United States Department of Labor
Employees' Compensation Appeals Board

D.B., Appellant	)	
and	)	**Docket No. 18-0053**
	)	**Issued: June 20, 2018**
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:
CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On October 9, 2017 appellant, through counsel, filed a timely appeal from a September 21, 2017 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 the 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 has met her burden of proof to establish an injury on April 7, 2015 while in the performance of duty.

FACTUAL HISTORY

This case has previously been before the Board.[3] The facts as set forth in the Board's prior decision are incorporated herein by reference. The relevant facts are as follows.

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. B.C., 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., that appellant was asleep at the time of the alleged injury, and that she was charged absent without leave (AWOL). B.C also noted that it was considered misconduct to be asleep while on duty. Appellant stopped work on April 7, 2015 and returned to work on May 5, 2015. No evidence was received with the claim.

In a May 22, 2015 development 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 evidence to support that the incident occurred in the performance of duty, as well as a medical report addressing how the alleged incident caused a diagnosed condition. In a separate letter dated May 22, 2015, OWCP requested additional factual information from the employing establishment as to whether she was in the performance of duty when the alleged incident occurred.

In a June 16, 2015 narrative statement, appellant alleged 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 her supervisor standing there looking at her and that, without saying a word, her supervisor 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 also indicated that TIGA (Homeland Security) investigated the event, but she had not received a report.

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, and 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

[3] Docket No. 16-0818 (issued January 17, 2017).

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. He provided ultrasound, electrical stimulation and light manipulation and he took off work until the following Monday.

In a June 15, 2015 statement, appellant's supervisor related 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. The supervisor 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. The supervisor called appellant's name, but received no response. She called appellant a second time only much louder and very lightly laid her hand on appellant's 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." The supervisor indicated that this was at 7:22 a.m. and she went directly to the department's manager, B.C. to explain what happened and was told to write up an AWOL charge for sleeping, which she did. She indicated that appellant left sometime thereafter and told a coworker that she had been shoved into the desk. Appellant's supervisor 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 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 appellant requested 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 appellant's initial evaluation on April 8, 2015, she 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 T9-10 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 and a copy of the April 7, 2015 security incident report, which indicated that appellant was charged .3 hours AWOL for sleeping during her tour of duty. A November 16, 2015 telephone report indicated that the investigative report for the April 7, 2015 incident had not yet been finalized. The employing establishment indicated that there was no evidence to support that the incident had occurred as appellant alleged. It also stated that she had been charged AWOL for repeated incidents of sleeping on duty.

In a May 12, 2014 letter regarding the issue of conduct -- verbal counseling memorandum, the employing establishment discussed AWOL charges when appellant was observed sleeping at her desk. It indicated that if she needed to sleep during work hours, she could sleep on break or during lunch. However, appellant must leave the area and go to a break area or the health unit. The employing establishment also advised that if she had a medical condition which caused her to fall asleep, then she should advise management and provide medical certification to support the medical condition. The memorandum stated that if appellant was observed sleeping at her desk again, she would be charged AWOL in 15-minute increments. It advised that sleeping at her desk was unacceptable behavior and considered misconduct and that she should conscientiously perform the duties of her position under its Rules of Conduct. Copies of the 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 were also submitted.

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

By decision dated January 17, 2017, the Board set aside the January 13, 2016 decision and remanded the case for further findings. The Board found that OWCP had failed to adequately discuss or analyze the evidence raised by the June 25, 2015 request for reconsideration to determine whether appellant was in the performance of duty at the time of the employment incident. The Board instructed OWCP to make findings as to whether she met her burden of proof to establish whether falling asleep at her desk was or was not in the performance of duty.

By decision dated September 21, 2017, OWCP denied appellant's claim, finding that she was not in the performance of duty on April 7, 2015 when she fell asleep at her desk. It found that there was no evidence to support that the incident had occurred as she alleged. OWCP further found that appellant was not engaged in the performance of her employment duties or in the act of personal comfort at the time of injury.

LEGAL PRECEDENT

An employee seeking benefits under FECA[4] 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

[4] *Supra* note 2.

disability or specific condition for which compensation is claimed is causally related to the employment injury.[5] 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.[6]

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.[7] To determine whether a federal employee has sustained a traumatic injury in the performance of duty it must first be determined whether fact of injury has been established.[8] First, the employee must submit sufficient evidence to establish that he or she actually experienced the employment incident at the time, place, and in the manner alleged.[9] 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.[10]

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.[11] An injury is stated 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.[12]

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, convenience and relaxation; (b) eating meals and snacks on-premises; or (c) taking authorized coffee breaks.[13]

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

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

[7] 20 C.F.R. § 10.5(ee); *Ellen L. Noble*, 55 ECAB 530 (2004).

