United States Department of Labor
Employees' Compensation Appeals Board

D.P., Appellant	)	
and	)	**Docket No. 21-1017**
	)	**Issued: March 9, 2023**
DEPARTMENT OF VETERANS AFFAIRS, TIBOR RUBIN VA MEDICAL CENTER, Long Beach, CA, 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:
PATRICIA H. FITZGERALD, Deputy Chief Judge
JANICE B. ASKIN, Judge
JAMES D. McGINLEY, Alternate Judge

JURISDICTION

On June 25, 2021 appellant, through counsel, filed a timely appeal from a May 14, 2021 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.

ISSUE

[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*.

The issue is whether appellant was an employee, as defined under 5 U.S.C. § 8101(1)(B), at the time of her alleged February 24, 2020 employment incident.

FACTUAL HISTORY

On September 22, 2020 appellant, then a 60-year-old hospital housekeeping aide, filed a traumatic injury claim (Form CA-1) alleging that on February 24, 2020 she injured her right shoulder when mopping floors, emptying trash cans, cleaning empty beds, and refilling paper towels while in the performance of duty. She stopped work on September 9, 2020.

In support of her claim, appellant provided a September 22, 2020 work excuse note, which indicated that she could return to full-duty work on October 22, 2020. The note further indicated that her condition was not the result of an industrial accident or an occupational disease.

In a September 28, 2020 development letter, OWCP advised appellant of the deficiencies of her claim. It advised her of the type of additional factual and medical evidence needed and provided a questionnaire for her completion. OWCP afforded appellant 30 days to submit the necessary evidence. No additional evidence was received.

By decision dated November 4, 2020, OWCP denied appellant's traumatic injury claim, finding that the evidence of record was insufficient to establish that the claimed incident occurred as alleged. It noted that she had not responded to its September 28, 2020 development questionnaire requesting specific factual information regarding the claimed injury. OWCP concluded, therefore, that the requirements had not been met to establish an injury as defined by FECA.

On January 25, 2021 appellant resigned from the employing establishment effective February 1, 2021. She alleged that she sustained her first injury after being trained for two days. Appellant asserted that she was cleaning three to four beds at a time within 10 to 15 minutes, as she was taught. She requested help, but her supervisor informed her that there was no help available. Appellant further alleged that she pushed Big Ben dumpsters down the sidewalk and up a hill several times by herself when the trash compactor was broken, as she was again denied help. She contended that her physician indicated that she should perform limited duty with no repetitive motions.

On March 26, 2021 appellant, through counsel, requested reconsideration. She submitted the completed development questionnaire and related that on February 2, 2020, she started working for the employing establishment as a compensated work therapy housekeeper. In the middle of February 2020, while cleaning an empty patient bed, appellant experienced right shoulder pain. She contended that she notified her physician in March 2020. Appellant asserted that there were no witnesses to her injury, but that she called her then-supervisor for help, and subsequently reported her right shoulder injury to her current supervisor in April 2020. She contended that she did not sustain any other shoulder injury between the date of injury and the date that she first reported her claim to her current supervisor and physician. Appellant clarified that she was claiming a traumatic injury.

In a June 24, 2020 note, Dr. Rodney Wishnow, a Board-certified internist, noted that on February 28, 2020 appellant injured her right shoulder while cleaning patient rooms. He noted that she continued to have pain to her right shoulder off and on. Dr. Wishnow diagnosed right shoulder strain.

On July 22, 2020 Dr. Amarpreet K. Bath, an internist, found that appellant could perform light-duty work with no pushing, pulling, or heavy lifting or reaching due to her right shoulder injury. She directed her to avoid repetitive motions until further notice.

On August 11, 2020 Dr. Martin C. Tynan, an orthopedic surgeon, examined appellant due to right shoulder pain. He noted that she had attributed her shoulder pain to overuse and repetitive motions while cleaning at work. Appellant alleged that her pain was worsened by lifting heavy objects and overhead activities. On July 13, 2020 she underwent a right shoulder magnetic resonance imaging (MRI) scan which demonstrated mild-to-moderate rotator cuff and long head biceps tendinosis and moderate biceps tenosynovitis. This scan also provided findings suspicious for distal clavicular osteolysis most commonly seen with repetitive microtrauma. Dr. Tynan provided a steroid injection of the right shoulder and found that appellant could perform light duty.

Appellant also resubmitted the September 22, 2020 work excuse form.

Appellant provided a series of notes dated February 4 through July 24, 2020 addressing her right shoulder and right wrist pain signed by nurses and social workers from the employing establishment.[3]

In an April 29, 2021 letter of controversion, the employing establishment contended that on February 2, 2020 appellant was not an employee, but was participating in a compensated work therapy program with the employing establishment. She was selected as a housekeeping aid and began working on May 4, 2020.

