United States Department of Labor
Employees' Compensation Appeals Board

R.W., Appellant	)	
and	)	**Docket No. 21-1182**
	)	**Issued: April 15, 2022**
DEPARTMENT OF THE ARMY, TRAINING MANAGEMENT DIRECTORATE, Fort Leavenworth, KS, 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:
ALEC J. KOROMILAS, Chief Judge
JANICE B. ASKIN, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On July 29, 2021 appellant, through counsel, filed a timely appeal from a June 11, 2021 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.[3]

[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*.

[3] The Board notes that, following the June 11, 2021 decision, OWCP received additional evidence. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id*.

ISSUE

The issue is whether appellant has met her burden of proof to establish a traumatic injury in the performance of duty on August 5, 2019, as alleged.

FACTUAL HISTORY

On August 7, 2019 appellant, then a 48-year-old information technology (IT) specialist, filed a traumatic injury claim (Form CA-1) alleging that at 6:00 p.m. on August 5, 2019 she sprained her feet, ankles, knees, and wrists while in the performance of duty. She explained that, as she was leaving work, she stumbled on a mat on the sidewalk immediately outside of an employing establishment building, causing her to twist her body and fall forward. On the reverse side of the claim form her regular work hours were noted as 9:00 a.m. to 5:30 p.m. M.H., an employing establishment supervisor, contended that appellant was not in the performance of duty because she had completed her duty hours and was departing the building when the incident occurred. Appellant stopped work on August 6, 2019.

The employing establishment completed and signed an authorization of an authorization for examination and/or treatment (Form CA-16). In Part B, attending physician's report, dated August 6, 2019, Abigail Kidwell, a nurse practitioner, noted diagnosed of joint pain, sprain, and abrasion due to a fall at work on August 5, 2019. In an after visit summary of even date, she noted that she had ordered x-rays of appellant's right wrist, left knee, and left foot.

In an undated accident report, appellant indicated that on August 5, 2019 she left work at 6:00 p.m. and was walking along a sidewalk outside of her building and noticed a pile of pallets obstructing the sidewalk. To avoid the pallets, she stepped onto a mat covering a corner, but there was no sidewalk underneath, so she fell forward. Appellant indicated that she twisted her body to avoid striking the pallets and protruding nails and landed primarily on her left side, with her hands bracing her upper body to avoid hitting the sidewalk.

OWCP received a job description for IT specialist with the employing establishment.

In a development letter dated August 14, 2019, OWCP informed appellant of the deficiencies of her claim. It advised her of the type of factual and medical evidence necessary to establish her claim and provided a factual questionnaire for her completion. In a separate development letter of even date, OWCP requested that the employing establishment provide additional information regarding appellant's traumatic injury claim, including comments from a knowledgeable supervisor regarding the accuracy of appellant's statements. It afforded both parties 30 days to respond.

OWCP thereafter received a progress note by Ms. Kidwell dated August 6, 2019 indicating that appellant complained of pain in her feet, knees, and wrists, which she attributed to falling from a sidewalk at work on August 5, 2019. Appellant noted that she described landing on her outstretched hands, mainly catching herself with her right wrist and left knee. On physical examination, Ms. Kidwell documented decreased range of motion and tenderness in the right wrist, medial joint line tenderness and crepitus with range of motion of the left knee, tenderness over the second and third metatarsals of the left foot, and small abrasions over the left anterior knee and left posterior forearm. She recommended x-rays, diagnosed abrasion and pain in the right wrist,

left knee and left foot, and noted that appellant requested a letter to be off from work until August 13, 2019.

In a follow-up note dated August 19, 2019, Ms. Kidwell indicated that appellant related ongoing complaints in the right wrist, left knee, and feet, left worse than right, which were causing her difficulty performing her regular work duties. She reviewed x-rays, which were normal, and performed a physical examination. Ms. Kidwell recommended a magnetic resonance imaging (MRI) scan of the right wrist and left foot and prescribed a walking boot for appellant's left foot and ankle.

In an e-mail dated August 19, 2019, R.R., an employing establishment supervisor, noted that appellant requested to cancel a previously approved leave request from August 8 through 13, 2019 because her physician had placed her out of work due to her injury.

