

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

A.P., Appellant)	
)	
and)	Docket No. 22-0491
)	Issued: March 8, 2023
DEPARTMENT OF HOMELAND SECURITY,)	
IMMIGRATION & CUSTOMS)	
ENFORCEMENT, New York, NY, Employer)	
)	

Appearances:
Jeffrey P. Zeelander, Esq., for the appellant¹
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
JANICE B. ASKIN, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge
JAMES D. MCGINLEY, Alternate Judge

JURISDICTION

On February 21, 2022 appellant, through counsel, filed a timely appeal from a December 13, 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.³

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.*

³ The Board notes that, following the December 13, 2021 decision, OWCP received additional evidence. However, 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.*

ISSUE

The issue is whether appellant has met his burden of proof to establish a traumatic injury in the performance of duty on May 10, 2020, as alleged.

FACTUAL HISTORY

On May 14, 2020 appellant, then a 51-year-old special agent, filed a traumatic injury claim (Form CA-1) alleging that on May 10, 2020 he sustained a fractured left forearm (ulnar) and a fractured right ring finger with torn tendons, as well as a torn tendon in the right middle finger, while in the performance of duty. He explained that he was involved in a physical altercation while taking necessary police action to subdue a violent felon. Appellant indicated on the claim form that the injury occurred at 11:00 p.m. The reverse side of the claim form indicated that his regular work hours were 10:00 a.m. to 6:00 p.m. The employing establishment acknowledged that appellant was injured in the performance of duty. Appellant stopped work on May 11, 2020.

OWCP received a copy of a May 11, 2020 police report describing the incident.

In a development letter dated May 18, 2020, OWCP informed appellant of the type of factual and medical evidence necessary to establish his claim. In a separate development letter of even date, it requested that the employing establishment provide additional information regarding appellant's traumatic injury claim, including comments from a knowledgeable supervisor regarding the accuracy of appellant's statements. OWCP afforded both parties 30 days to respond.

In a May 19, 2020 statement, C.Q., appellant's supervisor, noted that on May 10, 2020 at "23:58 p.m. [11:58 p.m.]," appellant notified him that appellant had been assaulted and injured and had to go to the hospital. He explained that appellant related that, at approximately "23:10 [11:10]," appellant's 15-year-old daughter and a friend were followed and threatened by a man as they walked home. Appellant's daughter called appellant who left his residence, witnessed the unidentified man harassing and threatening his daughter and friend, and he confronted the man as his daughter reached their residence. Appellant identified himself as a "cop/police" and told the man to leave. A confrontation occurred initiated by the man, the man then retrieved a wooden plank and assaulted appellant, fracturing his arm and injuring his hand. C.Q. noted that appellant was transported to the hospital for treatment and that appellant confirmed that there was no history between appellant and the attacker, who was charged with assault in the second degree, a felony.

OWCP received May 11, 2020 x-rays of appellant's left hand and a May 14, 2020 treatment note from Dr. David V. Tuckman, Board-certified in hand surgery and orthopedic surgery, who diagnosed a left ulnar shaft fracture, right middle finger bony mallet, and right ring finger bony mallet.

By letter dated June 16, 2020, to the employing establishment, OWCP requested additional information as to whether appellant's alleged injury occurred in the performance of duty. It noted that the incident occurred at his personal residence while off duty. OWCP afforded the employing establishment 10 days to respond. No response was received.

By decision dated June 29, 2020, OWCP denied the claim for compensation, finding that appellant was not in the performance of duty at the time of the May 10, 2020 incident. It explained that the evidence was insufficient to establish that he sustained an injury or medical condition "that

arose during the course of employment and within the scope of compensable work factors as defined by FECA.”

On July 20, 2020 appellant requested a review of the written record by a representative of OWCP’s Branch of Hearings and Review.

OWCP received a copy of appellant’s position description and a July 17, 2020 report from Dr. Tuckman.

By decision dated October 8, 2020, an OWCP hearing representative affirmed the January 15, 2020 decision. The hearing representative explained that appellant had a fixed place and hours of work, the incident occurred outside of appellant’s scheduled work hours, there was no evidence that appellant was performing official duties at the time of the assault, and the assault occurred for reasons unrelated to his employment. OWCP’s hearing representative found that the assault constituted an off-premises injury and did not arise out of and in the scope and course of employment.

On September 21, 2021 counsel for appellant requested reconsideration and submitted new evidence. He argued that appellant did not have a fixed place and hours of work and that the injury occurred in the performance of duty.

In a September 21, 2021 statement, P.F., the Special Agent in Charge, indicated that appellant was in the performance of duty when the incident occurred. P.F. explained that, at the time of the May 10, 2020 incident, appellant was a special agent subject to Law Enforcement Availability Pay (LEAP), and that a requirement of LEAP was that special agents were required to work or be available to work outside of their scheduled duty hours. In addition, P.F. noted that appellant was designated as a peace officer by the State of New York, having the authority to intervene if a misdemeanor or felony is committed in his presence. P.F. indicated that “during the incident on May 10, 2020 appellant was deemed to be acting within the scope of his employment and should be covered” by OWCP.

Dr. Tuckman continued to treat appellant and provided treatment notes dated May 14, June 16, and July 16, 2020.

By decision dated December 13, 2021, OWCP denied modification of the October 8, 2020 decision. It found that there was no evidence that appellant was on unscheduled duty at the time of the incident, and that a peace officer designation did not fall within the coverage of FECA.

