

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

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**J.M., Appellant** )

**and** )

**DEPARTMENT OF JUSTICE, U.S.  
PROBATION DEPARTMENT, EASTERN  
DISTRICT OF NEW YORK, Brooklyn, NY,  
Employer** )

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**Docket No. 14-482  
Issued: May 15, 2014**

*Appearances:*

*Alan J. Shapiro, Esq., for the appellant  
Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

RICHARD J. DASCHBACH, Chief Judge  
MICHAEL E. GROOM, Alternate Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On December 23, 2013 appellant, through her attorney, filed a timely appeal from the October 29, 2013 merit decision of the Office of Workers' Compensation Programs (OWCP) denying her 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 this case.

**ISSUE**

The issue is whether appellant met her burden of proof to establish that she sustained bilateral knee, back and right shoulder injuries on November 15, 2012 while in the performance of duty.

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

## **FACTUAL HISTORY**

On November 21, 2012 appellant, then a 38-year-old probation officer, filed a traumatic injury claim alleging pain in both knees, back and right shoulder as a result of being struck by a sport utility vehicle (SUV) as she crossed the street on November 15, 2012. She submitted a police accident report regarding the November 15, 2012 incident.

In a November 16, 2012 medical report, Dr. Michael M. Raffinan, a Board-certified family practitioner, diagnosed a sprain not otherwise specified. He placed appellant on light-duty work through November 30, 2012.

An unsigned hospital report dated November 15, 2012 noted that appellant was treated by Debra Duncan-Anderson, a nurse practitioner. She was diagnosed as having a sprain and strain of an unspecified site of the back. In a November 15, 2012 prescription, Ms. Duncan-Anderson ordered ibuprofen to treat appellant's sprain and strain.

By letter dated November 28, 2012, OWCP advised appellant that the evidence submitted was insufficient to establish her claim. It requested that she submit additional factual and medical evidence, including a rationalized medical opinion from an attending physician which provided dates of examination and treatment, a history and date of injury, a detailed description of findings and test results, a diagnosis and clinical course of treatment together with a physician's opinion explaining how the reported November 15, 2012 work incident caused or aggravated a medical condition. OWCP also requested that the employing establishment submit factual and any medical evidence regarding treatment appellant received at its medical facility.

In a December 5, 2012 letter, the employing establishment stated that appellant was conducting official business when she was struck by an SUV on November 15, 2012.

On December 12, 2012 appellant stated that she was conducting an initial home visit as required at the time of her injury on November 15, 2012.

On November 28, 2012 Dr. Raffinan prescribed physical therapy to treat appellant's neck and back sprain after a car accident. On December 5, 2012 he reported a history of the November 15, 2012 incident and appellant's medical treatment. Dr. Raffinan saw her on November 16, 2012, at which time she complained about pain in her knees, upper and lower back and shoulders, more on the right side than the left side. He provided findings on physical examination and placed appellant off work from November 20 through December 4, 2012. On November 28, 2012 appellant returned to Dr. Raffinan's office with pain in the same areas. Dr. Raffinan stated that his examination findings were similar to those of November 16, 2012. He referred appellant to an orthopedic surgeon for further evaluation and advised that until a determination was made by this physician, she was unable to perform field work. Dr. Raffinan stated that this type of work may require defensive or combative actions which would worsen her sprained back, shoulders and knees.

Daily notes from physical therapists addressed the treatment of appellant's lumbago on December 7, 12 and 20, 2012.

In a January 3, 2013 decision, OWCP accepted that the November 15, 2012 incident occurred as alleged. It denied appellant's claim, however, finding that she failed to submit sufficient medical evidence to establish that her back, shoulder or knee injuries were causally related to the accepted employment incident.

On January 25, 2013 appellant requested an oral hearing before an OWCP hearing representative.

Daily notes from physical therapists addressed the treatment of appellant's lumbago on December 21 and 31, 2012 and January 2, 2013.

In a January 17, 2013 report, Dr. Keith S. Tobin, a Board-certified radiologist, advised that an x-ray of the right knee was normal.

On January 17, 2013 Dr. Leon E. Popovitz, an orthopedic surgeon, reported that appellant had suffered from right knee pain for approximately two months. He obtained a history of the November 5, 2012 employment incident. Dr. Popovitz listed findings on physical examination and assessed appellant as having right knee pain possibly secondary to a meniscal tear. He recommended further diagnostic testing of the right knee. In reports dated January 24 and March 28, 2013, Dr. Popovitz listed physical examination findings and diagnostic test results. He assessed appellant as having right knee patellofemoral syndrome which was recovering well.

In a January 24, 2013 report, Dr. William Louie, a Board-certified radiologist, advised that an x-ray of the lumbar spine revealed subtle grade 1 retrolisthesis at L5-S1.

