

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

C.B., Appellant)

and)

DEPARTMENT OF VETERANS AFFAIRS,)
BALTIMORE VETERANS ADMINISTRATION)
MEDICAL CENTER, Baltimore, MD, Employer)

Docket No. 07-492
Issued: August 13, 2007

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On December 12, 2006 appellant filed a timely appeal from the August 2 and November 15, 2006 merit decisions of the Office of Workers' Compensation Programs, finding that he did not sustain an injury in the performance of duty on October 22, 2005. Pursuant to 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 established that he sustained an injury in the performance of duty on October 22, 2005.

FACTUAL HISTORY

On October 25, 2005 appellant, then a 52-year-old housekeeping aide, filed a claim alleging injury on October 22, 2005. He hurt his right shoulder and sustained a laceration to the bottom of his gum and a headache as a result of being struck on the left temple during an assault by a coworker in the men's locker room at work. Appellant stated that his coworker became

upset about having to possibly pay for a set of keys. They exchanged words which caused the coworker to become physical. Appellant's regular work shift was from 10:00 p.m. to 6:30 a.m. The employing establishment controverted the claim, contending that appellant's shift, 6:00 a.m. to 2:30 p.m., had ended when the alleged injury occurred.

By letter dated November 10, 2005, the Office advised appellant that the evidence submitted was insufficient to establish his claim. It requested that he provide a detailed description of how and when the injury occurred, witness statements and an explanation for his delay in seeking medical treatment. The Office addressed the medical evidence appellant needed to submit to establish his claim. On November 10, 2005 the Office also requested that the employing establishment provide the exact time appellant was injured, whether the area where the injury occurred was federally-owned, operated and/or maintained and comments regarding appellant's allegations.

A November 16, 2005 report of Kathleen Herath, a registered nurse, noted appellant's symptoms of pain in the right shoulder with decreased range of motion overhead towards the back and out to the side and occasional headaches resulting from being hit on the left side of his head. Ms. Herath indicated that appellant was scheduled for a magnetic resonance imaging (MRI) scan.

The medical records of Dr. Thomas V. Whitten, an attending Board-certified orthopedic surgeon, were received by the Office. An October 31, 2005 prescription ordered an MRI scan of appellant's right shoulder to rule out a rotator cuff tear. In an October 31, 2005 medical report, Dr. Whitten stated that appellant injured his shoulder at work. On physical examination, he reported weakness of the rotator cuff that was possibly due to pain and very limited motion as a result of pain. Dr. Whitten stated that x-rays showed no obvious fracture but indicated that there was concern that appellant sustained a torn rotator cuff. He related that appellant had been unable to work. Dr. Whitten found that appellant sustained a right shoulder injury and that he could not perform his regular work duties. A November 28, 2005 disability certificate provided a diagnosis of rotator cuff tear of the right shoulder. Dr. Whitten stated that appellant would be out of work for 6 to 10 weeks following surgery. On November 28, 2005 Dr. Whitten recommended arthroscopic surgery to be followed by an open repair of appellant's right shoulder.

On November 11, 2005 Dr. Brad M. Cogan, a Board-certified radiologist, performed an MRI scan which demonstrated torn and retracted supra and infraspinatus tendons of the right shoulder.

In an undated narrative statement received by the Office on December 9, 2005, appellant further described the October 22, 2005 incident. He was in the men's locker room at the employing establishment to retrieve his coat while waiting to clock out from work. Ralph Williams, a coworker, was in the locker room using profanity in response to losing a set of work keys. Appellant stated that Mr. Williams expressed anger at his supervisor who told him that he would be charged \$10.00 per missing key. Appellant informed Mr. Williams that this had been the policy since he started working at the employing establishment. Mr. Williams responded with profane language and began punching appellant in the face and head with both fists. While trying to protect himself with his hands, appellant stated that he was struck in the right shoulder

area where he felt a sharp pain and popping sensation. He also sustained a busted lip and a knot in his left temple area. The next morning he woke up with severe bruising on the back of his right arm, a knot on his left temple and a swollen lip.

Appellant stated that the injury occurred at 2:23 p.m. on October 22, 2005. He noted that there were no witnesses but he immediately reported the incident to Rodney Weaver, a supervisor. Appellant related that Earl Purvey, a coworker, noticed his bleeding lip and asked what happened. He stated that Harry L. Van Cleaf, an employing establishment police officer, prepared a report regarding the injury. Appellant contended that he did not delay in seeking medical treatment. Since his injury was not lift-threatening, he made an appointment for October 31, 2005. Appellant noted that he previously underwent surgery in June 2000 for a work-related right shoulder injury.

