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

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| **M.B., Appellant** | ) | |
| **and** | ) | **Docket No. 20-1072** |
| | ) | **Issued: November 10, 2022** |
| **DEPARTMENT OF THE ARMY, EDGEWOOD CHEMICAL BIOLOGICAL CENTER, Edgewood, MD, Employer** | ) | |

*Appearances:*
*Analese B. Dunn, 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 April 20, 2020 appellant, through counsel, filed a timely appeal from an October 30, 2019 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 to consider 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 her burden of proof to establish an injury in the performance of duty on December 17, 2014, as alleged.

## ***FACTUAL HISTORY***

This case has previously been before the Board.[3] The facts and circumstances as presented in the Board's prior order are incorporated herein by reference. The relevant facts are as follows.

On February 10, 2015 appellant, then a 56-year-old general engineer, filed a traumatic injury claim (Form CA-1) alleging that on December 17, 2014 at 11:30 a.m. she injured her neck, right thigh, knee, and lower leg, and feet when she slipped and fell in a restaurant while attending a mandatory safety meeting in the performance of duty. She stopped work on December 22, 2014 and returned on December 23, 2014. On the reverse side of the claim form, appellant's supervisor, M.M., the acquisitions logistics division chief, controverted the claim, contending that her fall was not on the premises, or in the course of employment, as it occurred at a restaurant off-premises during her lunch period.

In e-mails dated October 17 and 29, 2014, H.S., the equipment specialist/provisioner for appellant's work group, requested a vote regarding the location of the December safety meeting. On December 9, 2014 H.S. notified employees, including appellant and M.M., that a "Nested Safety Meeting/[Holiday] Luncheon" was scheduled for December 17, 2014 at a restaurant beginning at 11:30 a.m. She noted that employees would be able to order individually and receive separate bills. H.S. noted that 24 employees were planning on attending. She further indicated that following this meeting, there was a holiday "Sweets and Treats" event at the employing establishment with a variety of desserts.

Appellant provided a December 9, 2014 e-mail from L.L., a technical writer at the employing establishment, regarding the "Holiday Sweets and Treats" potluck following lunch at a restaurant.

In a February 3, 2015 e-mail reply, M.M. asserted that the December 17, 2014 luncheon was not a work-related event and that attendance was voluntary. He noted that no work activities were conducted at the restaurant and that the safety meeting was conducted on employing establishment premises at approximately 2:00 p.m.

On February 5, 2015 L.R., a coworker, completed a statement and asserted that the December 17, 2014 holiday luncheon at a restaurant was not a mandatory event. She reported that appellant stumbled on the flooring transition from the dance floor to the dining area.

On February 9, 2015 R.B., Provisioning Branch Chief, reported that he attended a voluntary luncheon on December 17, 2014 at a restaurant. He noted that the luncheon was purely social and that, following the luncheon, a division safety meeting was then to be held at the employing establishment.

[3] *Order Remanding Case*, Docket No. 18-1290 (issued August 13, 2019).

On February 9, 2015 M.M. completed a form and noted that, while at a restaurant on December 17, 2014, appellant stumbled at a transition between wood flooring and carpet. He reported that she grasped the back of a chair to keep herself from falling and turned awkwardly. M.M. referred to the event at a restaurant as a "non-sanctioned lunch gathering" and "leisure lunch."

On February 11, 2015 M.M. completed a memorandum and reported that the December 17, 2014 holiday luncheon was a non-mandatory, non-sanctioned, informal gathering to celebrate the holidays during lunch. He noted that the voluntary gathering was to begin at 11:30 a.m. and end at 12:30 p.m., within the normal lunch period. M.M. indicated, "Due to a conflict with a mandatory supervisors' meeting from 9:00 a.m. until 12:00 p.m. on December 17 and the lack of a private area to conduct business at [a restaurant], a safety meeting was never planned at the restaurant. Those intentions were announced at the November 2014 Acquisition Logistics Division Staff/Safety, to include the voluntary nature of the [holiday] party." M.M. further noted that a separate, mandatory, division safety meeting was planned and conducted at the employing establishment from 2:00 p.m. until 3:00 p.m. after the voluntary holiday party. This memorandum was initialed by 11 individuals.