LEGAL PRECEDENT

An employee seeking benefits under FECA⁴ has the burden of proof to establish the essential elements of his or her claim, including the fact that the individual is an employee of the United States within the meaning of FECA, that the claim was filed within the applicable time limitation, that an injury was sustained while in the performance of duty as alleged, and that any disability or specific condition for which compensation is claimed is causally related to the

⁴ *Supra* note 2.

employment injury. These are the essential elements of each and every compensation claim regardless of whether the claim is predicated on a traumatic injury or an occupational disease.⁵

The phrase sustained while in the performance of duty is regarded as the equivalent of the coverage formula commonly found in workers' compensation laws, namely, arising out of and in the course of employment.⁶ In the course of employment relates to the elements of time, place, and work activity.⁷ To arise in the course of employment, an injury must occur at a time when the employee may reasonably be stated to be engaged in his or her master's business, at a place when he or she may reasonably be expected to be in connection with his or her employment, and while he or she was reasonably fulfilling the duties of the employment, or engaged in doing something incidental thereto.⁸

ANALYSIS

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

In this case, appellant indicated on the claim form that he was injured in a physical altercation while taking necessary police action to subdue a violent felon. The evidence of record establishes that appellant's 15-year-old daughter and her friend were followed and threatened by the assailant as they walked home. As appellant's daughter approached their residence, appellant identified himself as a "cop/police" and asked the assailant to leave. The assailant then retrieved a wooden plank, assaulted and injured appellant. Appellant confirmed that there was no history between himself and the assailant who was charged with assault in the second degree, a felony. He noted that the injury occurred at 11:00 p.m. and that his regular work hours were 10:00 a.m. to 6:00 p.m. A May 19, 2020 statement from C.Q., appellant's supervisor, confirmed the circumstances of the injury as described by appellant.

The Board has held that an injury occurs in the performance of duty according to FECA when the employee is injured: (1) at a time when the employee may be reasonably stated to be engaged in the employer's business; (2) at a place where the employee may reasonably be expected to be in connection with the employment; and (3) while the employee was reasonably fulfilling the duties of his employment or engaged in doing something incidental thereto.⁹

OWCP also received a statement from P.F., an employing establishment Special Agent in Charge, who indicated that "during the incident on May 10, 2020 appellant was deemed to be acting within the scope of his employment and should be covered" by OWCP. P.F. explained that appellant was a special agent subject to LEAP, which required that appellant work or be available

⁵ See *M.D.*, Docket No. 19-0841 (issued December 2, 2020); *J.L.*, Docket No. 20-0717 (issued October 15, 2020); *J.W.*, Docket No. 18-0183 (issued January 4, 2019); *Delores C. Ellyett*, 41 ECAB 992 (1990).

⁶ This construction makes the statute effective in those situations generally recognized as properly within the scope of workers' compensation law. *D.T.*, Docket No. 19-1486 (issued January 17, 2020); *Bernard D. Blum*, 1 ECAB 1 (1947).

⁷ *R.E.*, Docket No. 18-0515 (issued February 18, 2020); *J.G.*, Docket No. 17-0747 (issued May 14, 2018).

⁸ *M.T.*, Docket No. 19-1546 (issued March 5, 2020); see *J.B.*, Docket No. 17-0378 (issued December 22, 2017).

⁹ See *K.P.*, Docket No. 98-1574 (issued January 12, 2000); see also *M.D.*, Docket No. 19-0841 (issued December 2, 2020).

to work outside of his scheduled duty hours. In addition, P.F. noted that appellant's position as a special agent made him a peace officer of the State of New York who must intervene if a misdemeanor or felony is committed in his presence.

The Board notes that OWCP's procedures recognize that FECA coverage can be afforded in cases wherein the documentary evidence of record establishes that the appellant was performing emergency duty, or was in a special mission status. However, certain documentary evidence must be obtained. Although P.F. provided a written response to OWCP's development letter, 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. Further documentation is required to establish that appellant was authorized to perform emergency duty or a special mission as a LEAP or peace officer, and as such, that he was required to intervene if a misdemeanor or felony was committed in his presence at any location, at any time. Without this information, the case record is incomplete.¹⁰

Proceedings under FECA are not adversarial in nature, nor is OWCP a disinterested arbiter.¹¹ 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.¹² The Board finds that OWCP insufficiently developed the evidence regarding whether he was in the performance of duty at the time of the alleged injury.¹³

As OWCP failed to request all the information as required under its procedures, the case must be remanded for further development of the claim.¹⁴ On remand, OWCP shall obtain clarifying information as to the employing establishment's policies. Following this and other such further development as deemed necessary, OWCP shall issue a *de novo* decision.

CONCLUSION

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

¹⁰ See *K.R.*, Docket No. 21-0368 (issued May 16, 2022); see also *R.H.*, Docket No. 20-1011 (issued February 17, 2021); *S.T.*, Docket No. 20-0588 (issued September 16, 2020).

¹¹ *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).

¹² *T.T.*, Docket No. 20-0383 (issued August 3, 2020).

¹³ *D.C.*, Docket No. 19-0846 (issued October 17, 2019); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Initial Development of Claims*, Chapter 2.800.5d(1) (June 2011); see also *Performance of Duty*, Chapter 2.804.4f (August 1992).

¹⁴ See *S.T.*, Docket No. 20-0588 (issued September 16, 2020).

ORDER

IT IS HEREBY ORDERED THAT the December 13, 2021 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: March 8, 2023
Washington, DC

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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

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