

FACTUAL HISTORY

On June 24, 2010 appellant filed a traumatic injury claim alleging that she sustained injuries to her head and low back when she was assaulted by her supervisor on June 7, 2010. The record reflects that her tour of duty was 7:00 a.m. to 3:30 p.m., Thursday through Monday. William Soto, a supervisor, noted that appellant put in a leave slip and exited the premises at approximately 9:00 a.m.

Appellant provided her account of the claimed assault. On the morning of June 7, 2010, Alethia Canary, her supervisor, refused to transport appellant to an 8:30 a.m. medical appointment that had been scheduled after a work-related knee injury sustained on June 4, 2010.² After her supervisor refused to authorize sick leave pending receipt of a medical report, appellant signed out from work and went home. She went to a 1:00 p.m. medical appointment but was advised by the physician's staff that she needed to have specific paperwork to be treated under workers' compensation. Appellant returned to the employing establishment at 2:00 p.m., where she began to argue with Ms. Canary over the medical documentation. She stated that she used her cell phone to call 911 and informed the operator: "my supervisor is driving me crazy, and someone has to do something otherwise I'm going to go postal." Appellant stated that she chose her words on purpose in order to get the attention of the local police and her supervisor. She walked around Ms. Canary and moved closer to get her attention. Ms. Canary then struck appellant with a radio. Appellant stated that she fell down and was again struck by her supervisor and kicked in the back.

On June 7, 2010 William Soto, the manager of operations, placed appellant on an emergency off-duty status. He found that she had ended her work tour that morning at approximately 9:00 a.m., but returned to the building at 2:00 p.m. and started yelling at Ms. Canary, who tried to avoid appellant. Mr. Soto found that appellant kept following Ms. Canary around the dock and the supervisor got on her radio to call for help from other supervisors. Appellant told Ms. Canary that "I'm threatening you and will hit you." She then attacked Ms. Canary by pushing her and hitting her with a pocketbook. Appellant scratched Ms. Canary's right ear and pulled out an earring. She was then struck by Ms. Canary, in an attempt to block being struck by appellant and the pocketbook.

On July 6, 2010 the employing establishment controverted the claim, contending that appellant was off duty at the time of the claimed incident and had instigated the attack on her supervisor. It noted that she was on emergency placement in an off-duty status pending removal. The employing establishment denied making arrangements for or authorizing appellant's medical treatment.

² Appellant's June 4, 2010 traumatic injury claim was accepted for sprain and contusion of the right knee and leg and medial meniscal tear of the right knee. (File No. xxxxxx421).

A transcript of appellant's June 7, 2010 telephone call to 911 was submitted to the record. It states:

"911 Operator: 9-1-1. What is the emergency?"

"[Appellant]: Hello. My name is [...] I am calling from the Kearny Post Office. I gone Postal and I am about to kick my supervisors ass. Can you send the cops here please?"

"911 Operator: What's the address there Ma'am? Hello?"

"Phone hangs up."

The record reflects that appellant called 911 back to give the location of the employing establishment.

In an August 16, 2010 decision, OWCP denied appellant's claim finding that her injury arose as a result of her willful misconduct. It found that the evidence of record did not support an assault on appellant by her supervisor. Rather, the 911 call of June 7, 2010 and her return to work that day after signing out supported her employer's assertion that she intended to assault her supervisor.

In a June 7, 2010 statement, received to the record on September 9, 2010, Ms. Canary stated that she was unable to take appellant to a medical appointment that morning due to being short staffed. Appellant became upset and Ms. Canary noted that she would attempt to get the appointment rescheduled. She spoke with another supervisor and was brought to Ms. Canary's office to file out a leave request form. Ms. Canary informed appellant that she would have to provide medical documentation for her absence. Appellant left, but came back to the employing establishment building around 2:00 p.m. She began yelling and screaming at Ms. Canary, after talking with several employees. Ms. Canary told appellant that she was not on the clock and started to walk away. Appellant reached for her purse, took out her cell phone and called the police. Ms. Canary stated that she walked from the dock area to the transportation office to get away from appellant. Appellant began screaming for Ms. Canary and she used her radio to call all supervisors to ignore appellant. She then came up to Ms. Canary and screamed in her face. Ms. Canary noted that she tried to ignore appellant, but appellant continued to follow her around. She noted that appellant stated: "I'm threaten you. I will hit you ok." Ms. Canary then got on her radio to call management to come and get appellant. When the supervisor of operations and plant manager arrived, appellant began pushing Ms. Canary and swinging a pocketbook at her. Ms. Canary stated that she defended herself by hitting appellant with the radio. Appellant stumbled back, but charged at Ms. Canary, scratching her right ear and pulling out an earring. At that time, she was pulled away by the managers and other employees.

