

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

K.M., Appellant)	
)	
and)	Docket No. 21-1306
)	Issued: April 28, 2023
U.S. POSTAL SERVICE, CAROL STREAM)	
PROCESSING & DISTRIBUTION)	
CENTERCAROL STREAM, IL, Employer)	
)	

Appearances:
Thomas R. Marciniak, for the appellant¹
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
PATRICIA H. FITZGERALD, Deputy Chief Judge
VALERIE D. EVANS-HARRELL, Alternate Judge
JAMES D. MCGINLEY, Alternate Judge

JURISDICTION

On August 20, 2021 appellant, through her representative, filed a timely appeal from a July 6, 2021 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act² (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 her burden of proof to establish an injury in the performance of duty on October 22, 2020, as alleged.

FACTUAL HISTORY

On November 20, 2020 appellant, then a 21-year-old mail processing clerk, filed a traumatic injury claim (Form CA-1) alleging that on October 22, 2020 she sustained injuries to her lower back while in the performance of duty. She indicated that D.S., a coworker, attacked her while she was sitting in her vehicle in the employee parking area several minutes after her shift ended. Appellant stopped work on October 23, 2020.

In a hospital visit summary dated October 22, 2020, Dr. Matthew Thomas Destefani, a Board-certified pediatrician, noted that he examined appellant due to an assault. He ordered computerized tomography (CT) scans of her head, face, neck, and cervical spine, and x-rays of her right hip and left wrist.

In a statement dated November 10, 2020, appellant clarified that she had preexisting injuries to her lower back which were aggravated by the October 22, 2020 assault.

In a referral note dated November 19, 2020, Dr. Udit V. Patel, a Board-certified anesthesiologist and pain medicine specialist, recommended that appellant undergo a magnetic resonance imaging (MRI) scan of the lumbar spine and released her to return to sedentary work with no lifting, carrying, pushing or pulling over 10 pounds.

In a November 30, 2020 development letter, OWCP advised appellant of the deficiencies of her claim. It advised her of the factual and medical evidence necessary and provided a questionnaire for her completion. In a separate letter of even date, OWCP requested that the employing establishment provide information, including any investigative reports, regarding the parking area where she claimed she was injured, whether appellant was engaged in any official duties at the time of the assault, and whether there was any animosity between her and D.S. by reason of a personal association outside of work.

In response to OWCP's development questionnaire, appellant, through her representative, indicated that on October 22, 2020 D.S. pulled her from her vehicle and assaulted her, injuring her back. She noted that she had a relationship outside of work with another coworker, D.N., who she later learned was the boyfriend of D.S. Appellant indicated that she ended the relationship with D.N. in July 2020, and then had no interactions with D.S. until the October 22, 2020 incident. She related that she believed the attack was provoked by other employees gossiping about her.

In an undated response to OWCP's development questionnaire, the employing establishment indicated that appellant had clocked out of work and was in the employee parking area when she was involved in a fight with D.S. It noted that she had a personal relationship outside of work with D.S.'s boyfriend. Attached to the employing establishment's response was a November 25, 2020 letter enclosing an assault and threat specialty report by G.P., an investigating inspector. G.P. indicated that he interviewed witnesses A.S and C.S., who did not see the initial

interaction, but had observed a fight on the ground and then pulled D.S. off of appellant. He further noted that he reviewed the employee parking area surveillance footage from October 22, 2020 and it accurately reflected what appellant had recounted in her statement. G.P. observed that appellant exited the facility and got into her vehicle, and then D.S. exited the facility, approached appellant's vehicle, opened the driver's side door, and pulled appellant out. He noted that both women fell to the ground and D.S. could be seen striking appellant.

By decision dated January 8, 2021, OWCP denied appellant's traumatic injury claim, finding that she had not established that the October 22, 2020 traumatic injury occurred in the performance of duty, as alleged.

On February 1, 2021 appellant, through her representative, requested an oral hearing before a representative of OWCP's Branch of Hearings and Review.

OWCP thereafter received copies of text messages dated July 8, 2020 between appellant and D.S., who was using D.N.'s phone to communicate with appellant. D.S. asked appellant for the truth about her relationship with D.N., and appellant replied that D.N. had pursued her, but that D.S. should speak to D.N. for any further details.

In a written statement to police dated October 22, 2020, appellant noted that "it all initially transpired" when D.N. began expressing an interest in her and then continued to pursue her, despite being in a relationship with D.S. The two eventually developed feelings for one another and became involved with each other for about three months. Appellant further related that D.S. suddenly became aware of their relationship, so appellant stopped interacting with D.N. She noted that she had no further contact with D.S. until the October 22, 2020 incident.

In a police incident report dated October 22, 2020, Officer E.B. indicated that she interviewed appellant on that date. Appellant related that when she was attempting to leave the employee parking area, D.S. approached her, opened the vehicle door, and began yelling at her. She related she tried to reverse her vehicle to get away, but D.S. started hitting her in her face and pulled her out of her vehicle. They both fell to the ground, and D.S. punched and choked her until other employees arrived and separated them. Appellant explained that she had been involved in a romantic relationship with a coworker, D.N, who she subsequently learned was the boyfriend of D.S. She ended the relationship, but believed that coworkers continued to gossip about their relationship, and that prompted the assault.

OWCP also received photographs of appellant showing cuts and marks on her face, neck, and throat.

In a watch desk report dated October 23, 2020, the employing establishment noted that its inspectors and the local police responded to a report of two employees involved in a physical altercation on October 22, 2020.

