United States Department of Labor
Employees' Compensation Appeals Board

L.P., Appellant	)	
and	)	**Docket No. 23-0510**
	)	**Issued: November 2, 2023**
DEPARTMENT OF VETERANS AFFAIRS, VA MEDICAL CENTER, Battle Creek, MI, 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:
ALEC J. KOROMILAS, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
JAMES D. McGINLEY, Alternate Judge

JURISDICTION

On March 1, 2023 appellant, through counsel, filed a timely appeal from a September 27, 2022 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 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 a traumatic injury in the performance of duty on February 18, 2022, as alleged.

FACTUAL HISTORY

On February 19, 2022 appellant, then a 69-year-old librarian, filed a traumatic injury claim (Form CA-1) alleging that on February 18, 2022 at 8:15 a.m. she sustained a fractured patella when she slipped and fell on an ice patch while in the performance of duty. She stopped work on February 21, 2022. On the reverse side of the claim form, P.B., appellant's supervisor, controverted the claim, asserting that appellant was not injured in the performance of duty as she was not scheduled to work on her "holiday off." She noted that appellant had forgotten that it was her day off work.

In an e-mail dated February 23, 2022, appellant expressed her concerns regarding mitigating expenses and loss from misinformation and guidance she received from the employing establishment's employee health office following the alleged February 18, 2022 incident. She stated that at the time of her fall she was told that her injury was covered by FECA, and her healthcare was arranged by the employing establishment, but she incurred additional expenses due to miscommunications by the employee health office. In addition, appellant expressed her concern about her FECA status, although she had been assured that her claim would be approved.

In a report dated February 21, 2022, Dr. Mark D. Russell, an osteopath and Board-certified orthopedic surgeon, noted that appellant fell three days prior and he diagnosed closed nondisplaced comminuted left patella fracture, initial encounter.

In a development letter dated February 24, 2022, OWCP informed appellant that the evidence of record was insufficient to establish her claim. It advised her of the type of factual and medical evidence necessary to establish her claim and provided a questionnaire for her completion. OWCP requested that appellant provide a detailed description of the February 18, 2020 incident. In a separate development letter of even date, it requested the employing establishment provide information regarding whether she was in the performance of duty at the time of the alleged injury. OWCP afforded both parties 30 days to provide the necessary evidence.

OWCP subsequently received additional medical evidence.

OWCP also received a copy of appellant's timesheet summary for the period February 13 through 26, 2022, which noted that the code used on February 18, 2022 was "LH-Holiday."

In response to OWCP's development letter, the employing establishment submitted a letter dated March 14, 2022, controverting appellant's claim. It asserted that she was not in the performance of duty on February 18, 2022 since she was not scheduled to work on that day, as it was her designated holiday (President's Day) off work due to her compressed work schedule. The employing establishment further asserted that appellant was not prescheduled for overtime work or compensation time on that day. Additionally, it contended that she had failed to establish causal relationship.

In an undated letter, P.B. related that appellant's in lieu of day occurred every other Monday. She further related that appellant was not scheduled to work on February 21, 2022 therefore appellant's holiday off work fell on Friday, February 18, 2022. P.B. indicated that this was consistent with the employing establishment's policy regarding in lieu of holiday schedules for employees, such as appellant, who had a compressed work tour. She further indicated that at the time of injury, while appellant was on the employing establishment's property, appellant was leaving the building to return home. P.B. maintained that appellant was not working in an official capacity as it was her day off work. She related that appellant's tour started at 7:00 a.m. P.B. noted that around 7:30 a.m. appellant contacted her by telephone stating that she had come to work, but forgot that day was her holiday. At that time, appellant related that she was going home. P.B. indicated that she was not aware that appellant was on the employing establishment's campus until she called her at 7:30 a.m. She reiterated that appellant was not scheduled to work on February 18, 2022 and advised that she did not have preapproval for overtime work or compensation time on that date.

