

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

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**S.P., Appellant**

**and**

**DEPARTMENT OF THE ARMY, FORT SAM,  
Houston, TX, Employer**

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**Docket No. 12-1566  
Issued: December 3, 2012**

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

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

RICHARD J. DASCHBACH, Chief Judge  
PATRICIA HOWARD FITZGERALD, Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On July 16, 2012 appellant filed a timely appeal of a March 22, 2012 Office of Workers' Compensation Programs' (OWCP) merit decision denying her claim for continuation of pay and an April 27, 2012 decision denying her 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.

**ISSUES**

The issues are: (1) whether OWCP properly denied appellant's claim for continuation of pay; and (2) whether appellant has met her burden of proof in establishing that she sustained an injury when an elevator fell while she was in the performance of duty on June 24, 2011.

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

## **FACTUAL HISTORY**

On January 5, 2012 appellant, then a 65-year-old nurse, filed a traumatic injury claim alleging that on June 24, 2011 she sustained a back strain, meniscal tear in her right knee and hamstring partial tear in her right leg as well as a ruptured Baker's cyst when she was on an elevator which fell several stories from the sixth floor. Barbara Ann Henry, a witness, stated that the elevator was going to the basement from the sixth floor and fell a short distance, causing a jolt.

Appellant's supervisor controverted her claim stating that at the time of the incident appellant was sent to the emergency room and no injuries were found. She further stated that appellant denied any injuries in December 2011. Appellant's supervisor stated that in the original report appellant stated that the elevator jolted rather than fell.

In a decision dated March 22, 2012, OWCP denied appellant's claim for continuation of pay on the grounds that the injury was not reported on a form approved by OWCP within 30 days of the injury.

OWCP also requested additional factual and medical evidence by letter dated March 22, 2012. In a discharge note dated June 24, 2011, it indicated that Joseph E. Browne, Jr., a physician's assistant, diagnosed back strain. Dr. Stuart Pipkin, a Board-certified orthopedic surgeon, examined appellant on July 21, 2011 and diagnosed spondylitic changes to the cervical thoracic and lumbar spine. He stated that appellant had some increase in back pain when an elevator fell about one floor. Dr. Pipkin stated, "This jarred her back and increased the pain somewhat." On November 7, 2011 appellant reported pain in her right leg since a fall in July 2011. In a note dated November 15, 2011, Dr. Michael Murphy, a physician Board-certified in pain management, diagnosed low back pain and performed a lumbar epidural steroid injection. Dr. Pies L. Kujawa, a Board-certified orthopedic surgeon, completed a note on December 20, 2011 and noted that appellant had surgery on her lumbar spine which resulted in some residual weakness and numbness in the L4-S1 nerve distribution on the right leg. He stated, "Approximately, a couple of months ago, she was in an elevator ... that fell a floor and a half. [Appellant] did not actually fall but she did strain her low back and posterior hip area at the time." Dr. Kujawa diagnosed locked sacroiliac joint as well as a partial hamstring tear.

By decision dated April 27, 2012, OWCP denied appellant's claim finding that the medical evidence did not provide a consistent history of injury and diagnosis as a result of the elevator incident on June 24, 2011.

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

Section 8118 of FECA<sup>2</sup> provides for payment of continuation of pay, not to exceed 45 days, to an employee "who has filed a claim for a period of wage loss due to a traumatic injury with [her] immediate superior on a form approved by the Secretary of Labor within the time

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<sup>2</sup> 5 U.S.C. § 8118.

specified in section 8122(a)(2) of this title.” This latter section provides that “written notice of injury” shall be given within 30 days.<sup>3</sup>

Section 8118(a) makes continuation of pay contingent on the filing of a written claim within 30 days of the injury. When an injured employee makes no written claim for a period of wage loss within 30 days, he or she is not entitled to continuation of pay, notwithstanding prompt notice of injury.<sup>4</sup>

Continuation of pay requires the employing establishment to continue the employee’s regular pay during any periods of disability, up to a maximum of 45-calendar days. This is paid by the employing establishment, not OWCP. However, the ultimate decision as to whether appellant is eligible for continuation of pay rests with OWCP.<sup>5</sup>

Continuation of pay is payable only for time lost from work due to an initial traumatic injury.<sup>6</sup> To be eligible for continuation of pay, an employee must: (1) have a traumatic injury which is job related and the cause of the disability and/or the cause of lost time due to the need for medical examination and treatment; (2) file Form CA-1 within 30 days of the date of the injury (but if that form is not available, using another form would not alone preclude receipt); and (3) begin losing time from work due to the traumatic injury within 45 days of the injury.<sup>7</sup> Whether a particular injury caused an employee disability from employment is a medical issue, which must be resolved by competent medical evidence.<sup>8</sup>

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

In the instant case, appellant filed her notice of injury on January 5, 2012 more than five months after her alleged employment incident on June 24, 2011. There is no provision under FECA for excusing an employee’s failure to file a claim for continuation of pay within 30 days of the employment injury.<sup>9</sup> Therefore, OWCP properly found that appellant was not entitled to continuation of pay.

