United States Department of Labor
Employees' Compensation Appeals Board

N.J., Appellant	)	
and	)	
DEPARTMENT OF JUSTICE, FEDERAL BUREAU OF PRISONS METROPOLITAN DETENTION CENTER, Brooklyn, NY, Employer	)	**Docket No. 20-1148** **Issued: March 8, 2021**

Appearances:
Alan J. Shapiro, 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 May 13, 2020 appellant, through counsel, filed a timely appeal from an April 22, 2020 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.

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[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 May 21, 2018, as alleged.

FACTUAL HISTORY

On May 23, 2018 appellant, then a 39-year-old corrections officer, filed a traumatic injury claim (Form CA-1) alleging that at 7:02 a.m. on May 21, 2018 she was injured in a motor vehicle accident (MVA) while in the performance of duty. She explained that she was driving to firearms training when a large tree branch fell through the windshield and roof of her vehicle. While pulled over, the back of her vehicle was rear-ended by a speeding car. Appellant noted that she sustained lacerations on her face, a "busted" lip, headaches, and stiffness in her back, neck, and shoulders. She also indicated that she could not bend her knees after the accident. On the reverse side of the claim form, the employing establishment acknowledged that appellant was in the performance of duty when her injury occurred. Appellant did not stop work.

Appellant subsequently submitted a partially legible May 22, 2018 attending physician's report (Form CA-16) in which Dr. Omar Ahmed, a Board-certified neurologist, acknowledged that she was involved in a car accident and checked a box marked "Yes" to indicate that her conditions were caused by the May 21, 2018 employment incident. The form provided that she would need to participate in physical therapy and estimated that she would be totally disabled from work from May 22 to June 21, 2018.

In a September 14, 2018 medical note, Dr. Alexios Apazidis, a Board-certified orthopedic surgeon, advised that appellant would be undergoing surgery on September 28, 2018 and opined that she would be totally disabled from work for 30 days as a result of the difficulties she encountered in performing her employment duties.

In an October 10, 2018 development letter, OWCP noted that when appellant's claim was first received, it appeared to be a minor injury that resulted in minimal or no lost time from work. Based on this criteria, it had administratively approved payment of a limited amount of medical expenses without formally considering the merits of her claim. However, a formal decision was now required. OWCP advised appellant of the deficiencies of her claim and instructed her as to the factual and medical evidence necessary to establish her claim. It provided a factual questionnaire for her completion concerning the circumstances surrounding her claimed injury and requested that she submit a narrative medical report from her physician, which contained a detailed description of findings and diagnoses, explaining how the reported incident caused or aggravated her medical condition. OWCP afforded appellant 30 days to respond.

In an October 22, 2018 medical note, Dr. Apazidis diagnosed left knee pain and right shoulder pain. He indicated that appellant could return to work on light duty on October 29, 2018. Dr. Apazidis also indicated that she underwent shoulder surgery on September 28, 2018 and underwent knee surgery on October 12, 2018.

By decision dated November 13, 2018, OWCP denied appellant's traumatic injury claim, finding that the evidence of record was insufficient to establish that her injury and/or medical

condition arose during the course of employment and within the scope of compensable work factors.

On November 21, 2018 appellant, through counsel, requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review.

Appellant submitted a May 21, 2018 police report which recounted the events of the incident when her vehicle was disabled due to a fallen tree branch and a second vehicle then struck the rear end of her vehicle. She was transported to the hospital for treatment.

In a June 25, 2018 diagnostic report, Dr. Sasan Azar, a Board-certified neuroradiologist, performed a magnetic resonance imaging (MRI) scan of appellant's cervical spine, finding a reversal of the normal curvature of the cervical spine, disc desiccation at C2-3 and C3-4, a posterior bulge at the C4-5 level, early disc desiccation at C5-6 and a posterior bulge at C6-7.

In a July 2, 2018 diagnostic report, Dr. Steve Losik, a Board-certified radiologist, performed an MRI scan of appellant's left knee and diagnosed an intrameniscal tear in the anterior horn of the lateral meniscus and mild joint effusion consistent with recent trauma. In a separate diagnostic report of even date, he performed an MRI scan of her right shoulder, finding Type III acromion with hypertrophic changes of the acromioclavicular joint with impingement of the rotator cuff and bone marrow edema in the distal clavicle and adjacent acromion with fluid in the acromioclavicular joint.

