United States Department of Labor
Employees' Compensation Appeals Board

C.M., Appellant	)	
and	)	**Docket No. 14-116**
	)	**Issued: July 2, 2014**
DEPARTMENT OF DEFENSE, DEFENSE COMMISSARY AGENCY, Fort Lee, VA, Employer	)	

Appearances:
Daniel M. Goodkin, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
PATRICIA HOWARD FITZGERALD, Acting Chief Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On October 21, 2013 appellant, through counsel, filed a timely appeal from the June 19, 2013 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[1] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant met his burden of proof to establish an injury in the performance of duty on August 24, 2011.

FACTUAL HISTORY

On September 22, 2011 appellant, then a 60-year-old meat cutter, filed a traumatic injury claim (Form CA-1) alleging that on August 24, 2011 he sustained a work injury in the form of

[1] 5 U.S.C. §§ 8101-8193.

three head lacerations, left eye laceration and trauma to his head, neck, chest, ribs, knees and left wrist. Regarding the cause of injury, appellant stated, "was attacked by three masked men using ax handles as I tried to get out of my car upon returning from work to home. They told me to 'stop talking sh-- at work' as they were beating me."[2] On the same form, Angel Liciaga, appellant's supervisor, checked a box indicating that the claimed injury did not occur in the performance of duty and stated, "Employee alleges that three men beat him with ax handles at his residence, [though to] my knowledge there is no evidence that supports that this is work related. [Appellant] refused to make a statement to the police about what happen[ed] that day." Mr. Liciaga also noted, "[Appellant] has made statements to the store director and in the first portion of [Form CA-1] that he believes this accident was work related. However, there is no evidence to support this theory (that has been provided to me)."

In a September 29, 2011 letter, OWCP requested that appellant submit additional factual and medical evidence in support of his claim.

In a statement received on November 1, 2011, appellant discussed various incidents prior to August 24, 2011 which he believed showed that the alleged assault on August 24, 2011 was related to his work. He indicated that beginning in March 2011 he complained to Mr. Liciaga about improper actions in the workplace, including the falsification of product order invoices and the cutting and processing of fresh chicken in the meat department. Appellant detailed meetings he held with management officials in mid-March 2011 regarding these matters and indicated that on March 25 or 26, 2011 a window in his personal car was broken out while parked at his house. He discussed additional interactions with management regarding his concerns and then detailed the August 24, 2011 incident:

> "On the afternoon of August 24, 2011, I signed out on my time card at 2:30 p.m. but did not leave the commissary until approx. 2:40 p.m. I drove home … and as I pulled into my driveway, I turned off my car. Through my rear view mirror, I saw a white vehicle stop, blocking my driveway and my vehicle, three men came running out of the car, they were wearing bandanas (gang member attire), covering their faces to where only their eyes could be seen. They told me to 'stop talking sh-- at work' and all three began beating me on my legs, arms, hands, face, neck and head, with wooden ax handles. I was trapped inside my car.
>
> "I tried to get out on the passenger side of my car but one of the men went over to that side of the car and was striking me through the window, so I tried to get out of the driver's side again, but they had me trapped inside. For reasons unknown to me, one man turned his body towards the street and I grabbed the ax handle from him, but they all starting beating me on my left wrist to get the axe handle back, which they did, after one of them struck me in my left eye.
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> "When I was finally able to get out of the car, all three kept striking me repeatedly with the ax handles and then I was struck several times to the back of my head which made me fall to the ground on my knees. While I was trying to get up, they

[2] Appellant reported the time of his injury as 2:45 p.m.

told me again to 'stop talking sh-- at work' and then they ran to their car and left."[3]

In a September 29, 2011 statement, an employing establishment official stated that appellant's claim for an August 24, 2011 work injury was being controverted. She noted that appellant's claimed injury occurred at his home while he was off duty and that he refused to file a police report on the claimed date of injury.

