

restroom at work and sustained lacerations to her arms, shoulders, back of head and left hand. On the claim form she stated that she was exiting the restroom stall and was shoved to the floor. Appellant stated that while trying to get up, the assailant grabbed her hair, pushed her into a wall and cut her while cutting her hair.

The record contains a statement (on employing establishment Form 119, report of contact) from Allison Clemons, a coworker, who reported that on May 25, 2011 between 11:00 a.m. and 11:30 a.m. she saw a Caucasian female enter the restroom. Ms. Clemons states she went to a coworker's office adjacent to the restroom, when a student came and stated that someone was in the restroom bleeding. According to Ms. Clemons, she entered the restroom and found appellant alone, holding in her hand a silver object that resembled a nail file and bleeding from lacerations on her arm. Appellant stated that she had been attacked and the police were notified.

In an employing establishment police report dated May 25, 2011, Officer Brian Singleton stated that at 11:28 a.m. he arrived at the restroom and found appellant sitting in a wheelchair sobbing and speaking hysterically. He stated there were blood stains in droplets on the floor that "were not smeared consistent with a struggle." Officer Singleton stated there was a scalpel standing in the toilet bowl as if it had been placed there. He noted appellant had cuts on her left wrist, forearms, shoulders, palm and chest areas, as well as to her right forearm and triceps, with some of the cuts appearing to be in line and side by side. According to Officer Singleton, appellant described the assailant as a heavy black female, who pushed the door unto her as she was exiting the stall, shoved her against the wall face first and attempted to cut appellant's hair. Officer Singleton found no hair on the floor. Appellant indicated that she had picked up the scalpel and then later threw it down; stating that she did not scream or fight the assailant. Officer Singleton noted that she had been examined in the emergency room by Dr. Dennis Rudderow, Board-certified in internal medicine.

In a report dated May 26, 2011, Officer Mark Lucas reported an interview with the student, who initially found appellant indicated that appellant stated the attacker wore blue gloves, then stated the gloves were brown, and then stated they were clear gloves. He reported that Ms. Clemons stated that she observed appellant entering the restroom, then she went to her office "for not even 10 seconds" and then returned to the work area near the restroom, when the student entered the restroom and found appellant. Appellant stated that she fell backward into the rear wall of the stall, with her assailant stating that she wanted appellant's hair. According to Officer Lucas, she could not provide a description of the attacker other than she wore clear gloves and glasses and after stating she did not scream, stated she did scream until the assailant told her to be quiet. Officer Lucas concluded,

"After talking to [appellant], I noticed several inconsistencies in what [she] was saying. There were inconsistencies about what type of gloves the subject had on. There were inconsistencies in the description of the subject. Along with the inconsistencies, there were two witnesses that saw [appellant] enter the restroom and never saw anyone else enter the restroom behind her. They also never saw anyone leave out of the restroom before [she] left out. It also must be noted that [appellant] stated that she put her arms up around her face to protect her face, however, the cuts on her arms are located on the inside of her arms not the back of

her arms which would be consistent with one being in a defensive posture. With the facts presented about, it is the findings of this investigator that [her] story was not accurate in several instances.”

The report also contained a note dated May 27, 2011 from Officer Kirk Carron, who indicated that Dr. Rudderow had been asked for an opinion as to whether appellant’s wounds were consistent with an assault. Officer Carron stated that Dr. Rudderow could not determine whether the cuts were self-inflicted or consistent with an assault.

In a report dated May 25, 2011, Dr. Rudderow indicated that appellant was examined and that she had multiple linear superficial lacerations to her left arm, left torso and right side. The initial nurse assessment noted an abrasion to base of head and hair cut from base of head.

By letter dated June 14, 2011, Don Giraud, the chief of the employing establishment police service, indicated that on May 25, 2011 appellant’s spouse had stated that during the year prior appellant had been in treatment for depression. He also indicated that the spouse was worried about the mental status of his wife.

In a statement received on June 28, 2011, appellant stated that there was a climate of racial hostility at the employing establishment, and she had received a threatening note on March 15, 2011. She indicated that she did not keep the note but had informed her supervisors. Appellant stated that on May 25, 2011 she was pushed against the wall with her face against the wall, she did scream and her attacker talked about her “white girl hair” and appellant thought she had scissors.

In an undated statement received on July 18, 2011, Aaron Herr, a supervisor, stated that on May 20, 2011 appellant had been informed she would not receive a requested reassignment. According to the supervisor, on May 23, 2011, appellant stated that she did not feel safe at the current work site, referring to past threats. In a July 25, 2011 statement, supervisors Mr. Herr and Mary Gross discussed events prior to May 25, 2011.

Appellant submitted a June 16, 2011 report from Dr. Nestor Shust, Board-certified in emergency medicine, who indicated that she was treated for left shoulder pain. Dr. Shust also stated that she had “wounds consistent with patient[’]s description of altercation.” He provided a history that appellant sustained a direct blow on May 25, 2011, noting that she had been getting cortisone shots for a rotator cuff injury prior to May 25, 2011. Dr. Shust provided results on examination.

By decision dated August 5, 2011, OWCP denied the claim for compensation. It found the incident did not occur as alleged.

By letter dated August 30, 2011, appellant requested a hearing before an OWCP hearing representative. She submitted a November 9, 2010 report from Dr. Shust, who stated that she was treated at the urgent care facility on May 27 and June 16, 2011 for treatment of injuries that she received while at work on May 25, 2011. Dr. Shust stated, “[appellant] had recently been treated for a rotator cuff tear and AC [acromioclavicular] separation. In my medical opinion, I feel that it would not have been possible for the patient to have reached the injured sites; much less self-inflicted the lacerations.” A hearing was held on November 29, 2011.

