

ISSUE

The issue is whether appellant has met her burden of proof to establish right arm and hand injuries on March 29, 2013 while in the performance of duty, as alleged.

FACTUAL HISTORY

This case has been previously before the Board.⁴ The facts and circumstances of the case as set forth in the Board's prior decision are incorporated herein by reference. The relevant facts are as follows.

On March 29, 2013 appellant, then a 40-year-old pharmacy technician, filed a traumatic injury claim (Form CA-1) alleging that on that day she sustained inflammation of the tissue and tendon in her right forearm, thumb, and index finger when she was assaulted by M.N., local union president, who grabbed her right forearm and pulled and twisted with great force while in the performance of duty. No additional evidence was submitted.

OWCP, in an April 4, 2013 development letter, advised appellant of the factual and medical evidence necessary to establish her claim and attached a questionnaire for her completion. It afforded her 30 days to submit the necessary evidence.

In an April 9, 2013 letter, A.D., an employing establishment supervisor, controverted appellant's claim, contending that her injury had not occurred in the performance of duty because at the time of injury she was on annual leave.

The employing establishment submitted investigative reports concerning the March 29, 2013 incident. The report included the results from multiple interviews. In her March 30 and April 10, 2013 statements, appellant contended that she was on a computer in her office gathering evidence against M.N., when M.N. became angry and told appellant to leave the office because she was no longer on official time. She refused to leave and noted that she wanted the request in writing from M.N. M.N. denied appellant's request. While appellant was still on her cell phone talking to E.K., union national vice president, M.N. grabbed her right hand and twisted it in an attempt to pull her out of the office. She claimed that E.K. heard the whole incident. Appellant immediately called the employing establishment police. Officers L.S. and S.P. responded. Officer L.S. escorted appellant to the employee health unit to obtain treatment for her right wrist pain. Officer S.P. reported seeing no visible sign of injury. E.W. and J.W., union stewards, and W.M., appellant's coworker, were interviewed by the police. Each stated that on March 29, 2013 M.N. requested that appellant leave the premises and turn in her keys because she was not on official time. They were located in nearby offices with their doors open and heard appellant scream obscenities in response to M.N.'s request. E.W. and J.W. noted that they did not see M.N. touch appellant or observe any visible injuries on appellant. Officer S.P. interviewed M.N. who stated that appellant had resigned from her treasurer position due to an internal union investigation for writing checks to herself. She further noted that appellant was on annual leave and was not supposed to be in the national office. M.N. noted that she told appellant that she was not on official time and no longer worked for the union and told her to leave the union office. Appellant refused to leave and demanded that M.N. put her request in writing. M.N. refused to do so. She noted that

⁴ Docket No. 14-1532 (issued December 4, 2015).

appellant screamed “get your hands off me” while appellant was on her cell phone, but that M.N. stated that she was in the hallway during this incident and she never entered appellant’s office nor touched her.

Officer S.P. noted that he and Officer L.S. returned to appellant’s office to inquire about the outcome of her medical care. No arrest was made as there were no eyewitnesses to the actual alleged assault and battery and there were no visible signs of injuries.

In an April 3, 2013 investigative report, Officer S.P. noted that he had interviewed Dr. John C. Charnas, an employing establishment physician, who had evaluated appellant on March 29, 2013 and prescribed medication and advised her to take the rest of the day off and return to full-duty work the next day. Dr. Charnas performed a follow-up evaluation on April 1, 2013 and found no indication of visible injuries. He noted that appellant was wearing a wrist brace that he had not prescribed.

Appellant, in an April 10, 2013 letter, noted that a district national union representative had asked her to provide documentation regarding an official investigation. The documents were located in a union trailer on the employing establishment’s campus. Appellant noted that she was originally scheduled for annual leave, but since she needed to return to the employing establishment to get the requested documents she was planning to adjust the schedule to duty time and to speak to her supervisor about the correction of her leave status. Following the March 29, 2013 incident and her evaluation in the employee health unit, she was advised by a timekeeper to adjust her leave request to reflect duty time. The correction was made on April 1, 2013. In another letter, also dated April 10, 2013, appellant contended that she sustained an emotional condition on March 29, 2013, noting that Dr. George Shorter, an employing establishment physician, recommended that she seek medical attention for her continued anxiety and mental health which were related to her recent assault.

OWCP received medical evidence.

By decision dated May 16, 2013, OWCP denied appellant’s traumatic injury claim finding that the evidence of record failed to establish that she was injured in the performance of duty on March 29, 2013, as alleged, because she was on annual leave at the time of injury.

OWCP received additional medical evidence.

On June 7, 2013 appellant requested a telephonic hearing before a representative of OWCP’s Branch of Hearings and Review regarding the May 16, 2013 decision.