Appellant requested an oral hearing, which was held on January 13, 2011. She testified that, on June 7, 2010, she arrived at work at 7:00 a.m. and informed Ms. Canary of the medical appointment at 8:30 a.m. Appellant became upset because Ms. Canary refused to authorize sick

leave pending a medical report or drive appellant to the appointment. She signed out at work and left the premises to seek medical care through her insurance. After the physician's office declined service for a workers' compensation injury without a claim number, appellant went back to the employing establishment. As noted, she called the police and stood in front of Ms. Canary to prevent her from walking away. At that point, Ms. Canary began striking appellant with her radio. Appellant stated that the employing establishment refused to release a video tape of the incident.

In a March 30, 2011 decision, OWCP's hearing representative affirmed the denial of appellant's claim.³ She found that appellant failed to establish that she sustained an injury in the performance of duty. The hearing representative found that appellant committed an assault on Ms. Canary, who struck appellant in self-defense, knocking her down. It was noted that appellant had signed out at work earlier that day to go home but was turned away at a physician's office as she did not have a claim number. Appellant returned to the workplace where she assaulted Ms. Canary, having called 911 to state that she was about to kick Ms. Canary's ass.

On August 2, 2011 appellant requested reconsideration. In a letter dated September 29, 2011, counsel contended that OWCP should infer from the employing establishment refusal to release a surveillance video of the altercation that it would support appellant's claim.⁴

In an October 27, 2011 decision, OWCP denied modification of the March 30, 2011 decision, finding that appellant was not on the clock at the time of injury or performing any duties incidental to her federal employment. It found that Ms. Canary did not err or act abusively by not providing the requested medical forms and that appellant committed assault on her supervisor.

On April 2, 2012 appellant, through her attorney, requested reconsideration. Counsel reiterated her claim that she was assaulted and severely beaten by her supervisor on June 7, 2010 when she returned to the employing establishment seeking medical documentation. In a statement dated March 21, 2012, appellant alleged that she fell to the floor after Ms. Canary hit her with her radio. Ms. Canary reportedly continued to hit her with the radio, kicked her in the back and pulled her hair.

By decision dated April 13, 2012, OWCP denied appellant's request for reconsideration on the grounds that the evidence was insufficient to warrant further merit review.

LEGAL PRECEDENT -- ISSUE 1

FECA provides for payment of compensation for the disability or death of an employee resulting from personal injury sustained while in the performance of duty. The phrase sustained

³ OWCP's hearing representative characterized the August 16, 2010 decision as denying the claim on the basis that fact of injury had not been established. The finding of willful misconduct was not addressed.

⁴ The record contains a copy of an August 10, 2011 letter from the employing establishment denying counsel's request to produce the June 7, 2010 surveillance video. The employing establishment noted that its records pertaining to investigations into employee misconduct were exempt from disclosure. Counsel was advised of his right to appeal the denial.

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 employment.⁵ In addressing this issue, the Board has stated that, 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.⁶ This alone, however, is not sufficient to establish entitlement to compensation. The employee must also establish an injury arising out of the employment. To arise out of the employment, the injury must have a causal connection to the employment, either by precipitation, aggravation or acceleration.⁷

Section 8102(a)(1) of FECA provides:

“The United States shall pay compensation as specified by this subchapter for the disability or death of an employee resulting from personal injury sustained while in the performance of duty, unless the injury or death is --

caused by the willful misconduct of the employee....”

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 which is in wanton or reckless disregard of probably injurious consequences.”⁸ The allegation of willful misconduct is an affirmative defense which must be invoked in the original adjudication of the claim.⁹ If such defense is invoked, OWCP has the burden to prove willful misconduct on the part of the employee.¹⁰

ANALYSIS -- ISSUE 1

The Board notes that in the original adjudication of appellant's claim of injury on June 7, 2010, OWCP invoked the affirmative defense of willful misconduct in the August 16, 2010 decision.

⁵ *Bernard D. Blum*, 1 ECAB 1 (1947).

⁶ *Lenneth W. Richard*, 49 ECAB 337 (1998); *Janet Hudson-Dailey*, 45 ECAB 435 (1994).

⁷ *See Eugene G. Chin*, 39 ECAB 598 (1988); *Clayton Varner*, 37 ECAB 248 (1985).

⁸ *See Theodore Karantsalis*, 49 ECAB 603 (1998); *Judith D. Jenkins*, 32 ECAB 1219 (1981).

⁹ *See Latanya M. Cooper*, 51 ECAB 238 (1999); *Soo F. Dong*, 47 ECAB 800 (1996); *Gayle M. Petty*, 46 ECAB 996 (1995).