By decision dated September 25, 2019, OWCP denied appellant's traumatic injury claim, finding that the evidence of record was insufficient to establish a diagnosis in connection with the accepted August 5, 2019 employment incident. Thus, it concluded that the requirements had not been met to establish an injury as defined by FECA.

OWCP continued to receive evidence, including reports of x-rays of the left knee, and foot and right wrist dated August 6, 2019, which were read as normal.

In a letter dated August 19, 2019, Ms. Kidwell indicated that appellant may return to work on August 13, 2019.

An August 26, 2019 MRI scan of the left foot revealed bone marrow edema and non-displaced fractures in the first through fourth metatarsal bones. An MRI scan of the right wrist of even date revealed degenerative joint disease (DJD), bone marrow edema, tenosynovitis, and a probable ganglion cyst.

In a progress note dated August 27, 2019, Ms. Kidwell noted that the MRI scan of appellant's left foot was suspicious for a metatarsal fracture and recommended she continue to wear the boot and made a referral to an orthopedist. On August 29, 2019 she noted that appellant's diagnosis consisted of a metatarsal fracture and that she was awaiting a podiatry referral. In a letter of even date, Ms. Kidwell requested that appellant be excused from work on August 26, 27, and 29, 2019 due to pain and medical appointments.

In medical report dated September 20, 2019, Dr. Michelle Stone, an osteopath and family medicine specialist, reviewed laboratory work and appellant's MRI scan results and recommended a recheck in 12 weeks. In a work capacity evaluation (Form OWCP-5c) and equipment request of even date, she noted a diagnosis of a closed non-displaced fracture of the left foot and indicated that appellant needed a controlled ankle movement (CAM) boot, knee scooter, and non-weight-bearing restrictions.

In a follow-up note dated October 3, 2019, Ms. Kidwell noted that appellant related ongoing left knee pain which she attributed to her fall on August 5, 2019. She performed an examination and recommended an MRI scan of the left knee.

Dr. Stone, in a letter dated October 4, 2019, outlined that dates that appellant had been seen by her and Ms. Kidwell, and noted that the left foot MRI showed a fracture. She advised that she was in agreement with the treatment plan and testing provided by Ms. Kidwell.

In a Form OWCP-5c also dated October 4, 2019, Dr. Akilis Theoharidis, a Board-certified lower extremity surgeon and podiatrist, noted diagnoses of left foot fracture and reinjury of the left knee, which she had previously undergone arthroscopic surgery in 2017. He indicated that she needed to be in a CAM boot with crutches and was limited to non-weight bearing activities. Dr. Theoharidis further recommended that appellant be given an alternate work location to avoid stairs.

On October 9, 2019 appellant requested review of the written record by a representative of OWCP's Branch of Hearings and Review.

Following a preliminary review, by decision dated December 31, 2019, OWCP's hearing representative vacated the September 25, 2019 decision, finding that the evidence of record was sufficient to establish diagnoses of left foot metatarsal fracture, right wrist sprain, left knee contusion, and right ankle sprain, in connection with the accepted August 5, 2019 employment incident. The hearing representative remanded the case to OWCP to further develop the evidence as to whether appellant's injuries occurred while in the performance of duty.

In a development letter dated January 6, 2020, OWCP requested additional information from the employing establishment regarding the circumstances surrounding appellant's injury including whether it occurred on the employing establishment's property, whether she was performing her work duties immediately prior to her fall, and whether she was working outside of her regular schedule.

On January 13, 2020 OWCP received a response to its development questionnaire by P.W., an employing establishment supervisor, who indicated that the August 5, 2019 employment incident occurred on its premises, at appellant's duty station, immediately outside the facility where she works. P.W. asserted that she was not performing any assigned duties when she fell, but that she had been performing her work duties immediately prior to the injury. He included a map of the location where appellant fell, along with a February 1, 2019 copy of her request to work a flexible work schedule from 9:00 a.m. to 5:30 p.m.

In an e-mail dated March 5, 2020, an OWCP claims examiner requested additional information from P.W. regarding appellant's work schedule. In a response dated April 28, 2020, R.R. indicated that all employees are expected to work 8 hours each day, with a 30-minute lunch break, and appellant's schedule was 9:00 a.m. to 5:30 p.m. He further noted that there was no supporting documentation that her shift lasted beyond 5:30 p.m. on August 5, 2019.

