United States Department of Labor
Employees' Compensation Appeals Board

D.L., Appellant	)	
and	)	**Docket No. 19-0276**
	)	**Issued: April 20, 2020**
DEPARTMENT OF AGRICULTURE, ANIMAL & PLANT HEALTH INSPECTION SERVICE (APHIS), Mayaguez, PR, Employer	)	

Appearances:
Stephanie Leet, Esq., for the appellant[1]
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

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

JURISDICTION

On November 19, 2018 appellant, through counsel, filed a timely appeal from an October 29, 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 29, 2018 decision, additional evidence was submitted to OWCP and on appeal. 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 her burden of proof to establish that an injury occurred in the performance of duty, as alleged.

FACTUAL HISTORY

On March 21, 2014 appellant, then a 59-year-old entomologist, filed an occupational disease claim (Form CA-2) alleging that she developed bilateral carpal tunnel syndrome and right lateral epicondylitis when moving household items in preparation for her job-related relocation from Louisiana to Puerto Rico. She reported that she was unable to finish packing in order to relocate by August 26, 2013 due to "pain in both hands, numbness, and the inability to appreciate or grasp objects." Appellant noted that she first became aware of her condition on January 27, 2005 and of its relationship to her federal employment on August 20, 2013. On the reverse side of the claim form, appellant's supervisor, A.B. challenged appellant's occupational disease claim indicating that appellant never reported to duty, that she had a prior claim alleging the same issues/conditions for which she filed a Form CA-2a under OWCP File No. xxxxxx935,[4] and that appellant had submitted a retirement application.

By development letter dated March 28, 2014, OWCP advised appellant of the type of factual and medical evidence needed to establish her claim. It provided a questionnaire for her completion and afforded her 30 days to provide the necessary evidence. In a separate development letter of even date, OWCP requested that the employing establishment address appellant's allegations pertaining to her occupational disease claim.

OWCP subsequently received a January 24, 2014 narrative statement, wherein appellant's supervisor, A.R., related that on June 9, 2013 appellant accepted a full-time entomologist (identifier) position in Puerto Rico and that she was to report to the Plant Protection and Quarantine (PPQ) Office there on Monday, August 5, 2013. A.R. indicated that he had been attentively working with appellant in many aspects, particularly providing her abundant leave time, in order for her to conclude her arrangements and report to the Puerto Rico duty station. He noted that because of her failure to report to duty, she was placed in an absent without leave (AWOL) status and her pay was stopped on February 10, 2014.

By letter dated March 19, 2014, the employing establishment controverted the claim contending that the alleged injury did not occur in the performance of duty. It reported that appellant had received an Equal Employment Opportunity Commission (EEOC) default judgment in a lawsuit against the employing establishment in which it was ordered to "instate" her to the position of entomologist in Puerto Rico, and provide her with benefits and leave retroactive to March 14, 2005. Back pay was awarded for two months in 2005 and then resumed in March 2013. On June 9, 2013 appellant accepted the offer of reinstatement, and agreed to report for duty in Puerto Rico on August 5, 2013. The employing establishment related that, instead of reporting to work, appellant requested leave without pay through September 4, 2013, and then subsequently requested sick leave through January 2, 2014. Most recently by letter dated January 24, 2014, it

[4] Appellant has a January 27, 2005 occupational disease claim which was accepted for bilateral carpal tunnel syndrome, right ring finger trigger (acquired), lesion of right ulnar nerve, right lateral epicondylitis, and sprain of elbow and forearm radial collateral ligament under OWCP File No. xxxxxx935. Appellant's claims have not been administratively combined.

again instructed appellant to report to her duty station in Puerto Rico on February 10, 2014, but appellant had failed to report to duty. The employing establishment concluded that because appellant never reported for duty, the alleged injury did not occur within the performance of duty.

