

**United States Department of Labor
Employees' Compensation Appeals Board**

N.W., Appellant)	
)	
and)	Docket No. 19-0280
)	Issued: September 5, 2019
DEPARTMENT OF DEFENSE, DEFENSE)	
FINANCE & ACCOUNTING SERVICE,)	
Cleveland, OH, Employer)	
)	

Appearances:
Alan J. Shapiro, Esq., for the appellant¹
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
PATRICIA H. FITZGERALD, Deputy Chief Judge
JANICE B. ASKIN, Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On November 19, 2018 appellant, through counsel, filed a timely appeal from a September 27, 2018 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act² (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 has met her burden of proof to establish an injury in the performance of duty on January 26, 2017, as alleged.

FACTUAL HISTORY

On February 13, 2017 appellant, then a 68-year-old military pay technician, filed a traumatic injury claim (Form CA-1) alleging that, during a security check upon her arrival to work at approximately 10:55 a.m. on January 26, 2017, she attempted to explain to a security guard that she had a hearing aid in her purse. She claimed that the guard then grabbed her right wrist and raised her arm, causing strained muscles in the upper right side of her back. Appellant also experienced rapid breathing. She stopped work on February 7, 2017.

In a development letter dated February 15, 2017, OWCP informed appellant that her claim was deficient. It advised her of the type of factual and medical evidence needed and provided a factual questionnaire for her completion. OWCP afforded appellant 30 days to submit the necessary information.

In response, appellant submitted a January 26, 2017 e-mail sent at 11:44 a.m., notifying Security Director P.H. that she was going to the dispensary because the arm, which the security guard had grabbed by the wrist was “bothering” her. P.H. responded and requested additional information, including the names and numbers of the guards involved so that she could alert Physical Security and the Federal Protective Service.

On February 6, 2017 appellant provided a February 3, 2017 statement to P.H., recounting the events of January 26, 2017. She noted that, during the January 26, 2017 security screening, she placed her coat, purse, and other belongings in a bin as instructed. Appellant asserted that, after passing through the security line, she turned to retrieve her belongings from the bin and noticed that a female security guard was about to open her purse. She placed her hand over her purse and attempted to explain to the guard that it contained hearing aids. Appellant believed that the guard had not understood her, so she again explained that her purse contained hearing aids. She alleged that the security guard then grabbed her “right arm [near her] wrist tightly and lifted it away from [her] purse” and tightened her hold. A male security guard instructed appellant to allow the female guard to inspect her purse. Appellant acquiesced, but asked that she be allowed to remove the contents of her purse herself. The female security guard still held appellant’s right wrist and allegedly continued to tighten her hold. She searched appellant’s purse, removing a nail clipper and tweezer, asserting that these items had set off a metal detector. The female security guard noted previous “harassments” by various security guards on several occasions following her reassignment to Military Pay Operations, including instances where security officers had handled her hearing aids carelessly and opened a container of medication while inspecting her purse.

In a February 27, 2017 statement in response to OWCP’s development questionnaire, appellant again recounted the events of January 26, 2017. She contended that the female security guard had raised her right arm to shoulder level and held it straight out while pulling it away from the purse. Appellant alleged that the guard had a tight grip on her wrist and also applied pressure. She explained that she felt the need to inform the guard of the hearing aid in her purse because she

was concerned that her hearing aid would again be handled carelessly, as a previous guard had done. Appellant alleged that the female security guard instead tightened her grip on appellant's right wrist, applied more pressure, and turned appellant's arm more. She asserted that she was then "unable to move." Appellant noted that there were three or four other security guards who witnessed the incident. One of them approached her and advised her to allow the female guard to search her purse and appellant agreed. Appellant reported feeling a sharp throbbing pain in her right shoulder area and noted that she immediately reported the incident to Security Director P.H. She also notified her supervisor S.G., and then sought medical treatment by a registered nurse in the employing establishment's dispensary. When she returned to her desk, appellant was unable to perform her job duties as her right arm movements were restricted and she was having difficulty breathing. She noted a history of a 2006 right shoulder injury and right rotator cuff repair on December 10, 2015.³ Appellant noted that she did not know the names of any of the security guards, but when she provided separate descriptions to the safety director, her supervisor, and the employing establishment nurse, they were able to identify the guard who allegedly injured her.

OWCP also received a Supervisor Report of Accident/Incident dated February 13, 2017, by supervisor S.G., which recorded appellant's account of the alleged January 26, 2017 employment incident and noted that the safety office and physical security were investigating the matter.

