



## **FACTUAL HISTORY**

On October 28, 2011 appellant, then a 56-year-old program support assistant, filed a traumatic injury claim injury to her low back on October 26, 2011. She alleged an assault and battery by an individual who punched her from behind. At the time, appellant was located on the first floor in front of the police office. She stopped work on October 28, 2011. The employing establishment controverted the claim, stating that appellant had been at lunch and not in the performance of duty.

On October 26, 2011 appellant had lunch with another coworker in the cafeteria. Gerald Brown, listed as her brother, left his belongings in the cafeteria and did not inform appellant where he was going. At approximately 2:10 p.m. or 2:15 p.m., appellant left the cafeteria and took his belongings, including his cane and attempted to locate him. She stated that a white man, around 70 to 80 years of age, approached her and struck her lower back, where she had a preexisting bulging disc. Appellant subsequently found Mr. Brown walking near the police office. She also observed the man who struck her with an information clerk, apparently about to go into the police office. The man then identified appellant to the clerk. Appellant stated that she apparently had something that belonged to him, which were his jacket and a bag. Mr. Brown explained to the man that it was an honest mistake, as appellant thought that the belongings were his. Appellant stated that the man then took his jacket from Mr. Brown and left. She returned to her office but subsequently went to the police office to report the incident.

In a statement dated October 27, 2011, Grace Rodriguez, an employee at the information desk, noted that on October 26, 2011 at about 2:10 p.m., she saw an elderly patient running towards the elevators. The patient removed a bag from a lady's shoulder and stated that it was his. Ms. Rodriguez then asked the man what had happened and he stated that the woman also had his coat. She stated that she walked with him to make a police report; but the woman was nearby. The man asked for his jacket. It was returned and he went about his business.

Appellant filed a complaint of assault on October 26, 2011. The November 2, 2011 investigative report, prepared by Officer Henry Vargas, stated that, at approximately 2:40 p.m., appellant entered the police office at the employing establishment. Appellant alleged that she was struck several times in her low back by an unknown elderly white man with a green bag by the main elevator doors. She stated that she had lunch with her brother, Mr. Brown, who left his personal property with her. At approximately 2:10 p.m. and 2:15 p.m., appellant asked some of the men seated around her playing chess who would watch her brother's stuff and no one answered. She picked up his personal belongings before she returned to work, and was told by another employee that Mr. Brown was near the travel office. When appellant turned the corner by the main elevator, she was approached by the elderly man who hit her several times in the low back, stating that she had his bag. She then saw her brother and they stopped in front of the police office. The elderly man was near the information desk and about to go into the police office. Appellant noted that she had something else belonging to the elderly man, which was his jacket. Mr. Brown informed the man that it was an honest mistake and returned the coat. The elderly man took his jacket and left.

Officer Vargas asked appellant why she waited almost 25 minutes to report the incident, as she alleged that it occurred near the police office. Appellant stated that she had to report to

work right away. Officer Vargas noted that she did not exhibit any physical markings. He subsequently checked the canteen food court for an elderly white male as identified by appellant, but could not find any individual matching the description. A canteen employee informed Officer Vargas that he never saw a physical or verbal altercation near the elevator main area. He also checked with two police officers who were posted at the main lobby scanner between the hours of 2:01 p.m. and 2:30 p.m. They stated that they did not hear or see any verbal or physical altercation near the main elevators. Officer Vargas stated that Ms. Rodriguez noted that a white elderly man had removed a bag from appellant's shoulder, stating that it was his. He then headed towards the pharmacy but turned around. When she inquired, Officer Vargas told Ms. Rodriguez that appellant also took his coat. Ms. Rodriguez advised him to make a police report; but he subsequently saw appellant and asked for his jacket back. It was returned to him and he left. Officer Vargas reported that Ms. Rodriguez did not witness any verbal or physical altercation. Ms. Rodriguez did not hear appellant mention any assault by the elderly man. Officer Vargas also interviewed several secretaries located in the Police Administration Office, whose desks looked out to the main elevator area. They did not witness any verbal or physical assault between the hours of 2:01 p.m. and 2:30 p.m.

On November 2, 2011 Officer Vargas interviewed Mr. Brown, who explained that appellant was not his sister but that they shared a common religious faith. He stated that he saw an elderly white male reach towards her with a closed fist which struck her right shoulder blade and caused her to move forward. Mr. Brown stated that he saw appellant struck once. He then spoke with the man outside the police office, and stated that it was all a misunderstanding. Mr. Brown returned the jacket to the elderly man, who left.

