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<b>J.T., Appellant</b>	)	
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<b>and</b>	)	<b>Docket No. 23-0418</b>
	)	<b>Issued: December 15, 2023</b>
<b>DEPARTMENT OF THE AIR FORCE,</b>	)	
<b>HILL AIR FORCE BASE, UT, Employer</b>	)	
_____	)	

*Case Submitted on the Record*

Before:  
ALEC J. KOROMILAS, Chief Judge  
PATRICIA H. FITZGERALD, Deputy Chief Judge  
JAMES D. MCGINLEY, Alternate Judge

<sup>2</sup> The Board notes that, following the January 19, 2023 decision, OWCP received additional evidence. The Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

## **FACTUAL HISTORY**

On August 23, 2022 appellant, then a 41-year-old quality assurance specialist, filed a traumatic injury claim (Form CA-1) alleging that on August 22, 2022 at 9:00 a.m. he twisted his right knee and sustained a possible meniscus tear while in the performance of duty. On the reverse side of the claim form, K.P., an employing establishment supervisor, noted appellant's regular work hours as 6:00 a.m. to 3:30 p.m. and contended that he was not in the performance of duty when injured, as he was in the parking lot talking on the telephone when he kicked a rock, heard a popping noise, and felt pain in his right knee. Appellant stopped work on the date of injury.

In an August 23, 2022 medical report, Dr. Matthew F. Bitner, a Board-certified orthopedic surgeon, noted that appellant related complaints of pain and swelling in the right knee, which he attributed to a twisting injury while walking at work on August 22, 2022. On physical examination, he found mild effusion, pain with forced extension, and medial and lateral tenderness of the right knee. Dr. Bitner diagnosed a locked right knee, recommended a magnetic resonance imaging (MRI) scan, and advised that appellant should remain off work.

In a witness statement dated August 29, 2022, K.G., appellant's co-worker, indicated that on August 22, 2022 he observed appellant outside the northeast corner door of Building 850. He noted that appellant was sitting on the ground holding his right knee and that appellant told him that he had injured it in the parking lot. K.G. indicated that appellant was unable to stand up without assistance, so he helped him to his feet and to his car.

In a letter dated September 2, 2022, A.Y., an employing establishment injury compensation specialist, controverted appellant's claim "on the basis of performance of duty due to lack of details submitted by claimant." She further noted that a witness stated that he had found appellant "sitting on the ground in the parking lot where he was injured."

OWCP also received an employing establishment civilian personnel position description for quality assurance specialist.

In a development letter dated September 2, 2022, OWCP informed appellant of the deficiencies of his claim. It advised him of the type of factual and medical evidence necessary to establish his claim and provided a questionnaire for his completion. In a separate development letter of even date, OWCP requested that the employing establishment provide additional information regarding appellant's claim, including comments from a knowledgeable supervisor regarding the accuracy of all statements submitted in support of his claim. It also requested information regarding whether the parking facilities were owned, controlled, or managed by the agency; where the injury occurred in relation to the agency's premises and in relation to the place where appellant regularly performed assigned duties; and whether the activity he was engaged in when injured was a reasonable incident of his employment. OWCP afforded both parties 30 days to respond.

OWCP thereafter received an unsigned August 26, 2022 form medical report which noted a diagnosis of a locked right knee and possible displaced bucket-handle meniscal tear due to a work-related twisting injury on August 22, 2022.

A September 1, 2022 MRI scan of the right knee demonstrated a bucket-handle tear of the medial meniscus, a large meniscal fragment displaced into the medial intercondylar joint space,

edema, sprain, effusion, and high-grade cartilage fissuring in the central medial femoral condyle and far medial aspect of the medial facet of the patella.

In a September 6, 2022 follow-up report, Dr. Bitner reviewed the September 1, 2022 MRI scan results and performed a physical examination. He recommended surgery, including arthroscopy with meniscectomy and debridement of the right knee.

In a statement dated September 14, 2022, appellant indicated that he was walking from one building to another while looking at his telephone. He noted that while in front of Building 850, he kicked a small rock and twisted his right knee and a coworker saw him go down and helped him to his vehicle.

By decision dated October 6, 2022, OWCP denied appellant's claim, finding that he had not established that the August 22, 2022 incident occurred, as alleged. It concluded, therefore, that the requirements had not been met to establish an injury as defined by FECA.

OWCP continued to receive medical evidence, including a September 12, 2022 operative report by Dr. Bitner who indicated that he performed an unauthorized right knee arthroscopy, debridement, chondroplasty, and excision on that date. Dr. Bitner's postoperative diagnoses were right knee medial meniscus tear, displaced bucket handle from posterior horn to junction of mid third and anterior horn with multi-cleavage plane tears, lateral meniscus tear, grade 2 and 3 changes at the medial femoral condyle weight bearing surface, and a large medial plica.

In an October 18, 2022 report, Dr. Bitner noted that appellant's physical examination had improved. He diagnosed a large complex and displaced bucket-handle tear, status post right knee arthroscopy with debridement. Dr. Bitner opined that the August 22, 2022 employment incident caused a valgus loading and pivoting-type injury, which included twisting and joint loading forces on appellant's right knee that resulted in immediate pain, swelling, and an inability to fully extend his knee.

