

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

J.S., Appellant

and

**DEPARTMENT OF AGRICULTURE, ANIMAL
PLANT & HEALTH INSPECTION SERVICE
WILDLIFE SERVICES, Fort Collins, CO,
Employer**

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**Docket No. 14-0994
Issued: June 24, 2015**

Appearances:
Appellant, pro se
Ashkea Herron McAllister, for the Director

Oral Argument April 29, 2015

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On March 25, 2014 appellant filed a timely appeal from an October 17, 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 has met his burden of proof to establish a traumatic injury in the performance of duty on June 2, 2012.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On October 31, 2012 appellant, then a 62-year-old science technician and wildlife specialist, filed a traumatic injury claim alleging that on June 2, 2012 he sustained a proximal interphalangeal (PIP) fracture and mallet deformity of the right ring finger when he slammed his finger into a steel pole in a dog kennel. He explained that the incident occurred at his home, which was his official duty station, while he was training his dog. When the dog tried to escape, appellant reached for the dog. Instead, he slammed his right ring finger into a steel gate pole that held up the kennel fence. He went to the emergency room and had his finger placed in a splint.

In a June 2, 2012 diagnostic report, Dr. Brian W. Zernich, a diagnostic radiologist, noted that appellant jammed his ring finger. He observed a fracture at the dorsal base of the distal phalanx. Dr. Zernich diagnosed intra-articular comminuted fracture base of the distal phalanx of the ring finger with possible avulsion fracture or separate fracture of the head of the middle phalanx.

In a November 9, 2012 statement, Christopher D. Carrillo, appellant's supervisor, controverted appellant's claim. He pointed out that appellant did not inform him of the June 2, 2012 injury until a June 14, 2012 e-mail in which appellant stated that he had injured his finger while feeding his dogs. Mr. Carrillo stated that appellant did not inform him at that time that the injury occurred in the performance of duty.

Mr. Carrillo confirmed that appellant received a dog hire allowance of \$21.00 per month, but stated that the compensation was not to purchase or maintain animals, but rather was to provide for the hire of the use of dogs (or horses) on a daily or monthly basis. He related that appellant's July 2012 monthly work report did not mention dog training or any injuries sustained during the month. Mr. Carrillo also stated that appellant's time-entry information for June 2, 2012 reflected that appellant was working on rifles, not dog training.

The employing establishment provided Wildlife Service (WS) Directive 4.101, which outlined the employing establishment's policy on tours of duty. It noted that in order to "allow maximum flexibility to perform duties and to satisfy legal requirements" WS employees would use the "maxiflex tour of duty." The guidelines later noted that maxiflex hours would be from 6:00 a.m. to 6:00 p.m., Monday through Saturday. WS employees could perform work at any time during this time band in order to meet the requirement of 80 hours per pay period. It also submitted copies of appellant's May to July 2012 monthly narrative work reports.

In a letter dated November 16, 2012, OWCP advised appellant that the evidence submitted was insufficient to establish his claim. It requested that he respond to its questionnaire and provided additional information regarding the circumstances surrounding the June 2, 2012 employment incident in order to determine whether the alleged injury occurred in the performance of duty. A similar letter was also sent to the employing establishment.

In a November 20, 2012 statement, appellant pointed out that Mr. Carrillo had confirmed that appellant was on duty during the June 2, 2012 incident and appellant argued that dog training was part of his official duties. He noted that of his five dogs he treated only one as a pet. Appellant stated that his work dogs were always kept in the kennel and that he would not keep

the other four dogs if not for work. He reported that he had been paid each month for the past nine years to keep and use his dogs for work.

Appellant explained that on June 2, 2012 he was training a young dog on essential voice commands. He noted that training the young dog could occur throughout the day depending on his time, mood, the animal's disposition, and other variables. Appellant noted that the employing establishment did not have any guidelines, policies, rules, or suggestions about animal training.

In a November 30, 2012 statement, appellant responded to OWCP's development letter. He stated that he was on duty at the time of the June 2, 2012 incident as shown by his supervisor's statement and the employing establishment's time and attendance report. Appellant reported that training animals used for work was authorized by his employing establishment. Appellant argued that dogs used in the employing establishment's work were not pets, but rather tools. He further stated that, although he received a dog hire allowance every month, he was never instructed on how these funds were to be used. Appellant noted that he was not required to report every minute or every single activity into his timekeeping system and that many routine activities, such as putting gas in a truck, were generally not reported. He included a timekeeping (MIS 2000) input screen which included "dog training" as a category.

