



## **FACTUAL HISTORY**

On November 16, 2010 appellant, then a 55-year-old clerk, filed a traumatic injury claim (Form CA-1) alleging that she sustained a right shoulder injury while stacking and moving tubs in the performance of duty on November 15, 2010. She submitted a November 15, 2010 emergency room report and a November 18, 2010 duty status report by Dr. Harry Moffitt, an osteopath Board-certified in orthopedic surgery, who diagnosed right shoulder internal derangement. Dr. Moffitt indicated that appellant felt a sharp pain in her right shoulder on November 15, 2010 while stacking and moving tubs at work.

A January 7, 2010 magnetic resonance imaging (MRI) scan of appellant's right shoulder revealed tendinitis/tendinopathy of the distal aspect of the supraspinatus tendon, degenerative changes at the acromioclavicular (AC) joint, suggestion of slap lesion, adhesive capsulitis and os acromiale.

In a May 3, 2010 report, Dr. Vinay K.P. Reddy, a Board-certified rheumatologist, advised that appellant was being referred to Dr. Moffitt for her right shoulder problem. Dr. Reddy reported that she had tried and failed medical management including physical therapy and most likely required surgical intervention.

On January 7, 2011 appellant, through her attorney, filed a claim for wage-loss compensation for the period January 1 to 14, 2011. She submitted a January 7, 2011 report by Dr. Moffitt who diagnosed right shoulder derangement and partial tear and impingement.

By letter dated January 11, 2011, OWCP informed appellant that her claim was originally received as a simple, uncontroverted case administratively handled to allow a limited amount of medical payments. Since a claim for wage loss had been received, it would formally adjudicate the merits of the claim. After review, OWCP found that the evidence of record failed to establish that the incident occurred as alleged. It requested a physician's opinion as to how the employment incident resulted in the diagnosed condition of right shoulder derangement. OWCP allotted 30 days for appellant to submit additional evidence and respond to its inquiries.

Appellant submitted an attending physician's report dated January 20, 2011 by Dr. Moffitt who diagnosed right shoulder derangement. Dr. Moffitt reported that he first saw appellant on September 2, 2010 after she injured her right shoulder due to a fall at work two years prior on July 14, 2008.

On January 25, 2011 appellant, through her attorney, filed a second claim for wage-loss compensation for the period January 15 to February 25, 2011. She submitted a January 25, 2011 report from Dr. Moffitt who advised that her surgery would be scheduled for February 25, 2011.

In a February 9, 2011 report, Dr. Moffitt notes that appellant gave a history of falling at work and injuring her left shoulder on July 14, 2008. He provided a brief medical history and reiterated his diagnosis of right shoulder derangement. Dr. Moffitt indicated that it was almost a reinjury and that appellant had aggravated a preexisting problem.

By decision dated February 23, 2011, OWCP denied appellant's claim on the basis that the evidence appellant submitted was not sufficient to establish that the described employment incident occurred as alleged. It further denied appellant's claims for wage-loss compensation.

On March 22, 2011 appellant, through her attorney, requested reconsideration. She submitted progress notes by Dr. Moffitt dated November 2 and 18, 2010 and February 22, 2011 diagnosing aggravation of right shoulder derangement due to impingement and partial cuff tear as a result of lifting tubs at work. Appellant also submitted February 22 and March 22, 2011 reports by Dr. Moffitt diagnosing right shoulder rotator cuff tear impingement syndrome and indicating that appellant needed approval for right shoulder surgery.

By decision dated June 16, 2011, OWCP denied modification of the February 23, 2011 decision.

### **LEGAL PRECEDENT**

An employee seeking benefits under FECA<sup>2</sup> 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 timely filed within the applicable time limitation period of FECA, that an injury<sup>3</sup> 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>

To determine whether a federal employee has sustained a traumatic injury in the performance of duty, it must first be determined whether a "fact of injury" has been established. A fact of injury determination is based on two elements. First, the employee must submit sufficient evidence to establish that he or she actually experienced the employment incident at the time, place and in the manner alleged. Second, the employee must submit sufficient evidence, generally only in the form of medical evidence, to establish that the employment incident caused a personal injury. An employee may establish that the employment incident occurred as alleged but fail to show that his or her condition relates to the employment incident.<sup>5</sup>

An injury does not have to be confirmed by eyewitnesses in order to establish the fact that an employee sustained an injury while in the performance of duty. However, the employee's statements must be consistent with the surrounding facts and circumstances and his or her subsequent course of action.<sup>6</sup> Such circumstances as late notification of injury, lack of

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

<sup>3</sup> OWCP's regulations define a traumatic injury as a condition of the body caused by a specific event or incident, or series of events or incidents, within a single workday or shift. Such condition must be caused by external force, including stress or strain, which is identifiable as to time and place of occurrence and member or function of the body affected. 20 C.F.R. § 10.5(ee).

