United States Department of Labor
Employees' Compensation Appeals Board

W.W., Appellant	)	
and	)	**Docket No. 19-0550**
	)	**Issued: October 7, 2019**
U.S. POSTAL SERVICE, POST OFFICE, Chicago, IL, 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:
JANICE B. ASKIN, Judge
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On January 14, 2019 appellant, through counsel, filed a timely appeal from an October 23, 2018 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.[3]

[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*.

[3] The Board notes that following the October 23, 2018 decision, OWCP received additional evidence. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id*.

ISSUE

The issue is whether appellant has met his burden of proof to establish an employment-related injury while in the performance of duty on August 9, 2018, as alleged.

FACTUAL HISTORY

On September 10, 2018 appellant, then a 45-year-old tractor trailer operator, filed a traumatic injury claim (Form CA-1) alleging that on August 9, 2018 at 12:15 p.m., while at lunch he and his supervisor had an altercation and his supervisor stabbed him multiple times in various areas of his body. The employing establishment controverted the claim noting that appellant and his supervisor, B.G., were off-premises during a lunch break when the altercation/assault occurred. On August 9, 2018 appellant was treated in the emergency department and diagnosed with neck stab wound, trauma.

In a handwritten statement largely illegible, appellant indicated a pattern of ongoing harassment over the past few months by his supervisor, B.G. On August 9, 2018 at 12:00 p.m., he reported going to lunch to buy a lottery ticket at Jim's Liquor Store. When appellant got out of his truck in the liquor store parking lot B.G. was present in the parking lot with a kitchen knife. He reported approaching B.G. where they became engaged in a verbal and physical altercation and B.G. stabbed him in the right shoulder.

An August 9, 2018 computerized tomography angiogram of the chest with contrast revealed a stab wound to the left upper shoulder/neck region, status post right shoulder reduction, and punctate air foci at the superficial aspect of the left sternocleidomastoid muscle. A duty status (Form CA-17) report dated August 27, 2018 prepared by a health care provider whose signature was illegible noted clinical findings of right shoulder pain and advised that appellant could not resume work.

In a letter dated September 11, 2018, the employing establishment challenged appellant's claim based on the element of performance of duty. Appellant reported that he was at lunch at Jim's Liquor Store when he was stabbed by B.G. The employing establishment advised that he was not in the performance of duty and that the incident took place off-premises and off the clock. It referenced time and attendance reports for August 9, 2018 supporting its challenge. The employing establishment submitted an "All Access Attempts History Report" from August 9, 2018 which noted that appellant entered the employing establishment building at 7:05 a.m. and exited the building at 7:06 a.m., he entered the building again at 7:11 a.m. and exited the building at 12:07 p.m. It also submitted a "Restricted USPS Time and Attendance Information Report" dated September 11, 2018 which noted that on August 9, 2018 he went out to lunch at 12:11 and returned at "12:61."

In a September 18, 2018 development letter, OWCP informed appellant that the evidence was insufficient to show that he was injured while performing his employment duties. It requested that he address whether he was on the premises of the employing establishment when the incident occurred and whether he was performing his assigned work duties. OWCP further requested, if the incident had occurred off-premises, that appellant identify the location of the incident and its relationship to his workplace and work activities. It afforded him 30 days for submission of the requested evidence.

OWCP received a duty status report (Form CA-17) dated September 24, 2018 from a healthcare provider whose signature was illegible who noted clinical findings of right shoulder pain and advised that appellant could not resume work.

Appellant provided a statement dated October 10, 2018 and noted that he experienced ongoing harassment from B.G. for a few months and consistently for the past month and a half. He indicated that B.G. was disrespectful toward him and stated "you don't know who I am, you better watch yourself." Appellant recounted that on August 9, 2018 at 9:20 a.m. he returned back to his unit from a break and approached his supervisor and stated "no one [is] going to listen to you because you are disrespectful." B.G. responded that he went to lunch at 11:00 a.m. and appellant responded "ok." Appellant interpreted this as an invitation to lunch which he disregarded. He reported clocking out for lunch and saw B.G. in the parking lot outside his car. When he was driving off the premises, B.G. was in the car in front of him and appellant attempted to go around him and B.G. moved his car over preventing him from getting in the lane beside him. Appellant drove to Jim's Liquor Store to purchase a lottery ticket. When he arrived, he got out of his truck in the liquor store parking lot and B.G. was standing by his car with a kitchen knife. Appellant reported approaching B.G. and B.G. grabbed his shirt and stated "we are not at the [employing establishment] now, I will kill your punk a**. You don't know who you f**king with." He reported stating "what are you going to do, stab me?" Appellant then indicated that he grabbed B.G. and B.G. began stabbing him. He reported throwing B.G. on the ground who then ran into the liquor store. After the altercation appellant returned to the job. He reported that he requested statements from the employing establishment relating to the assault "and was told by management that the postal inspectors had them."

On October 11, 2018 appellant was treated by a licensed social worker for post-traumatic stress disorder reportedly from an incident at work on August 9, 2018. The social worker noted that he was receiving treatment weekly since August 23, 2018.

By decision dated October 23, 2018, OWCP denied appellant's traumatic injury claim. It found that he was not in the performance of duty at the time of the alleged August 9, 2018 incident when he was at lunch and not on the premises of the employing establishment.

