

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

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<b>E.R., Appellant</b>	)	
	)	
<b>and</b>	)	<b>Docket No. 14-1436</b>
	)	<b>Issued: October 14, 2014</b>
<b>DEPARTMENT OF HOMELAND SECURITY,</b>	)	
<b>CUSTOMS &amp; BORDER PROTECTION,</b>	)	
<b>Pembroke Pines, FL, Employer</b>	)	
_____	)	

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

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:  
CHRISTOPHER J. GODFREY, Chief Judge  
PATRICIA HOWARD FITZGERALD, Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On June 13, 2014 appellant filed a timely appeal of a February 27, 2014 Office of Workers' Compensation Programs' (OWCP) merit decision 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 to consider the merits of the case.

**ISSUE**

The issue is whether appellant has met his burden of proof in establishing that he sustained an injury on November 14, 2013 in the performance of duty, as alleged.

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

## **FACTUAL HISTORY**

On November 17, 2013 appellant, then a 36-year-old customs and border patrol officer, filed a traumatic injury claim alleging that he experienced a sharp intense pain in his elbow on November 14, 2013 while opening a container door and over extending his right arm.

Appellant submitted a report dated December 18, 2013 from Dr. Michael Surdis, Jr., a chiropractor, finding constant pain and swelling in appellant's right elbow region and diagnosing medial epicondylitis. Dr. Surdis attributed appellant's diagnosed condition to his employment incident.

In a letter dated January 21, 2014, OWCP noted that appellant's claim initially appeared to be a minor injury and that a limited amount of medical expenses were administratively approved. It reopened appellant's claim for consideration as he had not returned to full duty. OWCP advised him that Dr. Surdis' report was not considered medical evidence as he was not a physician under FECA in regard to the treatment of extremities since he did not diagnose a spinal subluxation as demonstrated by x-ray to exist. It requested medical evidence in support of appellant's claim.

Appellant submitted an additional form report from Dr. Surdis dated January 23, 2014. He also submitted physical therapy notes.

By decision dated February 27, 2014, OWCP denied appellant's traumatic injury claim on the grounds that he failed to submit the necessary medical evidence to establish that he sustained a condition as a result of the November 14, 2013 employment incident.

## **LEGAL PRECEDENT**

An employee seeking benefits under FECA<sup>2</sup> has the burden of establishing the essential elements of his or her claim by the weight of the reliable, probative and substantial evidence, including the fact that the individual is an "employee of the United States" within the meaning of FECA and 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 or specific condition for which compensation is claimed is causally related to the employment injury.<sup>3</sup> 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>

OWCP defines 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>5</sup> To determine

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<sup>2</sup> 5 U.S.C. §§ 8101-8193.

<sup>3</sup> *Kathryn Haggerty*, 45 ECAB 383, 388 (1994); *Elaine Pendleton*, 41 ECAB 1143 (1989).

<sup>4</sup> *Victor J. Woodhams*, 41 ECAB 345 (1989).

<sup>5</sup> 20 C.F.R. § 10.5(ee).

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. 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>6</sup> Second, the employee must submit sufficient evidence, generally only in the form a medical evidence, to establish that the employment incident caused a personal injury.<sup>7</sup>

### ANALYSIS

OWCP determined that appellant established that the November 14, 2013 incident occurred as alleged. It denied his claim as it found that he did not establish that a medical condition resulted from the accepted employment incident.

Appellant submitted reports from his attending chiropractor, Dr. Surdis, who did not indicate that appellant’s spine was implicated by his injury, did not diagnose a subluxation of the spine and did not provide x-rays demonstrating such a subluxation of the spine. The Board finds that Dr. Surdis does not qualify as a physician under FECA.<sup>8</sup> Dr. Surdis’ reports are not considered probative medical evidence to establish a causal connection between a diagnosed medical condition and the accepted employment incident.

Appellant also submitted physical therapy notes signed by a physical therapist. The additional physical therapy reports and treatment notes are likewise insufficient to establish appellant’s claim because physical therapists are not physicians as defined by FECA. Therefore their medical opinions regarding diagnosis and causal relationship are of no probative value.<sup>9</sup>

An award of compensation may not be based on surmise, conjecture or speculation. Neither the fact that appellant’s claimed condition because apparent during a period of employment, nor his belief that his condition was caused by his employment is sufficient to establish causal relationship.<sup>10</sup> As appellant did not submit any medical opinion evidence to establish a diagnosed condition as a result of his accepted medical activities, he did not meet his burden of proof.

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<sup>6</sup> *John J. Carlone*, 41 ECAB 354 (1989).

<sup>7</sup> *J.Z.*, 58 ECAB 529 (2007).

<sup>8</sup> Section 8101(2) of FECA provide as follows: (2) physician includes surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors and osteopathic practitioners with the scope of their practice as defined by State law. The term physician includes chiropractors only to the extent that their reimbursable services are limited to treatment consisting of manual manipulation of the spine to correct a subluxation as demonstrated by x-ray to exist and subject to regulation by the Secretary. See *Merton J. Sills*, 39 ECAB 572, 575 (1988); *P.R.*, Docket No 14-1007 (issued August 13, 2014).

<sup>9</sup> 5 U.S.C. § 8101(2); *Roy L. Humphrey*, 57 ECAB 238 (2005); *S.P.*, Docket No. 14-900 (issued August 8, 2014).

<sup>10</sup> *P.R.*, *supra* note 8; *Walter D. Morehead*, 31 ECAB 188 (1986).

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 an injury in the performance of duty on November 14, 2013, as alleged.

**ORDER**

**IT IS HEREBY ORDERED THAT** the February 27, 2014 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 14, 2014  
Washington, DC

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

Patricia Howard Fitzgerald, Judge  
Employees' Compensation Appeals Board

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