United States Department of Labor
Employees' Compensation Appeals Board

A.M., Appellant	)	
and	)	**Docket No. 22-1255**
	)	**Issued: April 9, 2024**
DEPARTMENT OF VETERANS AFFAIRS, DAYTON VA MEDICAL CENTER, Dayton, OH, Employer	)	

Appearances:
Aaron Aumiller, 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
PATRICIA H. FITZGERALD, Deputy Chief Judge
JAMES D. McGINLEY, Alternate Judge

JURISDICTION

On August 29, 2022 appellant, through counsel, filed a timely appeal from a March 1, 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 an injury in the performance of duty on June 28, 2021, as alleged.

FACTUAL HISTORY

On June 30, 2021 appellant, then a 61-year-old nurse filed a traumatic injury claim (Form CA-1) alleging that on June 28, 2021 at 6:00 a.m. she was walking to her office when she slipped on unmarked puddles of water near the drinking fountain and fell, striking her left knee while in the performance of duty. She indicated that she sustained a broken patella with tendon rupture of the left knee. On the reverse side of the claim form, appellant's regular work hours were noted as 7:00 a.m. to 4:30 p.m. D.K., an employing establishment supervisor, contended that appellant was not in the performance of duty because she arrived to work an hour early to prepare for a survey by the Commission on Accreditation of Rehabilitation Facilities (CARF) and her early arrival was "unapproved." Appellant stopped work on June 28, 2021.

In an employing establishment report of contact form, C.R., a systems coordinator at the employing establishment, indicated that at approximately 5:55 a.m. she heard someone screaming for help. She reported that she looked down the hallway and saw appellant laying on the floor by the water fountain. C.R. walked over to help appellant, who appeared to be in great pain and was bleeding near puddles of water on the floor.

In an emergency room hospital record, Dr. Shariar Arasteh, an osteopathic physician specializing in internal medicine, indicated that appellant was evaluated for a fall at work and complaints of mild upper back pain and significant left knee pain. On examination of appellant's left knee, he observed tenderness to palpation, swelling, and limited range of motion. Dr. Arasteth noted that he suspected a patellar tendon disruption and opined that appellant sustained a work-related injury due to slipping on water on the floor.

A June 28, 2021 cervical spine computerized tomography (CT) scan showed significant degenerative changes mainly affecting C5-6 and C6-7.

In a report dated June 28, 2021, Dr. Donald W. Ames, a Board-certified orthopedic surgeon, described that appellant was evaluated for a left knee work injury. He recounted that appellant was walking to her office when she slipped in a puddle of water and fell. On examination of appellant's left knee, Dr. Ames observed palpable defect at the patella and inability to actively extend the left knee. He diagnosed left knee strain and closed comminuted fracture of the patella.

On June 29, 2021 appellant underwent an unauthorized open reduction internal fixation patella fracture with repair of the left knee. The operative report noted a postoperative diagnosis of closed comminuted fracture of the patella, left knee strain.

In a follow-up note and work status letter dated July 12, 2021, Dr. Ames indicated that appellant was healing well two weeks status-post surgery and released her to work on September 7, 2021.

In an attending physician's report (Form CA-20) dated July 12, 2021, Dr. Ames noted a date of injury of June 28, 2021 and indicated that appellant was walking into her office when she slipped in a puddle of water and fell down onto her left knee. He diagnosed closed comminuted fracture of the left patella.

In a development letter dated July 29, 2021, 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 provided appellant 30 days to respond.

In a July 29, 2021 statement, S.M., a human resource specialist for the employing establishment, controverted appellant's claim alleging that appellant's alleged injury did not occur in the performance of duty. She contended that appellant was at work one hour before her shift started. S.M. reported that appellant's tour of duty was 7:00 a.m. to 4:30 p.m., and noted that appellant was injured at 6:00 a.m. She provided a copy of a screenshot of a text thread with D.K., a risk management coordinator at the employing establishment. The text thread indicated that D.K. was asked why appellant was there at 6:00 a.m., and D.K. responded "I am assuming to try and get caught up on work." D.K. further clarified that she did not authorize appellant to come in early and appellant did not talk to her about coming to work early.