LEGAL PRECEDENT

FECA provides for the payment of compensation for the disability or death of an employee resulting from personal injury sustained while in the performance of duty.[4] The phrase "sustained while in the performance of duty" in FECA is regarded as the equivalent of the commonly found requisite in workers' compensation law of arising out of and in the course of employment.[5]

In order to be covered under FECA, an injury must occur at a time when the employee may reasonably be stated to be engaged in his or her master's business, at a place where he or she may reasonably be expected to be in connection with the employment, and while he or she was

[4] 5 U.S.C. § 8102(a).

[5] *See M.S.*, Docket No. 18-0465 (issued August 1, 2018).

reasonably fulfilling the duties of his or her employment or engaged in doing something incidental thereto.[6]

The Board has recognized a general principle, called the premises doctrine, that off-premises injuries sustained by employees having fixed hours and places of work while going to or coming from work or during a lunch period are not compensable as they do not arise out of and in the course of employment.[7] Rather, such injuries are merely the ordinary, nonemployment hazards of the journey itself, which are shared by all travelers, subject to certain exceptions.[8]

Exceptions to the premises doctrine have been made to protect activities that are so closely related to the employment itself as to be incidental thereto,[9] or which are in the nature of necessary personal comfort or ministration.[10] The Board has also found that the course of employment should extend to any injury that occurred at a point where the employee was within the range of dangers associated with the employment.[11] This exception has two components. The first is the presence of a special hazard at the particular off-premises point. The second is the close association of the access route with the premises, so far as going and coming is concerned.[12] The main consideration in applying this rule is whether the conditions giving rise to the injury are causally connected to the employment.[13]

Assaults arise out of the employment either if the risk of assault is increased because of the nature or setting of the work or if the reason for the assault was a quarrel having its origin in the work. Assaults for private reasons do not arise out of employment unless, by facilitating an assault that would not otherwise be made, the employment becomes a contributing factor.[14]

In this regard, Federal (FECA) Procedure Manual, Chapter 2.0804[15] provides the following as to the development of assault cases:

> "10. Assault Cases. Where the injury or death is caused by the assault of another person, it is necessary to establish to the extent possible whether the assault was accidental, arose out of an activity directly related to the work or work environment, or arose out of a personal matter having no connection with the employment. In the case of a personal matter, the evidence must show whether it was materially and substantially aggravated by the work association. An assault occurring off the

[6] *A.C.*, Docket No. 17-1927 (issued April 12, 2018).

[7] *K.M.*, Docket No. 17-1263 (issued December 19, 2018).

[8] *Id*.

[9] *See M.T.*, Docket No. 17-1695 (issued May 15, 2018).

[10] *See J.L.*, Docket No. 14-0368 (issued August 22, 2014).

[11] *Id*.

[12] *See B.H.*, Docket No. 14-0829 (issued July 8, 2015).

[13] *Id*.

[14] *J.G.*, Docket No. 17-0747 (issued May 14, 2018).

[15] *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Performance of Duty*, Chapter 2.804.10 (August 1992).

[employing establishment's] premises and outside of work hours may be compensable if it arose for reasons related to the employment.

a. It is the responsibility of the CE to obtain copies of any police reports which may have been made. Statements should also be obtained from the official superior and coworkers or other witnesses showing:

(1) Whether there was any animosity between the injured or deceased employee and the assailant by reason of a personal association away from work and, if so, this should be explained fully; and

(2) A full description of the events and circumstances which immediately preceded, led up to, and resulted in the assault.

b. A similar statement should be obtained from the assailant, if possible, and in disability cases, from the injured employee."

ANALYSIS

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

Appellant filed a traumatic injury claim (Form CA-1) alleging that, on August 9, 2018 at 12:15 p.m., while at lunch he and his supervisor had an altercation and his supervisor stabbed him multiple times in various areas of his body. At the time of the assault he was clocked out to lunch, not on the employing establishment premises, and outside of work hours.

OWCP found that appellant was not in the performance of duty at the time of the assault. However, it did not address whether the assault arose for reasons related to the employment. In an October 10, 2018 statement, appellant alleged that his supervisor had been harassing him. Moreover, in responding to OWCP's development questionnaire, he indicate that he requested statements relating to the assault "and was told by management that the postal inspectors had them." As these "statements" are in the employing establishment's possession or control, OWCP should have attempted to secure them.

Proceedings under FECA are not adversarial in nature and OWCP is not a disinterested arbiter. While appellant has the burden of proof to establish entitlement to compensation, OWCP shares the responsibility in the development of the evidence, particularly when such evidence is of the character normally obtained from the employing establishment or other governmental source.[16]

On remand, OWCP should further develop the case based on Chapter 2.0804[17] of the Federal (FECA) Procedure Manual and obtain any statements or investigatory report of the August 9, 2018 incident from the employing establishment to clarify whether the altercation/fight was within or outside the performance of duty. After such further development as deemed necessary, it shall issue a *de novo* decision.

[16] *See L.L.*, Docket No. 12-0194 (issued June 5, 2012); *N.S.*, 59 ECAB 422 (2008).

[17] *See supra* note 15.

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the October 23, 2018 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: October 7, 2019
Washington, DC

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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

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