In operative reports dated September 28 and October 12, 2018, Dr. Apazidis noted that appellant underwent surgery to treat her right shoulder rotator cuff tear and left knee meniscus tear, respectively.

In medical reports dated October 10 and 19, 2018, Dr. Apazidis evaluated appellant after her surgeries and diagnosed neck pain, low back pain, impingement syndrome of the right shoulder, left knee pain and a left knee lateral meniscus tear. He recommended that she continue her nonsurgical care and begin physical therapy. Dr. Apazidis identified May 21, 2018 as the onset date of appellant's conditions and opined that, based on her history of injury, her injuries were causally related to the May 21, 2018 employment incident.

In an undated disability letter, Dr. Ahmed indicated that he had been treating appellant regarding a May 21, 2018 car accident. He indicated that she underwent right shoulder surgery on September 28, 2018 and left knee surgery on October 12, 2018. Dr. Ahmed stated that appellant was participating in physical therapy two to three times per week and opined that she may be able to resume work.

A telephonic hearing was held on March 22, 2019. Appellant testified that on the date of the incident she was traveling to firearms training with a coworker. She recounted that she was scheduled to travel for training and that she was receiving compensation for the training. Appellant then described the May 21, 2018 employment incident where she was rear-ended by a speeding vehicle after she had parked when a fallen branch fell through her windshield and roof. She sustained lacerations to her face, damage to her front teeth and also injured her right shoulder and left knee. She also detailed her subsequent medical treatment for injuries she sustained during the accident. Appellant stated that the vehicle she was traveling in was her personal vehicle and that

she was being reimbursed for the mileage. Counsel for appellant explained that she was required to perform her firearms training annually on an assigned date. OWCP's hearing representative requested that appellant provide copies of her travel documentation as well as a response to OWCP's development questionnaire and any other information demonstrating that the employing establishment requested her to attend the training.

By decision dated June 5, 2019, OWCP's hearing representative set aside OWCP's November 13, 2018 decision and remanded the case for further action, requesting that OWCP obtain a statement from the employing establishment regarding appellant's work status.

In a June 10, 2019 development letter, OWCP requested that the employing establishment respond to questions concerning whether or not appellant was in travel status during the May 21, 2018 employment incident.

In response, the employing establishment submitted a July 4, 2019 statement in which it provided a schedule and instructions sent to appellant for her firearms certification scheduled for May 21, 2018 and explained that she was expected to perform her official duties on requalifying with her required weapons on that day. It also stated that she used her personal vehicle to travel to the training not a government vehicle. The attached firearms information sheet also provided that there would be a passenger van that would depart for the training facility at 6:10 a.m. and that, if employees chose to travel using their personal vehicles, they would not be reimbursed for mileage or fuel. A daily assignments sheet demonstrated that appellant was scheduled for firearms training on May 21, 2019 and that she was paid continuation of pay (COP) on May 22, 2019.

By decision dated September 4, 2019, OWCP denied appellant's traumatic injury claim, finding that the evidence of record was insufficient to establish that her injury and/or medical condition arose during the course of employment and within the scope of compensable work factors.

On September 11, 2019 appellant, through counsel, requested a telephonic hearing before an OWCP hearing representative.

Appellant submitted an April 11, 2019 narrative medical report in which Dr. Apazidis detailed his treatment for her in relation to the May 21, 2018 MVA.

A telephonic hearing was held on January 13, 2020. Counsel for appellant argued that appellant was directed by the employing establishment to attend firearms training the day of the employment incident and the fact that there was a van available to take her to the training was not relevant to the issue of performance of duty. He reasoned that because she was sent for mandatory training that was required as an essential function of her employment qualified her traveling as a part of a special dispatch. Appellant indicated that there were no alternative sites at her normal employing establishment where she could complete her firearms training and that she was still compensated for attending the training that day. She recounted that she received instructions on training techniques, and explained that employees usually transport themselves to training without use of the employing establishment's van and that the incident occurred on a regular workday in which she was scheduled to work. The hearing representative allowed appellant an additional 30 days to submit evidence.

By decision dated February 21, 2020, OWCP's hearing representative affirmed OWCP's September 4, 2019 decision.

On March 26, 2020 appellant, through counsel, requested reconsideration of OWCP's February 21, 2020 decision.

