

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

---

D.B., Appellant )

and )

DEPARTMENT OF VETERANS AFFAIRS, )  
VETERANS ADMINISTRATION MEDICAL )  
CENTER, Dublin, GA, Employer )

---

**Docket No. 14-924**  
**Issued: November 3, 2014**

*Appearances:*

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

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

CHRISTOPHER J. GODFREY, Chief Judge  
COLLEEN DUFFY KIKO, Judge  
PATRICIA HOWARD FITZGERALD, Judge

**JURISDICTION**

On March 11, 2014 appellant, through her attorney, filed a timely appeal from a January 6, 2014 merit decision of the Office of Workers' Compensation Programs (OWCP). 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 sustained an injury on June 14, 2013 in the performance of duty.

**FACTUAL HISTORY**

On June 20, 2013 appellant, then a 54-year-old practical nurse, filed a traumatic injury claim alleging that on June 14, 2013 she sustained pain in her neck, the upper right side of her

---

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

back, right shoulder and right arm in the performance of duty. She described her injury as occurring when a patient with dementia became combative and struck the left side of her neck and shoulder area with his fist several times. Appellant stopped work on August 14, 2013. The employing establishment controverted the claim based on wilful misconduct, noting that she did not follow its proper procedures in “trying to lift the patient from the floor.”

In a report of contact form dated June 14, 2013, appellant related that on that date a demented patient grew agitated when she tried to make him sit in a Broda chair. The patient hit her about six times with his fist on her left shoulder and the left side of her neck. Appellant stated, “When I attempted to stop patient from hitting me, he started to sit in the floor pulling me down with him causing my clothes to tear.” She described her complaints of pain down the left side of her neck into her left arm, pain and numbness in her right arm and hand and burning between her shoulder blades.

In a report of contact dated June 14, 2013, Joan Revels, a registered nurse and charge nurse that day, related that on June 14, 2013 she saw appellant trying to get a patient to sit in a Broda chair. When he refused appellant tried to make him sit and took his left arm. The patient slipped onto a foot rest and she tried to lift him by herself. Appellant stated that she had ripped her pants. Ms. Revels maintained that appellant verbally abused the patient.

Appellant sought treatment in the emergency room on June 14, 2013. She provided a history of being hit six times by a patient on “the left shoulder and left neck and then pulled down to the floor....” In response to the question, “Where is your pain?” appellant responded “down neck and between shoulder blades.” In a duty status report dated June 14, 2013, a physician found that appellant could perform light duty pending further evaluation.

A magnetic resonance imaging (MRI) scan study of the cervical spine, obtained on June 14, 2013 revealed postsurgical and chronic degenerative changes and moderate spinal stenosis with bilateral foraminal narrowing and near entrapment of the cord possibly resulting in radiculopathy. An MRI scan study of the scapula revealed subacromial and subdeltoid bursal fluid.

In a statement dated June 15, 2013, Jimmie Stone, a coworker, related that on that date a sitter (later identified as appellant) yelled and cursed at a patient and tried to get him to sit in a work chair with rolling wheels, rather than the wheelchair that he requested. She telephoned for assistance. Appellant yelled at the patient to get away from her and to get off her and the patient stated, “what did I do, I’m sorry, I’m sorry.” She told the patient that she did not come to work to “get beat up and kick on by a person like you....”

In another statement dated June 15, 2013, Beatrice James, a coworker, related that Ms. Stone telephoned her for assistance. When Ms. James arrived, appellant was cursing at a patient and telling him that she did not come to work to get kicked and he should get out of her way. The patient was apologizing for something and appellant stated that she was leaving because she was injured.

Dr. Laurence O.F. Harris, a Board-certified internist, indicated that on June 14, 2013 he evaluated appellant after she was hit by a patient with dementia multiple times in the back and

neck. He noted that she felt that she had “exacerbated neck and shoulder pain from an old injury.” Dr. Harris diagnosed scapular pain.

In a statement dated June 20, 2013, Renay Godfrey, a coworker, related that on June 14, 2013 she heard appellant tell a nurse to bring a patient a sedative. Appellant told the patient not to hit her and that he had ripped her pants. She verbally abused the patient and tried to shove him into a chair.

