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

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| **K.R., Appellant** | ) | |
| **and** | ) | **Docket No. 21-0308** |
| | ) | **Issued: May 16, 2022** |
| **DEPARTMENT OF HOMELAND SECURITY, TRANSPORTATION SECURITY ADMINISTRATION, FEDERAL AIR MARSHAL SERVICE, Egg Harbor Township,NJ, Employer** | ) | |

*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
PATRICIA H. FITZGERALD, Deputy Chief Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

### ***JURISDICTION***

On December 29 2020 appellant, through counsel, filed a timely appeal from a December 3, 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.

[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 his burden of proof to establish a traumatic injury in the performance of duty on March 7, 2016, as alleged.

## ***FACTUAL HISTORY***

On February 22, 2019 appellant, then a 44-year-old federal air marshal, filed a traumatic injury claim (Form CA-1) alleging that at 10:00 a.m. on March 7, 2016 he injured his shoulder and knee when he was struck by a vehicle when jogging while in the performance of duty. He did not stop work. On the reverse side of the claim form the employing establishment contended that appellant was jogging while on temporary duty (TDY) and was not in the performance of duty at the time of the alleged incident. It further noted that he failed to report his injury to the supervisor on duty at the time of his injury and no longer worked at the employing establishment.

In a March 1, 2019 witness statement, M.C., a coworker, indicated that on the morning of March 7, 2016, he and appellant were on TDY and were jogging when he witnessed appellant being struck by a vehicle. He attested that appellant went up and onto the hood of the vehicle before sliding/falling back onto the ground. M.C. noted that the vehicle drove away without stopping. He further indicated that, following the accident, appellant complained to him of pain in his shoulder and knee and was walking with a limp.

In a March 5, 2019 development letter, OWCP informed appellant of the deficiencies of his claim. It requested that he submit additional factual and medical evidence and provided a factual questionnaire for his completion. OWCP afforded appellant 30 days to submit the necessary evidence. No further information was received.

By decision dated April 12, 2019, OWCP denied appellant's traumatic injury claim, finding that he had not established the medical component of fact of injury, as no medical condition was diagnosed. It concluded, therefore, that the requirements had not been met to establish an injury as defined by FECA.

In a June 12, 2019 medical report, Dr. John W. Ellis, Board-certified in family medicine, noted that appellant was in Miami, Florida on March 7, 2016 when he was struck by a vehicle on the left side while jogging with his coworker, injuring his left shoulder, flank, and arm. Appellant reported that he was thrown up on the hood of the vehicle. Dr. Ellis indicated that shortly thereafter, appellant also developed pain in his right shoulder and knee. He noted that a May 3, 2016 x-ray of the left shoulder revealed an acromioclavicular (AC) joint separation while a May 22, 2017 x-ray of the right knee demonstrated no joint effusion or degeneration. Dr. Ellis also noted that a June 5, 2017 magnetic resonance imaging (MRI) scan of the right knee revealed a medial meniscus tear and patellar tendinosis. He conducted a physical examination and diagnosed right shoulder AC joint separation, right shoulder tendinitis, right shoulder probable rotator cuff tear, right knee strain, and a right knee medial meniscus tear. Dr. Ellis indicated that appellant previously had contusions on the left side of his body, which were now resolved. He opined that appellant's injuries arose out of and in the course of his employment and that they contributed to, aggravated, and/or caused appellant's diagnosed conditions. Dr. Ellis explained that, although appellant had preexisting tendinitis in both shoulders and tendinitis and arthritis in

both knees and ankles, being hit on the left side of the body on March 7, 2016 caused jerking on the contralateral right side of the body separating the clavicle from the AC joint of the right shoulder, as well as the medial meniscus injury in the right knee.

On June 27, 2019 appellant requested reconsideration.

By decision dated September 25, 2019, OWCP modified the April 12, 2019 decision, finding that the medical evidence of record was sufficient to establish a diagnosed medical condition. However, the claim remained denied, as appellant was found not to be in the performance of duty at the time of the accepted March 7, 2016 employment incident.

On September 17, 2020 appellant, through counsel, requested reconsideration.

In a September 14, 2020 statement, appellant again asserted that on March 7, 2016 he sustained injuries when he was struck by a vehicle while in the performance of duty. He alleged that, when the incident occurred, he was on a scheduled layover to Miami, Florida and was jogging with his coworker before heading back on his scheduled flight to Detroit, Michigan. Appellant asserted that his job as a federal air marshal required a multitude of skillsets and physical fitness. He contended that, due to this expectation, federal air marshals were required to conduct a health fitness assessment (HEA) quarterly. Appellant contended that it was customary for federal air marshals to exercise during layovers. He asserted that running and jogging countered the effects of prolonged sitting, and that it was a regular part of his job to go for jogs or runs while on layovers in other cities.

