

**United States Department of Labor
Employees' Compensation Appeals Board**

S.C., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Brooklyn, NY, Employer**

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**Docket No. 13-1915
Issued: September 16, 2014**

Appearances:
Paul Kalker, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

COLLEEN DUFFY KIKO, Judge
PATRICIA HOWARD FITZGERALD, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On August 19, 2013 appellant, through counsel, filed a timely appeal from a July 25, 2013 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant met his burden of proof to establish an emotional condition in the performance of his federal duties on June 22, 2010.

FACTUAL HISTORY

This case was previously before the Board. By decision dated September 13, 2012, the Board affirmed a May 13, 2011 OWCP decision, as modified, finding that appellant failed to establish that he sustained an emotional condition causally related to factors of his federal

¹ 5 U.S.C. § 8101 *et seq.*

employment.² The findings of fact and conclusions of law from the prior decision and order are hereby incorporated by reference.

By letter dated April 22, 2013, appellant through counsel, requested reconsideration by OWCP. Counsel argued that appellant was engaged in a representative function during his attendance at the National Association of Postal Supervisors (NAPS)³ Branch 164 meeting and thus was in the performance of duty when he was assaulted by Rudy Marinacci, a coworker. He referenced a March 7, 2013 statement from Jeff Goldman, President of NAPS Branch 164, as evidence that appellant was engaged in a representative function. Counsel noted appellant's specific activities during the meeting which included sharing information from postal service headquarters and the measures the postal service must take to reduce expenses and increase productivity. He further argued that appellant was engaged in a representative function because he was serving the mutual benefit of both employees of the postal service, as well as the postal service itself. Counsel stated that the objective of the association is to create a mutual benefit between the employing establishment and its employees and thus, establishes that appellant was in the performance of duty at the time of the June 22, 2010 assault.

In support of the arguments made, appellant submitted Mr. Goldman's March 7, 2013 statement, which referred to sections from the NAPS Branch 164 Constitution and bylaws. Article II of the constitution stated that, "The objects of this [a]ssociation shall be to cooperate with the [p]ostal [s]ervice to improve the [p]ostal [s]ervice and the welfare of its employees; to raise the standard of efficiency in the [p]ostal [s]ervice; to assist in establishing uniform and equitable salary rates; uniform and economical business methods; [and] widen the field of opportunity for worthy employees who make the business of the [p]ostal [s]ervice their life work."

Mr. Goldman stated that appellant served on the Branch's executive board with him as the vice-president of customer service in 2010. In May 2010, appellant and the executive vice president accompanied Mr. Goldman to an NAPS state convention. Information was brought forth from postal service headquarters and discussion topics included the financial stability of the postal service, reduction in expenses and increased productivity. The state convention stressed the importance of the employing establishment and NAPS working together to find ways to improve the efficiency of the postal service and address coming changes.

Mr. Goldman explained that at the June 22, 2010 NAPS Branch meeting, appellant and the other executive board members were to report to membership what had transpired at the state convention. Appellant informed branch membership of information he received at the state convention concerning financial difficulties and what each supervisor could do to ease this burden. He stressed the importance of filling out reports correctly and shared what was expected of supervisors. Supervisors were asked to pass this information on to their peers and employees as a reduction-in-force was expected to transpire. Appellant and the other executive board members then responded to questions and concerns from the membership.

² Docket No. 11-1608 (issued September 13, 2012).

³ NAPS is a management association which is composed of managers, supervisors and postmasters working for all supervisory personnel in the U.S. Postal Service. Membership is voluntary.

By letter dated June 20, 2013, the employing establishment controverted the claim. It stated that the June 22, 2010 altercation between appellant and Mr. Marinacci occurred at 6:30 p.m. outside of a Veterans of Foreign Wars parking lot. The altercation did not occur at or during the NAPS Branch meeting, which was scheduled to start one-hour later at 7:30 p.m. The employing establishment further stated that appellant was not on official time when the altercation occurred. It noted that NAPS is an employee organization whose meetings are held off postal premises and membership is strictly voluntary. The employing establishment has no control over NAPS Branch meetings and does not sponsor them. It further noted that appellant was harassing Mr. Marinacci on June 16, 2010 and failed to follow proper protocol procedures before entering another facility to perform his NAPS duties. The employing establishment provided witness statements previously of record in support of the arguments made.

