

ISSUE

The issue is whether appellant has met his burden of proof to establish that an injury occurred in the performance of duty, as alleged.

FACTUAL HISTORY

On March 15, 2017 appellant, then a 47-year-old letter carrier, filed a traumatic injury claim (Form CA-1) alleging that on March 6, 2017 he sustained a broken left humerus when he fell after being tackled by a police officer while in the performance of duty. He stopped work on March 6, 2017. On the reverse side of the claim form the employing establishment asserted that appellant had been injured due to his own willful misconduct as he had been injured while being questioned by the police and subsequently tackled.

In a letter dated March 17, 2017, the employing establishment further controverted the claim. It noted that management contacted the local police after another employee told management that appellant was going to commit suicide. The employing establishment contended that “it appears that the claimant was resisting the police officers’ repeated requests to sit down and talk to them about the situation, when the claimant said ‘shoot me I don’t care’ then the police tackled him.”

In a development letter dated March 21, 2017, OWCP informed appellant that the evidence of record was insufficient to establish his claim. It advised him of the type of factual and medical evidence required to establish his claim and attached a questionnaire for his completion. OWCP afforded appellant 30 days to provide the requested information.

OWCP thereafter received a March 6, 2017 Boulder, Colorado police department report which indicated that the employing establishment had called for a “welfare check” on appellant which turned into a “mental health hold.” The report noted the employing establishment had contacted the police department based on another employee’s concern that appellant was suicidal and noted circumstances to support the concern.⁴ A statement from Officer Z.H., noted that the individuals involved included police officers, appellant, and coworkers. Officer Z.H. noted that when he arrived on location, appellant was not acting erratically or improperly. After arriving, Officer Z.H. contacted L.G. and M.F., the postmaster, who both expressed concern for appellant including that he “posed a major threat” to himself and his coworkers. When the police officers approached appellant on his mail route, he was in his vehicle and was beginning to drive away. The report notes that appellant initially attempted to drive off, yelling that he had done nothing wrong. He then stopped his vehicle and started to walk away. The police officers attempted to shoot appellant with a Taser gun, and he took his jacket off and “slammed it to the ground.” Then, based upon an officer’s belief that appellant had a knife on his belt, and possibly a gun, he grabbed

⁴ The report noted that L.G., appellant’s supervisor, indicated that G.S., appellant’s coworker, informed management that appellant had previously indicated that he would be better off if he killed himself and that the only thing he had left in his life was his postal route. Also, G.S. became worried after learning that appellant had taken his name off the overtime list. L.G., appellant’s supervisor, was monitoring appellant on his route that day, and the employing establishment requested that the police contact L.G. who stated that he considered appellant’s current behavior abnormal due to his observation that appellant was not as talkative with coworkers.

appellant's left arm and tripped him to the ground. Officer Z.H. stated that once appellant was in custody and handcuffed, a tool was removed from his belt and given to security personnel. Officer Z.H. then talked to L.G. and M.F. who claimed "they had no other choice to make, but to call" the police as they believed appellant was a danger to both himself and others. M.F. expressed his concern to Officer Z.H. that appellant was going to make the police shoot him and try "suicide by cop." Lastly, L.G. stated that he had videotaped what happened on his cell phone.⁵

In support of his claim appellant submitted medical evidence including a March 13, 2017 return to work note by Dr. Christopher P. Reyburn, a Board-certified psychiatrist.

In a March 21, 2017 authorization for examination and/or treatment (Form CA-16), the employing establishment authorized treatment for a fractured left upper arm and noted a March 6, 2017 date of injury.

A March 24, 2017 computerized tomography (CT) scan of appellant's left shoulder indicated a left humerus fracture.

A duty status report (Form CA-17) dated March 30, 2017 noted that appellant had sustained a left humerus fracture when confronted by police. The form also indicated that appellant was disabled from work.⁶

In a March 27, 2017 attending physician's report, Part B of the Form CA-16. Dr. Ernest Soper, a clinical psychologist, diagnosed fractured left humerus, depression, and anxiety.

Dr. Soper, in an April 1, 2017 report, summarized the events that occurred on March 6, 2017 including the police requests for appellant to exit his vehicle, the actions by appellant and the postmaster, and an officer grabbing appellant's left arm and knocking appellant to the ground after tackling him. Dr. Soper explained that appellant loved his job delivering mail and that appellant denied any suicidal thoughts, but that he had requested help from the employee assistance program (EAP) at work due to bullying, but no help was provided.

