

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

R.R., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Philadelphia, PA, Employer**

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**Docket No. 15-1186
Issued: April 26, 2016**

Appearances:
Jay Feinschil, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

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

JURISDICTION

On May 4, 2015 appellant, through counsel, filed a timely appeal of an April 14, 2015 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.²

ISSUE

The issue is whether appellant has established injuries to his head, left eye, and left shoulder in the performance of duty on December 12, 2014.

¹ 5 U.S.C. § 8101 *et seq.*

² Appellant timely requested an oral argument before the Board pursuant to section 501.5(b) of the Board's *Rules of Procedure*, 20 C.F.R. § 501.5(b). After exercising its discretion, by order dated October 6, 2015, the Board denied his request for oral argument as the issue on appeal could be fully addressed on the record. *Order Denying Request for Oral Argument*, Docket No. 15-1186 (issued October 6, 2015).

FACTUAL HISTORY

On December 17, 2014 appellant, a 67-year-old letter carrier, filed a traumatic injury claim (Form CA-1) for benefits, alleging injuries to his head, left eye, and left shoulder on December 12, 2014 when he was punched in the face by a coworker. The employing establishment controverted the claim. It reported on the form that it was appellant who had actually struck a coworker who, unlike appellant, had visible marks on his face.

In a December 12, 2014 statement, received by OWCP on December 24, 2014, appellant asserted that when he reported for work on December 12, 2014 he discovered that the entrance doors to his worksite were locked. He alleged that, after ringing the doorbell four times and waiting for several minutes, his coworker B.Q. came to the door, stated, "it's you, you ... creep" and opened the door. Appellant reported that B.Q. accosted him, began calling him names, and punched him in the face three times. He asserted that when he entered the worksite, he told his supervisor and another coworker that B.Q. had assaulted him, and asked them to call the inspection service. Appellant alleged that his supervisor responded by laughing at him.

In a December 12, 2014 statement, received by OWCP on December 29, 2014, B.Q. responded to appellant's assertion. He reported that on December 12, 2014 at 5:55 a.m., he went to the worksite entrance after hearing the doorbell ring several times. B.Q. alleged that after he opened the door appellant hit him in the face with his lunch bag. B.Q. stated that he started cursing at appellant, pushed him into a mail cart, and told the supervisor to get appellant away from him.

By letter dated January 7, 2015, OWCP advised appellant that he needed to submit additional factual and medical evidence in support of his claim. It afforded him 30 days to submit the requested information.

Appellant submitted a December 12, 2014 hospital emergency room report, received by OWCP on January 26, 2015, which related that appellant reported an assault that had occurred at work that day at 6:00 a.m. He asserted that he had been punched in the face, causing him to fall to the ground, hitting his left shoulder against concrete. Appellant alleged that he was then punched two more times in the face. Appellant had complaints of left shoulder pain, neck pain, nose pain, forehead pain, and left temple pain. The report noted that there was no redness or swelling to his face.

By decision dated February 6, 2015, OWCP denied appellant's claim, finding that appellant had failed to meet his burden of proof to establish that the events occurred as alleged.

On March 10, 2015 appellant requested reconsideration.

In a report dated December 15, 2014, received by OWCP on March 10, 2015, Dr. Thomas Powell, an osteopath, related that appellant had stated that he was assaulted by a coworker and was punched in the face three times. He diagnosed postconcussion syndrome, scapular contusion, and headache.

In a statement received by OWCP on March 10, 2015, appellant's supervisor asserted that on Friday, December 12, 2014, at 5:55 a.m., he was sitting at his desk when the bell on the dock rang. B.Q. walked to the door when the bell rang again in an extended ring. The supervisor heard

yelling between appellant and B.Q. and then heard the supervisor's name being called. He walked over to investigate, opened the double doors, and saw appellant and B.Q. yelling at each other, B.Q. asked him to get appellant away from him, and the supervisor stood between the two employees to separate them. He related that appellant struck a clock, told him to look at his face, and said that B.Q. had assaulted him. Appellant's supervisor told appellant that he did not see any markings on his face and that he should get to work. He also related that B.Q. approached him and said that when he opened the door to see who was ringing the bell, appellant hit B.Q. with his lunch bag. He noticed a cut and some blood on B.Q.'s left cheek.