Appellant attached a March 17, 2020 letter in which A.F., the assistant human resource manager, explained that appellant was required to qualify with various firearms yearly to maintain appellant's position and that she was authorized to utilize her personal vehicle to drive to the training range. A.F. also provided that appellant's work hours on May 21, 2018 were documented from 6:00 a.m. to 2:00 p.m.

In an attached undated statement, appellant explained that she was scheduled for work from 6:00 a.m. to 2:00 p.m. on May 21, 2018. She was scheduled to arrive at the training facility at 8:00 a.m. and was given two hours of travel time.

By decision dated April 22, 2020, OWCP denied modification.

LEGAL PRECEDENT

An employee seeking benefits under FECA[3] 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,[4] 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.[5] 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.[6]

The phrase "sustained while in the performance of duty" has been interpreted by the Board to be the equivalent of the commonly founded prerequisite in workers' compensation law of "arising out of and in the course of employment."[7] To arise in the course of employment, in general, an injury must occur: (1) at a time when the employee may reasonably be stated 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

[3] *Id*.

[4] *S.S.*, Docket No. 19-1815 (issued June 26, 2020); *S.B.*, Docket No. 17-1779 (issued February 7, 2018); *Joe D. Cameron*, 41 ECAB 153 (1989).

[5] *M.H.*, Docket No. 19-0930 (issued June 17, 2020); *R.C.*, 59 ECAB 427 (2008); *James E. Chadden, Sr.*, 40 ECAB 312 (1988).

[6] *S.A.*, Docket No. 19-1221 (issued June 9, 2020); *L.M.*, Docket No. 13-1402 (issued February 7, 2014); *Delores C. Ellyett*, 41 ECAB 992 (1990).

[7] *C.L.*, Docket No. 19-1985 (issued May 12, 2020); *S.F.*, Docket No. 09-2172 (issued August 23, 2010); *Valerie C. Boward*, 50 ECAB 126 (1998).

duties of his or her employment or engaged in doing something incidental thereto.[8] In deciding whether an injury is covered by FECA, the test is whether, under all the circumstances, a causal relationship exists between the employment itself, or the conditions under which it is required to be performed, and the resultant injury.[9]

The Board has also recognized as a general rule that off-premises injuries sustained by employees having fixed hours and place of work, while going to or coming from work, are not compensable as they do not arise out of and in the course of employment. Rather, such injuries are merely the ordinary, nonemployment hazards of the journey itself, which are shared by all travelers.[10] Due primarily to the myriad of factual situations presented by individual cases over the years, certain exceptions to the general rule have developed where the hazards of travel may fairly be considered a hazard of employment. Exceptions to the general coming and going rule have been recognized, which are dependent upon the relative facts of each claim: (1) where the employment requires the employee to travel on the highways; (2) where the employing establishment contracts to and does furnish transportation to and from work; (3) where the employee is subject to emergency calls, as in the case of firefighter; (4) where the employee uses the highway to do something incidental to his or her employment with the knowledge and approval of the employing establishment; and (5) where the employee is required to travel during a curfew established by local, municipal, county, or state authorities because of civil disturbances or other reasons.[11] OWCP procedures indicate:

> "Where the Employment Requires the Employee to Travel. This situation will not occur in the case of an employee having a fixed place of employment unless on an errand or special mission. It usually involves an employee who performs all or most of the work away from the industrial premises, such as a chauffeur, truck driver, or messenger. In cases of this type, the official superior should be requested to submit a supplemental statement fully describing the employee's assigned duties and showing how and in what manner the work required the employee to travel, whether on the highway or by public transportation. In injury cases a similar statement should be obtained from the injured employee."[12]

The Board has also recognized the special errand exception to the going to and coming from work rule. When the employee is to perform a special errand, the employing establishment is deemed to have agreed, expressly or impliedly, that the employment service should begin when the employee leaves home to perform the errand. Ordinarily, cases falling within this exception involve travel which differs in time or route or because of an intermediate stop, from the trip which is normally taken between home and work. In such a case, the hazard encountered in the trip may

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[8] *S.V.*, Docket No. 18-1299 (issued November 5, 2019); *Roma A. Mortenson-Kindschi,* 57 ECAB 418 (2006); *Mary Keszler*, 38 ECAB 735, 739 (1987).