¹⁰ *See James P. Schilling*, 54 ECAB 641 (2003); *Alice Marjorie Harris (Roy Lee Harris)*, 6 ECAB 55 (1953).

In *Theodore Karantsalis*,¹¹ the employee filed a claim for compensation alleging an attack by a coworker in an employing establishment men's room. The Board reviewed the evidence of record and found that the employee was the aggressor in the attack, noting that prior to the incident he stated his belief that the coworker had accused him of taking the missing office equipment. The statements of the assaulted individual and other coworkers supported willful misconduct; which removed the employee from the performance of duty. In *Soo F. Dong*,¹² the employee had a confrontation with a security guard regarding the presentation of appropriate employee identification for entry to work. When asked to show proper federal identification, the employee presented a driver's license. When again requested for proper identification, she proceeded to walk past the guard. When the security guard raised his arms up as a barrier, she began to push, shove and bite him. The employee removed a shoe and used it to assault the guard. The Board noted that OWCP invoked the affirmative defense of willful misconduct which was supported by the statements obtained from the security guards and other employees. This removed the employee's injury from the performance of duty.¹³

The Board finds that the evidence of record supports that appellant engaged in willful misconduct on June 7, 2010. Appellant had been at work that morning on her shift but signed out at approximately 9:00 a.m., left the worksite and went home. She returned to the workplace that afternoon and, shortly after 2:00 p.m., assaulted her supervisor. The record reflects that appellant sought out Ms. Canary and was the aggressor in the assault. The recording of the 911 operator at 2:04 p.m. reflects that she formulated a premeditated intent to assault her supervisor: "I gone Postal and am about to kick my supervisor's ass." The statement of Ms. Canary reflects that appellant voiced the intent to strike her: "I'm threaten you. I will hit you ok." While appellant contends that it was her supervisor who precipitated the altercation, this allegation is negated by the telephone calls to 911 summoning the police prior to the assault. She acknowledged that she deliberately chose her words to get the attention of her supervisor and the police. This establishes premeditation on appellant's part. It is her willful misconduct of starting the fight on June 7, 2010 that was likely to have injurious consequences that removed appellant from the performance of duty.

LEGAL PRECEDENT -- ISSUE 2

Section 8128(a) of FECA does not entitle a claimant to a review of an OWCP decision as a matter of right; it vests OWCP with discretionary authority to determine whether it will review an award for or against compensation. OWCP, through regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a).¹⁴

¹¹ See *supra* note 8.

¹² See *supra* note 9.

¹³ Compare *Janet D. Yates*, 49 ECAB 240 (1997) (The Board found willful misconduct was not established. The altercation between the employees arose as a spontaneous reaction or impulse rather than deliberate behavior).

¹⁴ See *Annette Louise*, 54 ECAB 783 (2003).

To require OWCP to reopen a case for merit review under FECA, the implementing federal regulations provide that the evidence of argument submitted by a claimant must: (1) show that OWCP erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by OWCP; or (3) constitute relevant and pertinent new evidence not previously considered by OWCP.¹⁵ Section 10.608(b) of the regulations provide that when an application for reconsideration does not meet at least one of the three requirements enumerated under section 10.606(b)(2), OWCP will deny the application for reconsideration without reopening the case for a review on the merits.¹⁶

The Board has held that the submission of evidence or argument that repeats or duplications that already of record, does not constitute a basis for reopening the merits of a case.¹⁷

ANALYSIS -- ISSUE 2

Following issuance of the October 27, 2011 decision, counsel requested reconsideration on April 2, 2012. It was reiterated that appellant was assaulted by her supervisor, Ms. Canary, after returning to the workplace to seek a form in order to obtain medical care for her leg. Additional medical evidence accompanied the request.

OWCP denied reconsideration on April 13, 2012, finding that the contentions raised were cumulative in nature to the arguments counsel previously raised and were considered in the prior merit decision denying the claim. The Board finds that it did not abuse its discretion by denying appellant's request for reconsideration. The argument that appellant was assaulted by Ms. Canary and had returned to work to obtain a medical form were previously raised in the claim below and considered. As such, the contention is cumulative and did not warrant OWCP reopening the case for further merit review.

CONCLUSION

The Board finds that the June 7, 2010 altercation did not arise in the performance of duty. Appellant's claim of injury is precluded by her willful misconduct. OWCP did not abuse its discretion in denying her application for reconsideration without further merit review.

¹⁵ *D.K.*, 59 ECAB 141 (2007).

¹⁶ *K.H.*, 59 ECAB 495 (2008).

¹⁷ *See Eugene F. Butler*, 36 ECAB 393 (1984).

ORDER

IT IS HEREBY ORDERED THAT the April 13, 2012 and October 27, 2011 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: March 19, 2013
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

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