OWCP continued to receive medical evidence.

In a May 28, 2013 memorandum, A.D., a supervisor, noted that appellant was on 100 percent official time for the union from June 25, 2012 to March 29, 2013. Her regular tour schedule was Monday through Friday, but it may have included evenings, nights, weekends, and holidays. A.D. noted that changes in a tour of duty were based on the need for union duties and representations.

A June 3, 2013 memorandum by J.K., acting inventory management supervisor, noted that appellant had provided excellent union representation. She came in extra early to accommodate meetings with night shift personnel or stayed late for the evening shift crew.

In an October 31, 2013 e-mail, R.V., former local union president, noted that appellant was covered under workers' compensation as her current job involved 100 percent representation and not only when she had a client.

During a November 13, 2013 telephonic hearing, appellant noted that she went to the office on March 29, 2013 because she was working on a case. She was also researching and providing information for an investigation of M.N. regarding official union business as requested by B.S., a national union representative.

In a December 16, 2013 e-mail, M.N. noted that appellant did not work 24 hours, 7 days per week in the union office. Appellant's tour of duty was 7:00 a.m. to 3:30 p.m. M.N. asserted that appellant came into the union office on March 29, 2013 while on annual leave to work on internal union business. She confirmed that appellant was retrieving information, for B.S. M.N. indicated that she was retrieving financial documents which pertained to internal union business and union representatives could not perform such internal union business while in a paid duty status.

In a January 16, 2014 letter, J.S., assistant human resources manager, indicated that appellant was a pharmacy technician who was assigned to work 100 percent for the union. She noted that she had preapproved annual leave for March 29, 2013. Appellant did not inform her supervisor that she was on duty that day until she returned to work on April 1, 2013 and changed her leave request in the computer. J.S. noted that the supervisor approved the amended request and, therefore, appellant was recorded to be in duty status on March 29, 2013.

OWCP received medical evidence.

By decision dated January 30, 2014, an OWCP hearing representative affirmed the May 16, 2013 decision. He accepted that the March 29, 2013 employment incident occurred as alleged and that a medical condition had been diagnosed, but denied appellant's claim finding that she failed to establish that the assault on March 29, 2013 occurred while in the performance of duty. The hearing representative explained that her "assault and battery" were not facilitated by her employment, but rather resulted from activities related to the internal business of a labor organization.

On June 26, 2014 appellant appealed to the Board. By decision dated December 4, 2015, the Board affirmed the January 30, 2014 decision finding that appellant had not met her burden of proof to establish that the March 29, 2013 incident occurred in the performance of duty, as alleged. The Board found that at the time of the injury of appellant by M.N., appellant was on official time, but this incident was the result of activities related to the internal business of a labor organization, and, thus did not constitute a compensable factor of employment under FECA.

On December 2, 2016 appellant, through counsel, requested reconsideration of the January 30, 2014 OWCP decision. Counsel contended that on March 29, 2013 appellant was performing union business when she was attacked by M.N. He noted that she came to the office to work on the case of M.R., an employee. Counsel noted that appellant looked at case law, read,

and performed research. He cited OWCP's procedures, the AFGE master agreement, and Board precedent in support of his contention. Counsel submitted several documents in support of these new arguments in appellant's claim. He submitted a United States Department of Agriculture National Finance Center Checklist for Back Pay Cases. Counsel also submitted documents related to appellant's representation of M.R., including a Defense Finance and Accounting Service (DFAS) Checklist regarding the processing of payments/adjustments agreed on in settlement of back pay cases or as ordered by the Merit Systems Protection Board (MSPB) and a June 25, 2015 MSPB decision restoring M.R. to his former position with back pay. Also submitted was the Master Agreement between the employing establishment and AFGE which described the use of "official time" for union activity which provides that the "Department and Union agree that a constructive and cooperative working relationship between labor and management is essential to achieving the Department's mission and to ensuring a quality working environment for all employees. The Master Agreement also provided for the guidelines for use of "Official Time" for representational actions.

OWCP, by decision dated January 17, 2017, denied modification of its denial of appellant's claim for a work-related traumatic injury. It found that the evidence submitted was insufficient to establish that the March 29, 2013 employment incident occurred while she was in the performance of duty.

On January 17, 2018 appellant, through counsel, requested reconsideration. Counsel noted that appellant resigned from her union treasurer position on February 3, 2013 and that after that time she only worked as a shop steward representing employees in grievances. He asserted that the evidence established that she was performing representational functions at the time of the March 29, 2013 employment incident as she was working on M.R.'s grievance. Counsel cited Board precedent in support of his contention.