In a December 21, 2012 statement, Mr. Carrillo asserted that appellant was not performing his job duties when caring for and feeding his dogs. He alleged that appellant's timekeeping entry for June 2, 2012 reflected that appellant worked on rifles. Mr. Carrillo stated that appellant had noted no time entries for dog training in 2012.

In a decision dated April 4, 2013, while OWCP acknowledged that appellant injured his finger caring for a dog, it denied that the June 2, 2012 injury had occurred in the performance of duty. It determined that, although appellant used a dog for work, feeding and caring for that particular dog on that date was not part of his employment duties and thus was not in the performance of his federal employment duties.

On April 9, 2013 appellant requested a hearing, which was held on July 15, 2013. He stated that he was a wildlife specialist and that he worked out of his home, which was 200 miles from an employing establishment office. Appellant explained that his work was to control wild animals such as bears. He used dogs to pursue animals that had become a problem and needed to be contained. Appellant noted that the employing establishment was aware that he used dogs as part of his work and paid him a dog hire monthly fee. He stated that he trained these dogs himself because it was difficult to purchase one that was trained to do the work. Appellant explained that he did not have a set schedule for when to train dogs. The particular dog he was training on June 2, 2012 was very young and that he trained the young dog every day, once or twice a day for short periods of time. Appellant noted that at the time of the incident he was working on two commands, to come and to stay. He stated that he did not report every interaction with this dog because it involved only a brief time.

Appellant contended that because appellant used his dogs for work and because the employing establishment paid him to maintain these dogs, training and caring for them was part

of his federal work duties. He likened providing care to work dogs to maintaining other work equipment.

Along with an August 5, 2013 statement, Mr. Carrillo included copies of appellant's reimbursement claims for his use of dogs. Between July 2011 and June 2012 appellant received a dog hire fee for one trained dog at the rate of \$21.00 per month. He explained that, according to WS Directive 2.445, the use of trained dogs was allowed. Under the supervisor's interpretation, however, because appellant was training the dog, the dog was not yet authorized for use and, therefore, was not under hire. Mr. Carrillo contended that appellant was training the young dog on his own personal time. He also clarified that appellant did not inform him of the right ring finger injury until June 14, 2012 and he did not learn that the injury was employment related until he received OWCP claim dated October 31, 2012.

The employing establishment also submitted WS Directive 2.445 titled, "Use of Dogs in WS Activities." The policy stated that, in order "to assist in resolving some wildlife damage management problems, State Directors may authorize the use of trained dogs in their respective State(s)." The Directive defined a "trained dog" as "one proficient in the skills necessary to perform a specific wildlife damage management task and that responds to its handler's commands." The Directive noted that "personnel training dogs or using dogs trained for hunting, wildlife harassment, trailing, cargo inspection, or as retrievers or decoy dogs must be in compliance with state and local laws. Additionally, they must be: (1) controllable at all times; (2) maintained in a healthy environment and be properly licensed and vaccinated; and (3) not pose a threat to people or domestic animals."

On August 15, 2013 appellant responded to Mr. Carrillo's August 5, 2013 statement and submitted corrections to the hearing transcript. He repeated that it was very difficult to find a trained dog and he contended that the monthly "dog hire" allowance was not for any specific dog, but for any dog he wished to claim. Appellant explained that he and many specialists had back-up work animals. He also noted that the W.S. Directive provided standards for the use of dogs. It did not specify that only "trained dogs" were covered.

By decision dated October 17, 2013, an OWCP hearing representative affirmed the April 4, 2013 decision. He determined that the evidence demonstrated that appellant was permitted and reimbursed to have only one dog and, therefore, he was not in the performance of duty when he was training a second, younger dog. The hearing representative noted that appellant had a dog that was trained and had been receiving monthly reimbursement, but the second dog was not authorized.

LEGAL PRECEDENT

FECA provides for the payment of compensation for the disability or death of an employee resulting from a personal injury sustained while in the performance of duty. The phrase sustained while in the performance of duty has been interpreted by the Board to be the equivalent of the commonly found requisite in workers' compensation law of arising out of and in the course of employment. In the course of employment deals with the work setting, locale,

and time of injury whereas, arising out of the employment encompasses not only the work setting but also the requirement that an employment factor caused the injury.²

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 master's business; (2) at a place where he may reasonably be expected to be in connection with the employment; and (3) while he was reasonably fulfilling the duties of his employment or engaged in doing something incidental thereto.³

OWCP recognizes four categories of off-premises employees in its procedure manual: (1) messengers, letter carriers, and chauffeurs; (2) traveling auditors and inspectors; (3) workers having a fixed place of employment who are sent on errands or special mission by their employer; and (4) workers who perform services at home for their employer. For workers who perform services at home, the issue becomes whether the employee was performing official duties or whether at the time of injury, the employee was in fact doing something for the employer.⁴

Once an employee establishes that he or she sustained an injury in the performance of duty, he or she has the burden of proof to establish that any subsequent medical condition or disability for work, for which he or she claims compensation, is causally related to the accepted injury.⁵

ANALYSIS

Appellant filed a claim alleging that he sustained a fracture and mallet deformity of the right ring finger on June 2, 2012 when he slammed his finger into a steel gate pole while training a work dog at home. OWCP determined that his injury did not arise in the performance of duty. The Board finds that the injury did occur in the performance of duty.

