United States Department of Labor
Employees' Compensation Appeals Board

B.W., Appellant	)	
and	)	**Docket No. 22-0907**
	)	**Issued: December 13, 2022**
DEPARTMENT OF THE ARMY, WOMACK ARMY MEDICAL CENTER, Fort Bragg, NC, 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
VALERIE D. EVANS-HARRELL, Alternate Judge
JAMES D. McGINLEY, Alternate Judge

JURISDICTION

On May 31, 2022 appellant filed a timely appeal from a March 11, 2022 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 her burden of proof to establish a traumatic injury in the performance of duty on February 14, 2014, as alleged.

FACTUAL HISTORY

On November 26, 2015 appellant, then a 63-year-old dietetic technician, filed a traumatic injury claim (Form CA-1) alleging that at 4:55 a.m. on February 14, 2014 she sustained a buttocks contusion when she slipped and fell on ice and snow in the employing establishment parking lot while in the performance of duty. On the reverse side of the claim form her supervisor noted her regular work hours as 7:00 a.m. to 4:00 p.m. and acknowledged that appellant was injured in the performance of duty.

In a statement dated February 14, 2014, appellant indicated that she reported to work at 4:50 a.m. and pulled into the employing establishment parking lot and parked her vehicle. She proceeded to exit her vehicle and walk into the hospital and noticed that the parking lot was covered with ice and snow due to freezing temperatures. Appellant slipped and fell on her buttocks while in the parking lot. She did not seek immediate medical care because she thought she would be fine, but as the day progressed, she experienced pain and stiffness and sought medical treatment.

In an undated employing establishment safety report, appellant indicated that on February 14, 2014 at 4:55 a.m. she slipped and fell in the employing establishment parking lot, which was coated with ice. She reported injuries to her buttocks, but chose not to go to the emergency room at that time.

Appellant was treated in the employing establishment emergency room on February 14, 2014 and diagnosed with buttock contusion and fall.

On February 26, 2014 Dr. Brian K. Fleming, Board-certified in family medicine, treated appellant for bilateral hip pain that began on February 14, 2014 after she fell on ice in the employing establishment parking lot. Appellant initially reported no pain after the fall, but later that day she developed severe pain and sought medical treatment. Dr. Fleming diagnosed contusion of the hip and thigh.

On January 8, 2015 Dr. Sharon S. Mitchell, a Board-certified family practitioner, performed a routine medical examination. Appellant reported right hip pain following a fall on ice in December 2013. She diagnosed routine medical examination, hypercholesterolemia, benign hypertension, pain in hand joint, and right hip pain. An x-ray of the right hip was negative regarding any abnormalities.

On October 27, 2015 Dr. Robert M. Gabel, a Board-certified physiatrist, treated appellant for right hip pain. Appellant reported no problem with her right hip until February 14, 2014 when she slipped and fell while coming into work. In a return-to-work note dated October 27, 2015, Dr. Gabel returned appellant to work without restrictions.

In a development letter dated December 11, 2015, 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 questionnaire for her completion. OWCP afforded appellant 30 days for submission of the requested evidence.

OWCP received additional evidence. Appellant was treated by Dr. Tinsley W. Rucker, a Board-certified family practitioner, on March 25, 2014 for joint pain involving multiple sites.

On December 30, 2015 Dr. Mitchell treated appellant in follow up for right hip pain and hyperlipidemia. Appellant reported intermittent right hip pain, commencing on February 14, 2014, after she fell on ice while at work. Dr. Mitchell diagnosed recurrent right hip pain, pure hypercholesterolemia, and dietary counseling. In a return-to-work note of even date, she returned appellant to regular-duty work on December 30, 2015. In an attending physician's report (Form CA-20), Dr. Mitchell noted that appellant slipped and fell on ice at work on February 14, 2014 and injured her hip. She diagnosed right hip pain and checked a box marked "Yes" indicating that appellant's condition was caused or aggravated by an employment activity.

By decision dated January 14, 2016, OWCP accepted that the February 14, 2014 incident occurred as alleged and that appellant sustained diagnosed medical conditions, but denied her claim, finding that the claimed incident did not occur in the performance of duty, as alleged. It concluded, therefore, that the requirements had not been met to establish an injury and/or medical condition as defined by FECA.

On January 22, 2016 appellant responded to the development letter and indicated that on February 14, 2014 she parked in section J of the parking lot owned by the employing establishment when she slipped and fell. She noted that the parking lot was covered in frozen ice. Appellant indicated that she was supposed to park in section K, which was down the hill from section J, but they both were coated in ice so she decided to park up the hill in section J. She noted that she did not pay for parking and was not required to park in this lot.