In reports dated March 28 and May 21, 2013, Dr. Michael Y. Mizhiritsky, a Board-certified physiatrist, noted that appellant's back pain had improved. He listed findings on physical examination and diagnosed lumbar sprain and strain, and myofascial pain syndrome.

In a June 20, 2013 decision, an OWCP hearing representative affirmed the January 3, 2013 decision. She found that appellant failed to submit sufficient medical evidence to establish a causal relationship between her diagnosed medical conditions and the November 15, 2012 employment incident.

On July 30, 2013 appellant, through her attorney, requested reconsideration.

In a July 9, 2013 report, Dr. Mizhiritsky advised that appellant sustained a lumbar strain and myofascitis secondary to the November 15, 2012 employment incident. He noted that a January 2013 x-ray revealed mild retrolisthesis and no fractures. Dr. Mizhiritsky further noted that appellant was currently attending physical therapy two to three times a week for six weeks. He advised that if her symptoms worsened he would possibly obtain a magnetic resonance imaging scan and electromyogram to rule out disc pathology.

In an October 29, 2013 decision, OWCP denied modification of the June 20, 2013 decision. It found that Dr. Mizhiritsky's July 9, 2013 report was not sufficiently rationalized to

establish that appellant sustained lumbar conditions causally related to the November 15, 2012 employment incident.<sup>2</sup>

### **LEGAL PRECEDENT**

An employee seeking benefits under FECA<sup>3</sup> has the burden of proof to establish the essential elements of his or her claim by the weight of the reliable, probative and substantial evidence<sup>4</sup> including that he or she sustained an injury in the performance of duty and that any specific condition or disability for work for which he or she claims compensation is causally related to that employment injury.<sup>5</sup>

To determine whether a federal employee has sustained a traumatic injury in the performance of duty, it first must be determined whether fact of injury has been established.<sup>6</sup> There are two components involved in establishing the fact of injury. 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.<sup>7</sup>

The second component is whether the employment incident caused a personal injury and generally can be established only by medical evidence.<sup>8</sup> 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.<sup>9</sup> The belief of the claimant that a condition was caused or aggravated by the employment is insufficient to establish a causal relationship.<sup>10</sup>

### **ANALYSIS**

OWCP accepted that on November 15, 2012 appellant was struck by an SUV while in the performance of duty. It found that the medical evidence failed to establish that she sustained bilateral knee, back and right shoulder injuries as a result of the accepted incident. The Board

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<sup>2</sup> Following the issuance of the October 29, 2013 decision, OWCP received additional evidence. The Board cannot consider evidence for the first time on appeal which was not before OWCP at the time it issued the final decision in the case. See 20 C.F.R. § 501.2(c)(1); *J.T.*, 59 ECAB 293 (2008); *G.G.*, 58 ECAB 389 (2007); *Donald R. Gervasi*, 57 ECAB 281 (2005); *Rosemary A. Kayes*, 54 ECAB 373 (2003).

<sup>3</sup> 5 U.S.C. §§ 8101-8193.

<sup>4</sup> *J.P.*, 59 ECAB 178 (2007); *Joseph M. Whelan*, 20 ECAB 55, 58 (1968).

<sup>5</sup> *G.T.*, 59 ECAB 447 (2008); *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

<sup>6</sup> *S.P.*, 59 ECAB 184 (2007); *Alvin V. Gadd*, 57 ECAB 172 (2005).

<sup>7</sup> *Bonnie A. Contreras*, 57 ECAB 364 (2006); *Edward C. Lawrence*, 19 ECAB 442 (1968).

<sup>8</sup> *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, respectively).

<sup>9</sup> *Lourdes Harris*, 45 ECAB 545 (1994); see *Walter D. Morehead*, 31 ECAB 188 (1979).

<sup>10</sup> *Kathryn Haggerty*, 45 ECAB 383, 389 (1994).

finds that appellant failed to provide sufficient medical evidence to establish that she sustained bilateral knee, back and right shoulder conditions causally related to the November 15, 2012 employment incident.

In a July 9, 2013 report, Dr. Mizhiritsky found that appellant sustained a lumbar strain and myofascitis secondary to the November 15, 2012 employment incident. Although he generally supported causal relationship, he did not adequately explain the basis of his conclusion.<sup>11</sup> Dr. Mizhiritsky noted the results of the January 24, 2013 lumbar x-ray and that appellant was undergoing physical therapy. He advised that further diagnostic testing may be required if appellant's symptoms worsened. Dr. Mizhiritsky did not provide a fully-rationalized opinion explaining how the accepted employment incident caused the diagnosed medical conditions. His other reports did not provide a medical opinion addressing the causal relationship between the accepted employment incident and appellant's lumbar sprain and strain, and myofascial pain syndrome. Medical evidence which does not offer any opinion regarding the cause of an employee's condition is of limited probative value.<sup>12</sup> For the stated reasons, the Board finds that Dr. Mizhiritsky's reports are of diminished probative value and insufficient to establish appellant's claim.

