United States Department of Labor
Employees' Compensation Appeals Board

J.N., Appellant	)	
and	)	**Docket No. 19-0045**
	)	**Issued: June 3, 2019**
DEPARTMENT OF STATE, U.S. EMBASSY, Kabul, Afghanistan, Employer	)	

Appearances:
Alan J. Shapiro, Esq., for the appellant[1]
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
JANICE B. ASKIN, Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On October 8, 2018 appellant, through counsel, filed a timely appeal from an August 8, 2018 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[2] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

[1] In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.; see also* 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

[2] 5 U.S.C. § 8101 *et seq.*

ISSUE

The issue is whether appellant has met his burden of proof to establish a traumatic injury in the performance of duty on April 10, 2015, as alleged.

FACTUAL HISTORY

This case has previously been before the Board.[3] The facts and circumstances of the case as set forth in the Board's prior order are incorporated herein by reference. The relevant facts are as follows.

On August 24, 2015 appellant, then a 53-year-old construction manager, filed a traumatic injury claim (Form CA-1) alleging that he sustained a left knee injury on Friday, April 10, 2015 while walking down a concrete ramp at 5:00 p.m. while in the performance of duty. On the reverse side of the claim form, D.B., appellant's supervisor, indicated on August 27, 2015 that appellant's regular work hours were 8:00 a.m. to 5:00 p.m. Sunday through Thursday and Saturday. Appellant stopped work on June 16 and returned to work on July 23, 2015.

On January 16, 2016 OWCP received a June 3, 2015 magnetic resonance imaging (MRI) scan and reports dated June 4 and 24, 2015 from Dr. Michael J. Slimack, a Board-certified orthopedic surgeon. Dr. Slimack, based on the June 3, 2015 MRI scan, diagnosed left knee lateral meniscal tear.

In a February 2, 2016 development letter, OWCP advised appellant that when his claim was received, it appeared to be a minor injury that resulted in minimal or no lost time from work. The claim was administratively approved to allow payment for limited medical expenses, but the merits of the claim had not been formally adjudicated. OWCP advised that because appellant filed a claim for wage-loss compensation, his claim would be formally adjudicated. It advised that the evidence was insufficient to establish that he experienced the claimed incident or that his injury had been caused by an employment incident in the performance of duty. OWCP requested that appellant complete the attached questionnaire. Appellant was afforded 30 days to submit the necessary evidence.

On February 17, 2016 OWCP received appellant's completed factual development questionnaire. Appellant related that he was on duty and in his office on April 10, 2015 and hurt his knee while walking down a ramp at 5:00 p.m. He noted that the injury occurred on the Embassy compound, which is walled and includes housing, recreation, and work space. According to appellant, employees were always "on the clock" due to the heightened security risks and austere and restrictive living conditions. He also related that earlier, on April 10, 2015, he had played basketball from 1:00 to 2:00 p.m. with no difficulty or knee pain.

By decision dated March 16, 2016, OWCP denied the claim finding that appellant had not met his burden of proof to establish that he had been in the performance of duty on April 10, 2015 since Friday was not a scheduled workday.

[3] *Order Remanding Case*, Docket No. 17-1408 (issued December 11, 2017).

On March 31, 2016 appellant, through counsel, requested a telephonic hearing before an OWCP hearing representative. The requested hearing was held on October 24, 2016.

On October 18, 2016 OWCP received a July 16, 2016 report from Dr. Slimack noting appellant was status post left knee arthroscopic surgery.

By decision dated December 9, 2016, OWCP's hearing representative set aside the March 16, 2016 decision and remanded the case for further development of the evidence. He found that there was a preliminary issue of whether appellant was an independent contractor or a federal employee and cited to the relevant provisions of OWCP's procedure manual and elements to be considered.[4] If OWCP determined that appellant was an employee under 5 U.S.C. § 8101(1), it was instructed to determine whether he was in the performance of duty at the time of the April 10, 2015 incident.

In a letter dated December 13, 2016, OWCP requested additional information from appellant and the employing establishment. The employing establishment was asked for clarification on whether appellant was a civil employee at the time of the accepted April 10, 2015 incident and whether he had been in travel status.

In a February 1, 2017 letter, the employing establishment responded to OWCP's questions and provided a copy of appellant's employment contract. It indicated that he was not in the performance of duty at the time of the April 10, 2015 incident nor was he in travel status since his permanent duty station was Kabul, Afghanistan. As such, appellant was afforded an overseas allowance, danger pay, and special incentive differential due to the job in Kabul. The employing establishment noted that the terms of his contract did not require him to be available 24/7, although overtime, when necessary, was authorized. Furthermore, it contended that neither appellant's walking on the grounds of the Embassy compound nor being able to depart under dangerous conditions established that he was working or that he was "on the clock" at the time of the incident. A copy of the personal services contract form noted the terms of his employment including that he was a U.S. citizen hire for personal services abroad and his duty station was located in Kabul, Afghanistan. The terms of appellant's contract also noted that his workweek was not to be less than 40 hours and was to coincide with the workweek of employees at the Embassy or cooperating country agency.

By decision dated April 4, 2017, OWCP denied modification of the prior decision finding that appellant's permanent workstation was Kabul, Afghanistan, that he was not in travel status at the time of the April 10, 2015 incident, and that appellant was not required to be available for work 24/7.