In letters dated August 3 through September 8, 2021, Dr. Ames described that on June 28, 2021 appellant injured herself when she slipped on a puddle of water in the hallway. He noted that appellant was diagnosed with a displaced patella fracture and underwent left knee surgery on June 29, 2021. Dr. Ames opined that appellant's patella fracture was a direct result of the fall she sustained at work. She advised that appellant could return to modified-duty work on August 30, 2021 and full-duty work on September 13, 2021.

On August 24, 2021 appellant responded to OWCP's development questionnaire. She explained that she sustained an injury at the employing establishment on June 28, 2021. Appellant clarified that her tour of duty began at 7:00 a.m., but she had arrived early at approximately 6:00 a.m. with the intent to work on CARF survey preparation. She reported that one of her duties as quality management (QM) was providing support to the four mental health programs accredited by the CARF. Appellant noted that the reaccreditation surveys were scheduled for July 12 through 14, 2021 and, with the survey dates quickly approaching, she prioritized survey preparation. She alleged that during the past year she had consistently arrived to work before her tour started to ensure work was completed, and deadlines were being met. Appellant contended that her supervisor and the assistant chief of QM were fully aware, and in some cases were present and available, when she worked outside of her scheduled tour hours. She indicated that on the date of injury, she came into work early to support preparation and planning for the CARF surveys for the benefit of the program staff and facility. Appellant asserted that neither the assistant chief of QM nor her supervisor advised her that approval to work hours outside of her scheduled tour was required. She also contended that someone altered the Form CA-1 and included the word "unapproved." Appellant further cited to the FECA Procedure Manual and alleged that her arrival time of one hour at the employing establishment on June 28, 2021 was not excessive. In addition, she contended that the supervisor and assistant chief of QM's knowledge of her work outside of her scheduled tour set precedent that it was an acceptable practice.

Appellant submitted a copy of her Form CA-1 filed on June 30, 2021 and emails between herself and D.K.

On September 12, 2021 OWCP received an undated statement by appellant. She noted that she disagreed with the employing establishment's challenge that her injury did not occur in the performance of duty. Appellant asserted that she consistently arrived to work early and that she had unspoken supervisory approval for working outside of her tour of duty because they continually allowed her to work early and stay late without advising her to stop. She also alleged that arriving to work one hour before her fixed start time constituted a reasonable interval before her official work hours and cited to ECAB cases. Appellant further contended that she was doing work that benefited her employer, because the CARF reaccreditation surveys were due to be completed on June 30, 2021. She reported that, although her supervisors knew that she consistently worked outside of her tour of duty, they never informed her that prior approval was necessary. Appellant indicated that she had sent several emails to her supervisor about the amount of work that needed to be completed before the CARF reaccreditation deadline.

OWCP received emails between appellant and D.K. regarding appellant's work schedule. In a June 22, 2021 email, appellant informed D.K. that there was still extensive work to be completed for CARF surveys. In a separate email of even date, D.K. responded "[w]e all have to juggle multiple priorities. Respond with the best judgment of your schedule. It needs to be fit in."

In an August 31, 2021 email, D.K. informed appellant that she and a coworker were aware that she had been arriving 20 to 30 minutes early on a fairly regular basis to start her day but they did not realize that appellant needed this extra time to ensure that work was completed, and deadlines met. She noted that there would have been a discussion concerning the inability to complete work during appellant's regularly scheduled tour. D.K. reported that it was employing establishment policy that supervisory approval is required for working outside a scheduled tour of duty.

By decision dated September 17, 2021, OWCP accepted that the June 28, 2021 incident occurred as alleged, and that she sustained a diagnosed medical condition; however, it denied her claim, finding that the claimed injury did not occur in the performance of duty, as alleged.