Similarly, Dr. Raffinan's November 16, 2012 report which found that appellant had a sprain not otherwise specified is also insufficient to establish the claim, as this report does not provide a medical opinion addressing whether the accepted employment incident caused or aggravated the diagnosed condition.<sup>13</sup> Further, on November 28, 2012 he prescribed physical therapy to treat appellant's neck and back sprain post car accident, but he did not specifically address whether the accepted work incident caused or aggravated the diagnosed conditions.<sup>14</sup> In a December 5, 2012 report, Dr. Raffinan provided a history of the November 15, 2012 employment incident and appellant's medical treatment. He stated that his examination findings were similar to his prior November 16, 2012 examination findings. Dr. Raffinan did not provide a sufficiently rationalized medical opinion explaining why being hit by an SUV on November 15, 2012 caused appellant's sprain. He noted that she was being treated by an orthopedist and found that until the physician determined otherwise, she was unable to perform field work because it may require defensive or combative actions that would worsen her sprained back, shoulders and knees. However, the Board has held that fear of future injury is not compensable.<sup>15</sup> For the stated reasons, the Board finds that Dr. Raffinan's reports are insufficient to establish appellant's claim.

Dr. Popovitz's January 17, 2013 report found that appellant had right knee pain possibly secondary to a meniscal tear. His opinion, however, does not specifically address whether the

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<sup>11</sup> *Franklin D. Haislah*, 52 ECAB 457 (2001) (medical reports not containing rationale on causal relationship are entitled to little probative value); *Jimmie H. Duckett*, 52 ECAB 332 (2001).

<sup>12</sup> *A.D.*, 58 ECAB 149 (2006); *Jaja K. Asaramo*, 55 ECAB 200 (2004); *Michael E. Smith*, 50 ECAB 313 (1999).

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *I.J.*, 59 ECAB 408 (2008).

November 15, 2012 employment incident caused an injury.<sup>16</sup> Dr. Popovitz did not otherwise state that being hit by an SUV on November 15, 2012 caused a meniscal tear nor did he provide adequate rationale explaining how the diagnosed condition resulted from the accepted incident or worsened her underlying right knee condition. His other reports also failed to provide an opinion addressing whether appellant's diagnosed right knee patellofemoral syndrome was caused by the accepted employment incident.<sup>17</sup> The Board finds that Dr. Popovitz's reports are insufficient to establish appellant's claim.

Dr. Tobin's January 17, 2013 diagnostic test results did not find that appellant had a right knee condition causally related to the accepted employment incident. He advised that an x-ray of the right knee was normal.

Dr. Louie's January 24, 2013 x-ray report found that appellant had subtle grade 1 retrolisthesis at L4-S1, but he did not opine that the diagnosed condition was caused by the November 15, 2013 employment incident.<sup>18</sup> The Board finds, therefore, that Dr. Louie's report is insufficient to establish appellant's claim.

The reports from Ms. Duncan-Anderson, a nurse practitioner, and appellant's physical therapists are insufficient to establish appellant's claim. As neither a nurse practitioner nor a physical therapist is considered to be a physician as defined under FECA, their opinions are of no probative value.<sup>19</sup>

The unsigned hospital report is insufficient to establish appellant's claim. A report that is unsigned or bears an illegible signature lacks proper identification and cannot be considered probative medical evidence.<sup>20</sup> The Board finds that there is insufficient medical evidence to establish that appellant sustained bilateral knee, back and right shoulder injuries causally related to the accepted November 15, 2012 employment incident.

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.

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<sup>16</sup> See cases cited, *supra* note 12.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> The term physician includes surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors and osteopathic practitioners within the scope of their practice as defined by State law. 5 U.S.C. § 8102(2); A.C. Docket No. 08-1453 (issued November 18, 2008) (records from a physical therapist do not constitute competent medical opinion in support of causal relation, as physical therapists are not physicians as defined under FECA); *L.D.*, 59 ECAB 648 (2008) (a nurse practitioner is not a physician as defined under FECA); *Roy L. Humphrey*, 57 ECAB 238 (2005).

<sup>20</sup> *Thomas L. Agee*, 56 ECAB 465 (2005); *Richard F. Williams*, 55 ECAB 343 (2004).

**CONCLUSION**

The Board finds that appellant has not met her burden of proof to establish that she sustained bilateral knee, back and right shoulder injuries on November 15, 2012 while in the performance of duty.

**ORDER**

**IT IS HEREBY ORDERED THAT** the October 29, 2013 decision of the Office of Workers' Compensation Programs are affirmed.

Issued: May 15, 2014  
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