On April 2, 2014 appellant responded to OWCP's development questionnaire noting that she had previously sustained a work-related injury on January 27, 2005 under OWCP File No. xxxxxx935 which was accepted for bilateral carpal tunnel syndrome, bilateral cubital tunnel syndrome, right ring finger trigger (acquired), lesion of right ulnar nerve, and right lateral epicondylitis. She reported that the employing establishment "instated" her as a result of an EEOC award to entomologist (nonselection in 2005) and had not offered her relocation assistance, which would have relieved her of the tasks of packing her household for relocation. Instead, the employing establishment "demanded" that appellant sell her home in Louisiana and move in 90 days, causing her extreme stress, anxiety, and a flare up of her carpal tunnel symptoms. Appellant reported experiencing pain and numbness in her hands after packing, lifting, and moving household packing boxes. She described the exposure which specifically caused her condition, reporting that she packed household items from May through August 2013 at an average of 15 hours a week, and the packing involved pulling, pushing, and lifting boxes weighing 10 to 20 pounds. By the end of August, appellant's carpal tunnel syndrome symptoms had returned and she could no longer grasp objects. In support of her claim, she submitted medical reports documenting treatment for her condition.

By decision dated May 12, 2014, OWCP denied appellant's claim finding that she had not established the medical component of fact of injury.

On March 28, 2016 appellant requested reconsideration of OWCP's decision. She argued that the employing establishment was negligent by not offering her relocation services, light duty and accommodation with her reinstatement, and by challenging the merits of her claim. Appellant submitted factual and medical evidence in support of her claim.

By decision dated May 4, 2016, OWCP denied appellant's reconsideration request, finding that it was untimely filed and failed to establish clear evidence of error.

On April 21, 2017 appellant, through counsel, again requested reconsideration. In an accompanying appeal brief, counsel reported that, on June 9, 2013, appellant accepted an offer as a full-time entomologist in Puerto Rico. On August 26, 2013 appellant exacerbated her preexisting bilateral carpal tunnel syndrome and right lateral epicondylitis while packing her household items for her relocation to Puerto Rico. Counsel argued that because appellant's preexisting injury was exacerbated by a condition of her federal employment, namely her relocation to Puerto Rico, her disability was compensable as having resulted from an employment injury.

By decision dated September 18, 2017, OWCP modified the May 4, 2016 decision. It determined that medical evidence submitted in support of appellant's claim was found in OWCP File No. xxxxxx935 prior to the May 12, 2014 decision. Therefore, OWCP conducted a merit review and found that the medical component of fact of injury had been established. However, it denied the claim, finding that appellant had not established that the injury occurred in the performance of duty, as appellant had not yet begun to work when she was packing at home to relocate to Puerto Rico for her employment as an entomologist.

On September 5, 2018 appellant, through counsel, requested reconsideration. Counsel submitted a brief in support of appellant's claim arguing that her injury occurred in the performance of duty when appellant was packing her work materials for relocation to Puerto Rico. She contended that on August 26, 2013, as appellant was preparing for her transfer to Puerto Rico, she exacerbated her preexisting bilateral carpal tunnel syndrome and right lateral epicondylitis while she was packing her work material for the relocation.

With the request for reconsideration, appellant submitted a May 1, 2018 affidavit which provided a history of her injury and employment issues. She recounted that the March 27, 2013 EEOC decision found that she was discriminated against when she was not hired for employment in Puerto Rico and found that she suffered from bilateral carpal tunnel syndrome due to use of heavy equipment while performing her employment duties. Appellant reported that the decision ordered that she be instated to the position of entomologist in Puerto Rico through an unconditional offer. She argued that she was instated on March 13, 2013 and requested accommodation to be reassigned based on her physician's report, but the employing establishment determined that reassignment was not necessary because there were no medical restrictions which kept appellant from performing her critical duties. Appellant referenced documentation from the employing establishment which she argued established that she was an employee from the date of the June 9, 2013 acceptance. On the date of the alleged injury, she explained that she was at home packing materials she needed as an entomologist in Puerto Rico. The packing included boxes of reference materials and research materials from personal archives needed for difficult taxonomic identifications and research. Appellant reported that the duties of her position required that she be "instated" and report to headquarters by September 1, 2013. Thus, she was on the job and at work performing the duties tasked. Appellant reported that her injury was cumulative from packing beginning on the date of "instatement." She explained that the various boxes she packed contained research materials and books that she alleged were critical for her employment.