The record contains a number of e-mails produced by employing establishment officials on or shortly after August 24, 2011. Several individuals indicated that appellant refused to talk to police in detail or receive more than cursory medical attention when he appeared at the workplace shortly after the claimed time of the attack on August 24, 2011.[4] In an undated statement, a coworker stated that at about 3:50 p.m. she saw appellant at the workplace with blood all over his clothing and face.

In a November 10, 2011 decision, OWCP denied appellant's claim that he sustained an injury in the performance of duty on August 24, 2011. Regarding the reason for the denial, it stated, "[s]pecifically, your case is denied because the evidence is not sufficient to establish that the injury and/or medical condition arose during the course of employment and within the scope of compensable work factors. The reason for this finding is that the evidence submitted does not establish you were in the performance of duty at the time of the attack."

Appellant submitted additional evidence including a military police report from August 24, 2011. The report noted that military police responded to a call from the area of Commissary Building 4240 at the workplace and discovered that appellant had multiple injuries which he alleged were due to a battery that occurred outside his residence. Appellant refused to provide details about the incident other than to state that three men (with their faces covered by bandanas) hit him with ax handles. He also submitted a transcript of a telephone call he participated in with a coworker, Andy, approximately seven months after the August 24, 2011 incident. Andy indicated that "everybody in the commissary" thought that two other coworkers, Michael and Jimmy, had something to do with the August 24, 2011 attack.[5]

In a June 1, 2012 decision, OWCP denied modification of its November 10, 2011 decision finding that appellant did not show that he was injured in the performance of duty on

[3] Appellant met his wife at his workplace and a coworker called 911 for him. An ambulance arrived and he was transported to a nearby hospital emergency room. Appellant stated, "Since I had just been beaten and was bleeding profusely, I did not want anyone to see me talking to the police, since I had just been told to 'stop talking sh-- at work,' so I said nothing until two days later when I called the police station to talk to the detective who responded to the 911 call." He informed the detective that the "men who attacked me were of Asian descent." In an August 29, 2011 disability note, an attending physician indicated that appellant should be off work from August 24 to September 6, 2011.

[4] The record does, however, contain a medical record which shows that appellant sought medical treatment at a community hospital later in the day on August 24, 2011.

[5] Appellant also submitted several statements concerning his dealings with coworkers prior to August 24, 2011, including Michael Nguyen, and a record from an officer of Marina Police Department about a meeting the officer had with appellant and his wife on February 9, 2013.

August 24, 2011. It found that the additional evidence submitted by appellant did not establish an employment link to the claimed August 24, 2011 injury.

In a February 19, 2013 statement, appellant continued to argue that he believed he was attacked on August 24, 2011 by coworkers who were angry about his whistleblower activities. He submitted several documents that had already been considered by OWCP. By decision dated March 18, 2013, OWCP denied appellant's request for further review of the merits of his claim.

Appellant submitted various documents of officials from the Inspector General of the Department of Defense concerning whistleblower disclosures that he made as well as January 2013 letters of reprimand issued to several employing establishment workers for such actions as mislabeling products and engaging in improper inventory management.

In a June 19, 2013 decision, OWCP denied modification of its June 1, 2012 decision denying appellant's claim for an August 24, 2011 work injury.

LEGAL PRECEDENT

FECA provides for the payment of compensation for disability or death of an employee resulting from personal injury sustained while in the performance of duty.[6] The term "in the performance of duty" has been interpreted to be the equivalent of the commonly found prerequisite in workers' compensation law, "arising out of and in the course of employment."[7] The phrase "course of employment" is recognized as relating to the work situation, and more particularly, relating to elements of time, place and circumstance. In the compensation field, to occur in the course of employment, an injury must occur: (1) at a time when the employee may be reasonably engaged in the master's business; (2) at a place where he may reasonably be expected to be in connection with the employment; and (3) while he was reasonably fulfilling the duties of his employment or engaged in doing something incidental thereto.[8] This alone is not sufficient to establish entitlement to benefits for compensability. The concomitant requirement of an injury "arising out of the employment" must be shown, and this encompasses not only the work setting but also a causal concept, the requirement being that the employment caused the injury. In order for an injury to be considered as arising out of the employment, the facts of the case must show some substantial employer benefit is derived or an employment requirement gave rise to the injury.[9]

ANALYSIS

On September 22, 2011 appellant filed a traumatic injury claim alleging that on August 24, 2011 he sustained a work injury in the form of three head lacerations, left eye laceration and trauma to his head, neck, chest, ribs, knees and left wrist. Regarding the cause of

[6] 5 U.S.C. § 8102.