An employing establishment incident report form, signed on June 20, 2013 by Teen Clemons, a supervisor, and on June 25, 2013 by Christopher Mimbs, a safety official, provided that on June 14, 2013 appellant was attempting to make a patient with dementia sit in a chair. While she held his left hand, the patient pushed her three times with his palm open on her left shoulder. The form stated, “[Appellant] was seen by [the] charge nurse trying to lift [the] patient alone and stated [that] her pants had ripped.” The safety official indicated that she did not follow procedures and that it was investigating allegations that she verbally abused the patient.

By letter dated July 1, 2013, OWCP requested additional factual and medical information from appellant, including a detailed report from her attending physician addressing the cause of any diagnosed condition and its relationship to the identified work incident.

In a report dated July 19, 2013, Dr. William Maxwell Duke, Board-certified in family medicine, indicated that appellant related that approximately four weeks ago a patient hit her in the neck causing numbness of the right arm and pain in her neck. She had previously undergone surgery on her cervical spine in 2004 and had a history of a fall “many months ago.” An MRI scan study showed “spinal stenosis secondary to osteophytes in the lower cervical spine.” Dr. Duke diagnosed stenosis of the cervical spine and found that appellant could work with restrictions.

In a form report also dated July 19, 2013, Dr. Duke diagnosed cervical spinal stenosis. He provided a history of appellant being hit by a patient four weeks earlier and a fall “many months ago.” Dr. Duke checked “yes” in response to the question of whether the diagnosed condition was caused or aggravated by employment and provided as an explanation that it was “possibly aggravated.”

By letter dated July 30, 2013, the employing establishment controverted the claim, arguing that appellant had not factually established that the incident occurred or that she sustained a medical condition as a result of the incident. It stated:

“[Appellant’s] versions of events differ from the eye witness statement that watched this incident take place. [She] stated that the patient became combative when she attempted to get patient to sit in [a] [B]roda chair. The witness, Ms. Revels, stated that [appellant] was trying to force [the] patient to sit in [a] [B]roda chair. Another inconsistency includes [appellant’s] statement that the patient struck her six times with a closed fist on the left shoulder and the left side of her neck. Ms. Revels states that [appellant] was pushed by the veteran three times of the left shoulder with the palm of his hand.”

The employing establishment noted that it had submitted three other witness statements and provided its interpretation of the medical evidence.

In a decision dated August 9, 2013, OWCP denied appellant's claim after finding that she had not established that the incident occurred at the time, place and in the manner alleged. It further found that the medical evidence did not provide a diagnosis.

In an e-mail addendum to her statement, received by OWCP on August 15, 2013, appellant related that there were no witnesses around when the patient attacked her even though she called for assistance.<sup>2</sup> She asserted that Ms. Clemons wrote her statement based on Ms. Revels report and that Ms. Revels was not present at the incident but provided her "assumption of what occurred." Appellant further noted that Ms. Godfrey was not present at the time of the incident. She contended that she was not trying to make the patient sit as described by Ms. Revels but instead holding onto his arms to stop him from hitting. Appellant related that Ms. Revels did not arrive until "after the two nursing assistants had put the patient to bed and restrained his wrists with soft wrist restraints." She maintained that he did not slip onto the footrest of the Broda chair and that she did not attempt to lift the patient. Appellant stated, "What did occur when the patient sat in the floor and I was holding both of his forearms to prevent from being hit again by him; as he sat down, I was pulled over into a bending at the waist position, which caused my uniform pants to rip in the seam from the crotch almost to the back waistband...." She loudly called "damn" when her pants ripped but this was not directed at the patient. Appellant described medically how she could have pain on the right side of her neck through her right arm after being hit on the left side.

In a report dated September 27, 2013, Dr. David L. Tate, Board-certified in family practice, evaluated appellant for neck and shoulder symptoms. He noted that her condition had recently worsened after she began using the telephone while working as a secretary. Dr. Tate diagnosed cervical radiculopathy, cervical degenerative disc disease and cervical spinal stenosis. He recommended that appellant be evaluated by a spinal surgeon either through workers' compensation or privately and advised that her condition remained "related to her neck problems."

On October 17, 2013 appellant, through her attorney, requested reconsideration.<sup>3</sup> Counsel contended that a claimant's statement that an incident occurred must be rebutted by strong evidence. He also reviewed the definition of disability under FECA.