By letter dated December 6, 2005, Suzzane Meyers, an employing establishment workers' compensation case manager, contended that appellant did not sustain an injury in the performance of duty on October 22, 2005. Ms. Meyers stated that he was working overtime but at the time of the alleged incident, he was not performing his regular work duties. She related that the injury occurred as a result of an altercation between two individuals with conflicting accounts of the incident. Ms. Meyers argued that there was no medical evidence of record establishing that appellant's right shoulder condition was caused by his work duties.

In a November 28, 2005 statement, James E. Tillage, III, an employing establishment assistant police chief, stated that appellant's regular work shift was from 10 p.m. to 6:30 a.m. but that on October 22, 2005 he was working overtime from 6:00 a.m. to 2:30 p.m. He stated that the alleged incident occurred in the employing establishment's men's locker room at 2:23 p.m. while appellant was still on the clock. Chief Tillage indicated that appellant did not sign out until 2:30 p.m. He reported that Mr. Weaver related that appellant came to his office to sign out at 2:30 p.m. and informed him that he had been assaulted by Mr. Williams. Chief Tillage noted Mr. Williams' contention that appellant was having a seizure and when he went to help him, appellant swung at him and he swung back. He further noted that no witnesses were present at the incident.

Officer Van Cleaf's October 22, 2005 investigative report provided that on October 22, 2005 appellant and Mr. Williams were in the men's locker room at 2:20 p.m. preparing to leave work. Mr. Williams was talking about losing a set of keys and appellant commented that he could be charged for the lost keys. Appellant stated that Mr. Williams responded with profane language and proceeded to punch him in the face area. Officer Van Cleaf stated that appellant immediately reported this incident to Mr. Weaver who then reported it to the police. Appellant stated that Mr. Williams struck him five times with both fists. Officer Van Cleaf noted that there were no witnesses at the scene of the incident.

Mr. Weaver's October 22, 2005 report stated that he received a complaint from appellant that he had been physically assaulted by Mr. Williams in the locker room. Mr. Weaver related that he immediately contacted the employing establishment's police department.

By decision dated December 12, 2005, the Office found that appellant did not sustain an injury in the performance of duty on October 22, 2005. The evidence of record failed to establish the cause of the alleged injury and whether it occurred during appellant's work hours.

In a letter dated December 28, 2005, appellant requested a review of the written record by an Office hearing representative. Chief Tillage's March 23, 2006 memorandum reiterated Mr. Williams' version of the October 22, 2005 incident. He stated that appellant contended that he commented to Mr. Williams about losing a set of keys and Mr. Williams responded that he did not care. Chief Tillage stated that they both exchanged words back and forth and that Mr. Williams punched appellant several times in the face.

By decision dated April 7, 2006, an Office hearing representative set aside the Office's December 12, 2005 decision and remanded the case to the Office for further development of the record. The hearing representative found that the Office failed to consider evidence regarding the time and place of the alleged injury and the nature of the verbal and physical altercation between appellant and Mr. Williams which was in the case record at the time it issued its decision denying appellant's claim for compensation.

On remand, the Office issued a decision dated August 2, 2006, finding the evidence of record sufficient to establish that the October 22, 2005 incident occurred as alleged, but insufficient to establish that appellant sustained an injury causally related to the accepted employment incident.

By letter dated November 6, 2006, appellant requested reconsideration. In a July 14, 2005 report, Dr. Whitten noted that appellant continued to experience shoulder pain and weakness. He stated that the surgical intervention would not help him. Dr. Whitten recommended that appellant be released from his care and that he received treatment as needed unless a problem arose. In a June 9, 2006 report, Dr. Whitten stated that appellant was being evaluated following arthroscopic shoulder surgery. He elected to debride the shoulder and start therapy with the hope of improving his function. Dr. Whitten opined that, since appellant's job involved overhead lifting, he probably would not be able to return to work.

In a November 15, 2006 decision, the Office denied modification of its August 2, 2006 decision. The evidence submitted by appellant was insufficient to establish that he sustained a medical condition causally related to the October 22, 2005 employment incident.

LEGAL PRECEDENT

An employee seeking benefits under the Federal Employees' Compensation Act¹ 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 the Act; that the claim was filed within applicable time limitation; that an injury was sustained while in the performance of duty as alleged; and that any disability and/or specific condition for which compensation is claimed are causally related to the employment injury.² These are the essential elements of each

¹ 5 U.S.C. §§ 8101-8193.