In undated statements, appellant asserted that the employing establishment escalated the situation during the March 6, 2017 incident. He further asserted that he would not have sustained a fractured arm if the employing establishment had not contacted the police.

In another account of the March 6, 2017 incident, appellant noted that on the morning of March 6, 2017, he pulled mail and went out to deliver mail. While on his route, a coworker called and asked if he was okay, he responded affirmatively and asked to be left alone so that he could finish his route. Appellant then told his coworker to tear up his eight-hour work request as he did not want to hurt his supervisors or have someone else complete his route. After returning to his vehicle, following delivery of packages and mail, a policeman walked up to his vehicle and asked him to get out of the vehicle. Appellant declined explaining that he had done nothing wrong and needed to finish his route. At this point he began backing up his vehicle and the policeman

⁵ The videotape is not contained in the record as presented to the Board.

⁶ The signature on the form is illegible.

informed him that he almost hit a car. Appellant tried to leave, but a car was blocking his exit. A coworker ran up the street and stopped in front of his vehicle. Appellant explained that he then became frustrated, exited his vehicle, started walking to continue the delivery of his mail route, and asked that he be left alone so he could finish his route. The police followed, asked him to stop, and were getting angry. After turning around and seeing a Taser gun pointed at him, appellant threw his satchel and keys to the ground, put his arms up in the air, and yelled that he quit to the coworker, meaning that he was “done with the situation.” The police yelled at him to drop to the ground, tackled him, and broke his arm. The police placed him in handcuffs, called the paramedics, and he was transported to a hospital.

In an April 18, 2017 statement, L.G. described the events of March 6, 2017. On that date he was given a written statement from G.S., a coworker, expressing concern about appellant, so he informed the postmaster, M.F., who instructed him to contact the police for assistance. He told the police dispatcher appellant’s location and that he would meet the police there. After the arrival of M.F. and the police, G.S.’s statement was given to the police. The statement alleged that appellant “would not cooperate if confronted by the police.” L.G. noted that appellant exited an apartment building in which he had delivered mail and went to his postal vehicle. Three police officers then walked behind the postal vehicle and asked him to stop the vehicle so they could talk and help him. Appellant stopped and exited the vehicle, and began walking across the street. The police officers followed appellant and told him he was not under arrest as they only wanted him to sit down so they could talk to him. A short distance later, appellant turned and faced M.F. who was beside him. He yelled that he quit and he threw down his satchel. L.G. indicated that appellant informed the police that they could shoot him because he did not care. Three police officers surrounded appellant and wrestled him to the ground. L.G. noted that an ambulance was called because appellant complained that his shoulder had been wrenched out of its socket.

In an April 18, 2017 statement, M.F. stated that on March 6, 2017 he had been notified of a situation with a carrier “who had purchased a handgun” and “intended to do harm to himself.” He stated that the concern for appellant was based on a statement of a coworker who was concerned that appellant might be suicidal based on his recent behavior. After arriving at the location of appellant’s vehicle on the mail route, M.F. briefly talked with L.G., who told him the police had been contacted and were on the way. He stated that he heard screaming and blocked the exit to prevent appellant from driving away. M.F. alleged that appellant exited his vehicle and pushed him aside while he was trying to talk to him. Three police officers followed appellant asking if they could talk to him and asking him to sit down. Appellant continued to walk telling M.F. that he got what he wanted. Shortly thereafter, three police officers tackled appellant to the ground to restrain him as he yelled that he did not care if they shot him.

In a letter dated April 20, 2017, the employing establishment controverted the claim asserting that appellant had not been injured in the performance of duty. It attached a copy of a statement from G.S., the coworker who initially alerted management regarding her concern for appellant.

By decision dated May 4, 2017, OWCP denied appellant’s claim finding that he was not in the performance of duty at the time of the March 6, 2017 incident. It found that the tackle and arrest by the police was not directly related to his employment, and thus, did not arise in the course of the employment and within the scope of compensable work factors as defined by FECA.