In a decision dated April 28, 2020, OWCP accepted that the August 5, 2019 incident occurred and that she sustained diagnosed medical conditions, but denied her claim, finding that the claimed incident did not occur in the performance of duty, as alleged.

On March 31, 2021 appellant, through counsel, requested reconsideration of OWCP's April 28, 2020 decision. Attached to the request was a March 29, 2021 statement wherein she alleged that on August 5, 2019 her supervisor instructed her to complete updates on her secondary laptop prior to an upcoming temporary duty (TDY) mission to multiple locations. Appellant noted

that, due to the complexity and unpredictability of the updates, she stayed until 6:00 p.m. to ensure that the updates were completed. She indicated that her position required her to work before and after her scheduled times due to technical issues and dependency of others in the directorate and that leaving 30 minutes later than her normal scheduled hours was not uncommon due to position duties. Appellant attached e-mails from P.W. dated August 5, 2019 at 8:43 a.m. instructing her to complete the laptop updates prior to her upcoming TDY.

In a letter to the employing establishment dated April 14, 2021, OWCP provided a copy of appellant's request for reconsideration and her March 29, 2021 statement and requested responses from P.W. as to the accuracy of her allegations.

In a May 14, 2021 response to OWCP's letter, R.R. submitted responses from P.W., who indicated that he did not have an explanation for appellant's presence onsite after her regular duty hours. He noted that he did not instruct her to remain after hours to update her laptop and alleged that the August 5, 2019 e-mail was a reminder to not wait until the last minute to complete the update. P.W. advised that he could not confirm whether appellant was performing the actions of updating her laptop immediately prior to the injury and she could have done so anytime throughout the week. In a separate letter of even date, R.R. provided further information from P.W. asserting that her TDY dates were scheduled for August 14 through 23, 2019, during which she and another technician would be performing maintenance on existing equipment and installing new equipment in the employing establishment's server racks in Fort Knox, KY.

By decision dated June 11, 2021, OWCP denied modification of its April 28, 2020 decision.

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,[4] 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.[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]

FECA provides for the payment of compensation for "the disability or death of an employee resulting from personal injury sustained while in the performance of duty."[7] The phrase "sustained while in the performance of duty" has been interpreted by the Board to be the equivalent of the commonly found prerequisite in workers' compensation law of "arising out of and in the

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

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

[6] *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).

[7] 5 U.S.C. § 8102(a).

course of employment."[8] The phrase "in the course of employment" is recognized as relating to the work situation, and more particularly, relating to elements of time, place, and circumstance. To arise in the course of employment, an injury must occur at a time when the employee may reasonably be stated to be engaged in the master's business, at a place where the employee may reasonably be expected to be in connection with the employment, and while he or she was reasonably fulfilling the duties of his or her employment or engaged in doing something incidental thereto.[9] In deciding whether an injury is covered by FECA, the test is whether, under all the circumstances presented, causal relationship exists between the employment itself, or the conditions under which it is required to be performed, and the resultant injury.[10]

Injuries arising on the employing establishment's premises may be approved if the claimant was engaged in activity reasonably incidental to his or her employment.[11]

The course of employment for employees having a fixed time and place of work includes a reasonable interval before and after official working hours while the employee is on the premises engaged in preparatory or incidental acts.[12]

ANALYSIS

The Board finds that appellant has established that an incident occurred in the performance of duty on August 5, 2019, as alleged.

As previously noted, to arise in the course of employment, an injury must occur at a time when the employee may reasonably be stated to be engaged in the master's business, at a place where the employee may reasonably be expected to be in connection with the employment, and while she was reasonably fulfilling the duties of her employment or engaged in doing something incidental thereto.[13]

The occurrence of an incident on the employing establishment premises which leads to an injury is insufficient, in itself, to give rise to coverage under FECA as the employee must show not only that the injury encompasses the work setting, but also that the injury occurred a reasonable interval before or after official working hours while he was on the premises engaged in preparatory or incidental acts. What constitutes a reasonable interval before work depends on both the length

[8] *See M.T.*, Docket No. 17-1695 (issued May 15, 2018); *S.F.*, Docket No. 09-2172 (issued August 23, 2010); *Charles Crawford*, 40 ECAB 474, 476-77 (1989).

