



On appeal, appellant submitted a letter from Dr. Wesley Stevens, an osteopathic physician, dated November 10, 2015.<sup>2</sup>

### **FACTUAL HISTORY**

Appellant filed a traumatic injury claim (Form CA-1) on August 25, 2014 alleging that he sustained an injury to his right thigh by overextending his leg while getting into a pick-up truck on August 19, 2014. He reported that he worked as an engineering equipment operator in Modoc National Forest in Alturas, California. Appellant listed his injury as “pulled tendon/muscle, right thigh, backside.” He did not list any witnesses. Appellant’s supervisor noted by checking a box that his knowledge of the facts of the injury agreed with appellant’s statement.

In a letter dated December 29, 2014, OWCP requested appellant provide additional information. It, at that time, had no medical information about the claim and requested that appellant supply a report from his treating physician with a diagnosis of the condition alleged. OWCP further requested that a physician explain the causal relationship between the alleged work incident and the diagnosed condition. The letter included a questionnaire for appellant to complete. The questionnaire asked for details of the alleged incident, witness statements, and appellant’s immediate symptoms following the injury. The questionnaire asked about other injuries, the contact information for the doctor who first examined or treated appellant, and other background information. Appellant was afforded 30 days in which to respond.

OWCP received a report from Dr. Stephens dated September 3, 2014. Dr. Stephens recorded appellant’s history of the incident. “This 60[-]year[-]old white male ... developed an injury to the right leg on [August 18, 2014] while climbing into a one ton four-wheel drive pickup truck. The pickup is very high off the ground. When [appellant] put his leg in and lifted his body into the truck he felt a sharp twinge in the posterior right thigh that has been persistent. It seems to be very localized to one spot now. Patient has continued to work every day.” He noted that appellant could get up and down and walk normally. Dr. Stephens noted “a very localized area of tenderness in the mid posterior right thigh on palpation.” He diagnosed posterior right thigh pain and prescribed an ultrasound study. Dr. Stephens allowed appellant to continue working.

In a report dated September 5, 2014, Dr. Timothy A. Gallagher, Board-certified in family medicine, read and reported on a color flow duplex scan performed on appellant’s right thigh. He noted a small tear in the right biceps femoris muscle with an apparent, organized hematoma, but no evidence of active bleeding at the time of the examination. Dr. Gallagher’s report mentioned that appellant “sustained blunt trauma to his right thigh shortly after surgery to his right knee.” It contained no record of a physical examination (beyond the scan performed), no review of the record, and no discussion of appellant’s condition. The report also showed the signature of C. Bongiovanni, Ph.D., Director of Vascular laboratories, but was also signed by Dr. Gallagher.

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<sup>2</sup> The Board lacks jurisdiction to consider evidence for the first time on appeal. 20 C.F.R. § 501.2(c) (The Board’s review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision).

In a January 26, 2015 decision, OWCP denied appellant's claim. It found that he had provided insufficient medical evidence to support a firm medical diagnosis or support causation findings. OWCP determined that this medical evidence did not support appellant's claim.

On February 27, 2015 appellant requested a review of the written record by OWCP's Branch of Hearings and Review.

OWCP received a letter from appellant on March 2, 2015. Appellant reported that his doctor had kept him on light duty for approximately three weeks and that he desired only payment of his medical bills. He asserted a letter from Dr. Bongiovanni, Ph.D., was supportive of his claim.

In a decision dated June 12, 2015, the hearing representative noted that no additional medical information had been provided. He affirmed the January 26, 2015 decision denying appellant's claim. The hearing representative also noted that the report of Dr. Gallagher noted a conflicting mechanism of injury involving blunt trauma and a prior surgery to appellant's right knee.

Subsequent to the June 12, 2015 decision, appellant provided a report from Dr. Bongiovanni, Ph.D., dated June 29, 2015 which sought to clarify the September 5, 2015 report of Dr. Gallagher.<sup>3</sup> The report repeated the "blunt trauma" causation, but noted that the condition of the right thigh was not related to a surgery on appellant's left knee. In addition, appellant provided a copy of a California State Compensation Insurance Fund form<sup>4</sup> dated September 3, 2014 and signed by Dr. Stevens. The form contained the same information on history and medical treatment as was provided in the September 3, 2014 narrative report.

In a letter of July 9, 2015, received by OWCP on July 20, 2015, appellant requested reconsideration of the June 12, 2015 decision. Appellant again stated that he was only pursuing his claim for payment of his medical bills.

By decision dated October 16, 2015, OWCP denied merit review of the claim, pursuant to 5 U.S.C. § 8128(a).

### **LEGAL PRECEDENT -- ISSUE 1**

An employee 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

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<sup>3</sup> The signature of Dr. Gallagher does not appear as a counter-signature on this report.

