United States Department of Labor
Employees' Compensation Appeals Board

M.Z., Appellant	)	
and	)	**Docket No. 20-1078**
	)	**Issued: December 16, 2022**
DEPARTMENT OF VETERANS AFFAIRS, STRATTON VA MEDICAL CENTER, Albany, NY, Employer	)	

Appearances:
Thomas Harkins, 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
JAMES D. McGINLEY, Alternate Judge

JURISDICTION

On April 27, 2020 appellant, through counsel, filed a timely appeal from a November 22, 2019 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 November 22, 2019 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.

ISSUE

The issue is whether appellant has met her burden of proof to establish a traumatic injury in the performance of duty on December 13, 2018, as alleged.

FACTUAL HISTORY

On December 29, 2018 appellant, then a 63-year-old housekeeper, filed a traumatic injury claim (Form CA-1) alleging that on December 13, 2018 she broke her left little finger when she fell down a flight of steps while returning work uniforms after a snowfall while in the performance of duty. On the reverse side of the claim form her supervisor checked a box marked "No" to indicate that she was not in the performance of duty when the injury occurred and explained that she was not on duty at the time of her injury. He further noted that she was going to drop off work uniforms, but did not. Appellant stopped work on December 29, 2018.

In a December 13, 2018 medical report, Dr. Gene Pellerin, Board-certified in emergency medicine, evaluated appellant for pain in her left hand that she developed after falling down the stairs at the employing establishment. In a diagnostic report of even date, Dr. Jomol Turinsky, a Board-certified radiologist, performed an x-ray scan of her left hand and diagnosed an intra-articular fracture of the proximal phalanx of the fifth digit of the left hand. Dr. Pellerin applied an ulnar gutter splint to stabilize appellant's finger.

In a January 8, 2019 letter, the employing establishment controverted appellant's claim, explaining that she was not on duty at the time of her injury on December 13, 2018. It noted that she had been on leave from October 29 to December 9, 2018 and had approved leave from December 10, 2018 to January 7, 2019 for a different injury. The employing establishment attached a copy of appellant's timecard demonstrating that she was not scheduled to work on the date of the employment incident.

In a development letter dated January 8, 2019, OWCP advised appellant of the deficiencies of her claim. It informed her of the type of evidence needed and attached a questionnaire for her completion. OWCP afforded appellant 30 days to respond.

In a December 13, 2018 medical report, Dr. Andrew Ricci, a Board-certified plastic surgeon, evaluated appellant for a left little finger fracture as a result of falling downstairs while returning her uniform to the employing establishment. He diagnosed a small finger P1 fracture. In a medical report of even date, Dr. Heather Long, Board-certified in emergency medicine, noted that she underwent an x-ray scan after falling down three stairs and complaining of left little finger pain. She related that the x-ray scan revealed a fracture dislocation and prescribed pain medication. Dr. Long reported that appellant was also seen by plastic surgery and it opined that she would most likely need surgical placement.

In a December 20, 2018 medical report, Drs. James Drinane and Christine Bialowas, Board-certified plastic surgeons, diagnosed a left small finger P1 fracture and opined that it would require operative intervention.

In a December 26, 2018 medical report, Dr. Bialowas performed a closed reduction percutaneous pinning of the left small finger to treat appellant's left small finger P1 fracture. Appellant also submitted a diagnostic report of even date in which Dr. James McChesney, a Board-

certified radiologist, performed an x-ray scan of her left finger where he noted images demonstrating placement of non-threaded pins to stabilize the fracture of the proximal phalanx of the left fifth finger.

In a January 14, 2019 statement, appellant explained that she fell down a flight of stairs at the employing establishment while bringing her uniforms back on December 13, 2018.

In a January 24, 2019 response to OWCP's questionnaire, appellant explained that she was on leave on December 10, 2018 because the employing establishment could not accommodate her light-duty request and that she was following her supervisors' instructions to bring her uniform to the hospital. She recounted the events of the December 13, 2018 employment incident in which she was in route to return her uniform to the basement and rolled down approximately five to six stairs as well as the subsequent medical treatment she received. Appellant explained that she was injured on agency premises; however, she was not performing her regularly assigned duties at the time of her injury. She contended that her supervisor had called her multiple times and left her a voicemail on December 12, 2018 advising that she needed to come in to sign papers and return her uniforms because new uniforms were being issued. Appellant noted again that she was on leave that day and the only reason she came to the hospital was because of the instructions from her supervisor, as well as a previous conversation she had with her supervisor that made her feel as if her job would be in jeopardy if she did not follow her instructions.

By decision dated February 11, 2019, OWCP denied appellant's traumatic injury claim, finding that the evidence of record was insufficient to establish that her injury arose during the course of employment and within the scope of compensable work factors.

OWCP continued to receive evidence. In a February 4, 2019 medical report, appellant treated with Dr. Bialowas concerning the progression of her healing with regard to her left small finger comminuted intra-articular proximal phalanx fracture.

In an August 24, 2019 memorandum, appellant, through counsel, requested reconsideration of OWCP's February 11, 2019 decision. Counsel argued that no time period was specified for which she was required to return her uniforms, she was clearly performing duties incident and related to her federal employment at the time of the December 13, 2018 employment incident and the employing establishment received a substantial benefit from her returning the uniforms.