On June 14, 2017 appellant, through counsel, filed an appeal with the Board. In an order remanding case dated December 11, 2017, the Board set aside the April 4, 2017 decision and remanded for OWCP to make proper findings of fact as to whether appellant was an employee

[4] *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Civil Employee*, Chapter 2.0802.6 (June 1995).

under 5 U.S.C. § 8101(1), and if he was an employee, whether he was in the performance of duty at the time of the April 10, 2015 incident.[5]

By decision dated March 1, 2018, OWCP denied the claim finding that appellant had not established that he was a federal civilian employee.

On May 14, 2018 OWCP received counsel's request for reconsideration. Counsel contended that appellant was a civilian employee at the time of the accepted April 10, 2015 incident and submitted W-2 Wage and Tax statements for 2014, 2015, and 2016 in support of his request. These statements denoted the employing establishment as appellant's employer.

By decision dated August 8, 2018, OWCP granted modification as it found the evidence established appellant's status as a civil employee. However, it denied his claim finding that his injury had not occurred in the performance of duty. OWCP found that appellant had not been on the clock at the time of the incident as he was not required to work on Friday nor was he required to be available 24/7. Furthermore, it determined that he was not entitled to the extended coverage afforded an employee in temporary travel status because Kabul, Afghanistan was his duty station.

LEGAL PRECEDENT

An employee seeking benefits under FECA 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,[6] 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.[7] 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.[8]

Congress, in providing for a compensation program for federal employees, did not contemplate an insurance program against any and every injury, illness, or mishap that might befall an employee contemporaneous or coincidental with his or her employment. Liability does not attach merely upon the existence of an employee/employing establishment relation. Instead, Congress provided for the payment of compensation for "the disability or death of an employee resulting from personal injury sustained while in the performance of his duty."[9] The phrase "while in the performance of duty" has been interpreted by the Board to be the equivalent of the commonly

[5] *See supra* note 3.

[6] *S.B.*, Docket No. 17-1779 (issued February 7, 2018); *J.P.*, 59 ECAB 178 (2007); *Joe D. Cameron*, 41 ECAB 153 (1989).

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

[8] *K.M.*, Docket No. 15-1660 (issued September 16, 2016); *L.M.*, Docket No. 13-1402 (issued February 7, 2014); *Delores C. Ellyett*, 41 ECAB 992 (1990).

[9] 5 U.S.C. § 8102(a); *Angel R. Garcia*, 52 ECAB 137 (2000).

found prerequisite in workers' compensation law of "arising out of and in the course of employment." In addressing this issue, the Board has held: "In the compensation field, to occur in the course of employment, in general, an injury must occur: (1) at a time when the employee may reasonably be [stated] to be engaged in his or her master's business; (2) at a place where he or she may reasonably be expected to be in connection with the employment; and (3) while he or she was reasonably fulfilling the duties of his or her employment or engaged in doing something incidental thereto."[10] In deciding whether an injury is covered by FECA, the test is whether, under all the circumstances, a causal relationship exists between the employment itself, or the conditions under which it is required to be performed, and the resultant injury.[11]

ANALYSIS

The Board that appellant has not met his burden of proof to establish an injury in the performance of duty on April 10, 2015, as alleged.

The Board has previously explained that it is the employee's burden of proof to submit sufficient evidence necessary for OWCP to make a determination as to whether he was in the course of federal employment at the time of the incident.[12] The record reflects that appellant's duty station was Kabul, Afghanistan and his regular work hours were 8:00 a.m. to 5:00 p.m. Sunday through Thursday and Saturday. The date in question, April 10, 2015, was not a scheduled workday for appellant as it was a Friday. Appellant related that he had played basketball from 1:00 to 2:00 p.m., and had worked that day. No details were given as to the work he performed, or the hours he worked. No further details or evidence was provided other than appellant's allegation that he was on call 24/7. However, the employing establishment denied appellant's allegation that he was on call 24/7, "on the clock" or working on April 10, 2015. In addition, the contract appellant signed indicated that overtime was allowed when approved. He has not submitted evidence showing that the employing establishment approved overtime work on April 10, 2015, a nonscheduled workday. The Board finds that appellant has not met his burden of proof to establish that his injury occurred at a time when he was fulling the duties of his federal employment or doing something incidental thereto as the evidence submitted is insufficient.[13] Thus, appellant has not established that he sustained an injury in the performance of duty.[14]

On appeal counsel argues that OWCP erred in denying appellant's claim and ignoring his testimony that he was required to be available 24/7. Contrary to his contention, it found that the evidence of record did not support appellant's contention that he was required to be available 24/7.

[10] *See D.S.*, Docket No. 14-1624 (issued April 3, 2015); *see also George E. Franks*, 52 ECAB 474 (2001).

[11] *Mark Love*, 52 ECAB 490 (2001).

[12] *See A.C.*, Docket No. 15-0767 (issued July 15, 2015).

[13] *Supra* note 10.

[14] As appellant has failed to establish that the injury occurred in the performance of duty, the Board need not address the medical evidence of record. *A.S.*, Docket No. 17-1880 (issued December 12, 2018); *Marlon Vera*, 54 ECAB 834 (2003).

The record is devoid of evidence supporting appellant's assertion and he bears the burden of proof to establish his claim.

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 has not met his burden of proof to establish an injury in the performance of duty on April 10, 2015, as alleged.

ORDER

IT IS HEREBY ORDERED THAT the August 8, 2018 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 3, 2019
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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