



## **ISSUE**

The issue is whether appellant has met his burden of proof to establish that a traumatic injury occurred in the performance of duty on February 26, 2019, as alleged.

## **FACTUAL HISTORY**

On March 27, 2019 appellant, then a 57-year-old food service worker, filed a traumatic injury claim (Form CA-1) alleging that on February 26, 2019 he sustained an injury to his left shoulder when on break, he was walking to his car and slipped on ice in the parking lot while in the performance of duty. On the reverse side of the claim form, appellant's supervisor indicated that appellant was not in the performance of duty, noting that he was on a break in the parking lot when his February 26, 2019 injury occurred. Appellant stopped work on February 26, 2019.

In a March 20, 2019 progress note, Dr. John Kapoor, Board-certified in internal medicine, noted that appellant presented with left shoulder pain and referred him to orthopedics.<sup>4</sup> In a note of even date, he requested that appellant be excused from work due to a shoulder-related injury that prevented him from performing his work duties.

In a March 29, 2019 report, Dr. Mark Hamming, a Board-certified orthopedic surgeon, evaluated appellant for his left shoulder pain. Appellant informed Dr. Hamming that he slipped on ice in the employing establishment's parking lot and that his arm got caught behind him as he fell. On review of appellant's March 29, 2019 left shoulder x-rays, Dr. Hamming noted that appellant had no visible displaced fractures and diagnosed a left shoulder acute onset injury, suspicious for a possible acute rotator cuff tear and a possible labral tear. Dr. Hamming recommended that appellant participate in physical therapy and requested that he undergo a magnetic resonance arthrogram for further evaluation. In a work status report of even date, he provided a February 26, 2019 date of injury, diagnosed left shoulder pain and released appellant to work as of March 29, 2019 with restrictions of no overhead work.

In an April 5, 2019 medical report, Mitchell Berman, a registered nurse, noted that appellant presented to the emergency department after slipping on a wet kitchen floor at work and landing on his left shoulder.<sup>5</sup> In a diagnostic report of even date, Dr. Mary Barr, a Board-certified radiologist, performed an x-ray of appellant's cervical spine, left shoulder, and left ribs and found no evidence of any fractures, dislocations, or other abnormalities. Mr. Berman diagnosed a left shoulder contusion and cervical strain and informed appellant of follow-up instructions going forward.

In an April 10, 2019 diagnostic report, Dr. Jeffrey Rosengarten, Board-certified in diagnostic radiology, reported an abnormal left shoulder arthrogram including extra-articular extravasation. He recounted appellant's history of injury as persistent shoulder pain and severe limited range of motion, post two discrete falls at work occurring in February and April 2019. In a magnetic resonance imaging (MRI) scan of even date, Dr. Rosengarten found a near complete rupture/avulsion of the distal supraspinatus-infraspinatus tendon complex with a three centimeter

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<sup>4</sup> The progress note is only partially legible.

<sup>5</sup> Appellant has a separate claim for an April 5, 2019 incident under OWCP File No. xxxxxx382, which was accepted for a left shoulder contusion and an unspecified rotator cuff tear or rupture of the left shoulder.

retraction and severe delamination of the torn tendon, a calcified labrum with no unequivocal labral tear, moderate subacromial encroachment secondary to acromioclavicular joint degenerative changes, and severe biceps tendinosis.

In an April 17, 2019 progress note, Dr. Hamming discussed the results of the left shoulder MRI scan and diagnosed a left shoulder rotator cuff tear. He recommended a left shoulder arthroscopy, rotator cuff repair, open subpectoral biceps tenodesis, and a distal clavicle excision with subacromial decompression to treat appellant's injury.

In a May 15, 2019 attending physician's report (Form CA-20), Dr. Hamming diagnosed a left shoulder rotator cuff tear caused when appellant slipped on ice in the parking lot at work. He checked a box marked "Yes" to indicate his belief that appellant's condition was caused by appellant's employment activity and explained that when appellant fell, his arm was caught behind him.

In a June 4, 2019 letter, the employing establishment controverted appellant's claim for injuries he sustained on February 26, 2019. It noted that the February 26, 2019 incident was reported 30 days later and there were no witnesses. The employing establishment contended that appellant was not in the performance of duty at the time of the incident because he was on a break when it had occurred. It also reported that there was an April 5, 2019 work-related injury developed in another file, but as it also was for a left shoulder injury and requested that the claim files should be administratively combined as there was a pending authorization for arthroscopy.