On October 2, 2021 appellant requested an oral hearing before a representative of OWCP's Branch of Hearings and Review.

OWCP received several emails dated February 10, 2020 through April 16, 2021. The time stamps on the emails indicated that they were sent by appellant as early as 6:29 a.m. and as late as 7:47 p.m.

A hearing was held on January 5, 2022.

On January 25, 2022 OWCP received a memorandum from D.K. regarding appellant working, wherein she reported that in August 2019 appellant changed her tour of duty from 6:00 a.m. to 4:30 p.m. with every Friday off to 7:00 a.m. to 4:30 p.m. with every other Friday off. She indicated that since becoming appellant's supervisor, she worked from 7:30 a.m. to 4:00 p.m. so appellant was already on duty when she arrived at work or left work for the day. D.K. explained that she was aware that appellant routinely came to work 20 to 30 minutes before the start of her

tour, but she did not realize that it was because she needed the extra time to get her work done. She noted that appellant never informed her that she came into work early in order to complete her work. D.K. indicated that when appellant was assigned a project with a short deadline, she collaborated with appellant on prioritizing tasks and authorized appropriate compensation as needed. She reported that appellant was instructed to email her about her start and end times for work so that she could ensure that appellant was compensated for the time that she worked. D.K. reported that on June 24, 2021 she stopped by appellant's office at 4:00 p.m. to check on the preparation work related to an upcoming survey scheduled for July 2021. She indicated that appellant informed her that she would finish an item and leave for the day. D.K. explained that when she returned to work the following day, she was surprised to see emails from appellant that were sent at 7:30 p.m. She noted that she discussed her concerns with appellant's tour of duty with K.S., the chief of QM, and she planned to talk with appellant about her concerns on Monday, June 28, 2021. D.K. reported that appellant fell at work on the morning of June 28, 2021, so she did not have an opportunity to talk about appellant completing her assignment within her tour of duty until appellant returned to work. She indicated that she believed that appellant came to work early on June 28, 2021 because appellant felt that she was assisting the employing establishment in survey preparation.

By decision dated March 1, 2022, OWCP's hearing representative affirmed the September 17, 2021 decision.

LEGAL PRECEDENT

An employee seeking benefits under FECA[3] has the burden of proof to establish the essential elements of his or her claim, including 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 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]

The Board has interpreted the phrase "sustained while in the performance of duty" to be the equivalent of the commonly found prerequisite in workers' compensation law of "arising out of and in the course of employment."[7] The phrase "arising out of the employment" encompasses not only the work setting, but also a causal concept with the requirement being that an employment

[3] *Id*.

[4] *F.H.*, Docket No. 18-0869 (issued January 29, 2020); *S.B.*, Docket No. 17-1779 (issued February 7, 2018); *Joe D. Cameron*, 41 ECAB 153 (1989).

[5] *L.C.*, Docket No. 19-1301 (issued January 29, 2020); *J.M.*, Docket No. 17-0284 (issued February 7, 2018); *James E. Chadden, Sr.*, 40 ECAB 312 (1988).

[6] *P.A.*, Docket No. 18-0559 (issued January 29, 2020); *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] *See M.T.*, Docket No. 17-1695 (issued May 15, 2018); *S.F.*, Docket No. 09-2172 (issued August 23, 2010); *Valerie C. Boward*, 50 ECAB 126 (1998).

factor caused the injury.[8] In addressing the issue, the Board has held that, in general, an injury must occur: (1) at a time when the employee may reasonably be said 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 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 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]

It is well established as a general rule of workers' compensation law that, as to employees having fixed hours and places of work, injuries occurring on the premises of the employing establishment, while the employees are going to or from work, before or after working hours or at lunch time, are compensable.[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 June 28, 2021, as alleged.

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.[13] As previously indicated, for an injury to arise in 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.[14] What constitutes a reasonable interval before work

[8] *L.B.,* Docket No. 19-0765 (issued August 20, 2019); *G.R.,* Docket No. 16-0544 (issued June 15, 2017); *Cheryl Bowman,* 51 ECAB 519 (2000).

