United States Department of Labor
Employees' Compensation Appeals Board

D.B., Appellant	)	
and	)	**Docket No. 16-0818**
	)	**Issued: January 17, 2017**
DEPARTMENT OF THE TREASURY, INTERNAL REVENUE SERVICE, Covington, KY, 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:
PATRICIA H. FITZGERALD, Deputy Chief Judge
COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On March 15, 2016 appellant, through counsel, filed a timely appeal from a January 13, 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.

ISSUE

The issue is whether appellant sustained an injury on April 7, 2015 while in the performance of duty.

[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.*

FACTUAL HISTORY

On May 6, 2015 appellant, then a 59-year-old tax examining technician, filed a traumatic injury claim (Form CA-1) alleging that on April 7, 2015 she was sitting at her desk working on the computer and listening to music when she received a hard shove to her right shoulder from her manager at 7:45 a.m. She claimed injury to the right side of her neck, right shoulder and right arm. Barbara Crapser, the department manager, controverted the claim. She indicated that appellant's regular work hours were from 6:00 a.m. to 2:30 p.m. and that appellant was asleep at the time of the alleged injury and charged absent without leave (AWOL). Ms. Crapser also stated that it was misconduct to be asleep while on duty. Appellant stopped work on April 7, 2015 and returned to work on May 5, 2015. No medical evidence was received with the claim.

In a May 22, 2015 letter, OWCP advised appellant of the deficiencies in her claim and afforded her 30 days to submit additional evidence. Specifically, appellant was asked to submit a diagnosis of any condition resulting from her injury, evidence to support that she was injured while in the performance of duty, and a physician's opinion as to how her injury resulted in the diagnosed condition. In a separate letter dated May 22, 2015, OWCP requested additional factual information from the employing establishment so that it could be determined whether appellant was in the performance of duty when injured.

In response to the development letter, appellant submitted a June 16, 2015 narrative statement alleging that at 7:45 a.m. she was at her desk working on the computer and listening to music when she felt a hard shove on her right shoulder. She indicated that she had turned around yelling "I am not asleep why are you putting your hands on me." Appellant explained that she saw Ms. Richardson standing there looking at her, and that, without saying a word, Ms. Richardson left. She also recounted that she went to the health unit to report the assault, spoke to a work therapist and went to the union office.

Appellant submitted a June 12, 2015 temporary light/limited-duty job offer, and several reports from Dr. Patrick J. Brunner, a chiropractor. These included: six duty status reports (Forms CA-5) dated May 11 and 12, June 10, 15, 17 and 22, 2015, a May 11, 2015 return to work slip, a June 1, 2015 chiropractor manipulation therapy slip, an April 8, 2015 narrative report and office notes from April 10 to June 8, 2015.

In his April 8, 2015 report, Dr. Brunner noted the history of injury as occurring on April 7, 2015 while at work when appellant was shoved in the back, right shoulder area. Physical examination findings were provided and x-rays were obtained of the cervical and lumbosacral spine and right shoulder. Dr. Brunner found that taking into consideration appellant's past medical history, present history, physical evaluation and radiographic evaluation, it appeared that she sustained an acute traumatic shoulder sprain/strain, cervicothoracic sprain/strain, lumbosacral sprain/strain, aggravation of preexisting discogenic spondylosis of the cervical spine and lumbosacral spine with associated cervical brachial neuritis, lumbar plexus neuritis, and an aggravation of right shoulder cervical stable Mumford procedure. Dr. Brunner provided ultrasound, electrical stimulation and light manipulation and took appellant off work until the following Monday.

In a June 15, 2015 statement, Mary Denise Richardson, appellant's supervisor, indicated that she was making her usual morning rounds of saying "good morning" to all her employees,

when she found appellant sleeping, as she often was, at her desk with her head hanging down towards her chest. She called appellant's name three times, louder each time, and she did not wake up. Ms. Richardson started to get another manager to witness appellant sleeping yet again, but decided instead to try and wake her up. When she reached appellant's desk, appellant was leaning towards the right approximately five to six inches. Ms. Richardson called appellant's name, but received no response. She called it a second time only much louder and very lightly laid her hand on her right arm, just above the elbow so that, if it startled her, she would not fall out of the chair. Appellant woke up slowly, lifted her head and stated "I'm not sleeping" and then "do not touch me." Ms. Richardson indicated that this was at 7:22 a.m. and she went directly to the department's manager, Ms. Crapser, to explain what happened and was told to write up an AWOL charge for sleeping. She indicated that appellant left sometime thereafter and told a coworker that she had been shoved into the desk. Ms. Richardson indicated that there was an open investigation into the matter.