OWCP received a February 3, 2016 witness statement from S.J., appellant's coworker, who indicated that on February 14, 2014 she was walking through the employing establishment parking lot and saw appellant get out of her car and start to walk towards her when she slipped and fell on her buttocks. S.J. indicated that the parking lot was coated with ice and snow from the snow and freezing temperatures the night before, which caused the ground and parking lot to be slippery.

On February 3, 2016 Dr. Mitchell saw appellant for a routine examination. She noted that appellant had a history of right buttocks and hip pain, which developed after a fall at work in February 2014.

On February 16, 2016 appellant requested an oral hearing before a representative of OWCP's Branch of Hearings and Review.

By decision dated March 23, 2016, OWCP's Branch of Hearings and Review denied appellant's hearing request, finding that the request for hearing was untimely filed. After exercising its discretion, OWCP further found that the issue in the case could equally well be addressed through the reconsideration process.

Appellant submitted a sworn statement dated May 19, 2016 and indicated that on February 14, 2014 she arrived at work early enough to be on time with time to spare and as she traversed the employing establishment parking lot she fell. She reported arriving early for work for years so that she was ready to begin her shift promptly. Appellant indicated that her fall was witnessed by a coworker.

Appellant appealed the March 23, 2016 OWCP decision to the Board.[3] By order dated May 4, 2017, the Board set aside the March 23, 2016 decision, finding that appellant's hearing request was timely filed and remanded the case for further action consistent with the order of the Board.

By decision dated September 28, 2017, after preliminary review, an OWCP hearing representative vacated the merit decision dated January 14, 2016. It found that OWCP failed to properly develop the claim by sending a development letter to the employing establishment asking it to provide further specific information about the factual aspects of appellant's claim.

In a development letter dated October 2, 2017, OWCP requested that the employing establishment provide additional factual information regarding appellant's claim, including comments from a knowledgeable supervisor regarding the accuracy of all statements submitted in support of appellant's claim. It also requested information regarding whether the parking facilities were owned, controlled, or managed by the agency; if the public was permitted to use the lot; if the employee was required to park in this lot; if there was other parking available; if spaces in the lot were assigned; if the parking lot was monitored; if the employee has to pay for parking; and if the employee was entitled to reimbursement for travel to and from the parking lot or for parking expenses. OWCP further inquired as to whether appellant was authorized to report to work early or on a flexible work schedule as her injury occurred at 4:55 a.m., but her shift did not begin until 7:00 a.m. No written response was received from the employing establishment.

In a memorandum of telephone call (Form CA-110) dated December 11, 2017, OWCP called the employing establishment to obtain a response to the October 2, 2017 development letter. The employing establishment indicated that they sent a response, but OWCP advised that no response was received. It indicated that the employing establishment responded to the questions in the letter verbally. OWCP noted the following responses: "1. Unknown to [employing agency] EA; 2. Yes, lot is owned by EA; 3. Yes, public is permitted to use the lot; 4. No, employee was not required to park in lot; 5. No. Parking spots were not assigned; 6. Yes, parking lot is monitored by security cameras; 7. No, the lot is free; [and]? 8. No. the lot is free." The employing establishment further stated that it did not know why appellant was in the parking lot at 4:55 a.m., as there was no overtime and she did not work a flexible schedule.

By decision dated December 18, 2017, OWCP accepted that the February 14, 2014 incident occurred as alleged and that appellant sustained diagnosed medical conditions, but denied her claim, finding that the claimed incident did not occur in the performance of duty, as alleged.

[3] *Order Remanding Case*, Docket No. 16-1860 (issued May 4, 2017).

In letters dated January 16, 2017 and January 16, 2018, appellant requested that the employing establishment provide a complete response to OWCP's development letter dated October 2, 2017.

On July 5, 2018 appellant requested reconsideration. In an accompanying letter of even date, she asserted that her shift began at 5:00 a.m. Appellant indicated that employees reported to work at either 5:00 a.m. or 10:00 a.m. On the day she was injured she was to report by 5:00 a.m. Appellant requested that the employing establishment be required to provide the information requested in her January 16, 2018 letter.

In a letter dated December 23, 2021, OWCP requested that the employing establishment review and respond to appellant's June 30, 2018 letter. Appellant asserted that her reporting time was 5:00 a.m. on the date of injury February 14, 2014, which was in conflict with the Form CA-1 that indicated appellant's work hours were 7:00 a.m. to 4:00 p.m. OWCP requested that the employing establishment confirm if appellant was scheduled to work at 5:00 a.m. and to provide her work schedule on February 14, 2014.