P.B. submitted an employing establishment police report dated February 18, 2022, the employing establishment's policy, and reports dated February 18, 2022 from employee health.

In a completed questionnaire dated March 23, 2022, appellant asserted that the employing establishment did not alert her about her in lieu of holiday schedule, and she did not receive the 2022 bulletin containing the in lieu of holiday schedules. Thus, she contended that she was in the performance of duty on February 18, 2022. Appellant explained that there was considerable variation from one year to the next year when the in lieu of day occurred, noting that in 2021 her holiday for President's Day did not change her schedule. She noted that her in lieu of date for Juneteenth and Christmas was Tuesday and not Friday, as it was for President's Day. Due to these inconsistencies, appellant was unaware that her in lieu of date for President's Day was Friday, February 18, 2022.

By decision dated March 28, 2022, OWCP accepted that the February 18, 2022 incident occurred as alleged, and that a medical condition was diagnosed in connection with the accepted employment incident. However, it denied appellant's traumatic injury claim, finding that she was not in the performance of the duty at the time of the employment incident, because the evidence established that she was not authorized to work on February 18, 2022. Thus, OWCP found that she did not sustain an injury and/or medical condition that arose in the course of employment and within the scope of compensable work factors as defined by FECA.

On March 29, 2022 appellant requested an oral hearing before a representative of OWCP's Branch of Hearings and Review.

During a telephonic hearing held on July 6, 2022 appellant testified that she did not know that she was not supposed to work on February 18, 2022 until her husband, an employing establishment employee, called and told her about her work status. She claimed that her work schedule indicated a shortened schedule on that day. Appellant further claimed that the official time keeping system did not indicate in lieu of days until after they had occurred. She related that it indicated that she was assigned to work on February 18, 2022. Appellant noted that her in lieu of days changed every year as they fell on a Friday or Tuesday.

In a July 26, 2022 response to the July 6, 2022 hearing transcript, the employing establishment advised that appellant had an alternative work schedule consisting of eight shifts for nine hours per day and one shift for eight hours per day every bi-weekly pay period. Appellant's nonscheduled workday under this agreement was Monday. The President's Day holiday fell on her nonscheduled workday of February 21, 2022 which made Friday, February 18, 2022 her in lieu of paid time off holiday. The employing establishment indicated that on February 18, 2022 appellant arrived at work at approximately 6:30 a.m., and she was subsequently told by her husband that she did not have to work on that day. Appellant called her supervisor at approximately 7:30 a.m. to tell her that she mistakenly came to work on her in lieu of day off and was leaving for the day. While leaving at 8:30 a.m., she slipped on ice and injured her left knee. The employing establishment maintained that at the time of the February 18, 2022 employment incident, appellant's supervisor was unaware of her presence on the employing establishment campus on that day, and she had neither requested nor received approval for overtime work or compensation time on that day. It also maintained that, although it understood that appellant had mistakenly reported to work on her in lieu of paid holiday, her hearing testimony demonstrated, her understanding of her normal work schedule, and in lieu of holiday pay schedules.

In a statement dated August 9, 2022, appellant responded to the employing establishment's statements. She related that the leave calendar, which was used by supervisors, was not official, and it erroneously showed that she was scheduled to telework on February 18, 2022 when the correct telework date was February 14, 2022. Appellant contended that the agency representatives did not appear to rely on the official timekeeping system, because it did not indicate in lieu of holiday days for individuals on compressed schedules. In addition, she related that she never received the policy which identified in lieu of holiday schedules, noting that this was the only reliable source for these schedules because the dates changed each year. Appellant acknowledged that she did not request overtime or compensation time for February 18, 2022 explaining that both the leave calendar and the timekeeping system showed that she was scheduled to work on February 18, 2022. By decision dated August 17, 2022, OWCP's hearing representative vacated the March 28, 2022 decision, finding that the record was unclear as to whether appellant mistakenly came to work on an unassigned or assigned date. The hearing representative instructed OWCP to obtain information from the employing establishment regarding whether work days were as fluid and fluctuating as portrayed by appellant's hearing testimony. OWCP was also instructed to obtain a detailed description of how employees' work schedules, including in lieu of days, were promulgated and how this information was conveyed to employees.