² *Joe D. Cameron*, 41 ECAB 153 (1989); *Elaine Pendleton*, 40 ECAB 1143 (1989).

and every compensation claim regardless of whether the claim is predicated on a traumatic injury of an occupational disease.³

In order to determine whether an employee actually sustained an injury in the performance of duty, the Office 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 or exposure, which is alleged to have occurred.⁴ In order to meet his burden of proof to establish the fact that he sustained an injury in the performance of duty, an employee must submit sufficient evidence to establish that he actually experienced the employment injury or exposure at the time, place and in the manner alleged.⁵

The second component is whether the employment incident caused a personal injury and generally can be established only by medical evidence.⁶ The evidence required to establish causal relationship is rationalized medical opinion evidence, based upon complete factual and medical background, showing a causal relationship between the claimed condition and the identified factors.⁷ The belief of the claimant that a condition was caused or aggravated by the employment is insufficient to establish a causal relationship.⁸

ANALYSIS

The record supports that on October 22, 2005 appellant was assaulted by a coworker in the men's locker room at the employing establishment. The Board finds, however, that the medical evidence of record is insufficient to establish that the accepted incident caused or contributed to his right shoulder condition.

Dr. Whitten's October 31, 2005 prescription ordered an MRI scan of appellant's right shoulder to rule out a rotator cuff tear. In a November 28, 2005 report, Dr. Whitten recommended arthroscopic surgery to be followed by an open repair of appellant's right shoulder. This evidence is insufficient to establish appellant's claim because Dr. Whitten did not address the issue of causal relationship. He did not explain how appellant's right shoulder condition resulted from the physical assault by Mr. Williams on October 22, 2005 or explain how such an assault resulted in a shoulder condition and need for surgery. On October 31, 2005 Dr. Whitten stated that appellant sustained a shoulder injury at work. He reported weakness of the rotator cuff that was possibly due to pain and very limited range of motion as a result of pain.

³ See *Irene St. John*, 50 ECAB 521 (1999); *Michael I. Smith*, 50 ECAB 313 (1999); *Elaine Pendleton*, *supra* note 2.

⁴ See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Fact of Injury*, Chapter 2.803(2)(a) (June 1995).

⁵ *Linda S. Jackson*, 49 ECAB 486 (1998).

⁶ *John J. Carlone*, 41 ECAB 354 (1989); see 5 U.S.C. § 8101(5) (injury defined); 20 C.F.R. §§ 10.5(ee), 10.5(q) (traumatic injury and occupational disease defined).

⁷ *Lourdes Harris*, 45 ECAB 545 (1994); see *Walter D. Morehead*, 31 ECAB 188 (1979).

⁸ *Charles E. Evans*, 48 ECAB 692 (1997).

Dr. Whitten opined that appellant was totally disabled for work. Although Dr. Whitten stated that appellant sustained a work-related shoulder injury, a mere diagnosis of pain does not constitute a basis for payment of compensation.⁹ Further, he did not address whether appellant's disability for work was caused by the October 22, 2005 employment incident. Appellant noted that he had a preexisting right shoulder condition for which he underwent surgery in June 2000. However, this report of appellant's medical history was not discussed by Dr. Whitten.

Dr. Whitten's July 14, 2005 report stated that appellant continued to experience shoulder pain and weakness, but he provided no definitive diagnosis regarding appellant's shoulder and he did not attribute the cause of appellant's symptoms to the October 22, 2005 employment incident.¹⁰ Dr. Whitten's disability certificates listed a rotator cuff tear of the right shoulder and that he could not perform his regular work duties. This evidence, however, also failed to address whether the diagnosed condition and resultant disability were causally related to the accepted employment incident. In a June 9, 2006 report, Dr. Whitten stated that appellant was status post arthroscopic shoulder surgery. He opined that appellant probably would not return to work because his job required him to lift overhead. Dr. Whitten failed to provide any medical rationale explaining how or why appellant's shoulder surgery was necessitated by the October 22, 2005 employment incident. Moreover, he did not attribute appellant's disability to the accepted employment incident. The Board finds that Dr. Whitten's reports are not sufficient to establish that appellant's right shoulder condition was caused or contributed to by the assault of October 22, 2005.

The November 16, 2005 report of Ms. Herath, a registered nurse, has no probative value inasmuch as a nurse is not considered a "physician" under the Act.¹¹

Appellant did not submit sufficient medical evidence to establish the causal relationship between his right shoulder condition and the accepted October 22, 2005 employment incident. The Board finds that there is insufficient rationalized medical evidence of record to establish that appellant sustained a right shoulder injury in the performance of duty on October 22, 2005. Therefore, he failed to meet his burden of proof.

CONCLUSION

As appellant did not provide the necessary medical evidence to establish that he sustained an injury caused by the October 22, 2005 employment incident, he has failed to meet his burden of proof.

⁹ *Robert Broome*, 55 ECAB 339 (2004).

¹⁰ *Id.*

¹¹ 5 U.S.C. § 8101(2); see *Sheila A. Johnson*, 46 ECAB 323 (1994).

ORDER

IT IS HEREBY ORDERED THAT the November 15 and August 2, 2006 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: August 13, 2007
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

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

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