United States Department of Labor
Employees' Compensation Appeals Board

G.W., Appellant	)	
and	)	**Docket No. 22-0351**
	)	**Issued: June 10, 2024**
U.S. POSTAL SERVICE, MID-ISLAND PROCESSING & DISTRIBUTION CENTER, Melville, NY, Employer	)	

Appearances:
Stephen Larkin, 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 January 9, 2022 appellant, through counsel, filed a timely appeal from an August 13, 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 appellant submitted additional evidence on appeal. 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 his burden of proof to establish a traumatic injury in the performance of duty on March 23, 2019.

FACTUAL HISTORY

On March 25, 2019 appellant, then a 56-year-old tractor trailer operator, filed a traumatic injury claim (Form CA-1) alleging that on Saturday, March 23, 2019 at 10:22 a.m. he sustained left thumb and lower back injuries when he walked toward his vehicle in order to leave the worksite and was attacked by flying geese, causing him to fall backward over a retaining wall, while in the performance of duty. On the reverse side of the claim form, appellant's immediate supervisor indicated that appellant's regular work hours were 3:08 a.m. to 11:58 a.m., Monday through Friday. The supervisor contended that appellant was not injured in the performance of duty and noted that appellant was walking through the parking lot toward his personal vehicle when injured.[4] Appellant stopped work on the date of the claimed injury.

In a March 25, 2019 letter, S.C., the manager of the health and resource management department at the employing establishment, advised that appellant was working an extra day of overtime work on March 23, 2019. She indicated that, at the time of the reported incident, he was in the parking lot of the employing establishment. S.C. maintained that appellant was not authorized to leave at the time of the incident in that he left approximately 45 minutes prior to the scheduled end of his tour.

Appellant submitted copies of photographs of his left hand. In a March 26, 2019 attending physician's report, Part B of an authorization for examination and/or treatment (Form CA-16), a provider with an illegible signature referenced an attack by geese and diagnosed back spasm and left thumb fracture. In a duty status report (Form CA-17) of even date, the same provider determined that appellant was totally disabled from work.

In an April 2, 2019 development letter, OWCP notified appellant of the deficiencies of his claim. It advised him of the type of factual and medical evidence needed and provided a questionnaire for his completion. In a separate development letter of even date, OWCP requested that the employing establishment provide additional information relevant to the question of whether appellant was in the performance of duty at the time of his claimed March 23, 2019 employment incident. It afforded both parties 30 days to respond.

In an April 3, 2019 letter, K.J., an employing establishment health and resource manager, maintained that appellant had previously taken time off from work for a preexisting back condition.

Appellant subsequently submitted additional reports from health care providers, dated March and April 2019, including those of Dr. Steven Simonsen, a Board-certified orthopedic surgeon.

[4] OWCP assigned the claim OWCP File No. xxxxxx755. Under a separate claim, assigned OWCP File No. xxxxxx903, it accepted that on May 6, 2009 appellant sustained displacement of lumbar intervertebral disc without myelopathy and swelling, mass, or lump in the right chest area. OWCP has administratively combined OWCP File Nos. xxxxxx755 and xxxxxx903, with the latter designated as the master file.

On April 8, 2019 OWCP received a March 23, 2019 statement from appellant who indicated that, while walking out to his vehicle at 10:15 a.m. on the date of claimed injury, he noticed that he was "going to be attacked" by two flying geese. Appellant advised that he ran backward to escape the birds and collided into the retaining wall near the main entrance with the flagpole.

In an April 8, 2019 letter, K.J. maintained that appellant provided conflicting factual statements regarding the claimed March 23, 2019 employment incident. She asserted that he was not driving his route at the time of the claimed injury, but rather was "in the parking lot, unauthorized, taking it upon himself to clock out and leave without informing his supervisor." K.J. maintained that appellant was scheduled to start work on March 23, 2019 at 2:30 a.m. and to stop work at 11:00 a.m., but his claimed injury did not occur in the performance of duty because he left work in an unauthorized manner at 10:15 a.m. A daily assignment sheet contains the notation 2:30 a.m. associated with his name for March 23, 2019, and a record of his March 23, 2019 clock rings shows a 2:25 a.m. clock ring for "nonscheduled begin tour" and a 10:26 a.m. clock ring for "nonscheduled end tour."[5]

In an April 11, 2019 response to the April 2, 2019 development letter, appellant indicated that on March 23, 2019 he was walking to his vehicle in the parking lot after his work shift when he was attacked by flying geese and fell back over a retaining wall onto his back. He asserted that the parking lot where the claimed injury occurred was owned, controlled, and managed by the employing establishment. Appellant maintained that the employing establishment required him to park in the lot and that it paid for employee parking. He submitted excerpts from the contract between the employing establishment and union.

