



## **FACTUAL HISTORY**

On September 9, 2015 appellant, then a 29-year-old border patrol agent, filed a traumatic injury claim (Form CA-1) alleging that he sustained a possible insect bite on his right ear while working in the field at 8:00 a.m. on August 20, 2015. The employing establishment indicated that it first had notice of the claimed injury on September 9, 2015.

In a September 15, 2015 attending physician's report, Dr. Jason R. Hess, Board-certified in plastic surgery, provided a history that on August 20, 2015 appellant developed a puncture wound infection for which he underwent surgery on September 10, 2015. He reported findings of an insect bite that was possibly related to walking in the Tijuana River. Dr. Hess diagnosed an abscess, not otherwise specified. He indicated with a checkmark that the diagnosed condition was caused or aggravated by an employment activity. Dr. Hess noted that appellant had returned to his regular-duty work on September 11, 2015.

In a September 10, 2015 medical report, Dr. Marc E. Kobernick, Board-certified in emergency medicine, provided a history that two weeks previously appellant had a possible bug bite to the helix of his right ear while walking in the Tijuana River. Dr. Kobernick related that appellant did not think much of it, however, two days later his ear became more painful. Subsequently, his ear became red, warm to the touch, and swollen. Dr. Kobernick noted that appellant had lost some of the natural folds to the helix and antihelix of his ear. He reported appellant's family and social history, physical examination findings, and laboratory test results. Dr. Kobernick provided an impression of infected auricular hematoma and otalgia.

In a September 13, 2015 operative report, Dr. Hess indicated that on September 10, 2015 he had performed an incision and drainage of the right auricular fluctuance and abscess of the right auricular helix. He also performed a simple repair of a surgical wound measuring one centimeter in the right ear.

By letter dated December 18, 2015, OWCP notified appellant of the deficiencies in his claim. He was advised of the medical and factual evidence needed and was afforded 30 days to respond. A questionnaire attached to the letter asked appellant to describe in detail the factual circumstances of the claimed injury including where he was and what he was doing when the claimed bug bite occurred.

Appellant submitted hospital reports regarding his September 10, 2015 right ear surgery and laboratory test results dated October 19, 2015.

In a January 28, 2016 decision, OWCP denied appellant's claim. It found that the claimed work event did not occur as alleged. OWCP noted that appellant had not responded to the questions provided in its December 18, 2015 development letter.

In an appeal request form dated March 4, 2016, appellant requested reconsideration. In a letter of the same date, he stated that while tracking a group northbound through the brush on August 20, 2015, he was bitten by an unknown insect. Appellant related that this bite later developed into an infection which necessitated medical treatment. He asserted that this injury

occurred in the performance of his official duties as a border patrol agent and he should be covered under OWCP rules and guidelines.

A Form CA-16, an authorization for examination and/or treatment, dated August 19, 2015 and issued by the employing establishment provided a description of injury that on August 20, 2015 appellant sustained an insect bite to the right ear that became swollen and painful.<sup>2</sup>

Appellant resubmitted Dr. Hess' reports regarding his September 10, 2015 right ear surgery. In a September 24, 2015 operative report, Dr. Hess indicated that he performed an aspiration of the right antihelica fold and bolster dressing to the right antihelical fold on that date.

Appellant submitted laboratory test results dated September 12 and 15 and October 19 and 20, 2015.

In a March 17, 2016 decision, OWCP denied further merit review of appellant's claim. It found that the evidence submitted did not support that it had erroneously applied or interpreted a point of law or advance a relevant legal argument not previously considered. OWCP further found that the evidence submitted was repetitious.

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

An employee seeking benefits under FECA has the burden of proof to establish the essential elements of his or her claim, including: 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>3</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>4</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. There are two components involved in establishing fact of injury. First, the employee must submit sufficient evidence to establish that he actually experienced the employment incident at the time, place, and in the manner alleged. Second, the employee must submit evidence, in the form of medical evidence, to establish that the employment incident caused a personal injury.<sup>5</sup>

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<sup>2</sup> The Form CA-16 initially noted that appellant's date of injury was August 19, 2015. However, the employing establishment corrected the date to August 20, 2015.

<sup>3</sup> *Joe D. Cameron*, 41 ECAB 153 (1989); *Elaine Pendleton*, 40 ECAB 1143 (1989).

<sup>4</sup> *See Irene St. John*, 50 ECAB 521 (1999); *Michael E. Smith*, 50 ECAB 313 (1999); *Elaine Pendleton, id.*

<sup>5</sup> *T.H.*, 59 ECAB 388 (2008).

An employee's statement that an injury occurred at a given time and in a given manner is of great probative value and will stand unless refuted by strong or persuasive evidence.<sup>6</sup> Moreover, an injury does not have to be confirmed by eyewitnesses. The employee's statement, however, must be consistent with the surrounding facts and circumstances and his subsequent course of action. An employee has not met his burden 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. Circumstances such 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 statement in determining whether a *prima facie* case has been established.<sup>7</sup>

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

Appellant alleged that on August 20, 2015 he sustained a possible insect bite while working in the field. OWCP did not accept that the claimed work event occurred as alleged. The Board finds that appellant has not met his burden to prove the claimed employment incident occurred as alleged.

