

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

M.S., Appellant)
and) Docket No. 13-1865
DEPARTMENT OF THE TREASURY,) Issued: April 1, 2014
INTERNAL REVENUE SERVICE,)
Richmond, VA, Employer)

)

Appearances:

Alan J. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On August 7, 2013 appellant, through her attorney, filed a timely appeal from a March 22, 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.²

ISSUE

The issue is whether appellant met her burden of proof to establish an injury in the performance of duty on November 27, 2012.

¹ 5 U.S.C. § 8101 *et seq.*

² Appellant submitted new evidence on appeal. The Board lacks jurisdiction to review evidence for the first time on appeal. 20 C.F.R. § 501.2(c).

FACTUAL HISTORY

On November 28, 2012 appellant, then a 53-year-old control clerk, filed a traumatic injury claim (Form CA-1) alleging that on November 27, 2012 she sustained an injury to the left arm when she tripped over her shoelaces. She notified her supervisor, on November 28, 2012, who checked a box indicating that the injury had occurred in the performance of duty. However, the employing establishment controverted appellant's claim, stating that she was not in the performance of duty at the time of her injury because she was performing Combined Federal Campaign (CFC) funding and because she tripped over her own shoelaces.

By letter dated December 3, 2012, OWCP informed appellant that the evidence of record was insufficient to support her claim. It afforded her 30 days to submit additional evidence and respond to its inquiries.

In a witness statement dated November 28, 2012, appellant's manager stated that appellant was putting away signs and garland when she tripped over her shoelaces and landed face down on her arms.

OWCP received a report, dated November 28, 2012, from Dr. James L. Schmitt, a Board-certified radiologist, who noted mild degenerative changes with a small proximal ulnar spur of the left elbow, along with evidence of a joint effusion with prominent anterior and posterior fat pads. Dr. Schmitt stated that, while no fracture or dislocation could be identified, the history of recent trauma concerned him that there may be an occult fracture of the radial head.

In reports dated November 28 and December 6, 2012, Dr. Viral V. Patel, a Board-certified family physician, related appellant's symptoms, and diagnosed olecranon bursitis, left elbow pain and left shoulder strain. He noted that she fell at work. Dr. Patel advised appellant to return to work on November 28, 2012.

By decision dated January 10, 2013, OWCP denied appellant's claim finding that the evidence of record failed to establish that she was in the performance of duty at the time of the November 27, 2012 incident. It stated that her injury occurred when she was engaged in CFC activity and that she had not provided evidence that this activity was within the performance of her duties. OWCP accepted that appellant was a federal civilian employee who filed a timely claim, that the injury occurred and that a medical diagnosis had been given in connection with the event.

Appellant submitted a position description for a customer service clerk at the employing establishment. Her listed duties included: receiving, sorting and recording incoming work; performing a variety of clerical duties; receiving telephone calls from taxpayers and performing other duties as assigned.

By letter dated January 22, 2013, appellant requested reconsideration of the January 10, 2013 decision. She noted that the chairperson who had handled the CFC duties for many years had been unavailable in 2012. Appellant's manager and her team leader asked if she would do CFC and she agreed. Appellant stated that the incident occurred in the cafeteria of a federal building on a workday.

In an e-mail dated February 21, 2013, a case management specialist asked appellant's supervisor if she would like to comment on appellant's statement accompanying her reconsideration request. Appellant's supervisor responded on February 25, 2013 stating that she had nothing to add to appellant's statement.

By decision dated March 22, 2013, OWCP affirmed its prior decision denying appellant's claim. It found that she had not established that she was in the performance of duty at the time of the claimed incident, because she had not established that being the chairperson for CFC was part of her duties.

LEGAL PRECEDENT

An employee seeking benefits under FECA³ has the burden of establishing 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, that an injury⁴ 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

FECA provides for the payment of compensation for the disability or death of an employee resulting from personal injury sustained while in the performance of duty.⁶ 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 out of and in the course of employment.⁷ 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 employer'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.⁸

³ 5 U.S.C. §§ 8101-8193.

⁴ OWCP's regulations define a traumatic injury as a condition of the body caused by a specific event or incident or series of events of incidents, within a single workday or shift. Such condition must be caused by external force, including stress or strain, which is identifiable as to time and place of occurrence and member or function of the body affected. 20 C.F.R. § 10.5(ee).

⁵ *T.H.*, 59 ECAB 388, 393 (2008); see *Steven S. Saleh*, 55 ECAB 169, 171-72 (2003); *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

⁶ 5 U.S.C. § 8102(a).

⁷ *Charles Crawford*, 40 ECAB 474, 476-77 (1989).

⁸ *Mary Keszler*, 38 ECAB 735, 739 (1987).

ANALYSIS

Appellant alleged receiving a traumatic injury on November 27, 2012 when she landed on her left elbow after a fall. OWCP denied her claim, finding that she was not within the performance of duty. The Board finds that appellant was in the performance of duty.

In the traumatic injury claim (Form CA-1) dated November 28, 2012, appellant's supervisor checked a box indicating that the injury had occurred in the performance of duty. However, the supervisor later controverted her claim, stating that appellant was not in the performance of duty at the time of her injury because she was performing CFC funding and because she tripped over her own shoelaces. In a witness statement dated November 28, 2012, appellant's supervisor stated that appellant was putting away signs and garland when she tripped over her shoelaces and landed face down on her arms. In appellant's January 22, 2012 request for reconsideration, she noted that the chairperson who had performed CFC duties for many years had been unavailable in 2012. Her manager and her team leader asked if she would do CFC and she agreed. Appellant noted that the incident occurred in the cafeteria of a federal building on a workday.

OWCP accepted that the incident occurred as alleged but it did not find her in the performance of duty because of her CFC duties.

The Board finds that appellant's CFC duties were ancillary to her position and were in the performance of duty.

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 employer'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.⁹ The Board finds that appellant has established that she was acting in the performance of duty.

Appellant has met her burden of proof to establish that she was in the performance of duty on November 27, 2012 at the time of the accepted incident. The case is remanded to OWCP for development of the medical evidence.

CONCLUSION

Appellant established that she was in the performance of duty at the time of her November 27, 2012 incident.

⁹ *Mary Keszler, supra* note 8.

ORDER

IT IS HEREBY ORDERED THAT the March 22, 2013 decision is set aside and the case remanded to the Office of Workers' Compensation Programs for development of the medical evidence.

Issued: April 1, 2014
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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