By decision dated May 9, 2019, OWCP denied appellant's claim for a March 23, 2019 traumatic injury finding that the evidence of record was insufficient to establish that the injury arose during the course of employment and within the scope of compensable work factors. It indicated, "[t]he reason for this finding is that [appellant's] employing agency disagrees that [appellant was] injured in performance of duty as you left your assigned work early without prior approval…." OWCP maintained that this action was considered to constitute willful misconduct and took appellant out of the performance of duty.

On May 21, 2019 appellant requested an oral hearing before a representative of OWCP's Branch and Hearings or Review. He submitted additional medical evidence in support of his claim. By decision dated July 25, 2019, OWCP's hearing representative set aside the May 9, 2019 decision and remanded the case for OWCP to obtain additional information from the employing establishment regarding the rules and procedures regarding early work departures of employees.

On August 12, 2019 OWCP received an undated statement in which appellant asserted that he left 30 minutes early from work on March 23, 2019 and that his regular supervisor had already left work for the day. Appellant maintained that he followed the regular practice for such situations by submitting a request for or notification of absence (Form 3971) to an acting supervisor on March 23, 2019. He claimed that, when his regular supervisor returned to work the next day, he

[5] At the top of the record for clock rings, 3:08 a.m. was listed for "begin tour" and 11:58 a.m. was listed for "end tour." A daily assignment sheet contained the notation "0230" in connection with appellant's name for the date March 23, 2019. The case record also contains copies of photographs of the side of a building with an adjacent flagpole.

should have processed the Form 3971. Appellant also submitted copies of documents from occasions prior to March 23, 2019 where he also filed a Form 3971 in connection with leaving early from work.

On remand, OWCP requested additional information from the employing establishment in accordance with the July 25, 2019 decision.

In an unsigned and undated statement received by OWCP on August 16, 2019 an employing establishment official asserted that appellant had been instructed, on numerous occasions in the form of official discussions, that appellant was required to request permission to leave before his scheduled end of tour and was required to submit a Form 3971 prior to leaving the building. The official further asserted that on March 23, 2019 appellant failed to request permission from his supervisor to leave early and did not submit a Form 3971. In a July 31, 2019 statement, A.B., an employing establishment supervisor, indicated, "I do n[o]t remember issuing discipline and I do n[o]t have it written down or saved anyplace, but [appellant] was given official discussions on 8/27/2018, [and] 12/10/2018, 1/7/2019 and again on 2/25/2019…." He asserted that appellant was told on the latter date that he would receive disciplinary action in the future if he did not submit a Form 3971 signed by a supervisor. In an August 1, 2019 statement, A.P., another employing establishment supervisor, maintained that an employee must fill out a Form 3971 if he or she wanted to leave early from work. She noted, "[w]hen I came to this department, the employees would just leave early even on their regular days. Not on my watch. I put a stop to that." The employing establishment also submitted brief excerpts from an unspecified document discussing the filing of a Form 3971.

By *de novo* decision dated October 2, 2019, OWCP denied appellant's claim for a March 23, 2019 traumatic injury because he failed to establish that an injury occurred in the performance of duty.

On October 29, 2019 appellant requested an oral hearing before a representative of OWCP's Branch of Hearings and Review. A hearing was held on March 17, 2020 during which appellant provided further details regarding the March 23, 2019 accident and continued to assert that he followed the proper rules and procedures for his early departure from work on that date. After the hearing, he submitted additional medical evidence in support of his claim.

In a March 2, 2020 letter, appellant's union representative asserted that it was common practice for employees to sometimes file a Form 3971 the day after leaving early from work.

In an April 7, 2020 statement, K.J. asserted that an acting supervisor had the same authority as a regular supervisor with respect to handling a submitted Form 3971. She maintained that the acting supervisor on duty when appellant left work on March 23, 2019 had indicated that appellant did not file a Form 3971 or otherwise provide notice that he was leaving work early on that date.

In a May 9, 2020 letter, appellant's union representative asserted that it was common for employees, such as appellant, to clock in early and then leave early for the day.

By decision dated May 27, 2020, OWCP's hearing representative affirmed OWCP's October 2, 2019 decision.

On August 25, 2020 appellant requested reconsideration of the May 27, 2010 decision. In an August 4, 2020 letter, he again argued that he followed the proper rules and procedures for his early departure from work on March 23, 2019.

By decision dated September 25, 2020, OWCP denied appellant's request for reconsideration of the merits of his claim, pursuant to 5 U.S.C. § 8128(a).

On May 27, 2021 appellant, through counsel, requested reconsideration. In a May 27, 2021 letter, counsel provided additional argument in support of appellant's claim for a March 23, 2019 employment incident.

In a June 22, 2021 letter, S.C. asserted that any employee who worked on a "[n]onscheduled day," as appellant did on March 23, 2019, was required to submit a Form 3971 to a supervisor on the date of early departure. She advised that failure to do so would create an unauthorized absence and subject the employee to discipline. S.C. maintained that appellant also clocked in early on March 23, 2019 and consequently was given a discussion, the lowest form of discipline, on the same date.[6]

By decision dated August 13, 2021, OWCP denied modification of the May 27, 2020 decision denying appellant's claim.