By decision dated January 6, 2014, OWCP modified the August 9, 2013 decision to reflect that the medical evidence provided a diagnosed condition. It found, however, that appellant had not established the occurrence of the alleged June 14, 2013 work incident and thus denied her claim after finding that she had not established fact of injury. OWCP additionally

---

<sup>2</sup> In a July 22, 2013 e-mail, received by OWCP on August 15, 2013, appellant responded to the employing establishment's allegations of verbal abuse.

<sup>3</sup> In a duty status report dated August 8, 2013, received by OWCP on November 19, 2013, a physician diagnosed a shoulder condition and checked "yes" that the history of injury provided by appellant corresponded to that on the form of her injuring her left shoulder working at a computer desk.

determined that the medical evidence did not contain a reasoned opinion relating the diagnosed condition to the alleged employment incident.

### **LEGAL PRECEDENT**

An employee seeking benefits under FECA<sup>4</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>5</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>6</sup>

To determine whether an employee sustained a traumatic injury in the performance of duty, OWCP must determine whether “fact of injury” is established. First, an employee has the burden of demonstrating the occurrence of an injury at the time, place and in the manner alleged, by a preponderance of the reliable, probative and substantial evidence.<sup>7</sup> Second, the employee must submit sufficient evidence, generally only in the form of medical evidence, to establish a causal relationship between the employment incident and the alleged disability and/or condition for which compensation is claimed.<sup>8</sup> An employee may establish that the employment incident occurred as alleged, but fail to show that his or her disability and/or condition relates to the employment incident.<sup>9</sup>

In order to determine whether an employee actually sustained an 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 which must be considered in conjunction with one another. The first component to be established is that the employee actually experienced the employment incident which is alleged to have occurred.<sup>10</sup> An injury does not have to be confirmed by eyewitnesses in order to establish that an 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 or her subsequent course of action.<sup>11</sup> An employee has not met his or her burden of proof in 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>12</sup>

---

<sup>4</sup> See *supra* note 1.

<sup>5</sup> *Alvin V. Gadd*, 57 ECAB 172 (2005); *Anthony P. Silva*, 55 ECAB 179 (2003).

<sup>6</sup> See *Elizabeth H. Kramm (Leonard O. Kramm)*, 57 ECAB 117 (2005); *Ellen L. Noble*, 55 ECAB 530 (2004).

<sup>7</sup> *David Apgar*, 57 ECAB 137 (2005); *Delphyne L. Glover*, 51 ECAB 146 (1999).

<sup>8</sup> *Gary J. Watling*, 52 ECAB 278 (2001); *Shirley A. Temple*, 48 ECAB 404, 407 (1997).

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

<sup>10</sup> See *Louise F. Garnett*, 47 ECAB 639 (1996).

<sup>11</sup> See *Betty J. Smith*, 54 ECAB 174 (2002).

<sup>12</sup> *Id.*

Such circumstances as late notification of injury, lack of confirmation of injury, continuing to work without apparent difficulty following the alleged injury and failure to obtain medical treatment may, if otherwise unexplained, cast doubt on an employee's statements in determining whether a *prima facie* case has been established.<sup>13</sup> However, an employee's statement regarding the occurrence of an employment incident is of great probative force and will stand unless refuted by strong or persuasive evidence.<sup>14</sup>

### ANALYSIS

Appellant alleged that she injured her neck, the right side of her upper back, her right shoulder and right arm on June 14, 2013 after being repeatedly struck on the left side of her neck and shoulder by a patient. She maintained that a patient with dementia hit her with his fist around six times. When appellant attempted to stop him by holding his arms, he sat down on the floor pulling her with him and ripping her pants. She immediately informed a supervisor, Ms. Clemons, of the incident and sought treatment at the emergency room that date when her neck, right shoulders, and right arm began hurting and her right hand grew numb.