In a September 29, 2020 development letter, OWCP requested additional factual information from the employing establishment. It posed four questions requesting that the employing establishment provide information relative to appellant's duties, including whether or not he was on authorized TDY while in Florida, whether it was typical for federal air marshals to jog during layovers between flights, and whether jogging while on layovers was a "well-known and well-accepted" part of a federal air marshal's job.

In a November 24, 2020 response to OWCP's development questionnaire, appellant's supervisor, L.B., controverted the claim. He acknowledged that on March 7, 2016 appellant was in a TDY status in the Miami, Florida area. L.B. also indicated that he failed to report his injury and that he was unaware that he was injured on March 7, 2016 until he submitted his Form CA-1. He contended that appellant was assigned rest time in Miami before securing flights returning to Detroit. L.B. asserted that he appeared to be injured during his nonduty, TDY period. He indicated that, while federal air marshals were encouraged to maintain physical fitness, they were not mandated to follow a specific physical fitness regimen. L.B. noted that, during nonduty and TDY periods, federal air marshals may treat this time as any other unpaid nonduty period.

By decision dated December 3, 2020, OWCP denied modification of the September 25, 2019 decision.

## ***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 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 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]

In providing for a compensation program for federal employees, Congress did not contemplate an insurance program against any and every injury, illness, or mishap that might befall an employee contemporaneous or coincidental with his or her employment. Liability does not attach merely upon the existence for an employee-employer relation. Instead, Congress provided for the payment of compensation for disability or death of an employee resulting from personal injury sustained while in the performance of duty.[7]

The Board has interpreted the phrase "sustained while in the performance of duty" to be the equivalent of the commonly found prerequisite in workers' compensation law of "arising out of and in the course of employment."[8] The phrase "in the course of employment" encompasses the work setting, the locale, and time of injury. The phrase "arising out of the employment" encompasses not only the work setting, but also a causal concept with the requirement being that an employment factor caused the injury.[9] In addressing the issue, the Board has held that in the compensation field, to occur 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 his or her master's business; (2) at a place where 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 her employment or engaged in doing something incidental thereto.[10] In deciding whether an injury is covered by

[3] *Supra* note 2.

[4] *F.H.*, Docket No. 18-0869 (issued January 29, 2020); *J.P.*, Docket No. 19-0129 (issued April 26, 2019); *Joe D. Cameron*, 41 ECAB 153 (1989).

[5] *L.C.*, Docket No. 19-1301 (issued January 29, 2020); *J.H.*, Docket No. 18-1637 (issued January 29, 2020); *James E. Chadden, Sr.*, 40 ECAB 312 (1988).

[6] *P.A.*, Docket No. 18-0559 (issued January 29, 2020); *K.M.*, Docket No. 15-1660 (issued September 16, 2016); *Delores C. Ellyett*, 41 ECAB 992 (1990).

[7] *See* 5 U.S.C. § 8102(a); *see J.N.*, Docket No. 19-0045 (issued June 3, 2019).

[8] *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).

[9] *L.B.*, Docket No. 19-0765 (issued August 20, 2019); *G.R.*, Docket No. 16-0544 (issued June 15, 2017); *Cheryl Bowman*, 51 ECAB 519 (2000).

[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).

FECA, the test is whether, under all circumstances, a causal relationship exists between the employment itself, or the conditions under which it is required to be performed and the resultant injury.[11]

The Board has held that, where an employee is on travel status or a temporary-duty assignment, he or she is covered by FECA 24 hours a day with respect to any injury that results from activities essential or incidental to his or her temporary assignment.[12]

With regard to recreational or social activities, the Board has held that such activities arise in the course of employment when: (1) they occur on the premises during a lunch or recreational period as a regular incident of the employment; or (2) the employing establishment, by expressly or impliedly requiring participation or by making the activity part of the service of the employee, brings the activity within the orbit of employment; or (3) the employing establishment derives substantial benefit from the activity beyond the imaginable value of improvement in employee health and morale is common to all kinds of recreation and social life.[13]

