United States Department of Labor
Employees' Compensation Appeals Board

O.L., Appellant	)	
and	)	**Docket No. 16-0840**
	)	**Issued: August 28, 2017**
DEPARTMENT OF THE NAVY, NAVAL FACILITIES ENGINEERING, Wahiawa, HI, Employer	)	

Appearances:
Alan J. Shapiro, Esq., for the appellant[1]
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
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On March 17, 2016 appellant, through counsel, filed a timely appeal from a February 18, 2016 merit decision of the Office of Workers' Compensation Programs (OWCP). 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.

[1] In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; *see also* 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

[2] 5 U.S.C. § 8101 *et seq.*

ISSUE

The issue is whether appellant sustained an injury in the performance of duty on June 30, 2014.

On appeal counsel contends that OWCP's decisions are contrary to fact and law.

FACTUAL HISTORY

On September 12, 2014 appellant, then a 37-year-old sheet metal mechanic, filed a traumatic injury claim (Form CA-1) alleging that on June 30, 2014 Staff Sergeant (Sgt.) M.M. kicked him hard in the back while he was sitting at a desk, aggravating previous pain in his left shoulder, neck, lower back, and tail bone.

In a statement signed on June 30, 2014, appellant stated that at 1:00 p.m., in building 1207, he was taking a training course on a computer when M.M. came from behind and kicked his chair with such a tremendous force that the chair rolled forward and stopped at the desk. He stated that when he asked M.M. why he kicked the chair, M.M. replied that appellant should be working and not slacking on government time.

In another statement signed on July 3, 2014, appellant stated that on June 30, 2014, after attending an awards ceremony, he went to see S.K., the supervisor for another shop, on the way back to his compound. He indicated that he walked into S.K.'s office around 9:45 a.m., and told him that he was there to finish the rest of his security awareness training courses on the computer, and that he replied "sure." Appellant noted that, after he completed the course, S.K. had trouble printing the certificate, and stated that he had to be somewhere else, so appellant should try to print it himself. He stated that he tried for at least 10 minutes and was unsuccessful, and that he was sitting in front of the computer with his hand resting on his chin, and waiting for S.K. to return, when he saw the reflection of a man in uniform approaching him. The man in uniform kicked the back of the chair and stated "get back to work, who do you think you are, get back to work, you can[no]t be sleeping on government time." Appellant faced his attacker and asked why he kicked the back of the chair. He noted that he did not even know the man, but he kept pointing his finger in appellant's face and asked appellant to identify his boss so he could tell him that appellant was sleeping when he should have been working. Appellant indicated that he then asked the man who his boss was, and stated that he was not sleeping. He stated that, after he left, he was informed that the man in uniform was M.M. Appellant noted that he went to the emergency room the next day.

In a letter dated July 30, 2014, the employing establishment confirmed that on June 30, 2014 appellant notified it that he sustained an injury when a service member kicked his chair and that it had conducted an investigation into the matter and concluded that appellant was not in the performance of duty as he was away from his assigned work area at the time he sustained the injury. It also noted that appellant had not produced evidence to substantiate that he was temporarily totally disabled from performing his light-duty assignment.

In a statement dated July 3, 2014, S.K. stated that on June 30, 2014 at approximately 8:00 to 8:30 a.m., appellant entered his office at building 1207, located at the Civil Engineer

Compound. He indicated that he assumed that appellant was there to check if he would be able to log into the computer to complete his required 1A training. S.K. indicated that he was surprised to see appellant as he did not request the visit. Appellant informed him that he was just making his way back to the NAVFAC compound as he had just left the "Years in Service" ceremony at the Memorial Theater and wanted to stop by and say hello. As he was there, S.K. asked appellant to log onto the computer and check his e-mail to see if he received any notification from NMCI stating that the repair for his log on was complete. At the same time S.K. left a message with C.K., appellant's supervisor, to inform him that appellant was in his office testing, trying to complete the 1A training. He noted that they were able to locate the e-mail from NMCI that confirmed that the repair to appellant's log on was completed. Therefore, S.K. proceeded to open the required training and explained to appellant that he needed to complete and pass the course without shutting down the program. He noted that at approximately 10:10 a.m. appellant was able to complete the testing and was attempting to print his certificate. However, at that time connectivity needed to be completed between appellant's log in and the printer, and he did not have the time to load the printer to the computer. S.K. therefore suggested that appellant return to the NAVFAC compound and indicated that he would contact appellant at a later time to complete his training by printing his certificate. Appellant indicated that he had to go the restroom, and S.K. reminded him that he would need to return and log off the computer before returning to the NAVFAC compound. He indicated that appellant proceeded to leave for his appointment at approximately 10:30 a.m.

An incident report for the employing establishment indicated that on June 30, 2014 at approximately 1:00 p.m., appellant stated that he was conducting computer-based training at the training center/service school in building 1207 when an unknown male approached him from behind and kicked his chair with such force that it collided into the desk. Appellant indicated that there were four other people in the building who identified the other party as M.M. He then left the building and notified his supervisor, who informed him to call security. An unidentified witness told the investigator that at approximately 1:00 p.m. he observed appellant sitting at the computer desk with his head down. M.M. approached him from behind and kicked his chair and verbally told appellant to wake-up. The witness indicated that on a scale of 1 to 10 the amount of force with which M.M. kicked appellant's chair was a 3. M.M. was read his rights, advised that he was suspected of simple assault, and he then indicated his desire to remain silent until he consulted a lawyer.