In a memorandum dated January 13, 2022, the employing establishment indicated that it was unable to confirm if the claimant was authorized to report to work early on the date of injury, February 14, 2014, or if she was on a flexible work schedule.

By decision dated March 11, 2022, OWCP denied modification of the December 18, 2017 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 found prerequisite in workers' compensation law of "arising

[4] *Supra* note 2.

[5] *J.P.*, Docket No. 19-0129 (issued April 26, 2019); *S.B.*, Docket No. 17-1779 (issued February 7, 2018); *Joe D. Cameron*, 41 ECAB 153 (1989).

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

[7] *R.R.*, Docket No. 19-0048 (issued April 25, 2019); *L.M.*, Docket No. 13-1402 (issued February 7, 2014); *Delores C. Ellyett*, 41 ECAB 992 (1990).

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 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]

ANALYSIS

The Board finds that this case is not in posture for decision.

Whether an injury occurs in the performance of duty is a preliminary issue to be addressed before the remaining merits of the claim are adjudicated.[11] The Board finds that OWCP has not adequately developed this aspect of appellant's claim.

In a December 11, 2015 development letter, OWCP advised appellant of the type of factual and medical evidence necessary to establish her claim and attached a questionnaire for her completion. By separate letter dated October 2, 2017, it requested that the employing establishment address the accuracy of her allegations and claims and provide additional information. OWCP did not receive a written response to the development letter, rather, OWCP contacted the employing establishment by telephone and obtained a verbal response. It noted the following responses: "1. Unknown to EA, 2. Yes, lot is owned by EA, 3. Yes, public is permitted to use the lot, 4. No, employee was not required to park in lot, 5. No. Parking spots were not assigned, 6. Yes, parking lot is monitored by security cameras, 7. No, the lot is free, 8. No, the lot is free." OWCP further noted that it did not know why appellant was in the parking lot at 4:55 a.m. as there was no overtime and she did not work a flexible schedule.

OWCP's regulations provide that an employer who has reason to disagree with an aspect of the claimant's allegation should submit a statement that specifically describes the factual argument with which it disagrees and provide evidence or argument to support that position.[12] Appellant provided a detailed response to OWCP's development letter, along with supporting documentation including a witness statement and medical treatment records. However, the

[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] *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] *S.T.*, Docket No. 20-0388 (issued September 16, 2020); *T.H.*, Docket No. 17-0747 (issued May 14, 2018); *P.L.*, Docket No. 16-0631 (issued August 9, 2016); *see also M.D.*, Docket No. 17-0086 (issued August 3, 2017).

[12] 20 C.F.R. § 10.117(a); *D.L.*, Docket No. 15-0547 (issued May 2, 2016); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Initial Development of Claims*, Chapter 2.800.7a(2) (June 2011).

employing establishment failed to provide a written response to the October 2, 2017 development letter, providing only an oral response. It also indicated that appellant did not work a flexible schedule. However, on January 13, 2022, in response to another OWCP development letter, the employing establishment contradicted this statement noting it was unable to confirm appellant's February 14, 2014 schedule or if she worked a flexible schedule. OWCP then denied appellant's claim for compensation, finding that the evidence was insufficient to establish that the claimed incident occurred in the performance of duty, as alleged.

Proceedings under FECA are not adversarial in nature and OWCP is not a disinterested arbiter. While the claimant has the burden of proof to establish entitlement to compensation, OWCP shares responsibility to see that justice is done.[13] Once OWCP undertakes to develop the evidence, it has the responsibility to do so in a proper manner, particularly when such evidence is of the character normally obtained from the employing establishment or other government source.[14]

As OWCP failed to obtain information from the employing establishment in writing as required under its procedures, the Board will remand the case for OWCP to further develop the question of whether appellant was in the performance of duty when injured on February 14, 2014. On remand it shall obtain all relevant information from the employing establishment necessary to determine whether she was injured in the performance of duty at 4:55 a.m. on February 14, 2014, while walking in the employing establishment parking lot. Following this and other such further development as deemed necessary, OWCP shall issue a *de novo* decision.

CONCLUSION

The Board finds that this case is not in posture for decision.

[13] *L.G.,* Docket No. 21-0690 (issued December 6, 2021).

[14] *R.D.,* Docket No. 21-0050 (issued February 25, 2022); *R.A.,* Docket No. 17-1030 (issued April 16, 2018).

ORDER

IT IS HEREBY ORDERED THAT the March 11, 2022 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: December 13, 2022
Washington, DC

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

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

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