United States Department of Labor
Employees' Compensation Appeals Board

R.F., Appellant	)	
and	)	**Docket No. 14-0770**
	)	**Issued: September 29, 2015**
U.S. POSTAL SERVICE, PROCESSING & DISTRIBUTION CENTER, Little Rock, AR, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On February 21, 2014 appellant filed a timely appeal from a September 23, 2013 merit decision and a January 21, 2014 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[1] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether appellant has established an emotional condition in the performance of duty; and (2) whether OWCP properly denied merit review of the claim under 5 U.S.C. § 8128(a).

[1] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

The case has previously been before the Board. On April 18, 2012 appellant, a 39-year old mail handler and local union representative, filed a claim alleging an emotional condition resulting from an altercation with a coworker that date. He alleged that the coworker (Joe Smith) began talking with him about an upcoming union election and a verbal and physical altercation occurred. Appellant alleged that he was a union steward, on official time, and engaged in the performance of duty at the time of the incident. OWCP found that the altercation was not a compensable work factor as it related to private union business.

Appellant appealed that decision and in its May 21, 2013 decision, the Board remanded the case for additional factual development.[2] It noted that OWCP procedures provided specific guidelines for developing cases involving an alleged injury while a claimant was performing representational functions and that OWCP had failed to follow those procedure in developing the factual aspect of this case.

The Board cited OWCP procedure manual which states that when an employee claims to have been injured while performing representational functions, an inquiry should be made to determine whether the employee was on, or would have been eligible to be on, official time and in the performance of duty at the time of the injury.[3] The history of the case as set forth in the Board's prior decision is incorporated herein by reference.

Upon return of the case record, by letter dated June 17, 2013, OWCP requested information from the employing establishment as to whether appellant was on official time and in the performance of duty on April 18, 2012 at the time of the incident. In a response received on July 17, 2013, the employing establishment confirmed, through time and attendance reports, that appellant was on official time on April 18, 2012 and was within his official hours of duty at the time of the altercation on that date.

As to whether appellant was actually in the performance of duty at the time of the altercation, however, Alicia A. Settles, a human resources specialist responding on behalf of the employing establishment, responded: "No, [appellant] was just walking around on the workroom floor." There were no witnesses to the incident and the reports of both appellant and Mr. Smith differed considerably as to the circumstances surrounding the incident. The employing establishment had conducted an investigation, interviewed witnesses, and concluded that at the time of the incident appellant was not in the performance of duty.

Appellant was provided copies of the employing establishment response and afforded an opportunity to provide additional evidence to support his burden of proof to establish that he was in the performance of duty at the time of the incident.

[2] Docket No. 12-1816 (issued May 21, 2013).

[3] *Id.* *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Performance of Duty*, Chapter 2.804.16 (September 2010).

On August 26, 2013 appellant submitted a response stating that on April 18, 2012 he had just left his wife's office in the Human Resources office and was on his way to look for a supervisor "Allen." While on his way to look for that supervisor, he was confronted by the coworker, Mr. Smith. Mr. Smith allegedly, with his forearm, pushed appellant in the chest and later pushed appellant in the face with his hand. Appellant claimed that he did not know why Mr. Smith was mad but appellant stated that he had not supported Mr. Smith in the upcoming election for president of the local branch of the union. He claimed that Mr. Smith could have been upset because appellant had reported that his supporters had been improperly distributing election literature on the workroom floor. Appellant also claimed that Mr. Smith was angry at him for allegedly disparaging Mr. Smith to coworkers, which was detrimental to Mr. Smith's election campaign.

Mr. Smith denied that he had ever touched appellant. He claimed that any cuts on appellant's face would have been self-inflicted. Mr. Smith claimed that this type of behavior was a union tactic. He claimed he was running against Bobby Nation for president and appellant was a local steward under Mr. Nation.