In an August 12, 2014 note, Dr. Mary Ricardo-Dukelow, an internist, noted that appellant suffered from an assault injury on June 30, 2014. She noted that appellant was seen at Tripler Army Medical Center on July 1, 2014 and continued to suffer from shoulder and low back pain. Dr. Ricardo-Dukelow provided work restrictions for appellant, and noted that he would have a magnetic resonance imaging (MRI) scan as well as an orthopedics and neurology evaluation because his condition was worsening. She noted that she would reevaluate appellant in three weeks.

In a September 16, 2014 medical referral form, Dr. Patrick C. Lowry, a physician Board-certified in occupational medicine and Public Health and General Preventive Medicine, noted that appellant had an occupational injury and was restricted to working half days light duty.

By letter dated September 16, 2014, OWCP informed appellant that further information was needed in support of his claim and afforded him 30 days to submit the additional evidence.

In a September 19, 2014 report, Dr. Bernard Portner, a Board-certified physiatrist, diagnosed appellant with lumbago, lumbar strain and sprain, cervicalgia, neck strain and sprain, and pain in joint shoulder region. He described appellant's work injury history. Dr. Portner listed the date of injury as June 30, 2014 and released appellant to return to work light-duty part time.

By decision dated October 22, 2014, OWCP denied appellant's claim. It determined that although he established that the employment incident occurred and that a medical condition had been diagnosed in connection with the incident, his claim was denied because he had not established the element of performance of duty, as the condition arose outside the course of his employment. OWCP noted that appellant was not at his assigned duty station at the time of the alleged injury and that therefore he did not establish that he was injured in the performance of duty.

In an October 22, 2014 note, Dr. Ricardo-Dukelow noted that appellant suffered from an assault injury from June 30, 2014, and continued to suffer from severe lower back pain and shoulder pain. She reiterated his restrictions.

On November 17, 2014 appellant requested reconsideration. He stated that the allegation that he was not at his assigned duty station at the time of the alleged injury was incorrect. Appellant stated that his supervisor, C.K., had authorized him to be an "escort" which required specific training at building 1207. He noted that the reason he was to become an escort was that he was on light-duty status, and his supervisor did not assign daily task work to perform, but instead had him sit at a locker where spare parts were kept. Appellant stated that the escort training involved a test that must be taken in consecutive days over a three-day period. He stated that he took the test on June 26, 27, and 30, 2014. Appellant stated that on June 30, 2014 he went to building 1207 to finish up the test after an awards ceremony, and that he was there with his supervisor's knowledge, request, and permission. He noted that there were problems with the computer that morning and that S.K. spoke with his supervisor who was aware that he was taking the test and that the computer had problems. Appellant noted that he was unable to get his test results until approximately 12:00 p.m., and that the computer problem prevented him from getting his certificate for completing the test. He stated that S.K. told him around 12:45 p.m. that he had to leave the building. He then gave appellant the option of returning to his shop or waiting for the certificate to print, he chose to wait. Appellant alleged that he was assaulted by M.M. at approximately 1:00 p.m. while waiting for S.K. to return. He noted that at no point did his supervisor tell him to return to the shop, and to his knowledge his only assignment for June 30, 2014 was to sit in the locker that held spare parts.

By decision dated January 29, 2015, OWCP denied merit review. It found that the evidence did not establish that the incident occurred in the course of his federal employment. OWCP further determined that the evidence did not establish that the incident described caused injuries to appellant's shoulder and back.

By letter dated October 9, 2015, appellant, through counsel, submitted an October 1, 2015 sworn affidavit wherein appellant stated under oath the same allegations set forth in his November 14, 2014 letter. He also resubmitted the September 19, 2014 report by Dr. Portner and the August 12, 2014 note by Dr. Ricardo-Dukelow. In a new October 1, 2014 note, Dr. Dukelow reiterated that appellant suffered from an assault injury on June 30, 2014. She noted that his restrictions continued as he continued to suffer from shoulder and back pain.

In an October 23, 2015 letter, the employing establishment argued that appellant had not submitted information sufficient to merit further review.

By decision dated February 18, 2016, OWCP denied modification of the October 22, 2014 decision.

LEGAL PRECEDENT

An employee seeking benefits under FECA has the burden of proof to establish 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 filed within the applicable time limitation, that an injury was sustained while in the performance of duty as alleged, and that any disability and/or specific condition for which compensation is claimed are causally related to the employment injury.[3] These are the essential elements of each and every compensation claim regardless of whether the claim is predicated on a traumatic injury or an occupational disease.[4]

OWCP regulations at 20 C.F.R. § 10.5(ee) define a traumatic injury as a condition of the body caused by a specific event or incident or series of events or incidents within a single workday or shift.[5] To determine whether a federal employee has sustained a traumatic injury in the performance of duty, it must first be determined whether a fact of injury has been established.[6] First the employee must submit sufficient evidence to establish that he actually experienced the employment incident at the time, place, and in the manner alleged.[7] Second, the employee must submit sufficient evidence, generally only in the form of medical evidence, to establish that the employment incident caused a personal injury.[8]

[3] *C.S.*, Docket No. 08-1585 (issued March 3, 2009).