In an undated statement, F.B., a coworker, reported that appellant tripped on December 17, 2014 during a holiday luncheon at a restaurant. She noted that appellant tripped on the raised wooden strip at the edge of the floor. F.B. reported that the luncheon was a social gathering for the division, and that after the participants returned to the employing establishment, there was a nested safety meeting including the whole team.

In an undated statement, C.W., a coworker, noted that on December 17, 2014 appellant lost her balance on the dining area landing at a restaurant. He reported that most of the division was present and that the participants returned to the employing establishment for light refreshments and a monthly safety meeting conducted by M.M.

On February 19, 2015 appellant alleged that she "attended the safety meeting/[holiday] luncheon because Safety is mandatory and business (Safety) was planned." (Emphasis in the original.) She further asserted that M.M. was running late and he, therefore, presented the safety briefing later on December 17, 2015 at the employing establishment. Appellant alleged that the order of events was changed due to M.M.'s tardy arrival to a restaurant.

In a March 18, 2015 development letter, OWCP advised appellant of the deficiencies of her claim. It requested additional factual and medical evidence and provided a questionnaire for her completion. OWCP afforded appellant 30 days to respond.

Appellant subsequently submitted physical therapy notes.

By decision dated June 30, 2015, OWCP denied appellant's traumatic injury claim, finding that she had not established that she was injured in the performance of duty. It found that the luncheon at a restaurant was not a mandatory event and that the safety meeting was scheduled at the employing establishment after the luncheon.

OWCP subsequently received additional evidence. Appellant provided a statement dated July 24, 2015 in which she again asserted that the luncheon on December 17, 2014 was described as a "safety/[holiday] luncheon." She noted that she was required to attend 75 percent of the safety

meetings. Appellant provided a copy of her performance plan, which included the requirement of attending 75 percent of safety meetings.

On June 29, 2016 appellant, through counsel, requested reconsideration of the June 30, 2015 OWCP decision.

On June 28, 2016 appellant completed an affidavit, asserting that she was required to attend 75 percent of the safety meetings held, that she received e-mails regarding a safety meeting to be held at a restaurant on December 17, 2014, and that she attended the planned safety meeting at a restaurant on the scheduled date. She described the incident where she slipped at the restaurant. Appellant asserted that M.M. arrived late to the restaurant and announced that, due to his tardiness, the safety meeting had been cancelled.

In a September 26, 2016 letter, C.A., an employing establishment personnel officer, responded to appellant's request for reconsideration. She asserted that the employees had voluntarily gathered at the local restaurant to have a holiday lunch together. C.A. noted that a safety meeting was to occur at the restaurant prior to the luncheon and that the safety meeting was a work-related sanctioned activity. She reported that the scheduled safety meeting did not occur as the supervisor arrived late to the restaurant. M.M. therefore eliminated the safety meeting and held it later on December 17, 2014 at the employing establishment.

By decision dated September 27, 2016, OWCP denied modification of the June 30, 2015 decision.

On September 26, 2017 appellant, through counsel, requested reconsideration. She provided calendar entry for December 17, 2014, which noted that a nested safety meeting/holiday luncheon would be at a restaurant. Appellant also provided a September 26, 2017 affidavit asserting that the December 17, 2014 luncheon was always both a safety meeting and a luncheon. She denied attending monthly division meetings held on October 30 and November 5, 2014 and asserted that these meetings were not required and that all employees could not have received notice of the change of the scheduled safety meeting on those dates.

In October 29 and 31, 2014 correspondence, H.S., requested votes and then informed appellant and her coworkers that the winning location for the December safety meeting was at a restaurant to be held on Wednesday, December 17, 2014 at 11:30 a.m.