By letter dated July 18, 2013, appellant, through counsel, responded to the employing establishment's June 20, 2013 letter. Counsel argued that, though the NAPS Branch meeting may have started at 7:30 p.m. on June 22, 2010, it was scheduled to begin at 7:00 p.m. As an officer, appellant was required to attend the meeting 30 minutes early at 6:30 p.m. Counsel further argued that it was irrelevant that appellant was not on official time as attendance at the branch meeting pertained to the mutual benefit of NAPS members and the postal service.

Appellant provided a May 4, 2011 "letter of decision" from the employing establishment which gave Mr. Marinacci a letter of warning as a result of the June 22, 2010 incident. The employing establishment noted that as a manager, Mr. Marinacci was held to a higher standard and was required to act in a professional manner both on and off duty.

By decision dated July 25, 2013, OWCP denied modification finding that the evidence of record failed to establish that appellant suffered an emotional condition in the performance of duty. It noted that the evidence did not establish the specific benefits derived by the employing establishment.

LEGAL PRECEDENT

Where the disability results from an emotional reaction to regular or specially assigned work duties or a requirement imposed by the employment, the disability comes within the coverage of FECA.⁴

In providing for a compensation program for federal employees, Congress did not contemplate an insurance program against any and every injury, illness or mishap that might befall an employee contemporaneous or coincidental with his or her employment. Liability does not attach merely upon the existence of an employee-employer relation. Instead, Congress provided for the payment of compensation for disability or death of an employee resulting from personal injury sustained while in the performance of duty.⁵ The phrase 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 course of

⁴ *Lillian Cutler*, 28 ECAB 125 (1976).

⁵ See 5 U.S.C. § 8102(a).

employment. “Arising in the course of employment” relates to the elements of time, place and work activity”⁶

In the compensation field, to occur in the course of employment, 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 the employment; and (3) while he or she was reasonably fulfilling the duties of his or her employment or engaged in doing something incidental thereto.⁷ An employee seeking benefits under FECA⁸ has the burden of proof to establish by reliable, probative and substantial evidence the essential elements of his case.⁹

ANALYSIS

In the prior decision, the Board found that appellant failed to establish that his June 15 and 16, 2010 interactions with Mr. Marinacci rose to the level of a verbal altercation or harassment which would be covered as a compensable factor of employment.¹⁰ The Board also found that, while he established that he was assaulted in a parking lot by Mr. Marinacci on June 22, 2010 prior to an NAPS Branch meeting, he had not established that he was in the performance of duty at the time of his assault on June 22, 2010. It was from this finding that appellant requested further reconsideration before OWCP. By decision dated July 25, 2013, OWCP denied modification.

The Board affirms OWCP’s finding that appellant failed to meet his burden of proof to establish an employment-related emotional condition in the performance of duty on June 22, 2010.

Appellant’s injury did not occur at a place where one could reasonably expect him to be in connection with his employment. At the time of injury, he was off duty and on his way to an NAPS Branch meeting. Appellant had a fixed place of work: Whitestone Post Office. The injury took place off the premises of the employing establishment, in the Veterans of Foreign Wars parking lot. The employing establishment explained that it did not own, lease, maintain or control the parking lot where the incident occurred.¹¹ The NAPS Branch meeting was not held by the employing establishment, nor did it require attendance by its employees. The Board finds

⁶ *Eugene G. Chin*, 39 ECAB 598 (1988); *Clayton Varner*, 37 ECAB 248 (1985); *Thelma B. Barenkamp (Joseph L. Barenkamp)*, 5 ECAB 228 (1952).

⁷ See *Vincent A. Rosenquist*, 54 ECAB 166, 168 (2002); *James E. Chadden, Sr.*, 40 ECAB 312 (1988).

⁸ 5 U.S.C. §§ 8101-8193.

⁹ *John S. Steber*, 5 ECAB 93 (1952).

¹⁰ With respect to the Board’s findings regarding these claimed employment factors, it is noted that in the absence of further review by OWCP on an issue addressed by a Board decision, the subject matter reviewed is *res judicata* and is not subject to further consideration by the Board. 5 U.S.C. § 8128; *Clinton E. Anthony, Jr.*, 49 ECAB 476 (1998).