In a police incident report dated October 30, 2020, Officer E.B. noted that she interviewed A.S. and W.O., another employee, who separated appellant and D.S. on October 22, 2020. In a report dated November 4, 2020, she reviewed surveillance footage of the incident and noted it to be consistent with the statements of appellant, A.S., and W.O.

In a report dated November 13, 2020, an employing establishment inspector summarized various telephone calls which occurred between October 22 and 26, 2020 pertaining to appellant reporting the incident to local police and requesting emergency leave due to the incident.

In a medical report dated December 17, 2020, Dr. Jason Hurbanek, a Board-certified orthopedic surgeon and sports medicine specialist, indicated that appellant related complaints of left shoulder pain which had been present for seven to eight months and was then exacerbated during an assault on October 22, 2020. He diagnosed a left trapezius strain with scapulothoracic bursitis and recommended conservative care.

In a witness statement dated February 1, 2021, D.J., appellant's coworker, indicated that she and appellant had had many conversations regarding workplace gossip about appellant, but that she never observed appellant have any contact with D.S.

In a medical report dated February 24, 2021, an unknown provider indicated that appellant related complaints of low back and left shoulder pain which she attributed to the October 22, 2020 employment incident. The report noted diagnoses of sprain, spondylosis, disc protrusion, stenosis, and radiculopathy of the lumbar spine, lumbosacral disc degeneration, and a sprain of the left shoulder and upper arm.

In a letter dated March 12, 2021, Dr. Patel noted that he had placed appellant on limited duty from November 19, 2020 through January 7, 2021.

In a note dated March 13, 2021, Dr. Bernard L. Slusinksi, a family medicine specialist, released appellant to return to work lifting no more than 10 pounds and no prolonged standing.

A report of an MRI of the left shoulder dated April 16, 2021 was read as normal.

A hearing was held on May 11, 2021. Appellant testified during the hearing, providing further details regarding the October 22, 2020 incident and her injuries.

By decision dated July 6, 2021, OWCP's hearing representative affirmed the January 8, 2021 decision.

LEGAL PRECEDENT

Congress, in providing for a compensation program for federal employees, 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 of an employee/employer relation.³ Instead, Congress provided for the payment of compensation for "the disability or death of an employee resulting from personal injury sustained while in the performance of his duty."⁴ The phrase "while in the performance of duty" has been interpreted by the Board to be the equivalent of the commonly

³ *J.B.*, Docket No. 17-0730 (issued March 6, 2018); *Minnie N. Heubner (Robert A. Heubner)*, 2 ECAB 20 (1948); see also *Christine Lawrence*, 36 ECAB 422 (1985).

⁴ 5 U.S.C. § 8102(a); *J.N.*, Docket No. 19-0045 (issued June 3, 2019); *Angel R. Garcia*, 52 ECAB 137 (2000).

found prerequisite in workers' compensation law of "rising out of and in the course of employment." In addressing this issue, the Board has stated: "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 said 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 the employment; and (3) while he or she was reasonably fulfilling the duties of his or her employment or engaged in doing something incidental thereto."⁵

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 in order for an injury to be considered as arising out of the employment, the facts of the case must show some substantial employing establishment benefit is derived or an employment requirement gave rise to the injury.⁶

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. 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.⁷

The Board has held that when animosity or a dispute which culminates in an assault is imported into the employment from a claimant's domestic or private life, the assault does not arise in the performance of duty.⁸

ANALYSIS

The Board finds that appellant's injury on October 22, 2020 did not arise in the course of her federal employment.

At the time of the assault on October 22, 2020, appellant was inside her vehicle in the employing establishment's parking area immediately following the end of her shift. As noted, however, time, place, and manner are not alone sufficient to establish entitlement to compensation. Appellant must also establish that her injury arose out of her employment or that a factor of her employment gave rise to the assault.⁹

The case record establishes that appellant had prior personal relationships with D.N. and D.S. It was her personal relationship with them, which created the animosity that was imported into the workplace and led to the October 22, 2020 assault. The Board has long held that coverage

⁵ *K.G.*, Docket No. 18-1725 (issued May 15, 2019); *George E. Franks*, 52 ECAB 474 (2001).

⁶ *See Eugene G. Chin*, 39 ECAB 598 (1988).

⁷ *J.B.*, *supra* note 3; *see also R.S.*, 58 ECAB 660 (2007).

⁸ *J.B.*, *id.*; *B.T.*, Docket No. 15-0786 (issued June 10, 2015); *S.S.*, Docket No. 13-0318 (issued March 26, 2013).

⁹ *Id.*; *see also supra* note 6.

for an assault is denied when it arose from animosity which precipitated the assault and was imported into the workplace.¹⁰ Appellant's injury did not arise from her performance of duty. Rather, it was the result of personal animosity that arose out of her private life and prior relationships with her coworkers.¹¹

As the evidence of record is insufficient to establish a traumatic injury in the performance of duty on October 22, 2020, as alleged, the Board finds that appellant has not met her burden of proof.

Appellant may submit additional evidence, together with a written request for reconsideration to OWCP within one year of the Board's 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 October 22, 2020, as alleged.

¹⁰ *Agnes V. Blackwell*, 44 ECAB 200 (1992); *see also B.T.*, *supra* note 8; *M.B.*, Docket No. 15-0215 (issued April 24, 2015).

¹¹ *Id.*

ORDER

IT IS HEREBY ORDERED THAT the July 6, 2021 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 28, 2023
Washington, DC

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

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

James D. McGinley, Alternate Judge
Employees' Compensation Appeals Board