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

An employee seeking benefits under FECA<sup>10</sup> has the burden of establishing the essential elements of his or her claim by the weight of the reliable, probative and substantial evidence,

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<sup>3</sup> *Id.* at § 8122(a)(2).

<sup>4</sup> *See W.W.*, 59 ECAB 533 (2008). *See also P.R.*, Docket No. 08-2239 (issued June 2, 2009).

<sup>5</sup> 20 C.F.R. § 10.200.

<sup>6</sup> *Id.* at § 10.205(a)(3). *See also Carol A. Lyles*, 57 ECAB 265 (2005).

<sup>7</sup> *Id.* at 10.205(a)(1-3). *See also J.M.*, Docket No. 09-1563 (issued February 26, 2010).

<sup>8</sup> *Carol A. Lyles*, *supra* note 6.

<sup>9</sup> *Dodge Osborne*, 44 ECAB 849, 855 (1993).

<sup>10</sup> 5 U.S.C. §§ 8101-8193.

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>11</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>12</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>13</sup> 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.<sup>14</sup> 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.<sup>15</sup>

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

Appellant filed a claim alleging that she sustained multiple injuries from an elevator accident which occurred in the performance of duty on June 24, 2011. She and the witness indicated that the elevator dropped a distance resulting in a jolt to its passengers. OWCP accepted that the incident occurred. Appellant alleged that she sustained back and leg injuries as a result of the jolt. The Board finds that appellant failed to meet her burden of proof.

The medical evidence includes a discharge note dated June 24, 2011 indicating that a physician’s assistant diagnosed back strain. The Board notes that with respect to the report from a physician’s assistant, this is of no probative value since a physician’s assistant is not considered a physician under FECA.<sup>16</sup>

On July 21, 2011 Dr. Pipkin diagnosed spondylitic changes to the cervical thoracic and lumbar spine. He stated that appellant had some increase in back pain when an elevator fell about a floor. Dr. Pipkin stated, “This jarred her back and increased the pain somewhat.” He did not provide a diagnosed condition as a result of the elevator incident. The Board has held that the mere diagnosis of “pain” does not constitute the basis for payment of compensation.<sup>17</sup>

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<sup>11</sup> *Kathryn Haggerty*, 45 ECAB 383, 388 (1994); *Elaine Pendleton*, 41 ECAB 1143 (1989).

<sup>12</sup> *Victor J. Woodhams*, 41 ECAB 345 (1989).

<sup>13</sup> 20 C.F.R. § 10.5(ee).

<sup>14</sup> *John J. Carlone*, 41 ECAB 354 (1989).

<sup>15</sup> *J.Z.*, 58 ECAB 529 (2007).

<sup>16</sup> *P.B.*, Docket No. 12-960 (issued September 25, 2012); *George H. Clark*, 56 ECAB 162 (2004).

<sup>17</sup> *Robert Broome*, 55 ECAB 339 (2004).

Without more detail and an explanation of whether he believed that appellant's syondyolilic changes were due the employment incident, this report is not sufficient to meet appellant's burden of proof.

Dr. Murphy examined appellant on November 15, 2011 diagnosing low back pain and performing a lumbar epidural steroid injection. He did not provide a history of injury and did not attribute appellant's back pain to her employment. Further, as noted above, back pain is not a compensable diagnosis.

Dr. Kujawa examined appellant on December 20, 2011 and noted her history of spine surgery which resulted in some residual weakness and numbness in the L4-S1 nerve distribution on the right leg. He stated, "Approximately, a couple of months ago, she was in an elevator ... that fell a floor and a half. [Appellant] did not actually fall but she did strain her low back and posterior hip area at the time." Dr. Kujawa diagnosed locked sacroiliac joint as well as a partial hamstring tear. While he diagnosed back strain and indicated that this condition was due to appellant's elevator incident, he did not provide any medical reasoning explaining how or why the jolt from the elevator would result in the diagnosed back strain and posterior hip strain. Without medical rationale supporting his opinion that appellant's condition in December was due to her June employment incident, Dr. Kujawa's report is not sufficient to meet appellant's burden of proof.

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 denied appellant's claims for traumatic injury and continuation of pay.

**ORDER**

**IT IS HEREBY ORDERED THAT** the April 27 and March 22, 2012 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: December 3, 2012  
Washington, DC

Richard J. Daschbach, Chief Judge  
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge  
Employees' Compensation Appeals Board

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