Appellant submitted numerous documents in support of her claim including partial pages of a March 14, 2014 agency certification of reassignment and accommodation efforts from D.W., the reasonable accommodations program coordinator. In this document, the employing establishment reported that it made every effort to accommodate appellant's carpal tunnel syndrome by agreeing to purchase a $90,000.00 microscope and ergonomic office furniture. Further, appellant's supervisor eliminated all nonessential job functions.

Appellant provided an acceptance form for a full-time entomologist GS-12 position in Puerto Rico which she had signed on May 14, 2013. The form does not contain any other signatures. E-mail correspondence dated July 29 to August 23, 2013 was also submitted, including a partial July 29, 2013 e-mail from another employing establishment employee, M.G., with the subject line addressed "RE: Site Visit." M.G. replied to appellant by stating that he was not certain why she was addressing her questions to him or why she was confused over her employment status. He noted that she had accepted her position on June 9, 2013 with the understanding that she would report for duty in Puerto Rico on August 5, 2013. M.G. further stated that her instatement as an employee of the employing establishment occurred when she accepted the position on June 9, 2013 and from that moment on, she had been an employee of the agency and subject to the rules of responsibilities and conduct obligations just the same as every other USDA employee. He reported that further employment questions should be directed to her supervisor and human resources.

A July 30, 2013 e-mail from L.W., the employing establishment's State Plant Health Director for Puerto Rico, reported that a conference call took place on that same date with herself,

appellant, and A.R., appellant's supervisor. L.W. provided a summary of the conversation which addressed appellant's concerns, start date, and accommodations for relocation to Puerto Rico. Appellant reported that she would not be reporting to work until September 3, 2013, if she was able to find an airline ticket for that date, as she had two upcoming medical appointments in August. She further indicated that she needed time to pack and move out of her house. L.W. made appellant aware that there were no relocation benefits approved and that as a regular employee, if she was not working as scheduled, she must request some sort of approved leave. Appellant acknowledged that she was aware that relocation expenses were not part of the agreement. She reported that she would be requesting leave without pay as she was not sure how much leave she had. Appellant reported that she was restricted to light-duty work and that she would bring and use her props to make sure the working conditions would not impact her medically. L.W. informed her that if she needed any props they would be procured by the employing establishment.

By decision dated October 29, 2018, OWCP denied modification of the September 18, 2017 decision finding that appellant had not established that the injury occurred in the performance of her federal employment duties, 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,[5] 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.[6] 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.[7]

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."[8] For purposes of awarding compensation benefits under FECA, section 8101(1) defines employee, in relevant part, as a civil officer or employee in any branch of the Government of the United States or as an individual rendering personal service to the United States similar to the service of a civil officer or employee of the United States.[9] In determining whether a claimant is an employee for purposes of compensation, the Board will consider the particular facts and circumstances surrounding his or her employment.[10]

[5] *S.B.*, Docket No. 17-1779 (issued February 7, 2018); *J.P.*, 59 ECAB 178 (2007); *Joe D. Cameron*, 41 ECAB 153 (1989).

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

[7] *K.M.*, Docket No. 15-1660 (issued September 16, 2016); *L.M.*, Docket No. 13-1402 (issued February 7, 2014); *Delores C. Ellyett*, 41 ECAB 992 (1990).

[8] 5 U.S.C. § 8102(a).

[9] *Id*. at § 8101(1).

[10] *Wendy S. Warner*, 38 ECAB 103 (1986).