Appellant filed a traumatic injury claim on September 9, 2015 alleging that at 8:00 a.m. on August 20, 2015 he sustained a "possible" insect bite on his right ear while working in the field as a border patrol agent. Likewise, the history of injury provided by Dr. Hess and Dr. Kobernick is speculative and general in nature. Dr. Hess reported that appellant had an insect bite "possibly" related to walking in the Tijuana River. Dr. Kobernick reported that appellant had a "possible" bug bite to the helix of his right ear while walking in the Tijuana River. Further, neither physician described the work duties appellant was performing at the time of injury. There were no witnesses to the alleged incident. Appellant did not report his injury to the employing establishment until September 9, 2015. He did not receive medical treatment for his claimed injury until September 10, 2015 by Dr. Kobernick. While Dr. Kobernick noted that appellant initially did not think much of his medical condition until his ear later became more painful, red, warm to the touch, and swollen, appellant did not respond to the questions provided in OWCP's December 18, 2015 development letter regarding his claimed injury prior to the issuance of the January 28, 2016 decision.

The Board thus finds that appellant has not established that the August 20, 2015 incident occurred as alleged. Because appellant has not established that the August 20, 2015 incident occurred, it is unnecessary for the Board to consider the medical evidence regarding causal relationship that was submitted prior to OWCP's January 28, 2016 decision.<sup>8</sup>

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>6</sup> *R.T.*, Docket No. 08-408 (issued December 16, 2008); *Gregory J. Reser*, 57 ECAB 277 (2005).

<sup>7</sup> *Betty J. Smith*, 54 ECAB 174 (2002).

<sup>8</sup> *B.W.*, Docket No. 13-244 (issued May 13, 2013).

## LEGAL PRECEDENT -- ISSUE 2

Section 8128 of FECA vests OWCP with a discretionary authority to determine whether it will review an award for or against compensation, either under its own authority or on application by a claimant.<sup>9</sup> Section 10.608(b) of OWCP's regulations provide that a timely request for reconsideration may be granted if OWCP determines that the claimant has presented evidence and/or argument that meet at least one of the standards described in section 10.606(b)(3).<sup>10</sup> This section provides that the application for reconsideration must be submitted in writing and set forth arguments and contain evidence that either: (1) shows that 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> Section 10.608(b) provides that when a request for reconsideration is timely but fails to meet at least one of these three requirements, OWCP will deny the application for reconsideration without reopening the case for a review on the merits.<sup>12</sup>

## ANALYSIS -- ISSUE 2

Appellant disagreed with OWCP's denial of his traumatic injury claim and requested reconsideration.

In his March 4, 2016 request for reconsideration, appellant described the circumstances surrounding his injury. He stated that on August 20, 2015 he was bitten by an unknown insect while tracking a group northbound through the brush in the performance of his work duties as a border patrol agent. Appellant also explained his delay in seeking medical treatment. He stated that he sought medical treatment after his insect bite became infected. Appellant also submitted a Form CA-16 issued by the employing establishment, which described appellant's injury on August 20, 2015 as an insect bite to the right ear that became swollen and painful.

In order to require reopening a claim for merit review, appellant does not have to submit all evidence necessary to discharge his burden of proof.<sup>13</sup> If OWCP determines that the new evidence lacks substantive probative value, it may deny modification of the prior decision, but only after the case has been reviewed on the merits.<sup>14</sup> Appellant's March 4, 2016 letter and the employing establishment's Form CA-16 constitute relevant factual evidence not previously considered and pertinent to the issue of whether he has established that the employment incident occurred as alleged. The Board, therefore, finds that appellant has submitted sufficient evidence

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<sup>9</sup> 5 U.S.C. § 8128(a).

<sup>10</sup> 20 C.F.R. § 10.608(a).

<sup>11</sup> *Id.* at § 10.606(b)(3).

<sup>12</sup> *Id.* at § 10.608(b).

<sup>13</sup> *Paul Kovash*, 49 ECAB 350 (1998).

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

to require OWCP to reopen the case for merit review. The Board will set aside the March 17, 2016 OWCP decision and remand the case for a review of the merits of appellant's claim.<sup>15</sup>

**CONCLUSION**

The Board finds that appellant has not met his burden of proof to establish a right ear injury on August 20, 2015 while in the performance of duty. The Board finds, however, that appellant has submitted sufficient evidence in support of his request for reconsideration to warrant merit review of his claim under 5 U.S.C. § 8128(a).

**ORDER**

**IT IS HEREBY ORDERED THAT** the March 17, 2016 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this decision by the Board. The decision dated January 28, 2016 is affirmed.

Issued: September 1, 2016  
Washington, DC

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

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

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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<sup>15</sup> As noted, the employing establishment executed a Form CA-16 on August 19, 2015 authorizing medical treatment. The record indicates that appellant first sought medical treatment on September 10, 2015 from Dr. Hess and Dr. Kobernick. The Board has held that where an employing establishment properly executes a Form CA-16, which authorizes medical treatment as a result of an employee's claim for an employment-related injury, it creates a contractual obligation, which does not involve the employee directly, to pay the cost of the examination or treatment regardless of the action taken on the claim. *See D.M.*, Docket No. 13-535 (issued June 6, 2013). *See also* 20 C.F.R. §§ 10.300, 10.304. Although OWCP denied appellant's claim for an injury, it did not address whether he is entitled to reimbursement of medical expenses pursuant to the Form CA-16. Upon return of the case, OWCP should further address this matter.