By decision dated February 13, 2012, OWCP's hearing representative affirmed the denial of the claim. The hearing representative reviewed the evidence and found the incident was not established as alleged.

LEGAL PRECEDENT

FECA provides for the payment of compensation for "the disability or death of an employee resulting from personal injury sustained while in the performance of duty."² The phrase "sustained while in the performance of duty" in FECA is regarded as the equivalent of the commonly found requisite in workers' compensation law of "arising out of and in the course of employment."³ An employee seeking benefits under FECA has the burden of establishing that he or she sustained an injury while in the performance of duty.⁴ 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. The second component is whether the employment incident caused a personal injury, and generally this can be established only by medical evidence.⁵

An employee has the burden of establishing the occurrence of an injury at the time, place and in the manner alleged, by a preponderance of the reliable, probative and substantial evidence.⁶ An injury does not have to be confirmed by eyewitnesses to establish 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 subsequent course of action.⁷ It is well established that a claimant cannot establish fact of injury if there are inconsistencies in the evidence that cast serious doubt as to whether the specific event or incident occurred at the time, place and in the manner alleged.⁸ 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 an employee's statements in determining whether a *prima facie* case has been established.⁹ However, an employee's statement alleging that an injury occurred at a given time

² *Id.* at § 8102(a).

³ *Valerie C. Boward*, 50 ECAB 126 (1998).

⁴ *Melinda C. Epperly*, 45 ECAB 196, 198 (1993); *see also* 20 C.F.R. § 10.115.

⁵ *See John J. Carlone*, 41 ECAB 354, 357 (1989).

⁶ *William Sircovitch*, 38 ECAB 756, 761 (1987); *John G. Schaberg*, 30 ECAB 389, 393 (1979).

⁷ *Charles B. Ward*, 38 ECAB 667, 671 (1987).

⁸ *Gene A. McCracken*, 46 ECAB 593 (1995); *Mary Joan Coppolino*, 43 ECAB 988 (1992).

⁹ *Robert A. Gregory*, 40 ECAB 478, 483 (1989).

and in a given manner is of great probative value and will stand unless refuted by strong or persuasive evidence.¹⁰

ANALYSIS

In the present case, appellant filed a traumatic injury claim alleging that on May 25, 2011 she sustained injuries while she was in the performance of duty. She alleged that she was attacked by an unknown assailant, who used a scalpel and appellant sustained lacerations and abrasions while attempting to defend herself. The initial question is whether the factual element of the claim has been established.

The evidence of record does not raise a question of late notification of injury or continuing to work without difficulty. Appellant's statement is given great probative value. The allegation, however, must be consistent with the facts and circumstances of the case. In this regard, the Board must rely on the contemporaneous evidence from the officers who investigated the incident and the accompanying witness statements. While there is evidence in the record regarding allegations of events occurring prior to May 25, 2011, such as threatening notes, this evidence is of little probative value as to the specific allegation of a May 25, 2011 incident. Even if the allegations were established, it would be a matter of speculation whether such incidents supported the allegation of a May 25, 2011 incident. The investigating officers were in a position to examine the physical evidence with respect to the allegation. A review of this evidence indicates that the allegation in this case was not supported by the reported facts and circumstances.

The May 25, 2001 report from Officer Singleton and the May 26, 2011 report from Officer Lucas specifically noted several inconsistencies between appellant's statements and the evidence at the scene. These inconsistencies include that appellant was initially found holding the scalpel, but the officer found it placed in the toilet bowl, the blood stains were not smeared or consistent with a struggle, wounds were not consistent with a defensive posture, no hair was found, the description of the attacker was vague, there were no witnesses supporting the incident as alleged and no assailant was identified. The witness statements did not support the allegation as no individual matching appellant's description of the assailant was seen, despite the proximity of witnesses to the restroom. It was clearly the opinion of Officer Lucas that the allegation was not supported by the surrounding circumstances.

The investigating officers provided first hand contemporaneous accounts of the circumstances surrounding the allegation on May 25, 2011. Appellant has not established the factual element of the claim.¹¹

The Board notes that appellant submitted evidence from Dr. Shust, who referred briefly to a shoulder condition and opined that he did not believe appellant could have reached the injured sites and self-inflict wounds. Dr. Shust did not provide any additional explanation as to

¹⁰ *Id.*

¹¹ See A.K. Docket No. 12-613 (issued July 25, 2012) (claimant's allegation of an assault by a student was not supported by the investigation report).

what specific injury sites he felt appellant could not reach or fully explain her restrictions on motion. The description of the injury in the investigative report were primarily lacerations to the forearms, shoulder and chest area and Dr. Shust did not provide any support or detailed explanation for an opinion that appellant could not reach these areas. The evidence indicated that the physician who initially examined appellant was unable to make a determination as to whether the wounds were consistent with an assault or self-inflicted.

Having reviewed the probative evidence of record, the Board finds that the evidence does not confirm appellant's allegation of an assault by an unknown assailant on May 25, 2011. The allegation of the May 25, 2011 incident is not consistent with the facts and circumstances of the case. Appellant has not established an employment incident as alleged, and therefore has not met her burden of proof to establish the claim.¹² Since the evidence does not establish an incident at the time, place and in the manner alleged, the Board will not review the medical evidence.¹³

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

CONCLUSION

The Board finds that the evidence of record does not establish an employment incident as alleged on May 25, 2011 and therefore appellant did not meet her burden of proof to establish an injury in the performance of duty.

¹² The Board also notes that compensation is not payable for an injury "caused by the employee's intention to bring about the injury" 5 U.S.C. § 8102(a)(2).

¹³ *S.P.*, 59 ECAB 184 (2007).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated February 13, 2012 is affirmed.

Issued: October 1, 2012
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board