In an October 22, 2022 attending physician's report (Form CA-20), Dr. Bitner noted a history that appellant twisted his right knee while walking to his car. He diagnosed medial meniscus tear and sprain of the right knee and checked a box marked "Yes" that the condition was caused or aggravated by an employment activity. Dr. Bitner opined that appellant was totally disabled from work for the period August 23 through October 13, 2022 and released him to regular work, effective October 13, 2022.

On October 24, 2022 appellant requested reconsideration of OWCP's October 6, 2022 decision. In support thereof request, he submitted a response to OWCP's development questionnaire and indicated that his job duties included working in the power support shop in Building 850 and in the air-conditioning shop in Building 847. Appellant noted that he regularly walked from one building to the other to perform inspections and would pick up trash and kick small rocks out of his walking path along the way. He related that, on August 22, 2022, he was walking from one building to the other while looking at his telephone, and he attempted to kick a small rock out of the way. Appellant noted that his right knee twisted, and he felt a pop with immediate pain. He indicated that K.G. helped him to his vehicle and he went home and made an appointment with a local orthopedic specialist. Appellant noted that a facilities manager was in charge of the building's parking lot.

By decision dated January 19, 2023, OWCP accepted that the August 22, 2022 incident occurred as alleged and that appellant sustained diagnosed medical conditions, but denied his claim, finding that the claimed incident did not occur in the performance of duty, as alleged.

### **LEGAL PRECEDENT**

An employee seeking benefits under FECA<sup>3</sup> 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,<sup>4</sup> 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.<sup>5</sup> 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.<sup>6</sup>

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.”<sup>7</sup> 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 duties of his or her employment or engaged in doing something incidental thereto.<sup>8</sup> In deciding whether an injury is covered by FECA, the test is whether, under all the circumstances presented, causal relationship exists between the employment itself, or the conditions under which it is required to be performed, and the resultant injury.<sup>9</sup>

### **ANALYSIS**

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

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<sup>3</sup> *Supra* note 1.

<sup>4</sup> *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).

<sup>5</sup> *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).

<sup>6</sup> *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).

<sup>7</sup> *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).

<sup>8</sup> *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).

<sup>9</sup> *J.N.*, Docket No. 19-0045 (issued June 3, 2019); *M.W.*, Docket No. 15-0474 (issued September 20, 2016); *Mark Love*, 52 ECAB 490 (2001).

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.<sup>10</sup> The Board finds that OWCP has not adequately developed this aspect of appellant's claim.

In a September 2, 2022 development letter, OWCP advised appellant of the type of factual and medical evidence necessary to establish his claim and attached a development questionnaire for his completion. By separate letter of even date, it requested that the employing establishment address the accuracy of his allegations and claims and provide additional information.

OWCP's regulations provide that an employer who has reason to disagree with an aspect of the claimant's allegation should submit a statement that specifically describes the factual argument with which it disagrees and provide evidence or argument to support that position.<sup>11</sup> Appellant provided a detailed response to OWCP's development letter along with medical treatment records. Although the employing establishment initially challenged the claim in a September 2, 2002 letter, it merely indicated that a witness found appellant sitting on the ground in the parking lot where he was injured, but appellant had not submitted a sufficient description of the incident. However, it failed to provide a written response to OWCP's subsequent development questionnaire, including whether the parking facilities were owned, controlled, or managed by the agency; where the injury occurred in relation to the agency's premises and in relation to the place where appellant regularly performed assigned duties; and whether the activity appellant was engaged in when injured was a reasonable incident of his employment. OWCP then denied appellant's claim, finding that the evidence was insufficient to establish that the claimed incident occurred in the performance of duty, as alleged.

Proceedings under FECA are not adversarial in nature and OWCP is not a disinterested arbiter. While the claimant has the burden of proof to establish entitlement to compensation, OWCP shares responsibility to see that justice is done.<sup>12</sup> Once OWCP undertakes to develop the evidence, it has the responsibility to do so in a proper manner, particularly when such evidence is of the character normally obtained from the employing establishment or other government source.<sup>13</sup>

As OWCP failed to obtain information from the employing establishment as required under its procedures, the Board will remand the case for OWCP to further develop the question of whether appellant was in the performance of duty when injured on August 22, 2022.<sup>14</sup> On remand it shall obtain all relevant information from the employing establishment necessary to determine whether he was injured in the performance of duty. Following this and other such further development as deemed necessary, OWCP shall issue a *de novo* decision.

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<sup>10</sup> *S.T.*, Docket No. 20-0388 (issued September 16, 2020); *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).

<sup>11</sup> 20 C.F.R. § 10.117(a); *D.L.*, Docket No. 15-0547 (issued May 2, 2016); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Initial Development of Claims*, Chapter 2.800.7a(2) (June 2011).

<sup>12</sup> *L.G.*, Docket No. 21-0690 (issued December 6, 2021).

<sup>13</sup> *R.D.*, Docket No. 21-0050 (issued February 25, 2022); *R.A.*, Docket No. 17-1030 (issued April 16, 2018).

<sup>14</sup> *See B.W.*, Docket No. 22-0907 (issued December 13, 2022).

**CONCLUSION**

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

**ORDER**

**IT IS HEREBY ORDERED THAT** the January 19, 2023 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: December 15, 2023  
Washington, DC

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

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

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