United States Department of Labor
Employees' Compensation Appeals Board

J.S., Appellant	)	
and	)	**Docket No. 14-1532**
	)	**Issued: December 4, 2015**
DEPARTMENT OF VETERANS AFFAIRS, NORTHERN FLORIDA/SOUTHERN GEORGIA HEALTHCARE SYSTEM, Gainesville, FL, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
ALEC J. KOROMILAS, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On June 26, 2014 appellant filed a timely appeal from a January 30, 2014 merit decision of the Office of Workers' Compensation Programs (OWCP).[1] 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.

ISSUE

The issue is whether appellant met her burden of proof to establish right arm and hand injuries on March 29, 2013 while in the performance of duty.

[1] Although Ronald S. Webster, Esquire, attempted to file an appearance, appellant did not submit a signed statement, pursuant to section 501.9(b) of the Board's *Rules of Procedure* (20 C.F.R. § 501.9(b)), authorizing him to represent her. As appellant had singularly submitted a timely appeal, the Board is deeming this a *pro se* appeal.

[2] 5 U.S.C. § 8101 *et seq.*

On appeal, appellant contends that she was injured while in the performance of duty as she was performing official union work, which entitled her to official time.

FACTUAL HISTORY

On March 29, 2013 appellant, then a 40-year-old pharmacy technician, filed a traumatic injury claim alleging that on that date she developed inflammation of the tissue and tendon in her right forearm, thumb, and index finger when she was assaulted by the local union president, Muriel Newman. She stated that Ms. Newman lunged toward her while appellant was sitting on a chair and talking on her cell phone with the national union vice president, Everett Kelly. Appellant claimed that Ms. Newman grabbed appellant's right forearm, pulling and twisting it with great force.

By letter dated April 4, 2013, OWCP advised appellant of the deficiencies in her claim and requested that she submit additional factual and medical information. It also requested that the employing establishment submit medical evidence, if she had been treated at its medical facility.

On April 9, 2013 Angela F. Di Leo, a supervisor, challenged appellant's claim, contending that the injury did not occur in the performance of duty. She contended that, at the time of appellant's injury, she was on annual leave.

The employing establishment submitted an investigative report regarding the March 29, 2013 incident. The report noted the results from interviews. In her statement, appellant claimed that she was on a computer in her office gathering evidence against Ms. Newman when she became angry and told appellant to leave the office because she was no longer on official time. She refused to leave and stated that she wanted the request in writing from Ms. Newman. Ms. Newman denied appellant's request. While appellant was still on her cell phone talking to Mr. Kelly, Ms. Newman grabbed her right hand and twisted it in an attempt to pull her out of the office. She claimed that Mr. Kelly heard the whole incident.

Appellant immediately called the employing establishment police on her desk telephone. Officer Luttrell, Officer Simmonds, and Officer Perry responded to her call. Officer Luttrell escorted appellant to the employee health unit to obtain treatment for her right wrist pain. Officer Perry reported seeing no visible sign of injury.

Elizabeth Weilacher and Jan Wheeler Jr., both union stewards, and William McLaughlin, a coworker, were interviewed by the police. Each stated that on March 29, 2013 Ms. Newman requested that appellant leave the premises and turn in her keys because she was not on official time. They also heard appellant scream obscenities in response to Ms. Newman's request. Ms. Weilacher and Mr. Wheeler stated that they did not see Ms. Newman touch appellant or observe any visible injuries on appellant.

Officer Perry interviewed Ms. Newman who stated that appellant had resigned from her treasurer position due to an internal union investigation for writing checks to herself. Ms. Newman related that appellant was on annual leave and was not supposed to be on the property. She stated that appellant claimed to be getting information that had been requested by

the national office. Ms. Newman stated that she told appellant that she was not on official time and no longer worked for the union and told her to leave the union office. Appellant refused to leave and demanded that Ms. Newman put her request in writing. Ms. Newman refused to do so. She related that appellant screamed "get your hands off me" while appellant was on her cell phone, but that Ms. Newman stated that she was in the hallway during this incident and she never entered appellant's office nor touched her.

Officer Perry stated that he and Officer Luttrell returned to appellant's office to inquire about the outcome of her medical care. No arrest was made as there were no eyewitnesses to the actual alleged assault and battery, there were no visible signs of injuries.

In an April 3, 2013 investigative report, Officer Perry noted interviewing Dr. John C. Charnas, an employing establishment physician, who had evaluated appellant's condition on March 29, 2013. Dr. Charnas stated that he examined her, prescribed medication, and advised her to take the rest of the day off and return to full-duty work the next day. He stated that on April 1, 2013 he performed a follow-up evaluation and saw no type of visible injuries. Dr. Charnas noted that appellant was wearing a wrist brace that he had not prescribed.