[9] *Mark Love,* 52 ECAB 490 (2001).

[10] *See R.G.*, Docket No. 16-1419 (issued December 6, 2016).

[11] *Id*.

[12] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Performance of Duty*, Chapter 2.804.6(b) (August 1992).

differ somewhat from that involved in normally going to and returning from work. However, the essence of the exception is not found in the fact that a greater or different hazard is encountered, but in the agreement to undertake a special task. For this reason, coverage is afforded from the time the employee leaves home, even though in time and route the journey may be, in part, identical to that normally followed in going to work.[13]

ANALYSIS

The Board finds that appellant has met her burden of proof to establish an injury in the performance of duty on May 21, 2018, as alleged.

The evidence of record indicates that on May 21, 2018 at 7:02 a.m. appellant was traveling to a required firearms training when a tree branch fell and impacted the roof and windshield of her personal vehicle. While pulled over her vehicle was rear-ended by a speeding vehicle. OWCP denied appellant's traumatic injury claim, finding that her injury was caused by an ordinary nonemployment hazard of the journey itself, which is shared by all travelers.

In accordance with OWCP's procedures, OWCP requested in a June 10, 2019 development letter that the employing establishment respond to a series of questions, including describing appellant's assigned duties and show how and in what manner the work required her to travel. In a July 4, 2019 statement, the employing establishment explained that she was expected to perform her official duties on requalifying with her required weapons on May 21, 2018 and attached a daily assignment sheet that demonstrated that she was assigned to perform firearms training on the day of the employment incident. Further, in a March 17, 2020 letter, the assistant human resources manager indicated that appellant's firearms training was a yearly requirement associated with her employment duties. She attested that appellant was authorized to utilize her personal vehicle to drive to the training range and that appellant's work hours on May 21, 2018 were documented from 6:00 a.m. to 2:00 p.m.

Appellant explained on multiple occasions that she was assigned to travel to a separate location from her usual fixed location of work in order to complete required firearms training. The employing establishment's March 17, 2020 letter and a daily assignment sheet establish that she was authorized to utilize her personal vehicle to travel to the training range and that she was on the clock at 7:02 a.m. when the MVA occurred. For this reason, appellant was afforded coverage from the time she left her home to travel to the firearms training under the special errand exception.[14] The Board thus finds that she has met her burden of proof to establish that the May 21, 2018 employment incident occurred in the performance of duty, as alleged. As it has been established that appellant was in the performance of duty, the medical evidence of record must be considered.[15]

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[13] *D.T.*, Docket No. 11-0751 (issued March 12, 2012).

[14] *Id*.

[15] *C.R.*, Docket No. 19-1721 (issued June 17, 2020).

As OWCP has not yet evaluated the medical evidence to determine whether there is a causal relationship between the accepted employment incident and a diagnosed condition, the case must be remanded to OWCP. On remand, it shall evaluate the medical evidence of record to determine whether appellant sustained an injury and/or disability due to the May 21, 2018 employment incident.[16] After any further development as deemed necessary, OWCP shall issue a *de novo* decision.[17]

CONCLUSION

The Board finds that appellant has met her burden of proof to establish a traumatic injury in the performance of duty on May 21, 2018, as alleged.[18] The case is not in posture for decision, however, with regard to whether appellant has met her burden of proof to establish causal relationship between her diagnosed condition(s) and the accepted employment incident.

[16] The Board notes that appellant reported on her Form CA-1 and testified during the hearing that she sustained facial lacerations and a lip contusion. On remand, OWCP shall apply its procedures pertaining to visible injuries with regard to appellant's claimed contusions, abrasions, lacerations, and/or swelling. *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Initial Development of Claims*, Chapter 2.800.6(a) (June 2011); Chapter 2.805.3(c) (January 2013).

[17] *P.S.*, Docket No. 19-1818 (issued April 14, 2020).

[18] The Board notes that the employing establishment issued a Form CA-16. A 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. *See* 20 C.F.R. § 10.300(c); *S.P.*, Docket No. 19-1904 (issued September 2, 2020); *J.G.*, Docket No. 17-1062 (issued February 13, 2018); *Tracy P. Spillane*, 54 ECAB 608 (2003).

ORDER

IT IS HEREBY ORDERED THAT the April 22, 2020 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: March 8, 2021
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