By decision dated September 23, 2013, OWCP denied the claim for compensation finding that appellant had not established a compensable work factor. It found appellant had failed to establish that he was in the performance of duty at the time of the altercation with the coworker. Citing *Sylvester Blaze*,[4] OWCP found that the incident arose out of internal union business and did not contribute to or was facilitated by the workplace. It was motived by a personal union matter between appellant and the coworker and did not arise in the performance of duty.

In a letter dated September 26, 2013, appellant requested reconsideration. He stated that he was not just walking around at the time of the April 18, 2012 incident, and reiterated that he was looking for a supervisor about a potential grievance and had been looking for job information relevant to union members. Appellant resubmitted statements from other coworkers and contended that the injury compensation specialist handling the case was biased.

By decision dated January 21, 2014, OWCP denied the claim without considering the merits. It found the evidence submitted was either duplicative or irrelevant to the underlying issue of whether appellant was in the performance of duty at the time of the incident.

LEGAL PRECEDENT -- ISSUE 1

Workers' compensation law does not apply to each and every injury or illness that is somehow related to an employee's employment. There are situations where an injury or illness has some connection with the employment but nevertheless does not come within the coverage of workers' compensation. These injuries occur in the course of the employment and have some kind of causal connection with it but nevertheless are not covered because they are found not to have arisen out of the employment.[5]

[4] *Sylvester Blaze*, 37 ECAB 851 (1986).

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

The Board has adhered to the principle that union activities are personal in nature and are not considered to be within the course of employment.[6] Attendance at a union meeting, for example, is exclusively for the personal benefit of the employee and devoid of any mutual employer-employee benefit that would bring it within the course of employment.[7]

The Board has recognized an exception to this general rule when employees performing representational functions, which entitle them to official time, are injured when in the performance of duty. The underlying rationale for this exception is that an activity undertaken by an employee in the capacity of a union official may simultaneously serve the interest of the employer.[8] OWCP procedure manual indicates that "representational functions" include "authorized activities undertaken by employees on behalf of other employees pursuant to such employees' right to representation under statute, regulation, executive order, or terms of a collective bargaining agreement.[9]

ANALYSIS -- ISSUE 1

In the present case, OWCP found that appellant had not established a compensable work factor. It accepted that an incident occurred on April 18, 2012, and confirmed that he was on official time at the time of the incident;[10] however, despite the fact that he was on official time, OWCP found that he was outside the performance of duty as the dispute involved internal union activity.

The Board has interpreted the phrase sustained while in the performance of duty as the equivalent of the coverage formula commonly found in workers' compensation laws, namely arising out of and in the course of employment.[11] Arising in the course of employment relates to time, place, and work activity: to arise in the course of employment, an injury must occur at a time when the employee may reasonably be said to be engaged in his employer's business, at a place where he may reasonably be expected to be in connection with his employment, and while he was reasonably fulfilling the duties of his employment or engaged in doing something incidental thereto.[12] The Board finds 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.

[6] *Jimmy E. Norred*, 36 ECAB 726 (1985).

[7] *C.M.*, Docket No. 10-753 (issued December 15, 2010).

[8] *Marie Boylan*, 45 ECAB 338, 342-43 (1994).

[9] Federal (FECA) Procedure Manual, *supra* note 3 at Chapter 2.804.16(b).

[10] The Board will accept the employing establishment's determination as to whether a union representative was on official time. *See* Federal (FECA) Procedure Manual, *supra* note 3 at Chapter 2.804.16(e).

[11] *Bernard D. Blum*, 1 ECAB 1 (1947).

[12] *Carmen B. Gutierrez*, 7 ECAB 58, 59 (1954).

In this case, the record establishes that although appellant had been on official union time, there is no evidence to establish that he was in the performance of duty at the time of the altercation. He acknowledged that he had just left his wife's office, in the human resources department, and reportedly was on his way to speak with a supervisor.