In a December 15, 2014 statement, received by OWCP on March 10, 2015, appellant's coworker J.W. asserted that on Friday, December 12, 2014 she was scanning parcels with B.Q. when she went across the floor to drop off mail tubs for routes 16 and 18. She heard the doorbell ring, B.Q. answered it, and she heard some indistinguishable voices. When she got to the door she saw appellant coming in and B.Q. headed to the key desk area. Appellant told her he was going home. J.W. asked him why he was leaving and he did not answer.

On March 10, 2015 appellant submitted a copy of a December 18, 2014 criminal complaint he filed against B.Q.³ The complaint asserted that B.Q. approached him and stated: "I'm gonna F--you up." Appellant related that he did not respond to B.Q., but that B.Q. proceeded to punch him in the face three times. He asserted that he did not punch him back. The complaint also states that appellant accused B.Q. of habitually making fun of him. Appellant also submitted a copy of a March 2, 2015 Defendant Notice to Appear at Criminal Court.

In a January 26, 2015 report, received by OWCP on March 10, 2015, Dr. Bernard J. Bonner, Ph.D, a licensed psychologist, advised that he began treating appellant on January 16, 2015 for symptoms of post-traumatic stress disorder (PTSD), stemming from the December 12, 2014 incident. He opined that appellant was unable to perform his duties as a postal carrier because of issues related to PTSD.

In a February 3, 2015 statement, received by OWCP on March 10, 2015, appellant reiterated his account of the altercation which occurred between him and B.Q. on December 12, 2014 and indicated that the statements provided by B.Q. and appellant's supervisor were not accurate.

By decision dated April 14, 2015, OWCP denied modification of the February 6, 2015 decision.

LEGAL PRECEDENT

An employee seeking benefits under FECA⁴ has the burden of proof to establish that 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

³ The actual date of this complaint is difficult to discern from the copy submitted to the record.

⁴ 5 U.S.C. § 8101 *et seq.*

related to the employment injury.⁵ 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.⁶

To determine 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.⁷ Second, the employee must submit sufficient evidence, generally only in the form of medical evidence, to establish that the employment incident caused a personal injury.⁸

OWCP cannot accept fact of injury if there are such inconsistencies in the evidence as to seriously question whether the specific event or incident occurred at the time, place, and in the manner alleged, or whether the alleged injury was in the performance of duty,⁹ nor can OWCP find fact of injury if the evidence fails to establish that the employee sustained an “injury” within the meaning of FECA. An injury does not have to be confirmed by eyewitnesses in order to establish the fact that an employee sustained an injury in the performance of duty, as alleged, but the employee’s statements must be consistent with surrounding facts and circumstances and his subsequent course of action.¹⁰ 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 cast doubt on an employee’s statements in determining whether he or she has established his or her claim.¹¹

ANALYSIS

In this case, appellant has not established fact of injury because of inconsistencies in the evidence that cast serious doubt as to whether the specific event or incident occurred at the time, place, and in the manner alleged. While the totality of the factual evidence indicates that some type of verbal and physical altercation took place between appellant and his coworker B.Q. on December 12, 2014, appellant did not establish that he was injured while allegedly being assaulted by B.Q. as he was attempting to enter the workplace. He asserted on the December 17, 2014 CA-1 form that he sustained injuries to his head, left eye, and left shoulder when he was punched in the face by B.Q. and reported in his December 12, 2014 statement that B.Q. cursed and insulted him when he met him at the entrance door, and then proceeded to punch him in the face three times. Appellant further asserted that when he told his supervisor and J.W. that B.Q. had assaulted him

⁵ *Joe D. Cameron*, 42 ECAB 153 (1989); *Elaine Pendleton*, 40 ECAB 1143 (1989).

⁶ *Victor J. Woodhams*, 41 ECAB 345 (1989).

⁷ *John J. Carlone*, 41 ECAB 354 (1989).

⁸ *Id.* For a definition of the term “injury,” see 20 C.F.R. § 10.5(ee).

⁹ *Pendleton*, *supra* note 5.

¹⁰ See *Gene A. McCracken*, Docket No. 93-2227 (issued March 9, 1995); *Joseph H. Surgener*, 42 ECAB 541, 547 (1991).