<sup>4</sup> "Doctor's First Report of Occupational Injury or Illness."

related to the employment injury.<sup>5</sup> These are the essential elements of each compensation claim regardless of whether the claim is predicated upon a traumatic or an occupational disease.<sup>6</sup>

To determine whether a federal employee has sustained a traumatic injury in the performance of duty, it first must be determined whether the fact of injury has been established. 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> Second, the employee must submit evidence, in the form of medical evidence, to establish that the employment incident caused a personal injury.<sup>8</sup>

Causal relationship is a medical issue and the medical evidence generally required to establish causal relationship is rationalized medical opinion evidence. The opinion of the physician must be based on a complete factual and medical background of appellant, 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 appellant.<sup>9</sup>

### **ANALYSIS -- ISSUE 1**

Appellant's claim was initially denied by OWCP in a decision dated January 26, 2015. That decision is not before the Board. Appellant requested a review of the written record which resulted in a decision dated June 12, 2015 which affirmed the earlier denial of the claim. The Board finds that he has not established a traumatic injury to his right thigh as alleged in his claim.

The written record before the hearing examiner was unchanged from that previously presented. That record does not explain the questions legitimately raised by Dr. Gallagher's September 5, 2014 report concerning a "blunt trauma" mechanism of injury and the existence of a recent right knee surgery which constituted a preexisting condition. The report of September 3, 2014 by Dr. Stevens fails to explain how the action of stepping up into a vehicle with high ground clearance caused appellant's alleged injury to his right thigh. As such appellant did not submit a rationalized medical opinion explaining how appellant's diagnosed condition was caused by the August 25, 2014 incident.

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<sup>5</sup> *G.T.*, 59 ECAB 178 (2008).

<sup>6</sup> *S.P.*, 59 ECAB 184 (2007); *Victor J. Woodhams*, 41 ECAB 345 (1989). A traumatic injury refers to injury caused by a specific event or incident or series of incidents occurring within a single workday or work shift whereas an occupational disease refers to an injury produced by employment factors which occur or are present over a period longer than a single workday or work shift. 20 C.F.R. §§ 10.5(q), (ee); *Brady L. Fowler*, 44 ECAB 343, 351 (1992).

<sup>7</sup> *Julie B. Hawkins*, 38 ECAB 393 (1987).

<sup>8</sup> *John J. Carlone*, 41 ECAB 354 (1989).

<sup>9</sup> *See I.J.*, 59 ECAB 408 (2008); *Donna Faye Cardwell*, 41 ECAB 730 (1990).

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.

### **LEGAL PRECEDENT -- ISSUE 2**

Under section 8128(a) of FECA, OWCP has the discretion to reopen a case for review on the merits. However, OWCP must exercise this discretion in accordance with the guidelines set forth in its regulations.<sup>10</sup> Section 10.606(b)(3) of OWCP's regulations provides that an application for reconsideration, including all supporting documents, must be submitted in writing and set forth arguments and contain evidence that either: (1) shows OWCP erroneously applied or interpreted a specific point of law; (2) advances a relevant legal argument not previously considered by OWCP; or (3) constitutes relevant and pertinent new evidence not previously considered by OWCP.<sup>11</sup>

### **ANALYSIS -- ISSUE 2**

Appellant requested a reconsideration of OWCP's June 12, 2015 decision. He did not show that OWCP made an error of law, nor did he advance a new legal theory. The record in the case was essentially unchanged from the time of the January 26, 2015 decision. The form report of Dr. Steven's was factually identical to his earlier narrative report except in presentation. The letter from Dr. Bongiovanni (a Ph.D.) dated June 29, 2015 is not medical evidence because there is no indication that he is considered a physician under the definition found in FECA.<sup>12</sup> His attempt to clarify the report of Dr. Gallagher serves to increase the uncertainty in the file and cannot be regarded as probative medical evidence. The evidence offered by appellant following the June 12, 2015 review of the record was entirely cumulative or irrelevant and therefore fails to establish that OWCP improperly denied a merit review under section 8128(a).

### **CONCLUSION**

The Board finds that appellant has not met his burden of proof to establish that he sustained an injury to his right thigh on August 19, 2014 in the performance of duty. OWCP also properly denied merit review under 5 U.S.C. § 8128(a) on October 16, 2015.

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<sup>10</sup> *E.B.*, 58 ECAB 681 (2007).

<sup>11</sup> *D.E.*, 58 ECAB 448 (2007).

<sup>12</sup> 5 U.S.C. § 8101(2) of FECA provides as follows: (2) physician includes surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors, and osteopathic practitioners within the scope of their practice as defined by State law. See *B.B.*, Docket No. 09-1858 (issued April 16, 2010); *Roy L. Humphrey*, 57 ECAB 238 (2005).

**ORDER**

**IT IS HEREBY ORDERED THAT** the Office of Workers' Compensation Programs' decisions dated October 16 and June 12, 2015 are affirmed.

Issued: March 28, 2016  
Washington, DC

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

Patricia H. Fitzgerald, Deputy Chief Judge  
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge  
Employees' Compensation Appeals Board