On May 4, 2018 appellant, through his representative, requested reconsideration.⁷

In support of his request, the representative submitted copies of an October 24, 2017 grievance over the March 6, 2017 incident, the settlement agreement reached in that grievance, and a copy of Article 15 (grievance/arbitration procedure) of the collective bargaining agreement between the union and the employing establishment. The settlement agreement summarized the history of events leading up to the March 6, 2017 incident and set forth the remedies agreed to by the parties. The remedies included that management would not escalate conditions between a carrier and the police in the future, that it would not exaggerate to the police, that it would abide by the contract regarding a mutual respect atmosphere and abide by the policy against violent and/or threatening behavior, that it would not interfere with the police, that it would make every effort to provide EAP to help those who seek it, that it would not film employees except for certain investigators, that it would not share private details of employees including their medical conditions, and that it would not cause unreasonable delay or interfere with injury claims in any way. The representative asserted that it was the employing establishment's mishandling and escalation of the incident which brought the parties together and created the conditions which caused appellant to panic at the involvement of the police and sustain an injury in the performance of duty.

By decision dated September 14, 2018, OWCP denied modification of its prior denial of the claim. It found that while the agency's actions may have been instrumental in the escalation of the conditions, the claimant's own actions and personal situations were additional contributing factors to his injury.

LEGAL PRECEDENT

An employee seeking benefits under FECA⁸ 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 or specific condition for which compensation is claimed is causally related to the employment injury. 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.⁹

The phrase sustained while in the performance of duty is regarded as the equivalent of the coverage formula commonly found in workers' compensation laws, namely, arising out of and in the course of employment.¹⁰ In the course of employment relates to the elements of time, place,

⁷ OWCP continued to receive medical evidence.

⁸ *Supra* note 3.

⁹ See *J.L.*, Docket No. 20-0717 (issued October 15, 2020); *J.W.*, Docket No. 18-0183 (issued January 4, 2019); *Delores C. Ellyett*, 41 ECAB 992 (1990).

¹⁰ This construction makes the statute effective in those situations generally recognized as properly within the scope of workers' compensation law. *D.T.*, Docket No. 19-1486 (issued January 17, 2020); *Bernard D. Blum*, 1 ECAB 1 (1947).

and work activity.¹¹ To arise in the course of employment, an injury must occur at a time when the employee may reasonably be said to be engaged in his or her master's business, at a place when he or she may reasonably be expected to be in connection with his or her employment, and while he or she was reasonably fulfilling the duties of the employment, or engaged in doing something incidental thereto.¹²

Section 8102(a)(1) of FECA provides:

“The United States shall pay compensation as specified by this subchapter for the disability or death of an employee resulting from personal injury sustained while in the performance of his duty, unless the injury or death is --

(1) caused by willful misconduct of the employee.”¹³

The Board has defined willful misconduct as deliberate conduct involving premeditation, obstinacy, or intentional wrongdoing with the knowledge that it is likely to result in serious injury or conduct that is in wanton or reckless disregard of probable injurious consequences.¹⁴ The allegation of willful misconduct is an affirmative defense which OWCP must invoke in the original adjudication of the claim and OWCP has the burden to prove such a defense.¹⁵

With respect to the affirmative defense of willful misconduct, OWCP's procedures provide:

“The question of willful misconduct arises where at the time of the injury the employee was violating a safety rule, disobeying other orders of the employer, or violating a law. Safety rules have been promulgated for the protection of the worker -- not the employer -- and, for this reason, simple negligent disregard of such rules is not enough to deprive a worker or the worker's dependents of any compensation rights. All employees are subject to the orders and directives of their employers in respect to what they may do, how they may do certain things, the place or places where they may work or go, or when they may or shall do certain things. Disobedience of such orders may destroy the right to compensation only if the disobedience is deliberate and intentional as distinguished from careless and heedless.”¹⁶

¹¹ *R.E.*, Docket No. 18-0515 (issued February 18, 2020); *J.G.*, Docket No. 17-0747 (issued May 14, 2018).

¹² *M.T.*, Docket No. 19-1546 (issued March 5, 2020); *see J.B.*, Docket No. 17-0378 (issued December 22, 2017).

¹³ 5 U.S.C. § 8102(a)(1).

¹⁴ *I.A.*, Docket No. 15-1913 (issued July 20, 2016); *W.S.*, Docket No. 15-1271 (issued October 5, 2015).

¹⁵ *See S.M.*, Docket No. 18-1574 (issued March 27, 2019); *see also Bruce Wright*, 43 ECAB 284, 295 (1991).

¹⁶ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Performance of Duty*, Chapter 2.804.14 (September 1995).

ANALYSIS

The Board finds that appellant has met his burden of proof to establish that an injury occurred in the performance of duty, as alleged.