¹¹ See *Constance G. Patterson*, 42 ECAB 206 (1989).

and asked them to call the inspection service, his supervisor laughed at him. The December 16, 2014 criminal complaint states that B.Q. approached and insulted him and punched him in the face three times. Appellant claimed to have not responded and that he did not punch B.Q. back.

Appellant's statements are contradicted, however, by the employing establishment and by the statements from B.Q. and his supervisor. The employing establishment responded on the CA-1 form that it was appellant who had actually struck B.Q., who, unlike appellant, emerged from the fracas with visible marks on his face. B.Q. asserted in his December 12, 2014 statement that appellant hit him in the face with his lunch bag just after B.Q. opened the door to the worksite. According to B.Q., it was only then that he started cursing at appellant, pushed him into a mail cart and told his supervisor to get appellant away from him. Appellant's supervisor asserted in his statement that he heard and observed yelling between appellant and B.Q., and that B.Q. asked the supervisor to get appellant away from him, after which he separated the two employees. The supervisor stated that appellant then struck a clock, told him to look at his face, and accused B.Q. of assaulting him. The supervisor asserted that he told appellant that he did not see any marks on his face and ordered him to return to work. He, however, noticed a cut and blood on B.Q.'s left cheek. B.Q. told him that appellant hit him first with his lunch bag after ringing the bell and entering the worksite. Thus, the supervisor's statement supports B.Q.'s account that he, unlike appellant, was struck in the face during the altercation.¹² In addition, the initial medical reports included no physical findings to indicate that appellant had sustained any trauma to his face. The December 12, 2014 emergency room report noted that he had complaints of left shoulder pain, neck pain, nose pain, forehead pain, and left temple pain but indicated that there was no redness or swelling on his face. Dr. Powell advised in his December 15, 2014 report that appellant told him that he was assaulted by an employee and punched in the face three times. He opined that he had postconcussion syndrome, scapular contusion, and headache, but did not relate any of these diagnoses to the December 12, 2014 work incident.

Based on the instant record, therefore, there is contradictory evidence which created an uncertainty as to the time, place, and manner alleged. Appellant allegedly injured his head, left eye, and left shoulder after being punched in the face three times by B.Q. during the December 12, 2014 work incident. As noted above, however, his supervisor's statement corroborates B.Q.'s account that it was he, not appellant, who was struck in the face during the altercation.¹³

Appellant asserts in his appeal to the Board that he was punched in the face by a coworker who was nearly one foot taller and 100 pounds heavier than him, and that a photograph of his face taken within a few hours of the incident clearly depicted cuts, bruising, and swelling. He further asserts that B.Q. was being protected by his supervisor, who provided an inaccurate and untruthful statement. Appellant alleged that B.Q. had been bullying him and others for a lengthy period of time. The aforementioned picture, however, was not in the record and there was no

¹² The evidence submitted by an employing establishment on the basis of their records will prevail over the assertions from the claimant unless such assertions are supported by documentary evidence. *See generally Sue A. Sedgwick*, 45 ECAB 211, 218 n.4 (1993).

¹³ *Id.*

corroborating witness statement.¹⁴ This casts additional doubt on appellant's assertion that he injured his head, left eye, and left shoulder while being assaulted and punched in the face three times by B.Q. on December 12, 2014 as he was attempting to enter the workplace. OWCP requested that appellant submit additional factual and medical evidence explaining how he injured his head, left eye, and left shoulder on the date in question. Appellant failed to submit any further corroborating evidence.

For the reasons stated above, the Board finds that appellant did not meet his burden of proof to establish fact of injury. 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 OWCP properly found that appellant failed to meet his burden of proof to establish injuries to his head, left eye, and left shoulder in the performance of duty on December 12, 2014.

ORDER

IT IS HEREBY ORDERED THAT the April 14, 2015 decision of the Office of Workers' Compensation Programs be affirmed.

Issued: April 26, 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

¹⁴ The December 12, 2014 statement from J.W indicates that she was present at the worksite during the time of the altercation between appellant and B.Q. and heard indiscriminate voices. She, however, did not describe the event or assert that she witnessed an altercation between the two employees.