By decision dated December 19, 2017, OWCP denied modification of its September 26, 2017 decision. Appellant appealed to the Board.

By order dated August 13, 2019,[4] the Board found that the case was not in posture for decision because the record submitted to the Board was incomplete. The Board noted that, in its September 27, 2016 decision denying modification, OWCP relied upon a September 27, 2016 statement from appellant's supervisor, M.M. The Board found that the record before it on appeal did not contain this statement or the supporting agenda. The Board remanded the case for further development and a *de novo* decision.

[4] *Id.*

On remand, OWCP requested that the employing establishment provide M.M.'s September 27, 2016 statement and accompanying agenda as requested by the Board.

On September 24, 2019 OWCP received the September 27, 2016 statement of M.M., wherein he explained that the holiday luncheon took place off-premises and that no one expected the safety briefing to take place at the restaurant. He further clarified that the flyer e-mailed to the staff was worded as follows: "Holiday Sweets & treats Potluck! Immediately following the ALD [Holiday] Luncheon Building 3549, Room 614" and 8 days ahead of time, the event at the restaurant was titled "ALD [Holiday] Luncheon." M.M. noted that on several occasions he advised that they would not be conducting a nested safety meeting because of the lack of a private room at the restaurant and because he would not have enough time to conduct such a meeting.

By decision dated October 30, 2019, OWCP denied modification of its prior decision.

## ***LEGAL PRECEDENT***

An employee seeking benefits under FECA[5] 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,[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]

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.[9]

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."[10] The phrase "in the course of employment" encompasses the work setting, the locale, and time of injury. The phrase "arising out of the employment,"

[5] *Supra* note 2.

[6] *K.R.*, Docket No. 21-0308 (issued May 16, 2022); *S.B.*, Docket No. 17-1779 (issued February 7, 2018); *J.P.*, 59 ECAB 178 (2007); *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); *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).

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

[10] *A.K.*, Docket No. 16-1133 (issued December 19, 2016); *Charles Crawford*, 40 ECAB 474, 476-77 (1989).

encompasses not only the work setting, but also a causal concept with the requirement being that an employment factor caused the injury.[11] 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.[12] In deciding whether an injury is covered by 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.[13]

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 direct benefit from the activity beyond the intangible value of improvement in employee health and morale, which is common to all kinds of recreation and social life.[14]

There are three independent links, by which recreational or social activities can be tied to employment and, if one is found, the absence of the others is not fatal.[15] Accordingly, when an employee is injured during a recreational or social activity, he or she must meet one of the above-noted criteria in order to establish that the injury arose in the performance of duty.

OWCP's procedures provide that an employee is considered to be in the performance of duty while engaged in formal recreation when he or she is paid for participating or the recreational activity is required and prescribed as a part of the employee's training or assigned duties.[16] The claims examiner may approve injuries occurring under these circumstances if the file contains a statement from the official superior showing that: (1) at the time of the injury, the injured employee was engaged in a recreational activity organized and directed by the employing establishment and the employee was being paid for participating; or (2) the activity was required and prescribed as a part of the employee's training or assigned duties.[17]

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[11] *See A.S.*, Docket No. 18-1381 (issued April 8, 2019); *D.L.*, 58 ECAB 667 (2007); *Mary Keszler*, 38 ECAB 735, 739 (1987).

[12] *A.S., id.*; *Roma A. Mortenson-Kindschi*, 57 ECAB 418 (2006); *Mary Keszler, id*.

[13] *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).

[14] *See K.R., supra* note 6; *K.W.*, Docket No. 20-1237 (issued September 24, 2021); *Lawrence J. Kolodzi*, 44 ECAB 818, 822 (1993).