Counsel submitted e-mails dated February 2 and 3, 2013 between appellant M.N. indicating the acceptance of her resignation from her treasurer position.

In a January 9, 2018 affidavit, appellant contended that from June 25, 2012 to the time she was assaulted on March 29, 2013 she was on 100 percent official time for the union. Her duties during this time involved handling grievance issues including research and interviews, and representing bargaining unit employees. On February 2, 2013 appellant submitted her resignation from her position as secretary/treasurer for the union. Her resignation was immediately accepted and from February 2 to March 29, 2013 she performed the function of a union shop steward and handled grievances for bargaining unit employees. Appellant noted that she did not resign from her position because of the investigation of M.N. She noted that her resignation occurred prior to the investigation. Appellant noted that on March 29, 2013 she used annual leave from 8:30 a.m. to 10:30 a.m. She began work at 10:30 a.m. Initially, appellant prepared a report concerning the investigation of M.N., which she completed around 12:00 p.m. She then began to perform research on M.R.'s case. M.R. was an employing establishment police officer who had been disciplined for unauthorized use of a firearm for which he had filed a grievance. Appellant claimed that she was performing legal research for his representation when M.N. entered the office around 1:30 p.m., yelled at her and then physically attacked her leading to an injury. She asserted that she did not initiate the altercation or in any way provoke M.N. Appellant maintained that there was nothing she could do to avoid the attack.

A February 12, 2018 questionnaire completed by M.R. noted that on October 19, 2012 he requested representation by the AFGE union and that appellant was assigned to his matter. He noted that he had weekly meetings with her regarding the status of his case and often spoke to her by telephone. Appellant updated him weekly in person, by e-mail, or by telephone about the status of his case. M.R. noted that he did not recall if she had contacted him on March 29, 2013, but noted that at times they spoke daily. He indicated that his case was complex and required a lot of work to be completed by appellant. M.R. further indicated that she was very much involved before and during his case which was being handled by federal court, ending in June 2015.

The employing establishment, in a February 20, 2018 letter, again challenged appellant's claim, contending that she had not submitted sufficient evidence to establish that her injury occurred in the performance of duty, as alleged.

By decision dated April 6, 2018, OWCP, denied modification of its January 17, 2017 decision.

LEGAL PRECEDENT

An employee seeking benefits under FECA⁵ 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

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."⁹ To arise in the course of employment, in general, an injury must occur: (1) at a time when the employee may reasonably be said to be engaged in the master's business; (2) at a place when he or she may reasonably be expected to be in connection with his or her employment; and (3) while he or she was reasonably fulfilling the duties of his or

⁵ *Supra* note 3.

⁶ *J.P.*, Docket No. 19-0129 (issued April 26, 2019); *S.B.*, Docket No. 17-1779 (issued February 7, 2018); *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 *R.R.*, Docket No. 19-0048 (issued April 25, 2019); *L.M.*, Docket No. 13-1402 (issued February 7, 2014); *Delores C. Ellyett*, 41 ECAB 992 (1990).

⁹ *See M.T.*, Docket No. 17-1695 (issued May 15, 2018); *S.F.*, Docket No. 09-2172 (issued August 23, 2010); *Valerie C. Boward*, 50 ECAB 126 (1998).

her employment or engaged in doing something incidental thereto.¹⁰ 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.¹¹

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 place. Assaults for private reasons do not arise out of the employment unless, by facilitating an assault that would not otherwise be made, the employment becomes a contributing factor.¹²

The Board has adhered to the principle that union activities are personal in nature and are not considered to be within the course of employment.¹³ Attendance at a union meeting, for example, is exclusively for the personal benefit of the employee and devoid of any mutual employer-employee benefit that would bring it within the course of employment.¹⁴

However, the Board has recognized an exception to this general rule when employees performing representational functions, which entitle them to official time, are injured when in the performance of duty.¹⁵ The underlying rationale for this exception is that an activity undertaken by an employee in the capacity of a union official may simultaneously serve the interest of the employer.¹⁶ OWCP’s procedures indicate that representational functions include authorized activities undertaken by employees on behalf of other employees pursuant to such employees’ right to representation under statute, regulation, executive order, or terms of a collective bargaining agreement.¹⁷

¹⁰ A.S., Docket No. 18-1381 (issued April 8, 2019); *Roma A. Mortenson-Kindschi*, 57 ECAB 418 (2006); *Mary Keszler*, 38 ECAB 735, 739 (1987).

¹¹ D.C., Docket No. 18-1216 (issued February 8, 2019); *R.B.*, Docket No. 16-1071 (issued December 14, 2016); *Eugene G. Chin*, 39 ECAB 598 (1988).