¹¹ *C.B.*, Docket No. 12-1849 (issued January 13, 2014).

that the evidence is insufficient to establish that the Veterans of Foreign Wars parking lot should be considered part of the premises of the employing establishment as it was not within its control.¹²

Moreover, appellant's injury did not occur at a time when one could reasonably say he was engaged in the employing establishment business. As a customer service supervisor, he had fixed hours of work. On June 22, 2010 appellant was off the clock when he was assaulted by Mr. Marinacci. He was not in duty status and the employing establishment had not granted him official time to attend the NAPS Branch meeting; attendance at the meeting was voluntary and not a requirement of his employment.¹³ The record establishes that appellant was not in duty status nor granted official time by the employing establishment to attend the meeting.¹⁴

Time and place are the two overt physical indicia of the term "in the course of employment."¹⁵ Both these elements of work connection are missing from appellant's case. As explained in the Lason treatise on workers' compensation law, this places a heavy burden on the third element of course of employment:

When seeking for a link by which to connect an activity with the employment, one has gone a long way as soon as one has placed the activity physically in contact with the employment environment and even further when one has associated the time of the activity somehow with the employment. This done, the exact nature and purpose of the activity itself does not have to bear the whole load of establishing work connection and consequently the employment-connection of that nature and purpose does not have to be as conspicuous as it otherwise might. Conversely, if the [activity] takes place on some distant vacant lot, several hours after the day's work has ceased, some independently convincing association with the employment must be built up to overcome the initial presumption of disassociation with the employment established by the time and place factors.¹⁶

Based on the evidence, appellant's injury did not occur while he was reasonably fulfilling the duties of his employment or engaged in doing something incidental thereto.¹⁷ He was off duty. Appellant was attending the NAPS Branch meeting for personal reasons when Mr. Marinacci assaulted him in the parking lot. He has not been instructed by the employing establishment to attend this meeting or to speak with membership.¹⁸ Mr. Goldman's statements

¹² *Michael Hazzard*, Docket 05-1514 (issued November 4, 2005).

¹³ *Paula G. Johnson*, 53 ECAB 722 (2002); *see also* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Performance of Duty*, Chapter 2.804.16(c) (March 1994).

¹⁴ *Bernard Redmond*, 45 ECAB 298 (1993).

¹⁵ Arthur Larson & Lex K. Larson, *The Law of Workers' Compensation* § 22.04.

¹⁶ *Id.* at § 22.03(1).

¹⁷ *S.B.*, Docket No. 06-978 (issued March 5, 2007).

¹⁸ *C.f.*, *Kelly Y. Simpson*, Docket No. 04-1809 (issued October 26, 2005).

do not establish that appellant was fulfilling the duties of his employment by attending the meeting. To be compensable the nature and purpose of the activity when appellant was injured must conspicuously and convincingly establish a work connection.¹⁹

Appellant was off duty, off postal premises and not required to attend the NAPS Branch meeting. The record does not support that his attendance at the meeting, half an hour before the start of the meeting, furthered his master's business or provided a substantial benefit to the employing establishment.²⁰

On appeal, counsel argues that appellant was engaged in a representational function when attending the June 22, 2010 NAPS Branch meeting which was for the mutual benefit of the employer and employee. The Board notes that NAPS is a management association and not a union as noted by counsel, and by the Board's in its prior decision.²¹ Appellant has failed to present the necessary evidence to establish that he was in the course of employment when the incident occurred. Thus, as he has failed to submit sufficient probative evidence to establish a compensable factor of employment, the Board finds that he failed to establish an emotional condition in the performance of duty.

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 did not meet his burden of proof to establish an emotional condition causally related to factors of his federal employment as a customer service supervisor.

¹⁹ *Supra* note 17.

²⁰ *M.L.*, Docket No.07-1620 (issued December 17, 2007).

²¹ *Supra* note 2. Compare Federal (FECA) Procedure Manual, Part 2 -- Claims, *Performance of Duty*, Chapter 2.804.16 (July 1997).

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' decision dated July 25, 2013 is affirmed.

Issued: September 16, 2014
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board