The phrase "sustained while in the performance of duty" has been interpreted by the Board to be the equivalent of the commonly found prerequisite in workers' compensation law of "arising out of and in the course of employment."[11] The phrase "in the course of employment" is recognized as relating to the work situation, and more particularly, relating to elements of time, place, and circumstance. To arise in the course of employment, an injury must occur at a time when the employee may reasonably be stated to be engaged in the master's business, at a place where the employee may reasonably be expected to be in connection with the employment, and while he or she was reasonably fulfilling the duties of his employment or engaged in doing something incidental thereto.[12] This alone is insufficient to establish entitlement to benefits for compensability. The concomitant requirement of an injury "arising out of the employment" must be shown, and this encompasses not only the work setting, but also a causal concept, the requirement being that the employment caused the injury.[13]

As has been explained by A. Larson, in his treatise, *The Law of Workers' Compensation*, in addressing an injury which occurs between hiring and the start of work: "When, as often happens in these cases, there is a substantial interval between the time when the employee receives notice to report for work later and the later time at which the employee's active service begins, an injury in the meantime, even on the premises, is covered only if there is a relation between the claimant's activity when injured and the employment."[14]

ANALYSIS

The Board finds that appellant has not met her burden of proof to establish that an injury occurred in the performance of duty, as alleged.

As previously noted, to arise in the course of employment, an injury must occur at a time when the employee may reasonably be stated to be engaged in the master's business, at a place where the employee may reasonably be expected to be in connection with the employment, and while she was reasonably fulfilling the duties of her employment or engaged in doing something incidental thereto.[15]

While appellant had accepted the offer for the entomologist position on June 9, 2013, she never reported to work in Puerto Rico to perform any of her employment duties.[16] The record reflects that while appellant was expected to report to her new assignment on August 5, 2013, she instead requested leave and remained in leave status as she continued packing in preparation of her job-related relocation to Puerto Rico.

[11] *See M.T.*, Docket No. 17-1695 (issued May 15, 2018); *S.F.*, Docket No. 09-2172 (issued August 23, 2010); *Charles Crawford*, 40 ECAB 474, 476-77 (1989).

[12] *See M.T., id.*; *Mary Keszler*, 38 ECAB 735, 739 (1987).

[13] *See M.T., supra* note 11; *Eugene G. Chin*, 39 ECAB 598, 602 (1988).

[14] A. Larson, *The Law of Workers' Compensation* § 26.02 (5) (June 2016).

[15] *See M.T., supra* note 11; *Mary Keszler, supra* note 12.

[16] *Id.*

The Board has previously considered factually similar cases wherein an injury was alleged while the claimant was packing items at home in anticipation of a job-related relocation, and the Board has found that injuries sustained under such circumstances are not sustained in the performance of duty.

In *Zahra Musa Anise-Levine*,[17] the claimant alleged that she sustained injury while packing items at home during a day off in anticipation of a relocation move. The Board found that appellant's injury was sustained outside of regular work hours preparing for a move related to a job change. Even though the employing establishment had authorized payment of moving expense, and claimant had been directed by the employing establishment to pack certain personal effects, these circumstances did not indicate that the injury occurred while appellant was in the performance of duty.

In *Mary Patania*,[18] the claimant alleged that she sustained injury while packing personal belongings at home related to her employing establishment transfer from Japan to Alaska. The employing establishment had provided moving services and appellant was not actually required to pack any work-related or personnel belongings. The Board concluded that injuries sustained by employees outside of their regular work hours while at home preparing for a move due to a job change are not sustained in the performance of duty.

In the present case, as in the prior cited cases, appellant was in leave status and was packing at her home in preparation of a job-related relocation at the time of her alleged injury. Thus, the Board finds that appellant was not injured in the performance of duty, as alleged.

As appellant has not established that she was in the performance of duty at the time of her alleged injury, the Board finds that she has not met her burden of proof to establish her claim.

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

CONCLUSION

The Board finds that appellant has not met her burden of proof to establish that an injury occurred in the performance of duty, as alleged.

[17] 34 ECAB 716 (1983).

[18] Docket No. 93-0349 (issued January 7, 1994).

ORDER

IT IS HEREBY ORDERED THAT the October 29, 2018 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 20, 2020
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Alternate Judge
Employees' Compensation Appeals Board