By decision dated May 14, 2021, OWCP modified its prior decision to find that appellant was not a federal civilian employee at the time of her injury on February 2, 2020.

LEGAL PRECEDENT

As defined by FECA, the term employee includes an individual rendering personal service to the United States similar to the service of a civil officer or employee of the United States, without pay or for nominal pay, when a statue authorizes the acceptance or use of the service, or authorizes payment of travel or other expenses of the individual.[4] Determining whether an unpaid or nominally paid individual is an employee is a two-step process.[5] Initially, the issue is whether the department or agency is authorized by statute to accept or use the service of the individual.[6]

[3] The remainder of these documents relate to appellant's dental care.

[4] 5 U.S.C. § 8101(1)(B).

[5] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Civil Employee*, Chapter 2.802.9 (September 2020).

[6] *Id*.

The second step is to ascertain whether the services rendered were similar to the service of a U.S. civil officer or employee.[7] When both questions are answered in the affirmative, an individual is a covered employee under FECA.[8]

Section 2.802.10 of OWCP's procedures[9] provides:

> *"Volunteer Workers with the Department of Veterans Affairs.* OWCP has determined that the Department of Veterans Affairs (DVA) has statutory authority to use the services of persons who serve without compensation in its Volunteer Service Program. Therefore, the [claims examiner] need not ask the DVA to cite its statutory authority for using the services of these individuals.
>
> "However, the [claims examiner] must be certain that the injured or deceased individual was "rendering a personal service of a kind similar to those of civilian officers or employees of the United States" as required by 5 U.S.C. 8101(1)(B)….
>
> "The [claims examiner] may affirmatively determine the status of these individuals when the service performed by the injured or deceased individual is clearly like the services in well-established positions in the Federal service, *e.g.*, nurse's aide, recreation supervisor, etc. Otherwise, the question should be submitted for determination by a Quality Assurance and Mentoring Examiner or higher adjudicative authority."

ANALYSIS

The Board finds that appellant was an employee as defined under 5 U.S.C. § 8101(1)(B) at the time of her alleged February 24, 2020 employment incident.

Appellant indicated that on February 2, 2020, she started working for the employing establishment as a compensated work therapy housekeeper. She alleged an employment incident resulting in a right shoulder injury on February 24, 2020. The employing establishment acknowledged that on February 2, 2020 appellant was participating in a compensated work therapy program and that she was formally hired as a housekeeping aid on May 4, 2020.

As noted above, determining whether an unpaid or nominally paid individual is an employee is a two-step process.[10]

Regarding the first step of whether the department or agency is authorized by statute to accept or use the service of the individual, the record indicates that appellant began participating

[7] *Id.*

[8] *E.G., mother of J.G.*, Docket No. 13-2125 (issued July 25, 2014); *Sandra Davis*, 50 ECAB 450 (1999); *Larry Knoke*, 39 ECAB 353 (1988); *George Abraham, father of Anne Abraham*, 36 ECAB 194, 196 (1984).

[9] *Supra* note 6 at Chapter 2.802.10.

[10] *Supra* note 6.

in a compensated work therapy program with the employing establishment on February 2, 2020, and that she was a participant in the compensated work therapy program at the time of her alleged injury on February 24, 2020. OWCP has determined that the Department of Veterans Affairs has statutory authority to use the services of persons who serve without compensation in its Volunteer Service Program. The Board thus finds that the employing establishment was authorized by statute to accept or use the service of appellant.

Regarding the second step of whether the services rendered were similar to the service of a U.S. civil officer or employee, the record indicates that appellant's position in the compensated work therapy program with the employing establishment was that of housekeeper. On May 4, 2020 appellant was hired by the employing establishment as a housekeeping aid. The Board thus finds that the services she rendered under the compensated work therapy program were similar to the service of a U.S. employee.

For these reasons, the Board finds that appellant has met her burden to establish that she was an "employee" within the meaning of section 8101(1)(B), and that she was a covered employee under FECA at the time of her February 24, 2020 alleged injury. The case must, therefore, be remanded to OWCP for consideration of appellant's traumatic injury claim. Following any further development as deemed necessary, OWCP shall issue a *de novo* decision.

CONCLUSION

The Board finds that appellant was an employee as defined under 5 U.S.C. § 8101(1)(B) at the time of her alleged February 24, 2020 employment incident.

ORDER

IT IS HEREBY ORDERED THAT the May 14, 2021 decision of the Office of Workers' Compensation Programs is reversed, and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: March 9, 2023
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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