be addressed by relevant

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<sup>20</sup> 20 C.F.R. § 501.2(c)(1).

<sup>21</sup> *D.K.*, 59 ECAB 141 (2007).

<sup>22</sup> *K.H.*, 59 ECAB 495 (2008).

medical evidence.<sup>23</sup> A claimant may obtain a merit review of an OWCP decision by submitting new and relevant evidence. In this case, appellant failed to submit any new and relevant evidence addressing a firm medical diagnosis and causal relationship.

The Board accordingly finds that appellant did not meet any of the requirements of 20 C.F.R. § 10.606(b)(2). Appellant did not show that OWCP erroneously applied or interpreted a specific point of law, advance a relevant legal argument not previously considered by OWCP or submit relevant and pertinent evidence not previously considered. Pursuant to 20 C.F.R. § 10.608, OWCP properly denied merit review.

### **CONCLUSION**

The Board finds that appellant did not meet his burden of proof to establish that his muscular sprain injury is causally related to the accepted May 17, 2012 employment incident. OWCP properly denied his request for reconsideration without a merit review.

### **ORDER**

**IT IS HEREBY ORDERED THAT** the July 3, 2012 decision of the Office of Workers' Compensation Programs is affirmed, as modified. The October 5, 2012 decision is affirmed.

Issued: May 23, 2013  
Washington, DC

Patricia Howard Fitzgerald, Judge  
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge  
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge  
Employees' Compensation Appeals Board

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<sup>23</sup> See *Bobbie F. Cowart*, 55 ECAB 746 (2004).