Officer Vargas reviewed the surveillance camera video and observed appellant walking to elevators from the canteen with several items in her hand at approximately 2:15 p.m. Appellant was followed by a white elderly male. Both individuals move outside the range of the camera. The elderly man is then observed walking back with a green bag. Officer Vargas did not observe the elderly man strike appellant. He noted that from where Mr. Brown stated that he was located, it would have been impossible for him to have seen appellant being struck. Officer Vargas concluded that there was no witness to the alleged assault and no assault was recorded by the surveillance cameras.

The record contains two witness statements by Mr. Brown. In a November 2, 2011 statement, he noted that on October 26, 2011 at approximately 2:15 p.m. he saw a man walk up behind appellant and hit her in back. The man looked to be about 70 years old. Mr. Brown stated that appellant picked up his coat and bag from the cafeteria and thought that both coats belonged to him. He noted that the elderly man was after his coat, which appellant had. On November 28, 2011 Mr. Brown related that on October 26, 2011 at around 2:15 p.m., appellant had taken another man's coat by mistake. The man walked over to Mr. Brown and he returned the coat. Mr. Brown stated that he did not see appellant get hit by anyone.

On November 24, 2011 the employing establishment advised OWCP that appellant had not returned to work but she was observed at the VA hospital visiting. Coreen Simmons, a program manager, noted that she spoke with appellant, who advised her that she was taking care of an uncle and that she had been placed off work by her doctor for six months. Ms. Simmons stated that appellant walked and bent down to pick up a large brown envelope without apparent

difficulty. She stated that, on October 26, 2011, appellant was seen by a VA practitioner and returned to work that day.

On December 1, 2011 the employing establishment submitted a copy of the video-surveillance tape in support of its challenge of appellant's claim. It noted that the police investigation and the tapes established that an assault did not occur as alleged. Further, the police officer interviewed Mr. Brown a second time, who denied seeing appellant struck by anyone. It noted that appellant was still out of work and that the case was being referred to the agency's Office of the Inspector General.

By decision dated December 19, 2011, OWCP denied appellant's claim. It found that an assault by an elderly man did not occur as alleged. It further denied appellant's claim as the medical evidence was not sufficient to establish causal relation.

On December 28, 2011 appellant, through her attorney, requested a telephone hearing before an OWCP hearing representative. Appellant submitted additional medical evidence in support of her claim.

At the March 20, 2012 hearing, appellant stated that she worked at the employing establishment for 13 years as a program assistant and worked in nutrition hospitality. She noted that on October 26, 2011 she took Mr. Brown's belongings which he left on a table and went to find him and to back to work. Appellant noted that she walked towards the main elevator and made a right turn when she felt someone behind her "bang, bang, bang in my lower back and snatched the bag off my arm..." She described the man and stated that she gave the items to Mr. Brown. Appellant then went to her supervisor and a coworker, who told her to report the assault to the police. She stated that Mr. Brown returned the coat to the man. Appellant noted that there were many people in the area when the incident occurred. She also discussed her medical treatment.

By decision dated May 17, 2012, an OWCP hearing representative affirmed the denial of appellant's claim. The hearing representative found that the evidence of record did not support a physical assault on October 26, 2011 as alleged.<sup>2</sup>

### **LEGAL PRECEDENT**

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.<sup>3</sup> An employee

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<sup>2</sup> The hearing representative noted that appellant had two other work injuries, the first on July 4, 2001 when she was stuck by a needle. OWCP accepted this claim for an open wound to her right hand under File No. xxxxxx949. The second injury occurred on November 3, 2002, when she assisted a patient. OWCP accepted a left shoulder sprain with bursitis and left trigger finger under File No. xxxxxx648. The hearing representative noted medical evidence of record that she received treatment for her lumbar and cervical spine and had been involved in two nonwork-related motor vehicle accidents in August 2001 and May 2003.

<sup>3</sup> 20 C.F.R. § 10.5(ee).

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 timely filed within the applicable time limitation period of FECA, that an injury was sustained 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. These are the essential elements of each and every compensation claim regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.<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. 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. An employee has the burden of establishing the occurrence of an injury at the time, place and in the manner alleged, by the preponderance of the reliable, probative and substantial evidence. An injury does not have to be confirmed by eyewitnesses in order to establish the fact that the 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. An employee has not met his burden of proof where there are such inconsistencies in the evidence as to cast serious doubt upon the validity of the claim.<sup>5</sup>

The employee must also submit sufficient evidence, generally only in the form of medical evidence, to establish that the employment incident caused a personal injury. The medical evidence required to establish causal relationship is usually rationalized medical evidence. Rationalized medical opinion evidence is medical evidence which includes a physician's rationalized opinion on the issue of whether there is a causal relationship between the claimant's diagnosed condition and the implicated employment factors. The opinion of the physician must be based on a complete factual and medical background of the claimant, must be 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.<sup>6</sup>

### ANALYSIS

Appellant alleged that she sustained injury to her low back on October 26, 2011 when she was physically assaulted by an elderly man. OWCP determined that the incident did not occur as alleged. The Board finds that appellant did not submit sufficient evidence to establish a physical assault at the time, place or in the manner alleged.