In a development letter dated June 13, 2019, OWCP informed appellant that his claim initially appeared to be a minor injury that resulted in minimal or no lost time from work and that continuation of pay was not controverted by the employing establishment, and thus limited expenses had therefore been authorized. However, a formal decision was now required. OWCP advised appellant that the evidence submitted was insufficient to establish that he actually experienced the incident alleged to have caused the injury. It requested additional factual and medical evidence and provided a questionnaire for his completion. OWCP afforded appellant 30 days to provide the necessary evidence.

Appellant subsequently submitted a June 21, 2019 progress note from Dr. Hamming, in which he provided that appellant wanted to continue with the plan for surgery, but was still awaiting authorization.

In a June 24, 2019 response to OWCP's development questionnaire, appellant explained that the employment incident occurred on March 29, 2019 and that he actually fell twice. He also asserted that both falls were captured on camera and that there were witnesses. Appellant further asserted that he was performing his work duties when injured and that the parking lot where the fall occurred was owned, controlled, or managed by the employing establishment.

On July 30, 2019 appellant by telephone informed OWCP that no February 26, 2019 incident had occurred. Rather, he explained that he signed and dated his Form CA-1 for a March 29, 2019 injury and that his supervisor must have incorrectly submitted the form noting February 26, 2019 as the date of injury. OWCP informed appellant that a decision on the present claim with a February 26, 2019 date of injury would be issued. Appellant was further advised to submit a new Form CA-1, with the March 29, 2019 date of injury he was alleging, in order to receive a separate decision.

By decision dated August 1, 2019, OWCP denied appellant's claim finding that the evidence of record was insufficient to establish that the injury and/or events occurred as he described. It explained that the medical evidence of record identified February 26 and March 20, 2019 dates of injury and also noted that in the July 30, 2019 telephone conversation he identified March 29, 2019 as the date of injury. OWCP concluded therefore that the requirements had not been met to establish the factual component of fact of injury as defined by FECA.

### **LEGAL PRECEDENT**

An employee seeking benefits under FECA<sup>6</sup> has the burden of proof to establish 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,<sup>7</sup> that an injury was sustained in the performance of duty, as alleged, and that any disability or medical condition for which compensation is claimed is causally related to the employment injury.<sup>8</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>9</sup>

To determine whether a federal employee has sustained a traumatic injury in the performance of duty it must first be determined whether fact of injury has been established.<sup>10</sup> Generally, fact of injury consists of two components that must be considered in conjunction with one another. 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>11</sup> Second, the employee must submit sufficient evidence to establish that the employment incident caused a personal injury.<sup>12</sup>

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, but the employee's statements must be consistent with the surrounding facts and circumstances and his or her subsequent course of action.<sup>13</sup> The employee has not met his or her burden of proof to establish the occurrence of an injury when there are inconsistencies in the evidence that cast serious doubt upon the validity of the claim. 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

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<sup>6</sup> *Supra* note 2.

<sup>7</sup> *J.P.*, Docket No. 19-0129 (issued April 26, 2019); *S.B.*, Docket No. 17-1779 (issued February 7, 2018); *Joe D. Cameron*, 41 ECAB 153 (1989).

<sup>8</sup> *J.M.*, Docket No. 17-0284 (issued February 7, 2018); *R.C.*, 59 ECAB 427 (2008); *James E. Chadden, Sr.*, 40 ECAB 312 (1988).

<sup>9</sup> *R.R.*, Docket No. 19-0048 (issued April 25, 2019); *L.M.*, Docket No. 13-1402 (issued February 7, 2014); *Delores C. Ellyett*, 41 ECAB 992 (1990).

<sup>10</sup> *E.M.*, Docket No. 18-1599 (issued March 7, 2019); *T.H.*, 59 ECAB 388, 393-94 (2008).

<sup>11</sup> *L.T.*, Docket No. 18-1603 (issued February 21, 2019); *Elaine Pendleton*, 40 ECAB 1143 (1989).