¹² W.W., Docket No. 19-0550 (issued October 7, 2019); *J.G.*, Docket No. 17-0747 (issued May 14, 2018); S.S., Docket No. 13-0318 (issued March 26, 2013).

¹³ *R.L.*, Docket No. 18-1375 (issued May 1, 2019); *J.G.*, Docket No. 17-1948 (issued September 13, 2018); *Jimmy E. Norred*, 36 ECAB 726 (1985).

¹⁴ *R.L.*, *id.*; *J.G.*, *id.*; *C.M.*, Docket No. 10-0753 (issued December 15, 2010).

¹⁵ *R.L.*, *id.*; *J.G.*, *id.*; *R.F.*, Docket No. 14-0770 (issued September 29, 2015) (those on official time performing activities related to the internal business of a labor organization such as soliciting new members or collecting dues are not considered to be in the performance of duty. The singular fact that one is on paid official time for union representation is not enough to establish that every interaction during such official time is within the performance of duty).

¹⁶ *R.L.*, *id.*; *J.G.*, *id.*; *Marie Boylan*, 45 ECAB 338, 342-43 (1994).

¹⁷ See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Performance of Duty*, Chapter 2.804.16 (July 1997).

ANALYSIS

The Board finds that appellant was in the performance of duty on March 29, 2013.

Preliminarily, the Board notes that it is unnecessary for the Board to consider the evidence appellant submitted prior to the issuance of OWCP's January 30, 2014 merit decision because the Board considered that evidence in its December 4, 2015 decision. Findings made in prior Board decisions are *res judicata* absent further review by OWCP under section 8128 of FECA.¹⁸

There is no dispute that on March 29, 2013 appellant was physically assaulted by M.N. At that time appellant was sitting on a chair in her office and talking on her cellphone to E.K., the national union vice president. The Board's previous decision affirmed OWCP's denial of appellant's traumatic injury claim, finding that the subject matter of the dispute concerned a nonemployment-related matter. The Board, however, finds that the altercation arose in the performance of duty.

During the November 13, 2013 telephonic hearing, in reconsideration requests dated December 2, 2016 and January 17, 2018, and in a January 9, 2018 affidavit, appellant and counsel asserted that on March 29, 2013 she was performing legal research related to M.R.'s grievance and an investigation of M.N. regarding official union business as requested by B.S., a national union representative, when she was yelled at and physically attacked by M.N. Further, A.D., appellant's supervisor, R.V., former local union president, and J.S., assistant human resources manager, maintained in a May 28, 2013 memorandum, an October 31, 2013 e-mail, and a January 16, 2014 letter, respectively, that appellant was on 100 percent official time for the union while at work. A.D. indicated that she was on official union time from June 25, 2012 to March 29, 2013. R.V. contended that appellant was covered under workers' compensation as she was on official union time even when she did not have a client. Appellant submitted a February 12, 2012 statement and a February 12, 2018 questionnaire from M.R., an employee, who noted that he was represented by appellant during his union grievance. M.R. related that although he could not recall whether she contacted him on March 29, 2013, they had weekly meetings in person and by e-mail, and often spoke daily by telephone regarding the status of his case which was being handled by federal court, ending in June 2015. Based on the above-noted statements, appellant has established that at the time of the assault on March 29, 2013 at 1:30 p.m., she was performing union representational functions on official union time. Thus, the Board finds that appellant has established that she was in the performance of duty on March 29, 2013, as alleged.¹⁹

Consequently, the issue is whether the incident at work caused an injury. OWCP did not adjudicate this aspect of the case as it found that the physical altercation did not occur in the performance of duty. The case will, therefore, be remanded for OWCP to consider whether the medical evidence establishes that appellant sustained an injury due to the March 29, 2013

¹⁸ *C.D.*, Docket No. 19-1973 (issued May 21, 2020); *M.D.*, Docket No. 20-0007 (issued May 13, 2020).

¹⁹ *See S.C.*, Docket No. 11-1608 (issued September 13, 2012); *Charles D. Gregory*, 57 ECAB 322 (issued 2006).

altercation. Following such further development as is deemed necessary, OWCP shall issue a *de novo* decision.²⁰

CONCLUSION

The Board finds that appellant has met her burden of proof to establish right arm and hand injuries on March 29, 2013 while in the performance of duty, as alleged. The Board further finds, however, that the case is not in posture for decision regarding whether appellant's right hand and arm injuries are causally related to the accepted March 29, 2013 employment incident.

ORDER

IT IS HEREBY ORDERED THAT the April 6, 2018 decision of the Office of Workers' Compensation Programs is reversed and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: November 4, 2020
Washington, DC

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

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

²⁰ *J.W.*, Docket No. 18-0183 (issued January 4, 2019).