[7] *Bernard D. Blum*, 1 ECAB 1, 2 (1947).

[8] *See L.K.*, 59 ECAB 465 (2008); *R.S.*, 58 ECAB 660 (2007).

[9] *See Eugene G. Chin*, 39 ECAB 598, 601-02 (1988).

injury, appellant stated, "was attacked by three masked men using ax handles as I tried to get out of my car upon returning from work to home. They told me to 'stop talking sh-- at work' as they were beating me." In later statements, appellant asserted that he was attacked by unidentified coworkers due to his whistleblower activities at work, including exposing employees who falsified product order invoices and mishandled inventory.

The Board finds that appellant has not established a sufficient nexus to his employment such that his claimed injuries on August 24, 2011 would be covered under FECA as occurring in the performance of duty. Appellant's claimed injury occurred at his home while he was off duty and was not performing any regular or specially assigned duties. Therefore, two important aspects of the performance of duty test have not been met. At the time of the claimed work injury on August 24, 2011, the injury did not occur: (1) at a time when the employee may be reasonably said to be engaged in the master's business; or (2) at a place where he may reasonably be expected to be in connection with the employment.[10] Appellant also has not shown that he was reasonably fulfilling the duties of his employment or engaged in doing something incidental thereto. He has attempted to establish an employment link by positing that he would not have been attacked but for his whistleblower activities at work, *i.e.*, his work activities placed him in a position of risk to be harmed.[11] However, appellant has not proven such an employment link. His alleged attackers, by his own account, wore bandanas and he was not able to identify them. The record reflects that appellant was initially reluctant to cooperate with law enforcement officials and there is no police report of record which identifies the claimed attackers.[12]

On appeal, counsel argued that because appellant consistently indicated that his claimed attackers told him to "stop talking sh-- at work" as they were beating him, it must be accepted that there was a work link to the attack. Counsel made reference to Board precedent which indicates that an employee has not met his burden of proof to establish an injury when there are such inconsistencies in the evidence as to cast serious doubt upon the validity of the claim, but that an employee's statement alleging 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.[13] While it is true that appellant consistently indicated that he was being attacked for "talking sh-- at work," the Board notes that, even if it could be established that he made this statement, the link of the claimed incident to work factors would still remain vague. For these

[10] *See supra* note 8.

[11] Larson has identified three types of risks: risks distinctly associated with the employment, risks personal to the claimant, and "neutral" risks, *i.e.*, risks having no particular employment or personal character. He further indicated that harms from the first risk are universally compensable and those from the second are universally noncompensable; harms from the third risk are the subject of controversy in modern compensation law but there is increased acceptance for finding an injury arose in the performance of duty when a condition of employment put the claimant in a position to be injured by the neutral risk. *See* A. Larson, *The Law of Workers' Compensation*, sections 7.00, 7.30 (2010).

[12] Appellant presented documents which he felt established the participation of coworkers in the claimed attack, including a transcript of a telephone call held seven months after the August 24, 2011 incident, but the documents lack probative value.

[13] *Robert A. Gregory*, 40 ECAB 478, 483 (1989); *Thelma S. Buffington*, 34 ECAB 104, 109 (1982).

reasons, appellant has not established that he was in the course of his employment at the time of the alleged incident and he has not shown that he sustained an injury in the performance of duty on August 24, 2011.

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 appellant did not meet his burden of proof to establish that he sustained an injury in the performance of duty on August 24, 2011.

ORDER

IT IS HEREBY ORDERED THAT the June 19, 2013 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 2, 2014
Washington, DC

Patricia Howard Fitzgerald, Acting Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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