<sup>12</sup> *B.M.*, Docket No. 17-0796 (issued July 5, 2018); *John J. Carlone*, 41 ECAB 354 (1989).

<sup>13</sup> *M.F.*, Docket No. 18-1162 (issued April 9, 2019); *Charles B. Ward*, 38 ECAB 667, 67-71 (1987).

medical treatment may, if otherwise unexplained, cast sufficient doubt on an employee's statements in determining whether a *prima facie* case has been established.<sup>14</sup>

### ANALYSIS

The Board finds that the case is not in posture for decision.

Appellant filed a Form CA-1 on March 27, 2019 alleging that he injured his left shoulder on February 26, 2019 when he slipped on ice in the employing establishment parking lot. The employing establishment's June 4, 2019 letter controverting his claim acknowledged the February 26, 2019 incident did occur and challenged the claim on the basis that he failed to report his injury within 30 days and that he was not in the performance of duty when injured.

Appellant's Form CA-1 identifies February 26, 2019 as the date of injury and the employing establishment's June 4, 2019 letter did not dispute that the incident occurred. The medical evidence of record also provided a consistent history of his injury due to slipping and falling on ice on February 26, 2019.<sup>15</sup> In Dr. Rosengarten's April 10, 2019 diagnostic report, he noted appellant's history of persistent shoulder pain and severe limited range of motion in relation to two falls at work occurring in February and April 2019. Further, Dr. Hamming's March 29 and May 15, 2019 medical evidence provided February 26, 2019 as the date of injury and identified a consistent mechanism of injury in appellant slipping and falling on ice. Therefore, the Board finds that appellant has met his burden of proof to establish that the February 26, 2019 employment incident occurred as alleged. Thus, the case will be remanded to OWCP to further develop the claim consistent with its procedures to determine whether the February 26, 2019 employment incident occurred in the performance of duty and, if so, whether the medical evidence of record establishes a causal relationship between a diagnosed condition and the accepted employment incident.<sup>16</sup>

The Board further notes that appellant subsequently filed a separate traumatic injury claim concerning an April 5, 2019 employment incident in which he slipped and fell on a wet floor under OWCP File No. xxxxxx382. Appellant's claim was later accepted for a contusion of the left shoulder and an unspecified rotator cuff tear or rupture of the left shoulder on January 22, 2020. In its June 4, 2019 opposition letter, the employing establishment requested that the two claim files be administratively combined. OWCP's procedures provide that cases should be administratively combined when correct adjudication of the issues depends on frequent cross-referencing between files.<sup>17</sup> For example, if a new injury case is reported for an employee who previously filed an injury claim for a similar condition or the same part of the body, doubling is required.<sup>18</sup> In the present case, appellant filed his initial claim on March 27, 2019 alleging a left shoulder injury due

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<sup>14</sup> *L.D.*, Docket No. 16-0199 (issued March 8, 2016); *Betty J. Smith*, 54 ECAB 174 (2002).

<sup>15</sup> *B.S.*, Docket No. 19-0524 (issued August 8, 2019).

<sup>16</sup> See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Performance of Duty*, Chapter 2.804.4 (August 1992).

<sup>17</sup> See *id.* Chapter 2.400.8(c) (February 2000).

<sup>18</sup> *Id.*; *D.C.*, Docket No. 19-0100 (issued June 3, 2019); *N.M.*, Docket No. 18-0833 (issued April 18, 2019); *K.T.*, Docket No. 17-0432 (issued August 17, 2018).

to a February 26, 2019 incident. He subsequently filed a separate claim for the same injury related to an April 5, 2019 incident.

For a full and fair adjudication, the case must be returned to OWCP to administratively combine the current case record with OWCP File No. xxxxxx382 so that it can properly determine whether appellant's February 26, 2019 fall occurred in the performance of duty and whether his diagnosed conditions were causally related to the accepted employment incident. Following this and other such further development as OWCP deems necessary, it shall issue a *de novo* decision.

**CONCLUSION**

The Board finds that the case is not in posture for decision.

**ORDER**

**IT IS HEREBY ORDERED THAT** the August 1, 2019 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: June 23, 2020  
Washington, DC

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

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

Patricia H. Fitzgerald, Alternate Judge  
Employees' Compensation Appeals Board