[9] *J.C.,* Docket No. 21-0941 (issued September 20, 2022); *A.S.,* Docket No. 18-1381 (issued April 8, 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.V.,* Docket No. 20-1586 (issued February 24, 2022); *R.K.,* Docket No. 18-1269 (issued February 15, 2019); *Narbik A. Karamian,* 40 ECAB 617, 618 (1989); *Eileen R. Gibbons,* 52 ECAB 209 (2001).

[12] *R.W.,* Docket No. 21-1182 (issued April 15, 2022); *J.K.,* Docket No. 17-0756 (issued July 11, 2018).

[13] *L.P.,* Docket No. 21-1079 (issued February 2, 2022); *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).

[14] *Supra* note 12.

depends on both the length of time involved and the circumstances occasioning the interval and the nature of the employee's activity.[15]

In *R.W.*,[16] the Board found that an August 5, 2019 incident that happened 30 minutes after a claimant's shift ended occurred while in the performance of duty. It noted that the claimant was waiting for an update to complete on her laptop and that the employing establishment had confirmed that the task was part of appellant's work duties, even though the employing establishment indicated that the claimant did not need to complete the update that day. The claimant also explained that it was not uncommon for her to stay 30 minutes past her off-duty time.

In this case, the evidence of record establishes that appellant's tour of duty was from 7:00 a.m. to 4:30 p.m. Appellant has submitted several statements explaining that she was at work at 6:00 a.m. on June 28, 2021 to work on CARF survey preparation. She provided a June 22, 2021 email from herself to D.K. wherein she informed D.K. that extensive work was to be completed for CARF surveys. The Board thus finds that on June 28, 2021 when appellant arrived at the employing establishment medical center before her scheduled work shift, she was engaged in a preparatory and/or incidental act and was thus in the performance of duty. The Board notes that like the claimant in *R.W.*, appellant was performing her work duties at the time of the June 28, 2021 incident. In the instant case, appellant arrived one hour before her shift started on June 28, 2021 in order to work on CARF surveys before the deadline for completion on June 30, 2021. In a text thread and a memorandum from D.K., the employing establishment acknowledged that appellant came to work early on June 28, 2021 to "get caught up on work" by assisting in survey preparation. In a memorandum received on January 25, 2022, the employing establishment also acknowledged that appellant came to work early on June 28, 2021 because appellant felt that she was assisting with survey preparation. Accordingly, appellant has established that she was engaged in preparatory or incidental acts related to her work.[17]

As appellant has established that the June 28, 2021 employment incident factually occurred in the performance of duty, the question becomes whether this accepted employment incident caused an injury.[18] The Board will, therefore, set aside the March 1, 2022 decision and remand the case to OWCP for consideration of the medical evidence. Following this and other such further development as deemed necessary, OWCP shall issue a *de novo* decision addressing whether appellant has met her burden of proof to establish an injury causally related to the accepted employment incident.

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

[16] Docket No. 21-1182 (issued April 15, 2022).

[17] *See J.K.*, Docket No. 17-0756 (issued July 11, 2018) (the Board determined that a claimant who stayed at work 30 minutes after her shift ended in order to finalize notes and check e-mails was engaged in preparatory or incidental acts); *see also I.F.*, Docket No. 12-192 (issued September 26, 2013) (the Board determined that a claimant who stayed at work 45 minutes after she was supposed to leave was still in the performance of duty as she had to make three trips from her office to her vehicle in order to pack up her work materials).

[18] *M.L.*, Docket No. 19-0361 (issued October 24, 2019); *Willie J. Clements*, 43 ECAB 244 (1991).

CONCLUSION

The Board finds that appellant has met her burden of proof to establish that an incident occurred in the performance of duty on June 28, 2021, 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 June 28, 2021 employment incident.

ORDER

IT IS HEREBY ORDERED THAT the March 1, 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: April 9, 2024
Washington, DC

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

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

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