The employing establishment controverted the claim, arguing that the statements of witnesses did not support that the June 14, 2013 incident occurred as alleged. In a statement dated June 14, 2013, Ms. Revels related that on that date appellant tried to force a patient to sit in a chair after he did not comply with her instructions. Patient slipped down on a footrest and appellant tried to lift him. Appellant told Ms. Revels that her pants had ripped. In an incident report signed June 20, 2013, Ms. Clemons indicated that appellant was trying to make a patient with dementia sit in a chair. While appellant held his left hand, the patient pushed her with an open palm three times on the left shoulder. Ms. Clemons stated that a charge nurse witnessed appellant attempting to lift him without assistance. On June 15, 2013 Ms. Stone related that appellant was yelling at a patient and trying to get him to sit in a chair.<sup>15</sup> Appellant told him that she did not come to work to get beat up. In another statement dated June 15, 2013, Ms. James related that she witnessed appellant cursing at a patient and telling him that she did not come to work to get kicked. Appellant indicated that she was leaving because she was injured. In a June 20, 2013 statement, Ms. Godfrey asserted that she heard appellant tell a patient not to hit her and that he had made her pants rip.

The Board finds that the evidence does not contain sufficient inconsistencies sufficient to cast serious doubt on whether an incident occurred on June 14, 2013. While the Board takes seriously the assertions of patient abuse, such assertions have not been proven for the reasons set forth herein.<sup>16</sup> Appellant immediately reported the incident to her supervisor and sought treatment on that date in the emergency room. She provided a sufficiently consistent history of injury to her physicians, the employing establishment and OWCP. An employee's statement

---

<sup>13</sup> See *Linda S. Christian*, 46 ECAB 598 (1995).

<sup>14</sup> See *Gregory J. Reser*, 57 ECAB 277 (2005).

<sup>15</sup> Ms. Stone provided the date of the incident as June 15, 2013.

<sup>16</sup> Although alleged by the employing establishment, OWCP made no finding of wilful misconduct under section 8102(a) of FECA. *Morris Reminger*, 18 ECAB 341 (1966); see *Theresa B.L. Grissom*, 18 ECAB 193 (1966).

regarding the occurrence of an employment incident is of great probative force and will stand unless refuted by strong or persuasive evidence.<sup>17</sup> Not only is there no strong evidence contradicting appellant's statement regarding how the incident occurred, there is considerable evidence supporting her statement. The employing establishment did not dispute that she was involved in an incident with a patient on June 14, 2013. The incident report prepared by the employing establishment provided that the patient pushed appellant with an open palm three times on the left shoulder. Ms. Godfrey overheard appellant tell the patient not to hit her and that he had ripped her pants. Ms. Stone and Ms. James heard appellant tell him that she did not come to work to get beat up or kicked. Ms. Revels witnessed that appellant told a patient to sit in a chair, that he slipped to a foot rest and that her pants ripped when she tried to lift the patient.<sup>18</sup> While the number of times that the patient hit appellant, whether his fist was open or closed and whether he pulled her down to the floor or whether she was trying to lift him are disputed, it is not contested that the patient struck her and that her pants ripped while she was in a bent over position. Under the circumstances of this case, the Board finds that appellant's allegations have not been refuted by strong or persuasive evidence and there are insufficient inconsistencies to cast serious doubt on whether an incident occurred.<sup>19</sup> Consequently, appellant has established the occurrence of the June 14, 2013 work incident.

As appellant has established that a June 14, 2013 incident occurred at the time, place and in the manner alleged, the issue is whether the medical evidence establishes that she sustained an injury as a result of this incident.

On June 14, 2013 appellant received treatment in the emergency room for complaints of pain after being hit in the left shoulder and neck by a patient. In a duty status report dated June 14, 2013, a physician described the clinical findings as reduced right upper extremity motor strength and determined that she should work limited duty. The physician did not, however, provide a diagnosis or address causation and thus his report is of little probative value.<sup>20</sup>

In a report dated June 15, 2013, Dr. Harris related that he evaluated appellant on June 14, 2013 after she was hit by a patient with dementia in her neck, back and shoulders. He noted that she believed that she had aggravated preexisting pain in her neck and shoulders. Dr. Harris diagnosed scapular pain. The Board has held that pain is generally a description of a symptom and not considered a firm medical diagnosis.<sup>21</sup> Dr. Harris did not provide a firm diagnosis or

---

<sup>17</sup> See *Gregory J. Reser*, *supra* note 14.

<sup>18</sup> It is unclear whether Ms. Revels witnessed the entire incident that occurred between appellant and the patient. Appellant maintained that Ms. Revels was not a witness.