As to the substance of the altercation, the evidence indicated that the coworker confronted appellant over an upcoming union election. There were no witnesses at the time of the alleged altercation, but there is also no dispute that the substance of the altercation was solely related to local union matters. This confrontation is more properly characterized as a private dispute unrelated to job duties.[13] The burden of proof is on appellant to establish that he was in the performance of duty at the time of the altercation. OWCP procedure manual explicitly states that activities relating to the internal business of a labor organization, such as soliciting new members or collecting dues, are not considered in the performance of duties.[14] The Board finds this altercation to have been a diversion from the performance of duty and became a private dispute between the two factions of the local union.

The Board finds that as this matter was solely related to internal union business, appellant has failed to establish a compensable work factor with respect to the April 18, 2012 incident.[15]

LEGAL PRECEDENT -- ISSUE 2

To require OWCP to reopen a case for merit review under section 8128(a), its regulations provide that the evidence or 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 it; or (3) constitute relevant and pertinent new evidence not previously considered by OWCP.[16] Section 10.608(b) of its regulations provide that when an application for reconsideration does not meet at least one of the three requirements enumerated under section 10.606(b)(3), OWCP will deny the application without reopening the case for a review on the merits.

ANALYSIS -- ISSUE 2

Following OWCP's September 23, 2013 denial of the claim for compensation, appellant filed a timely request for reconsideration. In support of his request, he disputed the employing establishment's contention that he was not in the performance of duty but was "just walking around" at the time of the April 18, 2012 incident. Appellant reiterated that he was looking for a

[13] This situation relates more similarly to the importing of personal, private disputes (*e.g.*, *Edward Savage, Jr.*, 46 ECAB 346 (1994)) than to the "friction and strain" doctrine referenced in the Federal (FECA) Procedure Manual, *supra* note 3 at Chapter 2.804(12). Further, the Board finds this case to be beyond the facts in *Joseph H. McHale*, 45 ECAB 669 (1994) (where a union-related discussion was found to be an insubstantial deviation from the performance of duty).

[14] Federal (FECA) Procedure Manual, *supra* note 3 at Chapter 2.804.16(d).

[15] As appellant has not established any compensable employment factors, the Board need not consider the medical evidence of record; *see Margaret S. Krzycki*, 43 ECAB 496, 502-03 (1992).

[16] 20 C.F.R. § 10.606(b)(3); *D.K.*, 59 ECAB 141, 146 (2007).

supervisor about a potential grievance and had been reviewing job information relevant to union members. He resubmitted statements from other coworkers and contended that the injury compensation specialist handling the case was biased.

In its January 21, 2014 decision, OWCP found the evidence duplicative of documents already submitted into the record and his argument regarding the bias of the injury compensation specialist was found to be irrelevant to the underlying issue of whether appellant was in the performance of duty at the time of the altercation.

The issue presented on appeal is whether appellant met any of the requirements of 20 C.F.R. § 10.606(b)(3), requiring OWCP to reopen the case for review of the merits of his claim. If a claimant fails to submit relevant evidence not previously of record, or advance legal contentions of facts not previously considered, OWCP has the discretion to refuse to reopen a case for further consideration of the merits.[17] The statements from the coworkers were previously of record and would not be sufficient to warrant a review of the merits. As for the new argument about the bias of the injury compensation specialist, the Board finds that argument irrelevant to the underlying issue and also insufficient to warrant a review of the merits.

The Board accordingly finds that appellant did not meet any of the requirements of 20 C.F.R. § 10.606(b)(3). Appellant did not show that OWCP erroneously applied or interpreted a specific point of law, advance a relevant legal argument not previously considered by OWCP or submit relevant and pertinent evidence not previously considered. Pursuant to 20 C.F.R. § 10.608, OWCP properly denied merit review.

CONCLUSION

The Board finds that appellant has failed to establish his burden of proof to establish an emotion condition causally related to employment factors. The Board further finds that OWCP properly denied appellant's request for review of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

[17] *Pamela I. Holmes*, 49 ECAB 581, 586 (1998).

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated January 21, 2014 and September 23, 2013 are affirmed.[18]

Issued: September 29, 2015
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

[18] Michael E. Groom, Alternate Judge, participated in the preparation of this decision but was no longer a member of the Board effective December 27, 2014.