In a March 8, 2017 statement, appellant contended that security guards identified in her claim had made false statements denying that she had been grabbed or touched during the January 26, 2017 security screening incident. She asserted that she had provided a truthful account of the incident. Appellant questioned whether a security video of the incident had been tampered with.⁴

In a development letter dated March 13, 2017, OWCP requested that the employing establishment provide statements from the security guards appellant had identified, as well as copies of any investigative reports, witness statements, and security videos. It afforded the employing establishment until March 24, 2017 to submit the requested information.

In a March 23, 2017 response, the employing establishment contended that it did not receive OWCP's development letter until March 17, 2017 and it, therefore, did not have enough time to obtain the security video through the proper channels before the March 24, 2017 deadline. It attached a February 13, 2017 statement by D.S., Director of Security and Force Protection, who confirmed that appellant's hearing aids were in her purse and she may not have heard the security officer who was telling her not to touch her purse. Also attached to the March 23, 2017 response

³ Under File No. xxxxxx422, OWCP had accepted that on or before June 6, 2014 appellant had sustained a right shoulder and upper arm sprain, and cervical, thoracic, and lumbar spine sprains. She had returned to work following her rotator cuff surgery on June 6, 2016. Appellant participated in physical therapy treatments for her prior injury from December 6, 2016 through January 26, 2017. Her claims have been administratively combined.

⁴ Appellant also submitted medical evidence. Hospital emergency department discharge instructions dated January 30, 2017 note a right shoulder strain. Dr. Catherine Watkins Campbell, Board-certified in family and occupational medicine, provided reports dated February 8 and March 1, 2017 diagnosing strains of the right shoulder, right upper arm, and right upper back attributable to the alleged January 26, 2017 employment incident, superimposed on a history of right rotator cuff repair.

was a February 14, 2017 statement of Inspector R.G., a Law Enforcement Security Officer with the Department of Homeland Security, who noted that he had viewed “the video” and that it did not demonstrate that a security officer had grabbed appellant’s right arm or wrist. Rather, the officer held the screening tray and appellant’s purse to allow a secondary inspection.

In a February 21, 2017 statement, D.S. asserted that “the video” showed no indication that a security officer grabbed appellant’s arm as alleged. The view from the 9th Street angle had been obstructed by the x-ray machine, but showed appellant’s arm as she reached for the tray her purse was in. The security officer held the tray and tried to keep appellant from grabbing it. The 6th Street camera had an unobstructed view. It showed that the security officer had maintained control of the tray with appellant’s purse and did not grab appellant as alleged. D.S. had also spoken with a security inspector who confirmed that appellant’s purse had been subjected to a secondary search.

By decision dated March 27, 2017, OWCP denied appellant’s claim, finding that the evidence of record was insufficient to establish that an injury occurred on January 26, 2017 as alleged.

On April 11, 2017 appellant, through counsel, requested a telephonic hearing before an OWCP hearing representative.⁵ During the hearing, held October 31, 2017, she related that, when going through the security check on January 26, 2017, she observed a female security guard reaching for her purse. Appellant recounted that she told the guard to “wait a minute” or to “hold it,” because on a prior occasion, a security guard had removed the hearing aids from their protective box. She then moved forward and reached for her purse, and the security guard grabbed her arm. A second security guard stepped forward and instructed appellant to let the female guard search her purse. Appellant agreed. The female security guard maintained her grip on appellant’s right wrist, pulled her arm away from the purse, turned appellant’s wrist, applied pressure, and raised her arm upward. Appellant then felt a sensation in her upper back and shoulder blade region. Additionally, counsel contended that neither he nor appellant had been provided a copy of the surveillance video. In a letter dated November 1, 2017, he requested that OWCP’s hearing representative provide a copy of the relevant security video should a copy become available.

In a letter dated November 6, 2017, the employing establishment’s workers’ compensation program manager filed a Freedom of Information Act (FOIA) request with the Department of Homeland Security (DHS) to obtain a copy of the January 26, 2017 security video. On November 15, 2017 DHS asserted that a search of relevant records revealed that the requested video was no longer available as such recordings were purged every 30 days.

By decision dated September 27, 2018, OWCP’s hearing representative affirmed the March 27, 2017, finding that the factual evidence of record did not support that the January 26, 2017 incident occurred as alleged. He found that the reviews of the surveillance video by R.G. and D.S. strongly refuted appellant’s allegations. The hearing representative further found that appellant had not provided witness statements or persuasive independent evidence to establish that

⁵ Appellant submitted additional medical evidence. In a report dated April 5, 2017, Dr. Robert Gillespie, a Board-certified orthopedic surgeon, diagnosed rotator cuff tendinitis causally related to the claimed January 26, 2017 employment incident.

a security officer had grabbed her right wrist during security screening on January 26, 2017 as alleged.