[9] *See M.T.*, *id.*; *Mary Keszler*, 38 ECAB 735, 739 (1987).

[10] *J.N.*, Docket No. 19-0045 (issued June 3, 2019); *M.W.*, Docket No. 15-0474 (issued September 20, 2016); *Mark Love*, 52 ECAB 490 (2001).

[11] *A.P.*, Docket No. 18-0886 (issued November 16, 2018); *S.M.*, Docket No. 16-0875 (issued December 12, 2017); *J.O.*, Docket No. 16-0636 (issued October 18, 2016); *T.L.*, 59 ECAB 537 (2008). *See also* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Performance of Duty*, Chapter 2.804.4a(3) (August 1992).

[12] *See K.A.*, Docket No. 20-0787 (issued September 16, 2021); *J.K.*, Docket No. 17-0756 (issued July 11, 2018).

[13] *Supra* note 7.

of time involved and the circumstances occasioning the interval and the nature of the employee's activity.[14]

Herein, the record reflects that on August 5, 2019 appellant's shift ended at 5:30 p.m., and, as she was leaving the employing establishment at 6:00 p.m., she fell on the sidewalk immediately outside of the building where she worked. Employing establishment supervisors, P.W. and R.R., confirmed that the area where she fell was on the employing establishment's premises. Appellant further indicated that she stayed past her normal shift on August 5, 2019 in order to complete an update on her laptop for an upcoming TDY assignment the following week. She had received an e-mail that morning from P.W. instructing her to complete the process prior to the upcoming TDY. Although P.W. indicated that it was not necessary that she complete the update that day, he confirmed that the task itself was part of her work duties and that she had been performing her work duties immediately prior to the injury. Appellant asserted that it was not uncommon for her to stay 30 minutes past her off-duty time, which the employing establishment did not dispute other than noting that this was not required. There is also no evidence of record to indicate that she was on the premises after the end of her scheduled shift on August 5, 2019 for any reason other than to complete the laptop update prior to leaving work for the day.

The Board, thus, finds that she has established that she was in the performance of duty at the time of the August 5, 2019 employment injury.

As appellant has established that the August 5, 2019 employment incident occurred in the performance of duty, the issue becomes whether this accepted incident caused an injury.[15] The Board will, therefore, set aside OWCP's June 11, 2021 decision and remand the case for OWCP to determine whether appellant sustained an injury causally related to the accepted August 5, 2019 incident, and if so, to also determine the nature and extent of disability, if any.[16] Following any further development deemed necessary, OWCP shall issue a *de novo* decision.

CONCLUSION

The Board finds that appellant has met her burden of proof to establish that an incident occurred in the performance of duty on August 5, 2019, as alleged. The Board further finds that this case is not in posture for decision with regard to whether she sustained an injury causally related to the accepted August 5, 2019 employment incident.[17]

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[14] *See P.S.*, Docket No. 13-370 (issued November 12, 2013); *William W. Knispel*, 56 ECAB 639 (2005); *Venicee Howell*, 48 ECAB 414 (1997); *Dwight D. Henderson*, 46 ECAB 441 (1995); *Arthur A. Reid*, 44 ECAB 979 (1993); *Nona J. Noel*, 36 ECAB 329 (1984).

[15] *D.M.*, Docket No. 20-0314 (issued June 30, 2020); *A.D.*, Docket No. 17-1855 (issued February 26, 2018); *T.H.*, 59 ECAB 388 (2008).

[16] *Id.*; *see also J.L.*, Docket No. 17-1712 (issued February 12, 2018).

[17] The Board notes that the employing establishment executed a Form CA-16. A completed Form CA-16 authorization may constitute a contract for payment of medical expenses to a medical facility or physician, when properly executed. The form creates a contractual obligation, which does not involve the employee directly, to pay for the cost of the examination or treatment regardless of the action taken on the claim. *See* 20 C.F.R. § 10.300(c); *J.G.*, Docket No. 17-1062 (issued February 13, 2018); *Tracy P. Spillane*, 54 ECAB 608 (2003).

ORDER

IT IS HEREBY ORDERED THAT the June 11, 2021 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: April 15, 2022
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board