<sup>4</sup> *T.H.*, 59 ECAB 388 (2008). See *Steven S. Saleh*, 55 ECAB 169 (2003); *Elaine Pendleton*, 40 ECAB 1143 (1989).

<sup>5</sup> *Id.* See *Shirley A. Temple*, 48 ECAB 404 (1997); *John J. Carlone*, 41 ECAB 354 (1989).

<sup>6</sup> See *Mary Jo Coppolino*, 43 ECAB 988 (1992).

confirmation of injury, continuing to work without apparent difficulty following the alleged injury and failure to obtain medical treatment may cast doubt on an employee's statements in determining whether he or she has established a *prima facie* claim for compensation. The employee has the burden of establishing the occurrence of an alleged injury at the time, place and in the manner alleged by a preponderance of the evidence.<sup>7</sup> An employee has not met this burden when there are such inconsistencies in the evidence that cast serious doubt upon the validity of the claim. However, 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 and persuasive evidence.<sup>8</sup>

### ANALYSIS

The Board finds that appellant did not meet her burden of proof to establish that on November 15, 2010 she sustained a right shoulder injury as a result of stacking and moving tubs. As noted, the first element of fact of injury requires that she submit evidence establishing that an incident occurred at the time, place and in the manner alleged. Appellant did not report any witnesses to the event. As she was alone at the time the incident occurred and there were no eyewitnesses, her statement alleging that an injury occurred at a given time and in a given manner is of great probative value.<sup>9</sup> However, the Board finds that there are such inconsistencies in the evidence to cast doubt upon the validity of appellant's claim.

There are unresolved discrepancies regarding the time at which the alleged employment incident occurred. Appellant submitted two medical reports which predate the November 15, 2010 employment incident. First, a January 7, 2010 MRI scan of her right shoulder which revealed tendinitis/tendinopathy of the distal aspect of the supraspinatus tendon, degenerative changes at the AC joint, suggestion of slap lesion, adhesive capsulitis and os acromiale. Second, a May 3, 2010 report by Dr. Reddy who indicated that appellant was being referred to Dr. Moffitt for her right shoulder problem. Dr. Reddy reported that appellant had tried and failed medical management including physical therapy and most likely required surgical intervention. Appellant also submitted reports by Dr. Moffitt indicating that she sustained a right shoulder derangement as a result of stacking, moving and lifting tubs at work on November 15, 2010. Yet, on January 20, 2011 Dr. Moffitt reported that he first saw her on September 2, 2010 after she injured her right shoulder due to a fall at work on or about July 14, 2008. Approximately a month later, on February 9, 2011, he reported that appellant injured her left shoulder due to a fall at work on or about July 14, 2008. Dr. Moffitt indicated that it was almost a reinjury and that she had aggravated the problem she had before. His reports are contradictory in nature. Appellant did not provide an explanation to why Dr. Moffitt's reports were erroneous. The Board finds that it is not clear whether she was injured on November 15, 2010 or on or about July 14, 2008.

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<sup>7</sup> See *R.T.*, Docket No. 08-408 (issued December 16, 2008).

<sup>8</sup> See *Allen C. Hundley*, 53 ECAB 551 (2002); *Earl David Seal*, 49 ECAB 152 (1997).

<sup>9</sup> *Id.*

The medical evidence of record and Dr. Moffitt's reports are inconsistent with the surrounding facts and circumstances.<sup>10</sup> Appellant has not reconciled these contradictions in the record.

The evidence submitted contains such inconsistencies as to cast doubt on the validity of appellant's claim. Accordingly, the Board finds that appellant has not met her burden of proof in establishing that she experienced an employment-related incident at the time, place and in the manner alleged.<sup>11</sup>

On appeal appellant's attorney contends that OWCP's decision was contrary to fact and law. For the reasons stated above, the Board finds the attorney's argument is not substantiated.

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 appellant has not submitted sufficient evidence to establish that she sustained an injury in the performance of duty on November 15, 2010 as she failed to establish that the incident occurred as alleged.

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<sup>10</sup> Cf. *S.A.*, Docket No. 10-1786 (issued May 4, 2011) (where the Board found that appellant established that the incident occurred as alleged, as there were no inconsistent statements from appellant or other evidence refuting the occurrence of the alleged incident).

<sup>11</sup> Given that appellant did not establish an employment incident, further consideration of the medical evidence is unnecessary. See *Bonnie A. Contreras*, 57 ECAB 364, 368 n.10 (2006).

**ORDER**

**IT IS HEREBY ORDERED THAT** the June 16, 2011 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 10, 2012  
Washington, DC

Alec J. Koromilas, Judge  
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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