Appellant attached a May 3, 2019 statement in which she responded to the employing establishment's January 8, 2019 letter controverting her claim. She explained the events of the December 13, 2018 employment incident and asserted that she was on agency premises per the request of the head housekeeping supervisor, A.B. Appellant again detailed A.B.'s December 12, 2018 voicemail and noted that she asked her to call so that they could discuss a time for her to return her uniforms and sign some forms. Rather than call, she decided to stop by the employing establishment the next day after her physical therapy appointment because it was in close proximity to the employing establishment and A.B. previously had instructed her to leave her uniforms by the door if she was not there.

In a development letter to the employing establishment dated November 12, 2019, OWCP requested that the employing establishment provide a written statement by A.B., or any supervisor, clarifying whether appellant was instructed to come to the employing establishment to drop off her uniforms. It requested that the information be provided by November 22, 2019.

On November 21, 2019 the employing establishment provided an undated statement from A.B. confirming that she left a voicemail requesting that appellant come in to sign some paperwork and to return her uniforms. A.B. explained that she did not provide a date or time for appellant to come in to do so and only asked her to call.

By decision dated November 22, 2019, OWCP affirmed its February 11, 2019 decision.

LEGAL PRECEDENT

An employee seeking benefits under FECA[4] 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,[5] 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.[6] 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.[7]

The phrase "sustained while in the performance of duty" has been interpreted by the Board to be the equivalent of the commonly founded prerequisite in workers' compensation law of "arising out of and in the course of employment."[8] To arise 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 the master's business; (2) at a place when he or she may reasonably be expected to be in connection with his or her employment; and (3) while he or she was reasonably fulfilling the duties of his or her employment or engaged in doing something incidental there to.[9] 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.[10]

ANALYSIS

The Board finds that appellant has not met her burden of proof to establish a traumatic injury in the performance of duty on December 13, 2018, as alleged.

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[4] *Supra* note 2.

[5] *S.S.*, Docket No. 19-1815 (issued June 26, 2020); *S.B.*, Docket No. 17-1779 (issued February 7, 2018); *Joe D. Cameron*, 41 ECAB 153 (1989).

[6] *M.H.*, Docket No. 19-0930 (issued June 17, 2020); *R.C.*, 59 ECAB 427 (2008); *James E. Chadden, Sr.*, 40 ECAB 312 (1988).

[7] *S.A.*, Docket No. 19-1221 (issued June 9, 2020); *L.M.*, Docket No. 13-1402 (issued February 7, 2014); *Delores C. Ellyett*, 41 ECAB 992 (1990).

[8] *C.L.*, Docket No. 19-1985 (issued May 12, 2020); *S.F.*, Docket No. 09-2172 (issued August 23, 2010); *Valerie C. Boward*, 50 ECAB 126 (1998).

[9] *S.V.*, Docket No. 18-1299 (issued November 5, 2019); *Roma A. Mortenson-Kindschi*, 57 ECAB 418 (2006); *Mary Keszler*, 38 ECAB 735, 739 (1987).

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

Appellant alleged that on December 13, 2018 she broke her left little finger when she fell down a flight of steps while returning her uniforms to the employing establishment following a snowfall.

In various statements, appellant indicated that she received several voicemails on December 12, 2021 from A.B. regarding the signing of some forms and the return of uniforms. She initially indicated that A.B. had asked that she come in and leave the uniforms by the door if she was not there, but later noted that in a subsequent voice mail that A.B. specifically asked her to call so that they could discuss a time for her to return her uniforms and sign some forms. On November 21, 2019 the employing establishment provided an undated statement from A.B. in which she indicated that she left a voice message for the appellant requesting that she come to the office to sign some paperwork and to return old uniforms. A.B. also stated that she provided her number to appellant, but did not provide a specific date or time, rather A.B. just asked her to call.

To be covered, an injury must occur at a time when the employee may reasonably be said to be engaged in his or her master's business, at a place where he or she may reasonably be expected to be in connection with his or her employment, and while he or she was reasonably fulfilling the duties of his or her employment or engaged in doing something incidental thereto.[11]

The record establishes that on the date of the employment incident appellant was not in duty status because she was on leave for a different injury. Appellant received a voicemail message from A.B. specifically directing appellant to call A.B. to set up a time to drop off uniforms and sign some forms. Rather than call as instructed to set up a time to meet A.B., appellant decided to stop by the employing establishment the next day after her physical therapy appointment because it was in close proximity to the employing establishment. By doing so, she did not follow the instructions, rather came at her convenience. Appellant alleges that, in an earlier voicemail, A.B. indicated that she could drop off the uniforms at A.B.'s door if she was not there. However, there was no reference or instruction to sign paperwork which was an obvious part of the request. While this act could be considered incidental to her employment, she did not follow the specific instructions explicitly referenced by A.B. and, therefore, was not in the performance of duty.[12]

The Board, thus, finds that appellant has met her burden of proof to establish that the December 13, 2018 employment incident occurred in the performance of duty, as alleged.

CONCLUSION

The Board finds that appellant has not met her burden of proof to establish a traumatic injury in the performance of duty on December 13, 2018, as alleged.

[11] *R.A.*, 59 ECAB 581 (2008); *Mary Keszler*, 38 ECAB 735 (1987).

[12] *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Performance of Duty*, Chapter 2.804.4.(h) (August 1992).

ORDER

IT IS HEREBY ORDERED THAT the November 22, 2019 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: December 16, 2022
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

James D. McGinley, Alternate Judge
Employees' Compensation Appeals Board