The Board initially notes that the June 2, 2012 injury occurred on a Saturday afternoon at appellant's home and at a time and in a place where appellant could reasonably be engaged in his employer's business.

Mr. Carillo, appellant's supervisor, suggests that the late notice by appellant regarding his injury casts doubt on whether the injury actually occurred in the performance of duty. His point is a serious one. The injury occurred on June 2, 2012 and on that date appellant was diagnosed with a fracture and mallet deformity of his right ring finger. Appellant did not notify Mr. Carillo of any work injury on June 2, 2012 nor did appellant later mention it on June 7, 2012 when they had a conversation on the telephone. Appellant advised Mr. Carillo of the incident on June 14, 2012, that he had injured his right ring finger, but appellant did not then mention that it was work

² *A.K.*, Docket No. 09-2032 (issued August 3, 2010); *C.O.*, Docket No. 09-217 (issued October 21, 2009).

³ *Kathryn S. Graham Wilburn*, 49 ECAB 458 (1998); *Mary Keszler*, 38 ECAB 735, 739 (1987).

⁴ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Performance of Duty*, Chapter 2.804.5(a) (August 1992).

⁵ *Michael E. Smith*, 50 ECAB 313 (1999).

related. On June 16, 2012 Mr. Carillo had another communication from appellant. Appellant discussed the seriousness of his injury, but did not mention that the injury was, or might be, related to work. Mr. Carillo did not become aware of the allegation that the injury was work related until an OWCP claim was filed on October 12, 2012, more than four months after the incident. Appellant noted in his statement accompanying the CA-1 Form that he did not initially report the incident as a work-related injury to his supervisor because he believed it would be considered that training the dog was being done on his own time. He later claimed, during the hearing on July 5, 2013, that he did not report the injury because he did not realize the injury was going to be that bad. Appellant confirmed that he realized its severity when he met with a specialist on June 13, 2012. He also reported that he missed no time from work as a result of this injury.

An alleged work incident does not have to be confirmed by eyewitnesses in order to establish that an employee sustained an injury in the performance of duty, but the employee's statement must be consistent with the surrounding facts and circumstances and his subsequent course of action.⁶ A consistent history of the injury, as reported on medical reports to appellant's supervisor and on the notice of injury, can also be evidence of the occurrence of the incident.⁷ Such circumstances as late notification of injury, lack of confirmation of injury, continuing to work without apparent difficulty following the alleged injury, and failure to obtain medical treatment may, if otherwise unexplained, cast sufficient doubt on an employee's statements in determining whether a *prima facie* case has been established.⁸ Although an employee's statement alleging that an injury occurred at a given time and in a given manner is of great probative value and will stand unless refuted by strong or persuasive evidence,⁹ an employee has not met this burden when inconsistencies in the evidence cast serious doubt upon the validity of the claim.¹⁰

The Board finds that appellant's failure to report a serious injury to his supervisor within the notice provisions of the law is contrary to FECA.¹¹ Section 8119 of FECA states:

“An employee injured in the performance of his duty, or someone on his behalf, shall give notice thereof.... A notice of injury or death shall--

- (a) be given within 30 days after the injury or death;
- (b) be given to the immediate superior of the employee....;
- (c) be in writing;

⁶ *Rex A. Lenk*, 35 ECAB 253, 255 (1983).

⁷ *Id.* at 255-56.

⁸ *Dorothy M. Kelsey*, 32 ECAB 998 (1981).

⁹ *Id.*

¹⁰ *Joseph A. Fournier*, 35 ECAB 1175 (1984).

¹¹ *Supra* note 1.

- (d) state the name and address of the employee;
- (e) state the year, month, day, and hour when the particular locality where the injury or death occurred;
- (f) state the cause and nature of the injury ... and;
- (g) be signed by and contain the address of the individual giving the notice.”¹²

Nonetheless, the same statute requires, in section 8122, that an original claim for compensation must be filed within three years after injury or death. While appellant clearly failed to promptly provide the statutory notice of his injury, he did not meet the statutory requirements by filing a timely claim within three years.