[4] *S.P.*, 59 ECAB 184 (2007); *Joe D. Cameron*, 41 ECAB 153 (1989).

[5] 20 C.F.R. § 10.5(ee).

[6] *B.F.*, Docket No. 09-60 (issued March 17, 2009).

[7] *D.B.*, 58 ECAB 464 (2007); *David Apgar*, 57 ECAB 137 (2005).

[8] *C.B.*, Docket No. 08-1583 (issued December 9, 2008); *D.G.*, 59 ECAB 734 (2008); *Bonnie A. Contreras*, 57 ECAB 364 (2006).

It is the claimant's burden of proof to submit sufficient evidence necessary for OWCP to make a determination as to whether an employment incident occurred as alleged. The evidence must be sufficient to establish whether the claimant was in the course of federal employment at the time of the incident, so that a proper determination may be made as to whether an injury occurred while in the performance of duty.[9]

Regarding the phrase "in the course of employment," the Board has accepted the general rule of workers' compensation law that, as to employees having fixed hours and places of work, injuries occurring on the premises of the employing establishment, while the employees are going to and from work, before or after work hours, or at lunch time, are compensable.[10] An injury is said to arise in the course of employment when it takes place within the period of the employment, at a place where the employee reasonably may be, and while the employee is fulfilling employment duties or is engaged in doing something incidental thereto. Arising out of employment relates to the causal connection between the employment and the injury claimed.[11]

ANALYSIS

The Board finds that the case is not in posture for decision.

OWCP procedures[12] provide that, if the employee was on premises, but not performing regular work at the time of the alleged injury, the record must show exactly what the employee was doing when injured and the location of the area where the injury occurred in relation to the regular workplace. In disability cases both the official superior and the claimant should submit a statement showing precisely what the employee was doing when injured. If the initial reports and statements do not contain precise information in this regard, the official superior should be asked to submit a supplemental clarifying statement.[13] When the official superior has no knowledge of the facts and circumstances of the injury, statements should be obtained from coworkers or other witnesses who may have such knowledge. A conference should be held when conflicting statements are presented.[14]

The time of the accepted incident was approximately 1:00 p.m. on June 30, 2014. Appellant indicated that he was on premises, but in a different part of the compound from his duty station, when he walked into S.K.'s office following attendance at an awards ceremony. S.K. indicated that appellant came to his office earlier at approximately 8:00 to 8:30 a.m. Both S.K. and appellant agreed that he notified appellant's supervisor that he was in his office and that he was going to take the 1A training. Appellant completed the training assignment, but at some point there was a problem with him printing his certificate. S.K. indicated that at approximately

[9] *T.S.*, Docket No. 09-2184 (issued June 9, 2010).

[10] *A.C.*, Docket No. 15-0767 (issued July 15, 2015).

[11] *B.C.*, Docket No. 09-653 (issued December 24, 2009).

[12] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Performance of Duty*, Chapter 2.804.4(c) (August 1992).

[13] *Id.*

[14] *Id.*

10:10 a.m. he told appellant that he did not have the time to resolve the problem as he had an appointment, and suggested that appellant return to his compound and that he would contact him later about printing the certificate. He noted that appellant stated that he needed to go to the restroom, and S.K. reminded him that upon his return he should log off the computer and return to his work center.

Appellant's description of events corresponds with that of S.K., except that he relates that he was unable to obtain his test results until 12:00 p.m. and that he could not print the test results at that time. He has also noted that he did not return to his shop when he was unable to print the test results, but rather waited for S.K. to return to help him with the printer, because he did not have any assigned duties scheduled that day except to sit in the locker that held spare parts, due to his light work status.

As previously noted, if the alleged injury occurs on premises, and appellant was not performing his regular work at the time, OWCP is to obtain a statement from appellant's official superior, C.K. as to what appellant was doing at the time of injury. If there are conflicting statements of record, a conference should be held to clarify the information of record. While the evidence of record contains statements from S.K., he was not appellant's official superior. OWCP should have asked appellant's supervisor, C.K., for a statement to clarify whether appellant was authorized to be in building 1207 at 1:00 p.m., or whether prior authorization was withdrawn and appellant had abandoned his employment. If the record thereafter contains conflicting statements, OWCP should conference the case to resolve the conflict. The record does not establish that OWCP followed its procedures in denying appellant's claim as not in the performance of duty.

This case will therefore be remanded for further development of the factual evidence from appellant's official superior. After such proceedings as necessary, OWCP shall issue a *de novo* decision.

CONCLUSION

The Board finds that the case is not in posture for decision as to whether appellant sustained an injury in the performance of duty on June 30, 2014.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated February 18, 2016 is set aside and the case is remanded for further proceeding consistent with this opinion.

Issued: August 28, 2017
Washington, DC

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

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

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board