In an April 10, 2013 letter, appellant stated that a district national union representative had asked her to provide documentation regarding an official investigation. The documents were located in a union trailer on the employing establishment's campus. Appellant related that she was originally scheduled for annual leave, but since she needed to return to the employing establishment to get the requested documents she was planning to adjust the schedule to duty time and to speak to her supervisor about the correction of her leave status. Following the March 29, 2013 incident and her evaluation in the employee health unit, she was advised by a timekeeper to adjust her leave request to reflect duty time. The correction was made on April 1, 2013. In another April 10, 2013 letter, appellant contended that she sustained an emotional condition on March 29, 2013, noting that Dr. George Shorter, an employing establishment physician, recommended that she seek medical attention for her anxiety and mental health which were related to her recent assault.

Medical records dated March 29 to April 29, 2013 addressed right upper extremity and emotional conditions, work capacity, physical restrictions, and medical treatment.

In a May 16, 2013 decision, OWCP denied appellant's claim. It found that the evidence was insufficient to establish that the claimed injury arose during the course of her employment or within the scope of compensable work factors as the employing establishment verified that she was on annual leave on the date of injury.

On June 7, 2013 appellant requested a telephone hearing with an OWCP hearing representative.

In a May 28, 2013 memorandum, Ms. Di Leo stated that appellant was on 100 percent official time for the union from June 25, 2012 to March 29, 2013. Her regular tour schedule was Monday through Friday, but it may have included evenings, nights, weekends, and holidays. Ms. Di Leo stated that changes in a tour of duty were based on the need for union duties and representations.

E-mails dated January 25, May 29, and June 3, 2013 between appellant and Stephen Steinwandt, Pharmacy Chief, indicated his request that she prepare a letter to be given to an employee at 8:00 p.m. on January 25, 2013 regarding his reassignment.[3]

During a November 13, 2013 telephone hearing, appellant stated that she went to the office on March 29, 2013 because she was working on a case. She was also researching and providing information for an investigation of Ms. Newman regarding official union business as requested by national union representative Brenda Stallard.

In a December 16, 2013 e-mail, Ms. Newman stated that appellant did not work 24 hours, 7 days a week in the union office. Her tour of duty was 7:00 a.m. to 3:30 p.m. Ms. Newman contended that appellant came into the union office on March 29, 2013 while on annual leave to work on internal union business. As appellant stated, she was retrieving information for Ms. Stallard. Ms. Newman related that appellant was retrieving financial documents which involved internal union business and union representatives could not perform internal union business while in a paid duty status.

In a January 16, 2014 letter, Jackie Sheerer, assistant human resources manager, stated that appellant was a pharmacy technician who was assigned to work 100 percent for the union. She noted that she had preapproved annual leave for March 29, 2013. Appellant did not inform her supervisor that she was on duty that day until she returned to work on April 1, 2013 and changed her leave request in the computer. Ms. Sheerer stated that the supervisor approved the amended request and, therefore, appellant was recorded to be in duty status on March 29, 2013.

Medical records dated March 29 to November 26, 2013 addressed appellant's right wrist, hand, and elbow conditions, medical treatment, and work capacity.

In a January 30, 2014 decision, an OWCP hearing representative affirmed the May 16, 2013 decision. He found that the evidence was sufficient to establish that the March 29, 2013 incident occurred as alleged and that appellant was on official time on that date. The hearing representative, however, found that the evidence established that the assault and battery were not facilitated by appellant's employment, but rather resulted from activities related to the internal business of a labor organization.

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]

[3] In a June 3, 2013 memorandum, John M. Konerman, acting inventory management supervisor, stated that appellant had provided excellent union representation. Appellant came in extra early to accommodate meetings with night shift personnel or stayed late for the evening shift crew. In an October 31, 2013 e-mail, former local union president Robert Van Slyke stated that she was covered under workers' compensation as her current job involved 100 percent representation and not only when she had a client.

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

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 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 engaged in her master's business; (2) at a place where she may reasonably be expected to be in connection with the employment; and (3) while she was reasonably fulfilling the duties of her employment or engaged in doing something incidental thereto.[7] An employee seeking benefits under FECA[8] has the burden of proof to establish by reliable, probative, and substantial evidence the essential elements of his or her case.[9]

This alone is not sufficient to establish entitlement to benefits for compensability. The concomitant requirement of an injury arising out of the employment must be shown, and this encompasses not only the work setting, but also a causal concept, the requirement being that the employment caused the injury in order for an injury to be considered as arising out of the employment, the facts of the case must show some substantial employing establishment benefit is derived or an employment requirement gave rise to the injury.[10]

Larson, states that assaults arise out of the employment either if the risk of assault is increased because of the nature or setting of the work or if the reason for the assault was a quarrel having its origin in the work. Assaults for private reasons do not arise out of the employment unless by facilitating an assault which would not otherwise be made, the employment becomes a contributing factor.[11]

---

[5] *See* 5 U.S.C. § 8102(a).