The employing establishment controverted the claim alleging willful misconduct. An allegation of willful misconduct is in the nature of an affirmative defense.¹⁷ When claiming an affirmative defense in denying a claim, the defense must be invoked in the original adjudication of the claim, and the employing establishment has the burden to prove such a defense.¹⁸ The evidence required to establish this defense must be reliable, probative, and substantial.¹⁹ The Board finds that the evidence submitted fails to establish that appellant's actions rose to the level of willful misconduct. During the incident appellant was performing his regular duties as a letter carrier and had no intent to violate a safety rule, disobey other orders of the employer, or violate the law. Rather, the employing establishment involved the local police based upon a tip from a coworker and thereafter interacted with officers who ultimately tackled appellant out of fear of perceived self-harm based on representations made to them. Under the circumstances of this case the Board finds that appellant's conduct was not deliberate and intentional with regard to his actions leading to injury on that date, but rather resulted from an unexpected confrontation by police precipitated by acts of the employing establishment. Thus, the affirmative defense of willful misconduct is denied.

The Board further finds that appellant's injury occurred in the performance of duty as it occurred at a time and place where appellant was reasonably expected to be, and he was reasonably fulfilling the employment duties he had been assigned.²⁰ The evidence establishes that employing establishment management misrepresented facts to the police and escalated the incident. On the morning of March 6, 2017, while appellant was casing his mail, G.S. went to management with her concerns about appellant. However, it was not until appellant had left to go on his route that L.G. contacted the local police and alleged that appellant was a danger to fellow employees and himself. He told the police appellant had a gun and would be violent. The record does not establish that appellant was a danger to himself or others as he performed his regular duties as he delivered mail.

Herein, the employing establishment brought the police to appellant's mail route. The employing establishment provided inaccurate information to the police, which ultimately led to

¹⁷ *Supra* note 15.

¹⁸ *See B.P.*, Docket No. 17-0580 (issued March 12, 2018).

¹⁹ *See A.S.*, Docket No. 10-0514 (issued April 12, 2011).

²⁰ *See Robert J. Eglinton*, 40 ECAB 195 (1988) (A claimant tackled by a federal law enforcement officer who had been called by the employing establishment to investigate threats allegedly made by the claimant, was found to be in the performance of duty as at the time the employing establishment elicited law enforcement involvement he was pursuing his regular work duties. The Board found the claimant had established that the supervisor had mishandled the situation, by providing misinformation which led to the interaction between the claimant and the law enforcement official. It further found that the claimant would not have panicked and sustained injury had he not been misinformed by the employing establishment regarding the investigation into his behavior and had he have been properly informed regarding the meeting in the Postmaster's office with the law enforcement officer.)

the claimed injury when appellant was tackled by a police officer. The evidence indicates that appellant would not have been tackled by the police officer but for L.G. providing the police with inaccurate information and he would not have sustained injury, but for the mishandling and escalation of the incident by L.G. and M.F. who claimed appellant was a threat to himself and others. The Board finds that the alleged injury was the direct result of embellishment and misrepresentation to the police by appellant's supervisors. The Board therefore finds that the claimed injury occurred in the performance of duty and thus the issue of causal relationship between the accepted employment incident and the diagnosed conditions must be considered by OWCP. Upon return of the case record OWCP shall undertake such further development as deemed necessary to be followed by a *de novo* decision on appellant's entitlement to compensation.²¹

CONCLUSION

The Board finds that appellant has established that his alleged injury occurred in the performance of duty.

²¹ The Board notes that the case record contains an authorization for examination and/or treatment (Form CA-16) dated September 27, 2017. A properly completed Form CA-16 authorization may constitute a contract for payment of medical expenses to a medical facility or physician, when properly executed. The form creates a contractual obligation, which does not involve the employee directly, to pay for the cost of the examination or treatment regardless of the action taken on the claim. The period for which treatment is authorized by a Form CA-16 is limited to 60 days from the date of issuance, unless terminated earlier by OWCP. 20 C.F.R. § 10.300(c); *P.R.*, Docket No. 18-0737 (issued November 2, 2018); *N.M.*, Docket No. 17-1655 (issued January 24, 2018); *Tracy P. Spillane*, 54 ECAB 608 (2003).

ORDER

IT IS HEREBY ORDERED THAT the September 14, 2018 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded to OWCP for further proceedings consistent with this decision of the Board.

Issued: December 2, 2020
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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