

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

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E.H., Appellant )

and )

**DEPARTMENT OF HOMELAND SECURITY,** )  
**TRANSPORTATION SECURITY** )  
**ADMINISTRATION, LAGUARDIA** )  
**INTERNATIONAL AIRPORT,** )  
**Flushing, NY, Employer** )

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**Docket No. 12-427**  
**Issued: July 3, 2012**

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

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

COLLEEN DUFFY KIKO, Judge  
MICHAEL E. GROOM, Alternate Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On December 1, 2011 appellant filed a timely appeal of an August 2, 2011 decision of the Office of Workers' Compensation Programs (OWCP) denying his traumatic injury claim. Pursuant to the Federal Employees' Compensation Act<sup>1</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.

**ISSUE**

The issue is whether appellant established that he sustained a traumatic left thigh injury in the performance of duty.

On appeal, appellant stated that because he could not remember the exact time of the claimed injury, he could not request the appropriate portion of the employing establishment's

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

surveillance videos to corroborate the injury. He contended that no one asked him about a hole in the left leg of his pants until the date of his oral hearing. Appellant submitted two photographs of a hole in his uniform pants leg over the left outer thigh.

### **FACTUAL HISTORY**

On December 10, 2010 appellant, then a 50-year-old security screener, filed a traumatic injury claim (Form CA-1) alleging that at 9:00 a.m. on November 29, 2010, he sustained a puncture wound to his left thigh, resulting in an infected open abscess two inches in diameter. He stopped work in early December 2010 and did not return.

In a December 22, 2010 letter, OWCP advised appellant of the additional evidence needed to establish his claim, including a detailed statement of how the injury occurred.

Appellant submitted a December 28, 2010 statement asserting that he was bitten or stuck in the left thigh on November 29, 2010 when he sat down to operate an x-ray machine. He asserted that he showed the wound to his supervisor later that day. In a January 10, 2011 note, appellant asserted that he “was not bitten but was stuck with a sharp object at work November 29, 2010 between 9:00 a.m. and 10:00 a.m. on my left outer thigh.”

In an October 18, 2010 report, Dr. Arthur W. Sigelman, an attending Board-certified family practitioner, recommended that appellant work in a larger area as he had “sustained lacerations to his arms [and] leg from working in close quarters.” In a December 3, 2010 report, he diagnosed a left thigh abscess with cellulitis and referred appellant for surgery. Dr. Sigelman related appellant’s account of being “struck by a sharp object at work in his L[eft] thigh [November 29, 2010].”

In a December 2, 2010 report, Dr. Ferfoze B. Kahn, an attending Board-certified surgeon, noted draining an infected abscess with a large cavity on appellant’s left thigh. On December 21, 2010 he attributed the abscess to a “work related, bite insect or puncture wound.” On January 4 and February 25, 2011 Dr. Khan opined that the abscess resulted from a deep puncture wound caused by a sharp, infected object, possibly at an airport checkpoint.

An employing establishment supervisor provided December 14, 2010 and January 21, 2011 statements asserting that he observed appellant working without any apparent injury or difficulty from 9:00 a.m. to 10:04 a.m. on November 29, 2010. Appellant sat at a checkpoint, moved bins and otherwise worked without incident. In a January 5, 2011 statement, a second employing establishment supervisor recalled that on December 1, 2010, he requested sedentary duty as his leg was swollen and painful from a suspected bite. The employing establishment supervisor noted that appellant did not state that he had been bitten or otherwise injured at work.

By decision dated January 28, 2011, OWCP denied the claim finding that fact of injury was not established. It found that appellant’s divergent accounts of events, coupled with a lack of corroboration from surveillance video or his supervisors, failed to establish that the claimed November 29, 2010 incident occurred at the time, place and in the manner alleged.

In a February 17, 2011 letter, appellant requested an oral hearing held on June 13, 2011. At the hearing, he asserted that on November 29, 2010, while maneuvering past a row of

passengers at a checkpoint, he felt something sharp, possibly a wire from a suitcase frame, puncture his left thigh. At the time, appellant wore polyester uniform pants in which he later observed a hole near the left outer side seam. Later that day he noticed a puncture wound on his left thigh surrounded by a two-inch burgundy circle. Appellant told two coworkers and took a picture of the wound with his cell phone camera. He submitted the photograph as an exhibit. When appellant reported for duty on November 30, 2010, he told a supervisor that he left leg was bothering him and asked for sedentary duty at an exit gate.<sup>2</sup> He submitted additional evidence following the hearing.

In a July 12, 2011 statement, appellant explained that he worked from 4:00 a.m. to 12:30 p.m. on November 29, 2010. He believed that he “was stuck in my left outer thigh” going from a checkpoint to the x-ray station but was unsure when the incident occurred. Appellant stated that he focused on his job and was not a clock watcher. He asserted that employing establishment personnel had a personal vendetta against him for filing Equal Employment Opportunity complaints.