[8] *B.F.*, Docket No. 09-0060 (issued March 17, 2009); *Bonnie A. Contreras*, *supra* note 5.

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

[10] *C.B.*, Docket No. 08-1583 (issued December 9, 2008); *D.G.*, 59 ECAB 734 (2008); *Bonnie A. Contreras*, *supra* note 5.

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

[12] *B.C.*, Docket No. 09-0653 (issued December 24, 2009).

[13] *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).

ANALYSIS

The Board finds that appellant has not met her burden of proof to establish an injury on April 7, 2015 while in the performance of duty.

At the time of the alleged injury, appellant asserted that she was sitting at her desk working on the computer and listening to music, when she felt a hard shove on her right shoulder from her manager. She indicated that she had turned around yelling "I am not asleep why are you putting your hands on me." The employing establishment asserted that appellant was asleep at her desk at the time of the alleged injury and was charged .3 hours AWOL for sleeping while on duty. OWCP's decision determined that the incident did not occur as appellant alleged.

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.[14] Besides her initial statement and statement on the CA-1 form, appellant has not submitted any factual evidence to establish that she was awake and working at her desk at the time of the alleged injury. There is no final investigative report of record. There is also no evidence that appellant disputed the employing establishment's AWOL charge for being asleep at her desk on April 7, 2015. The employing establishment submitted 10 AWOL charges in which she was found to be asleep at her desk dating from May 28, 2014 to April 7, 2015. This is strong and persuasive evidence that appellant had a history of sleeping at her desk during the past year. Thus, the circumstances regarding the claimed incident and inconsistencies in the facts about how it occurred cast serious doubt upon the validity of the claim.[15] For these reasons, the Board finds that appellant has not established that the claimed April 7, 2015 work incident occurred in the manner alleged.

As appellant was asleep at her desk at the time of the alleged work incident, the Board further finds that she was not engaged either in the performance of her employment duties or in the act of personal comfort at the time of the alleged injury.

To be within the performance of duty, appellant must be at a place where she may reasonably be expected to be in connection with the employment and reasonably fulfilling the duties of her employment or engaged in doing something incidental thereto.[16] However, she provided no evidence or corroborating testimony that she was performing the duties of her position at the time of the alleged incident. The employing establishment specifically advised in its May 12, 2014 letter that sleeping at a desk was not permitted and amounted to a failure to perform the duties of appellant's position in accordance with its Rules of Conduct. As there is no evidence to support that she was performing the duties of her position or engaged in doing something incidental thereto, appellant was outside the performance of duty.

[14] *D.C.*, Docket No. 17-0690 (issued July 19, 2017); *A.D.*, Docket No. 17-0550 (issued July 7, 2017); *E.W.*, Docket No. 17-0069 (issued May 23, 2017); *P.C.*, Docket No. 17-0082 (issued April 13, 2017); *B.M.*, Docket No. 17-0324 (issued March 24, 2017).

[15] *See N.B.*, Docket No. 17-1476 (issued January 4, 2018).

[16] *Kathryn S. Graham Wilburn*, 49 ECAB 458 (1998).

Furthermore, the Board finds that appellant was not engaged in an act of personal comfort at the time of the alleged incident. While the Board recognizes the personal comfort doctrine is an essential part of working life, an employing establishment can place reasonable restrictions on this policy.[17] In this case, it designated specific authorized locations away from the work area if appellant needed to sleep. The Board has previously found that an employee is in the performance of duty if he or she takes a rest break in an employing establishment nursing station.[18] Appellant, however, was at her desk.

Appellant's supervisor had also previously informed appellant that medical evidence was needed if she had a medical condition which caused her to fall asleep at her desk. The current record is devoid of any such evidence that appellant has a medical condition that causes her to fall asleep at her desk. She has not alleged such a condition, nor has she submitted any medical evidence that supports she was prescribed medication that caused drowsiness. Accordingly, appellant's act of sleeping at her desk is outside the personal comfort doctrine and thus outside the performance of duty.[19]

On appeal counsel asserts that the September 21, 2017 decision is contrary to fact and law. However, for the reasons discussed, appellant was not in the performance of duty when she sustained an injury on April 7, 2015.

CONCLUSION

The Board finds that appellant has not met her burden of proof to establish an injury on April 7, 2015 while in the performance of duty.

[17] *Conrad R. Debski*, 44 ECAB 381, 389 (1993) (violations of express prohibitions relating to incidental activities, such as seeking personal comfort, as distinguished from activities contributing directly to the accomplishment of the main job, are an interruption of the course of employment).

[18] *J.O.*, Docket No. 16-0636 (issued October 8, 2016).

[19] *Supra* note 13.

ORDER

IT IS HEREBY ORDERED THAT the September 21, 2017 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 20, 2018
Washington, DC

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

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

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