An employee's statement alleging that an injury occurred at a given time and in a given manner is generally of probative value and will stand unless refuted by strong or persuasive

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<sup>4</sup> *Jussara L. Arcanjo*, 55 ECAB 281, 283 (2004).

<sup>5</sup> *Id.*

<sup>6</sup> *Judith A. Peot*, 46 ECAB 1036 (1995); *Ruby I. Fish*, 46 ECAB 276 (1994).

evidence.<sup>7</sup> The evidence of record, however, does not substantiate an assault on appellant by an elderly man or that he struck her repeatedly in her low back, as alleged. Appellant's allegations pertaining to the incident are not wholly consistent. Moreover, of numerous individuals working in and about the area where it allegedly occurred, there are no witness statements to support her allegation of assault.

Appellant stated that she was struck in the low back at approximately 2:15 p.m. on October 26, 2011 after leaving the cafeteria with several items in her possession. In her statement to Officer Vargas, she related that she was struck several times in her low back by an unknown elderly white male by the main elevator doors. The videotape submitted by the employing establishment recorded appellant carrying various items down a hallway, followed by an elderly man. Both go off camera and their interaction was not recorded. The only statement to support appellant's account of a physical assault that day was by her friend, Mr. Brown, on November 2, 2011. Mr. Brown related that he saw an elderly man reach towards her with a closed fist, which struck her right shoulder blade and caused her to move forward. He also related that he only saw her struck once. This account varies from that alleged by appellant of being struck in the low back several times. At the March 20, 2012 hearing, she described the assault as "bang, bang, bang in my lower back and snatched the bag off my arm." Mr. Brown subsequently spoke with the elderly man outside the VA police office and returned the jacket. The Board notes that Mr. Brown retracted his initial statement on November 28, 2011. He stated that, on the date of the alleged incident, appellant had taken another man's coat by mistake. Mr. Brown noted that he did not see appellant get struck by anyone on that date. In this regard, Officer Vargas related that Mr. Brown was located near the travel office, a location from which it would have been impossible for him to observe appellant being struck. The Board has reviewed the videotape submitted by the employing establishment, and notes that any interaction between appellant and the elderly male was off camera; but there were other individuals in the area who were contacted by the investigating officer.

Ms. Rodriguez noted that an elderly man initially retrieved a bag from appellant, stating it was his. She did not observe any verbal or physical altercation. Ms. Rodriguez subsequently spoke to the man, who noted that appellant also took his coat. She accompanied the man to the police office, when they came across appellant with Mr. Brown. The Board notes that the videotape shows appellant with Mr. Brown interacting with an elderly man and another female immediately outside the police office. It does not reflect any physical interaction between appellant and the claimed assailant. Ms. Rodriguez noted that, when encountered, appellant did not mention any assault by the elderly man. The Board notes that appellant's conduct on the videotape is not wholly consistent with that of an individual just struck repeatedly by another. After encountering her alleged assailant, the man is given the jacket and he departs down the hall. Officer Vargas interviewed two police officers assigned to the nearby main lobby scanner, who did not hear or see any verbal or physical altercation near the main elevators at the time alleged. Several secretaries located in the police office similarly did not witness any assault, as alleged. There is no explanation by appellant as to why the assault was not immediately reported to the police at this time. It is only some 20 minutes later, after the alleged assailant has departed and she returned to work, that she went to the police office to make a complaint.

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<sup>7</sup> See *J.E.*, Docket No. 11-1657 (issued March 20, 2012); *Caroline Thomas*, 51 ECAB 451 (2000).

Based on the weight of the evidence of record, the Board finds that appellant has not established that she was struck by an elderly male assailant on October 26, 2011, as alleged. For this reason, OWCP properly denied her claim for a low back injury.

**CONCLUSION**

The Board finds that appellant did not established an alleged physical assault at the time, place or in the manner alleged.

**ORDER**

**IT IS HEREBY ORDERED THAT** the May 17, 2012 and December 19, 2011 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: May 29, 2013  
Washington, DC

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

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

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