In an undated statement, Dr. Khan opined that the streptococcal and staphylococcal bacteria that caused appellant’s abscess had a three to seven day incubation period. He opined that appellant was likely injured at work as he did not have other competent exposures such as homelessness, farm work or foreign military service.

By decision dated and finalized on August 2, 2011, OWCP’s hearing representative affirmed the January 28, 2011 decision, finding that appellant had not established fact of injury. The hearing representative found that appellant provided conflicting accounts of how he was injured on November 29, 2010 and that employing establishment supervisors and surveillance videos did not substantiate any of the scenarios appellant offered.

### **LEGAL PRECEDENT**

An employee seeking benefits under FECA<sup>3</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 filed within the 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.<sup>4</sup> These are the essential elements of each and every compensation claim regardless of whether the claim is predicated on a traumatic injury or an occupational disease.<sup>5</sup>

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<sup>2</sup> Following the hearing, an employing establishment human resources official reiterated that surveillance video taken from 9:00 to 10:04 a.m. on November 29, 2010 did not show appellant sustaining any injury. In a January 27, 2011 report, an employing establishment physician reviewed medical records and opined that it was not possible to determine the precise time or cause of appellant’s left thigh injury and abscess.

<sup>3</sup> 5 U.S.C. § 8101-8193.

<sup>4</sup> *Joe D. Cameron*, 41 ECAB 153 (1989).

<sup>5</sup> *See Irene St. John*, 50 ECAB 521 (1999); *Michael E. Smith*, 50 ECAB 313 (1999).

In order to determine whether an employee sustained a traumatic 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 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 that is alleged to have occurred.<sup>6</sup> 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.<sup>7</sup>

An employee has not met his or her burden of proof of establishing the occurrence of an injury when there are such inconsistencies in the evidence as to cast serious doubt upon the validity of the claim.<sup>8</sup>

### ANALYSIS

Appellant claimed that he sustained a puncture wound to his left thigh in the performance of duty on November 29, 2010. He stated variously that the injury occurred at 9:00 a.m., that he did not remember when the injury occurred, that it happened while he was seated at an x-ray machine, while he passed close to a group of passengers, and while he was moving from an x-ray station to a checkpoint. Appellant asserted that he was bitten by an insect, that he was stuck with a sharp object and that he was unsure of the mechanism of injury. The employing establishment supervisors explained that surveillance video taken from 9:00 a.m. to 10:04 a.m. on November 29, 2010 did not establish that appellant sustained an injury. They asserted that when appellant first mentioned a leg injury on December 1, 2010, he did not state that it was occupationally related. The Board finds that, due to the conflicting evidence regarding the time, place and manner in which the alleged incident occurred, appellant has not established his claim.<sup>9</sup> Therefore, OWCP’s January 28 and August 2, 2011 decisions were appropriate under the law and facts of the case.

The Board notes that Dr. Kahn, an attending Board-certified surgeon, and Dr. Sigelman, an attending Board-certified family practitioner, both related appellant’s account of a November 29, 2010 workplace injury. In an October 18, 2010 report preceding the claimed injury, Dr. Sigelman noted that appellant had sustained “lacerations to his arms [and] leg from working in close quarters.” He stated on December 3, 2010 that appellant was stuck by a sharp object in the left thigh on November 29, 2010. Dr. Kahn offered that appellant had no other exposures to contaminated objects except at work. However, as appellant failed to establish the threshold issue of fact of injury, it is premature to address the secondary issue of causal relationship by reviewing the medical evidence in this case.<sup>10</sup>

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<sup>6</sup> *Gary J. Watling*, 52 ECAB 278 (2001).

<sup>7</sup> *Deborah L. Beatty*, 54 ECAB 340 (2003).

<sup>8</sup> *S.P.*, 59 ECAB 184 (2007).

<sup>9</sup> *See Caroline Thomas*, 51 ECAB 451, 455 (2000).

<sup>10</sup> *See S.P.*, *supra* note 8 (where a claimant did not establish an employment incident alleged to have caused his injury, it was not necessary to consider any medical evidence).

On appeal, appellant stated that the employing establishment's surveillance videos did not show his injury because he could not recall the precise time he was injured. He contended that no one asked him about the hole in the left leg of his pants until the date of his oral hearing. As noted, the factual evidence is too vague and conflicting to establish that appellant sustained the November 29, 2010 incident as alleged. Regarding the photographs submitted accompanying his request for appeal, the Board may not consider new evidence for the first time on appeal that was not before OWCP at the time it issued the final decision in the case.<sup>11</sup> 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 established that he sustained a left thigh injury in the performance of duty due to inconsistencies in the evidence regarding the occurrence of the alleged incident.

### **ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated August 2, 2011 is affirmed.

Issued: July 3, 2012  
Washington, DC

Colleen Duffy Kiko, 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>11</sup> 20 C.F.R. § 501.2(c).