LEGAL PRECEDENT

An employee seeking benefits under FECA[7] has the burden of proof to establish the essentials 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,[8] 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.[9] 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.[10]

Section 8102(a)(1) of FECA provides that the United States shall pay compensation as specified by the subchapter for the disability or death of an employee resulting from personal injury sustained while in the performance of his or her duty, unless the injury or death is caused by willful misconduct of the employee.[11] The Board has defined willful misconduct as deliberate conduct involving premeditation, obstinacy, or intentional wrongdoing with the knowledge that it is likely

[6] S.C. attached copies of documents from occasions prior to March 23, 2019 that appellant had filed a Form 3971.

[7] *Supra* note 2.

[8] *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).

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

[10] *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).

[11] 5 U.S.C. § 8102(a)(1).

to result in serious injury or conduct that is in wanton or reckless disregard of probable injurious consequences.[12] The allegation of willful misconduct is an affirmative defense, which OWCP must invoke in the original adjudication of the claim and OWCP has the burden to prove such a defense.[13]

OWCP procedures provide that the question of willful misconduct arises where, at the time of the injury, the employee was violating a safety rule, disobeying other orders of the employer, or violating a law. The procedures further provide that safety rules have been promulgated for the protection of the worker, not the employer, and, thus, simple negligent disregard of such rules is not enough to deprive a worker or the workers' dependents of any compensation rights. All employees are subject to the orders and directives of their employers in respect to what they may do, how they may do certain things, the place or places where they may work or go, or when they may or shall do certain things. Disobedience of such orders may destroy the right to compensation only if the disobedience is deliberate and intentional as distinguished from careless and heedless."[14]

The phrase "sustained while in the performance of duty" from section 8102(a)(1) of FECA 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 course of employment."[15] 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 he or she 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."[16]

ANALYSIS

The Board finds that appellant has not met his burden of proof to establish a traumatic injury in the performance of duty on March 23, 2019.

As noted above, the Board has defined willful misconduct as deliberate conduct involving premeditation, obstinacy, or intentional wrongdoing with the knowledge that it is likely to result in serious injury or conduct that is in wanton or reckless disregard of probable injurious consequences.[17] The Board finds that appellant's actions on March 23, 2019 did not constitute willful misconduct within the meaning of FECA and, therefore, OWCP improperly denied

[12] *W.S.*, Docket No. 15-1271 (issued October 5, 2015).

[13] *Bruce Wright*, 43 ECAB 284, 295 (1991).

[14] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Performance of Duty*, Chapter 2.804.14 (September 1995).

[15] *Charles Crawford*, 40 ECAB 474, 476-77 (1989).

[16] *Mary Keszler*, 38 ECAB 735, 739 (1987).

[17] *See supra* note 11.

appellant's claim for a March 23, 2019 injury on the basis that he engaged in willful misconduct on that date, which took him out of the performance of duty.

The Board, however, further finds that appellant has not met his burden of proof to show that he was in the performance of duty when injured. 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.[18] What constitutes a reasonable interval before work depends on both the length of time involved and the circumstances occasioning the interval, and the nature of the employee's activity.[19]

The case record establishes that appellant had left work early, before the end of his shift without following the procedures for notifying the employing establishment of his absence. While appellant alleged that he was permitted to leave early on March 23, 2019, there is no corroborative evidence to establish that he indeed submitted a Form 3971, or that a Form 3971 was not required. The employing establishment, however, submitted various witness statements to establish that appellant had neither submitted a Form 3971, nor requested permission to leave early on March 23, 2019. Appellant's unscheduled early departure was, therefore, neither at a reasonable interval before and after official working hours, nor incidental to his employment.[20]

As the evidence of record is insufficient to establish that his injury occurred in the performance of duty, the Board finds that appellant has not met his burden of proof.

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 a traumatic injury in the performance of duty on March 23, 2019.

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

[19] *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).

[20] *See E.V.*, Docket No. 16-1356 (issued December 6, 2016).

ORDER

IT IS HEREBY ORDERED THAT the August 13, 2021 decision of the Office of Workers' Compensation Programs is affirmed, as modified.[21]

Issued: June 10, 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

[21] The record contains an authorization for examination and/or medical treatment which was signed by an employing establishment official on March 23, 2019. A properly 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. The period for which treatment is authorized by a Form CA-16 is limited to 60 days from the date of issuance, unless terminated earlier by OWCP. 20 C.F.R. § 10.300(c); *P.R.*, Docket No. 18-0737 (issued November 2, 2018); *N.M.*, Docket No. 17-1655 (issued January 24, 2018); *Tracy P. Spillane*, 54 ECAB 608 (2003).