The inconsistent reasons appellant offered for failing to report the incident in a timely fashion do not refute the great probative value given to an appellant’s statement as to the circumstances surrounding the event. The facts have been consistently reported since the initial claim, the facts reported to the physicians by appellant were consistent, and the employing establishment did not dispute that the incident occurred as reported. Rather, the controversy surrounds whether the incident occurred in the performance of duty. Accordingly the Board affirms that the incident occurred as reported.

The Board will next determine whether the incident occurred in the performance of duty. The Board finds that “dog training” may be part of appellant’s official duty as a wildlife specialist. The timekeeping system screenshot demonstrates that “dog training” is an activity that appellant can record as work he performed. OWCP disputes appellant’s claim as he was not fulfilling the duties of his employment when he was training this specific young dog.

First, OWCP contends that appellant was not authorized as part of his employment to train this specific dog. In the October 17, 2013 decision, OWCP stated that appellant was allowed only one dog for hire in his position as a wildlife specialist. Because appellant had a dog that was already trained to perform wildlife damage management tasks, the hearing representative determined that another dog was not authorized. OWCP noted that Mr. Carrillo stated that appellant was not authorized to train a second dog. The hearing representative also stated that the expenditure reports reflected an ongoing expense for one trained dog at the rate of \$21.00 a month. The Board notes, however, that the reimbursement forms only indicate that appellant was paid a monthly allowance of \$21.00 for “dog hire.” Nowhere does it provide that the monthly allowance was for only one trained dog. Furthermore, the forms do not identify for which dog appellant could use the allowance or for what activities it covered. The Board finds that there is no evidence that appellant was prohibited from training more than one dog or from training a specific dog as part of his official duties for the employing establishment.

On the contrary, the Board finds that the evidence demonstrates that appellant was allowed to train and use more than one dog in the fulfillment of his duties. The employing

¹² *Supra* note 1 at 8119.

establishment provided WS Directive 2.445, which stipulated that “to assist in resolving some wildlife damage management problems, State Directors may authorize the use of trained dogs in their respective State(s).” The Directive further states that “personnel training dogs or using dogs trained for hunting, wildlife harassment, trailing cargo inspection, or as retrievers or decoy dogs must be in compliance with state and local laws. Additionally, the following criteria must be followed: dog(s) must be controllable at all times; dog(s) that pose a threat to people or domestic animals are not to be used; and all dogs must be maintained in a healthy environment and be properly licensed and vaccinated.

The Board notes that WS Directive 2.445 does not prohibit the use of multiple dogs. The employing establishment has not provided objective proof to indicate which of appellant’s dogs he was authorized to use in his employment. In addition, the evidence does not identify which of appellant’s dogs the employing establishment had approved for training or how appellant could use certain specific dogs in his employment. There is no evidence, other than Mr. Carrillo’s statements, that the specific dog appellant was training was not an “authorized” dog.

Second, OWCP alleged that appellant was not acting in the performance of duty when he trained this specific dog because the dog was too young to be of substantial benefit to the employing establishment. It pointed out that appellant was training a 5-month-old dog to obey general commands such as “come” and “stay” and not specific commands to perform wildlife tasks.

The Board notes that, although the employing establishment’s time log system lists “dog training” as an employment activity, it does not define the category. On the contrary, WS Directive 2.445 required that all dogs must be “controllable at all times” and “not pose a threat to people or domestic animals.” This requirement implies that a trained dog authorized for use by the employing establishment must follow basic commands. Appellant explained that he constantly trained his work dogs to ensure that they continued to be able to perform their duties. Thus, the Board finds that when appellant was training this young dog to “come” and “stay” he was reasonably fulfilling the duties of his employment.

Appellant has testified that he was often expected to use his own personal tools such as traps, guns, and his own vehicle when performing his employment duties and did not have to obtain prior authorization to use these tools. Given the level of discretion that appellant had in order to perform his employment duties, the Board finds that he had broad latitude to determine how many dogs he needed to train as part of his duties for the employing establishment and the necessary training techniques to employ in order to ensure that these dogs performed the duties helpful to his position.

The Board finds that appellant’s June 2, 2012 injury occurred in the performance of duty when he was training his dog.¹³ Accordingly, the case will be remanded to OWCP to consider the medical evidence in order to determine whether appellant sustained a diagnosed medical condition causally related to the June 2, 2012 employment incident.

¹³ *Supra* note 6.

CONCLUSION

The Board finds appellant has established that he suffered an injury in the performance of duty and the case is remanded for evaluation of the medical evidence.

ORDER

IT IS HEREBY ORDERED THAT the October 17, 2013 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further action consistent with this decision of the Board.

Issued: June 24, 2015
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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