By decision dated June 25, 2015, OWCP denied appellant's claim as the medical component of fact of injury had not been met. It found that, as appellant's chiropractor, Dr. Brunner, had not diagnosed a subluxation of the spine, he was not considered a physician and thus his reports could not establish the medical portion of her claim.

On July 16, 2015 OWCP received appellant's July 15, 2015 request for reconsideration.

Appellant submitted duplicative evidence previously of record along with new evidence from Dr. Brunner. In a July 8, 2015 letter, Dr. Brunner indicated that at the time of her initial evaluation on April 8, 2015, appellant was diagnosed with sprain/strains to the cervicothoracic and lumbar area and right shoulder. He indicated that he was not aware that her diagnosis of subluxation had to be demonstrated by an x-ray. Dr. Brunner reviewed the April 8, 2015 x-rays and indicated that they showed subluxation caused by the accident as there was reference to pelvic unleveling, misalignment of the lumbar films and multiple levels of degeneration resulting in subluxation and multilevel degeneration with changes to the vertebral alignment. He indicated that there was radiographic evidence of subluxation at L3-4, L4-5 and L5-S1. Dr. Brunner also indicated that the cerviocothoracic films showed a flattening of the normal cervical curve, which indicated a flexion-extension subluxation malpositioning. He concluded that the diagnoses should include subluxations of C1 through T9-T10 and L1 through S1. Dr. Brunner also indicated that appellant was on temporary disability and was working a reduced work schedule. Copies of his office notes and duty status reports from April 8 through July 8, 2015 were submitted along with an August 3, 2015 request for authorization.

In an August 19, 2015 letter, the employing establishment controverted the claim. It included copies of Family and Medical Leave Act forms dated December 15, 2008 and February 25, 2009, a May 12, 2014 letter regarding conduct issue -- verbal counseling for AWOL charges when appellant was observed sleeping at her desk and copies of notice of AWOL charges of when appellant was observed sleeping at her desk on May 28, June 28, July 22, September 5 and 22, November 5, and December 4, 2014; and February 10 and 20, March 12, April 7, and August 19, 2015. A copy of the April 7, 2015 security incident report was also submitted. A November 16, 2015 telephone report indicated that the investigative report for the April 7, 2015 incident had not yet been finalized.

By decision dated January 13, 2016, OWCP denied the claim as appellant was not in the performance of duty at the time of the alleged injury.

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]

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] 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.[10]

Injuries arising on the premises may be approved if the employee was engaged in activity reasonably incidental to the employment, such as: (a) personal acts for the employee's comfort,

[3] *C.S.*, Docket No. 08-1585 (issued March 3, 2009); *Bonnie A. Contreras*, 57 ECAB 364 (2006).

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

[5] 20 C.F.R. § 10.5(ee); *Ellen L. Noble*, 55 ECAB 530 (2004).

[6] *B.F.*, Docket No. 09-60 (issued March 17, 2009); *Bonnie A. Contreras*, *supra* note 3.

[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*, *supra* note 3.

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

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

convenience and relaxation; (b) eating meals and snacks on-premises; or (c) taking authorized coffee breaks.[11]

ANALYSIS

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

Section 20 C.F.R. § 10.126 requires OWCP to issue a decision containing findings of fact and a statement of reasons.[12] OWCP erred in its January 13, 2016 decision by failing to discuss or analyze the evidence raised by the June 25, 2015 request for reconsideration. While it listed the evidence appellant submitted, OWCP did not provide any discussion or analysis regarding whether the factual evidence was sufficient to establish that she was in the performance of duty at the time of the employment incident.

It is incumbent upon OWCP to review all of the evidence of record and make findings based upon the evidence of record. OWCP should make findings as to whether appellant met her burden of proof to establish whether falling asleep at her desk was or was not in the performance of duty.[13] Accordingly, the case will be set aside and remanded for consideration of the factual evidence pursuant to the standards set out in section 8128(a) and section 20 C.F.R. § 10.126. After such further development as OWCP deems necessary, it shall issue a *de novo* decision to protect appellant's appeal rights.

CONCLUSION

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

[11] *T.L.*, 59 ECAB 537, 540 (2008); Larson, *The Law of Workers' Compensation*, Volume 2, section 21.08[1] and section 21.07[2] (1999) Federal (FECA) Procedure Manual, Part 2 -- Claims, *Performance of Duty*, Chapter 2.804.4a(2) (August 1992).

[12] 20 C.F.R. § 10.126.

[13] *See Tia L. Love*, 40 ECAB 586 (1989).

ORDER

IT IS HEREBY ORDERED THAT the January 13, 2016 decision of the Office of Workers' Compensation Programs is set aside and the case remanded for further proceedings consistent with this decision of the Board.

Issued: January 17, 2017
Washington, DC

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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