OWCP's procedures provide that employees who are injured while exercising or participating in a recreational activity during authorized lunch or break periods in a designated area of the employing establishment premises have the coverage of FECA whether or not the exercise or recreation was part of a structured physical fitness plan (PFP). Injuries which occur during the use of fitness and recreational facilities furnished by the employing establishment outside of official work hours, on or off the premises, are not compensable if the employee was not participating in a structured PFP. The mere fact that the employing establishment allows employees to use its facilities on their own time does not create a sufficient connection to the employment to bring any resulting injury within the coverage of FECA.[14]

## ***ANALYSIS***

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

The evidence of record demonstrates that at 10:00 a.m. on March 7, 2016 appellant sustained multiple injuries when he was struck by a vehicle while jogging while in a temporary duty status in Miami, Florida. The incident occurred at the time and place, and in the manner, as alleged; however, OWCP denied the claim, finding that he was not in the performance of duty when injured as he was not injured on federal property nor while on official duty.

In a November 24, 2020 response to OWCP's September 29, 2020 development letter, L.B. indicated that appellant was encouraged, but not required, to participate in any specific physical

[11] *A.G.*, Docket No. 18-1560 (issued July 22, 2020); *J.C.*, Docket No. 17-0095 (issued November 3, 2017); *Mark Love*, 52 ECAB 490 (2001).

[12] *D.R.*, Docket No. 16-1395 (issued February 2, 2017); *T.C.*, Docket No. 16-1070 (issued January 24, 2017).

[13] *N.B.*, Docket No. 20-1446 (issued March 19, 2021); *L.B.*, Docket No. 19-0765 (issued August 20, 2019); *S.B.*, Docket No. 11-1637 (issued April 12, 2012); *Ricky A. Paylor*, 57 ECAB 568 (2006); *see also* A. Larson, *The Law of Workers' Compensation* § 22.00 (2015).

[14] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Performance of Duty*, Chapter 2.804.18(b) (March 1994).

fitness activity. He further asserted that he appeared to be injured during his nonduty hours and that federal air marshals were permitted to treat this time as they would during any other unpaid nonduty period. The Board notes that OWCP's procedures require that, in cases of injured air marshals, certain documentary evidence must be obtained.[15] Although L.B. provided a written response to OWCP's development questionnaire, his response was insufficient as he did not provide copies of employing establishment policies and procedures, or any other information needed for a full and fair adjudication of this case. Moreover, OWCP did not ask the employing establishment to address air marshals' quarterly HEA, as referenced by appellant. Without this information, the case record is incomplete.[16]

Proceedings under FECA are not adversarial in nature, nor is OWCP a disinterested arbiter.[17] While appellant has the burden of proof to establish entitlement to compensation, OWCP shares the responsibility in the development of the evidence, particularly when such evidence is of the character normally obtained from the employing establishment or other governmental source.[18] The Board finds that OWCP insufficiently developed the evidence regarding whether appellant was in the performance of duty at the time of injury on March 7, 2016.[19]

As OWCP failed to request all the information as required under its procedures, the case must be remanded for further development of the claim.[20] On remand OWCP shall obtain clarifying information as to the employing establishment's policies, specifically regarding its quarterly HEA, and appellant's duties on the date of incident, including development of whether physical fitness was incidental to appellant's employment as an air marshal and whether the employing establishment benefited from his physical fitness. It shall further inquire as to whether the quarterly HEA required him to engage in the physical fitness activity.

Following this and other such further development as deemed necessary, OWCP shall issue a *de novo* decision.

## ***CONCLUSION***

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

[15] Federal (FECA) Procedure Manual, *id.* at Chapter 2.804.7 (August 1992).

[16] *See R.H.*, Docket No. 20-1011 (issued February 17, 2021); *S.T.*, Docket No. 20-0588 (issued September 16, 2020).

[17] *J.F.*, Docket No. 19-0980 (issued December 23, 2020); *A.W.*, 59 ECAB 593 (2008); *Ann P. Drennan*, 47 ECAB 750 (1996); *Richard Michael Landry*, 39 ECAB 232 (1987).

[18] *T.T.*, Docket No. 20-0383 (issued August 3, 2020).

[19] *D.C.*, Docket No. 19-0846 (issued October 17, 2019); Federal (FECA) Procedure Manual, *supra* note 14 at Chapter 2.800.5(d)(1); *see also* Chapter 2.804.4(f).

[20] *See S.T.*, *supra* note 16.

## ***ORDER***

**IT IS HEREBY ORDERED THAT** the December 3, 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: May 16, 2022
Washington, DC

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

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

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board