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 timely filed within the applicable time limitation period of FECA,⁶ that an injury was sustained in the performance of duty as alleged, and that any disability or medical condition for which compensation is claimed is causally related to the employment injury.⁷ These are the essential elements of each and every compensation claim, regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.⁸

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.⁹ 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.¹⁰ Second, the employee must submit sufficient evidence to establish that the employment incident caused a personal injury.¹¹

ANALYSIS

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

Appellant filed a traumatic injury claim alleging that she sustained an upper back strain on January 26, 2017 at work when a security officer grabbed her right wrist and extended her arm while inspecting her purse. Security Director P.H. acknowledged that appellant had reported the alleged incident within an hour of its supposed occurrence. OWCP requested that the employing establishment provide additional information, including a statement from the security officer alleged to have injured appellant, as well as investigative reports and surveillance videos concerning the January 26, 2017 incident. In response, the employing establishment provided statements from Inspector R.G. and Security and Force Director D.S., who had both reviewed security video and found no evidence that a security officer had grabbed appellant's wrist as alleged. OWCP denied the claim, finding that appellant failed to establish the alleged January 26,

⁶ *C.B.*, Docket No. 18-0071 (issued May 13, 2019); *S.B.*, Docket No. 17-1779 (issued February 7, 2018); *J.P.*, 59 ECAB 178 (2007); *Joe D. Cameron*, 41 ECAB 153 (1989).

⁷ *J.M.*, Docket No. 17-0284 (issued February 7, 2018); *R.C.*, 59 ECAB 427 (2008); *James E. Chadden, Sr.*, 40 ECAB 312 (1988).

⁸ *C.B.*, *supra* note 6; *K.M.*, Docket No. 15-1660 (issued September 16, 2016); *Delores C. Ellyett*, 41 ECAB 992 (1990).

⁹ *D.B.*, Docket No. 18-1348 (issued January 4, 2019); *T.H.*, 59 ECAB 388, 393-94 (2008).

¹⁰ *C.B.*, *supra* note 6; *D.S.*, Docket No. 17-1422 (issued November 9, 2017); *Elaine Pendleton*, 40 ECAB 1143 (1989).

¹¹ *B.M.*, Docket No. 17-0796 (issued July 5, 2018); *John J. Carlone*, 41 ECAB 354 (1989).

2017 employment incident as factual. The Board finds, however, that OWCP did not sufficiently develop the evidence as to whether a security officer had grabbed appellant's right wrist on January 26, 2017 as alleged.

In its March 13, 2017 development letter, OWCP requested that the employing establishment provide statements from the security officer alleged to have grabbed appellant's wrist, and any investigative reports. The existence of such statements is supported by D.S.'s February 21, 2017 statement noting his interview of an unnamed security inspector, and appellant's February 27, 2017 statement contending that a security officer had made false statements to investigators. However, the employing establishment did not provide these statements in response to OWCP's direct request. Therefore, the case record as transmitted to the Board is insufficient and would not permit an informed adjudication of the case by the Board.

Proceedings under FECA are not adversarial in nature, nor is OWCP a disinterested arbiter. Although it is a claimant's burden of proof to establish his or her claim, OWCP shares responsibility in the development of the evidence, particularly when such evidence is of the character normally obtained from the employing establishment or other government source.¹² As D.S.'s February 21, 2017 statement and appellant's February 27, 2017 statement indicate that the employing establishment would have in its possession witness statements from security personnel appellant had accused or who were present during the alleged incident, OWCP should obtain a response from the employing establishment containing any relevant evidence or argument.¹³

The case will accordingly be remanded to OWCP for further development of the evidence regarding appellant's allegations of the January 26, 2017 workplace incident. OWCP shall request that the employing establishment provide a detailed statement, relevant investigative documents, and relevant witness statements regarding appellant's allegations. Following this and any necessary further development, it shall issue a *de novo* decision regarding whether appellant has established an injury on January 26, 2017 in the performance of duty, as alleged.

CONCLUSION

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

¹² *K.M.*, Docket No. 17-1263 (issued December 19, 2018); *A.M.*, Docket No. 18-0630 (issued December 10, 2018); *V.H.*, Docket No. 18-0273 (issued July 27, 2018).

¹³ *V.H.*, *id.*

ORDER

IT IS HEREBY ORDERED THAT the September 27, 2018 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further development consistent with this decision of the Board.

Issued: September 5, 2019
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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