[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] *See Eugene G. Chin*, *supra* note 6 at 602.

[11] *T.H.*, 59 ECAB 388 (2008); A. Larson, *The Law of Workers' Compensation* § 8.00 (2006); *see also R.S.*, 58 ECAB 660 (2007); *John J. Carlone*, 41 ECAB 354, 356-57 (1989).

With respect to whether injuries arising in the course of union activities are related to the employment, the general rule is that union activities are personal, that attendance at a union meeting, for example is exclusively for the personal benefit of the employee and devoid of any mutual employer-employee benefit.[12]

OWCP's procedure recognizes that certain representational functions performed by employee representatives of exclusive bargaining units benefit both the employee and the employing establishment.[13] Its stated policy is that employees performing representational functions entitling them to official time are in the performance of duty and entitled to all benefits of FECA if injured in the performance of those functions. Consistent with Larson, activities relating to the internal business of a labor organization, such as soliciting new members or collecting dues, are not included.[14]

ANALYSIS

OWCP has accepted that the incident occurred as alleged, but that the incident did not occur in the course of appellant's federal employment. The Board finds that OWCP properly denied her claim as the injury on March 29, 2013 did not arise in the course of her federal employment.

At the time of the injury of appellant by Ms. Newman, appellant was on official time. As noted, however, time, place, and manner are not alone sufficient to establish entitlement to compensation. The Board has held that the singular fact that one is on paid, official time for union representation is not enough to establish that every interaction during such official time is within the performance of duty. Appellant must also establish that her injury arose out of her employment or that a factor of her employment gave rise to the assault.[15]

The evidence of record does not establish that appellant's employment contributed to or facilitated the assault of March 29, 2013. This incident was the result of activities related to the internal business of a labor organization, and, thus does not constitute a compensable factor of employment under FECA. On March 29, 2013 Ms. Newman confronted appellant because she believed that, because appellant had resigned from the union due to an investigation into her misuse of official funds, appellant had no right to be in the union office. Appellant, on the other hand, argued that she was researching and providing information to a national union official regarding other alleged improper activities of Ms. Newman. The investigation regarding internal union misconduct by Ms. Newman was not required by appellant's employment as a pharmacy technician nor was it required by her representational union duties. Further, no employing establishment benefit was derived by the internal union investigation or resulting confrontation between Ms. Newman and appellant. As there is no connection between these actions and

[12] *Bernard Redmond*, 45 ECAB 298, 304 (1994).

[13] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Performance of Duty*, Chapter 2.804.16.a (July 1997).

[14] *Id.* at Chapter 2.804.16.d (July 1997).

[15] *See Eugene G. Chin*, *supra* note 6.

appellant's employment, her claimed injuries did not occur in the performance of duty on March 29, 2013 and are not compensable under FECA.[16]

On appeal, appellant cited to Chapter 2.804.16.d of the procedure manual and contended that she was injured while in the performance of duty as she was performing official union work which entitled her to official time.[17] As found above, the record establishes that, at the time of appellant's injuries on March 29, 2013, she was collecting documents related to an internal union investigation of Ms. Newman's actions which relates to internal union business and, thus, appellant was not in the performance of duty under Chapter 2.804.16.d. The procedure manual specifically states: "Activities relating to the internal business of a labor organization, such as soliciting new members or collecting dues, are not included" in the performance of duty. Although section 2.804.16.d of the procedure manual does not specifically exclude internal union investigations *per se*, it is clear from the language that duties outside the representational functions are not accorded FECA benefits. The claimed activity was clearly behavior outside the scope of representational functions.

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 her burden of proof to establish that she sustained right arm and hand injuries on March 29, 2013 while in the performance of duty.

[16] *R.F.*, Docket No. 14-770 (issued September 29, 2015).

[17] *Supra* note 13 at Chapter 2.804.16.d (March 1994).

ORDER

IT IS HEREBY ORDERED THAT the January 30, 2014 decision of the Office of Workers' Compensation Programs is affirmed.[18]

Issued: December 4, 2015
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals

[18] James A. Haynes, Alternate Judge, participated in the original decision but was no longer a member of the Board effective November 16, 2015.