<sup>19</sup> See *D.S.*, Docket No. 11-634 (issued October 5, 2011); *M.H.*, 59 ECAB 461 (2008).

<sup>20</sup> See *S.E.*, Docket No. 08-2214 (issued May 6, 2009) (medical evidence that does not offer any opinion regarding the cause of an employee's condition is of diminished probative value on the issue of causal relationship).

<sup>21</sup> See *H.A.*, Docket No. 13-1872 (issued February 26, 2014); *B.P.*, Docket No. 12-1345 (issued November 13, 2012).

directly relate the scapular pain to the June 14, 2013 work incident. Without a firm diagnosis supported by medical rationale, the report is of little probative value.<sup>22</sup>

On July 19, 2013 Dr. Duke discussed appellant's history of an injury four weeks ago when a patient hit her in the neck causing right arm and neck numbness. He noted that she had a prior history of a fall and surgery on her cervical spine in 2004. Dr. Duke diagnosed stenosis of the cervical spine due to osteophytes as seen by MRI scan study and found that appellant could work with restrictions. As he did not attribute the diagnosed condition of cervical spine stenosis to the June 14, 2013 work incident, his opinion is insufficient to meet her burden of proof.

In a form report dated July 19, 2013, Dr. Duke indicated that appellant had a history of being hit by a patient four weeks earlier and a fall months earlier. He diagnosed cervical spinal stenosis and checked "yes" in response to the question of whether the diagnosed condition was caused or aggravated by employment, providing as a rationale that the condition was "possibly aggravated." Dr. Duke's finding that the work incident "possibly aggravated" the diagnosed condition of spinal stenosis is speculative in nature and thus of little probative value.<sup>23</sup>

On September 27, 2013 Dr. Tate discussed appellant's complaints of continued neck and shoulder symptoms that worsened after she began working as a secretary. He diagnosed cervical radiculopathy, degenerative cervical disc disease and cervical spinal stenosis. Dr. Tate opined that appellant's symptoms continued to be due to her neck condition and advised her to see a spinal specialist either through workers' compensation or privately. He did not, however, reference the June 14, 2013 work incident or attribute any diagnosed condition to her altercation with a patient on that date. A physician must provide a narrative description of the employment incident and a reasoned opinion on whether the employment incident described caused or contributed to appellant's diagnosed medical condition.<sup>24</sup>

An award of compensation may not be based on surmise, conjecture, speculation or upon appellant's own belief that there is a causal relationship between her claimed condition and her employment.<sup>25</sup> Appellant must submit a physician's report in which the physician reviews those factors of employment identified by her as causing her condition and, taking these factors into consideration as well as findings upon examination and the medical history, explain how employment factors caused or aggravated any diagnosed condition and present medical rationale in support of his or her opinion.<sup>26</sup> She failed to submit such evidence and therefore failed to discharge her burden of proof.

---

<sup>22</sup> See *Samuel Senkow*, 50 ECAB 370 (1999) (finding that, because a physician's opinion of Legionnaires disease was not definite and was unsupported by medical rationale, it was insufficient to establish causal relationship).

<sup>23</sup> *Rickey S. Storms*, 52 ECAB 349 (2001) (while the opinion of a physician supporting causal relationship need not be one of absolute medical certainty, the opinion must not be speculative or equivocal. The opinion should be expressed in terms of a reasonable degree of medical certainty).

<sup>24</sup> *John W. Montoya*, 54 ECAB 306 (2003).

<sup>25</sup> *D.E.*, 58 ECAB 448 (2007); *George H. Clark*, 56 ECAB 162 (2004); *Patricia J. Glenn*, 53 ECAB 159 (2001).

<sup>26</sup> See *D.D.*, 57 ECAB 734 (2006); *Robert Broome*, 55 ECAB 339 (2004).



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 and 20 C.F.R. §§ 10.605 through 10.607.

**CONCLUSION**

The Board finds that appellant has not established that she sustained an injury on June 14, 2013 in the performance of duty.

**ORDER**

**IT IS HEREBY ORDERED THAT** the June 14, 2013 decision of the Office of Workers' Compensation Programs is affirmed, as modified.

Issued: November 3, 2014  
Washington, DC

Christopher J. Godfrey, Chief Judge  
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge  
Employees' Compensation Appeals Board