[15] *See K.R., supra* note 6; *Steven F. Jacobs*, 55 ECAB 252 (2004); *Archie L. Ransey*, 40 ECAB 1251 (1989); *Clifford G. Smith*, 32 ECAB 1702 (1981); *Stephen H. Greenleigh*, 23 ECAB 53 (1971).

[16] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Performance of Duty*, Chapter 2.804.8 (August 1992).

[17] *Id.*; *K.W., supra* note 14.

## ***ANALYSIS***

The Board finds that appellant has not met her burden of proof to establish an injury in the performance of duty on December 17, 2014, as alleged.

Whether an injury occurs in the performance of duty is a preliminary issue to be addressed before the remaining merits of the claim are adjudicated.[18] On her Form CA-1 appellant claimed that she sustained neck, right leg, and bilateral foot injuries when she fell at an off-premises employing establishment safety meeting on December 17, 2014 while in the performance of duty. On the reverse side of the claim form, the employing establishment contended that she was not in the performance of duty when her injury occurred as she was off-premises participating in an office holiday luncheon at the time of her injury.

The Board notes that there is no dispute that appellant was injured off-premises at a restaurant.[19] The claimed injury, therefore, is not covered under the first criterion for recreational and social activities as the injury did not occur on the employing establishment's premises.[20]

Appellant contends that she was required to attend a December 17, 2014 safety meeting which she believed was to be held at a Restaurant prior to the holiday lunch. The case record, however, establishes that on December 17, 2014 employees voluntarily gathered at the local restaurant to have a holiday lunch together, within the normal lunch period and that the December 17, 2014 holiday luncheon was a non-mandatory, non-sanctioned, informal gathering. The case record further establishes that the safety meeting was not held at the restaurant, that employees were so informed on October 30 and December 11, 2014, and that appellant was not engaged in any official capacity while attending the luncheon. A separate, mandatory, division safety meeting was held at the employing establishment from 2:00 p.m. until 3:00 p.m. on December 17, 2014 following the off-premises holiday lunch. The Board therefore finds that the claimed injury, therefore, is not covered under the second criterion as the employing establishment did not require employees to participate in the December 17, 2014 holiday luncheon, sponsor the event, or otherwise require participation or by making the activity part of the services of the employees.[21]

Furthermore, the evidence of record establishes that the holiday luncheon itself was not in any way related to the employing establishment's business. Consequently, the Board finds that appellant also has not satisfied the third criterion, that the employing establishment derived

[18] *K.W., id.*; *T.H.,* Docket No. 17-0747 (issued May 14, 2018); *P.L.,* Docket No. 16-0631 (issued August 9, 2016); *see also M.D.,* Docket No. 17-0086 (issued August 3, 2017).

[19] *See J.M.,* Docket No. 16-1418 (issued September 20, 2017); *Compare N.B.,* Docket No. 10-1446 (issued March 19, 2021) (the claimant was injured on the premises and physical fitness was encouraged during lunch); *T.L.,* Docket No. 19-0805 (issued November 18, 2019).

[20] *Supra* note 14; *Subhashini R. Prasad,* 56 ECAB 329 (2005); *Mary V. Tucker,* Docket No. 00-1409 (issued September 7, 2001).

[21] *Supra* note 14. *See also L.B.,* Docket No. 19-0765 (issued August 20, 2019); *Anna M. Adams,* 51 ECAB 149 (1999).

substantial direct benefit from the December 17, 2014 luncheon beyond the intangible value of improvement in employee social life and morale.[22]

For these reasons, appellant has not met her burden of proof to establish an employment-related injury in the performance of duty on December 17, 2014, as alleged.

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 an injury in the performance of duty on December 17, 2014, as alleged.

## ***ORDER***

**IT IS HEREBY ORDERED THAT** the October 30, 2019 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 10, 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

[22] *Supra* note 14. *See also id.*; *M.C.*, Docket No. 16-0824 (issued September 1, 2016); *J.M.*, Docket No. 16-0249 (issued May 13, 2016).