By letter dated August 19, 2022, OWCP requested that the employing establishment provide additional information in response to the issues raised in the hearing representative's August 17, 2022 decision. In an August 29, 2022 response, P.B. advised that the employing establishment followed the employing establishment's policy which identified days off when a holiday occurred on an in lieu of day. These days were set in advance by the policy and were not fluid. P.B. stated that appellant's lieu of day occurred every other Monday. She indicated that the in lieu of holiday for Washington's birthday was February 18, 2022. P.B. inserted a notice from the policy which indicated that for President's Day on Monday, February 21, 2022 the in lieu of date was Friday, February 18, 2022. She noted that beginning February 28, 2022 she requested her staff to use the scheduling system, and that appellant would not have seen her schedule for February 18, 2022 since they were not using the system at that time.

In a statement dated September 1, 2022, appellant indicated that the timekeeping system displayed inaccurate, and misleading information on in lieu of holiday days for employees working a compressed work schedule. She noted that on August 30, 2022 her supervisor was unable to locate the 2022 policy to share with her. Because the timekeeping system was confusing, appellant's supervisor was using the scheduling system. Appellant concluded that there was no effective or reliable dissemination of holiday schedules at the employing establishment because the OCHCO Bulletin was not posted online and there were no e-mail alerts or reminders. She attached a copy of the policy which showed Friday, February 18, 2022 as the in lieu of holiday date for President's Day on Monday, February 21, 2022.

In a letter dated September 23, 2022, OWCP requested clarification from P.B. as to whether appellant had sufficient resources to know when her in lieu of day occurred for President's Day in 2022 prior to February 18, 2022. It also requested that P.B. explain her statement that appellant would not have seen her schedule for February 18, 2022. Additionally, OWCP asked if appellant had access to the policy and, if not, what action she could have taken.

In a September 26, 2022 letter, P.B. responded that appellant would have had access to the payroll system, which would have shown her timecard and work schedule. She advised that the employing establishment currently used two systems for timekeeping/scheduling and that prior to February 18, 2022 it only used one system. Lastly, P.B. maintained that she had no knowledge of whether appellant was aware of the policy at the time of her injury. She noted, however, that appellant could have used internet to search for the policy, or asked her for assistance if she did not have access to it.

By decision dated September 27, 2022, OWCP denied modification.

LEGAL PRECEDENT

An employee seeking benefits under FECA[3] 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,[4] 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.[5] 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.[6]

[3] *Id*.

[4] *L.E.*, Docket No. 22-1282 (issued February 22, 2023); *S.B.*, Docket No. 17-1779 (issued February 7, 2018); *J.P.*, 59 ECAB 178 (2007); *Joe D. Cameron*, 41 ECAB 153 (1989).

[5] *L.E., id.*; *J.M.*, Docket No. 17-0284 (issued February 7, 2018); *R.C.*, 59 ECAB 427 (2008); *James E. Chadden, Sr.*, 40 ECAB 312 (1988).

[6] *L.E., id.*; *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).

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.[7]

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."[8] The phrase "in the course of employment" encompasses the work setting, the locale, and time of injury. The phrase "arising out of the employment" encompasses not only the work setting, but also a causal concept with the requirement being that an employment factor caused the injury.[9] 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.[10] 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.[11]

ANALYSIS

The Board finds that appellant has not met her burden of proof to establish a traumatic injury in the performance of duty on February 18, 2022, as alleged.

The record reflects that appellant had a compressed work schedule consisting of eight shifts for nine hours per day and one shift for eight hours per day every bi-weekly pay period with a nonscheduled workday falling on Monday. President's Day, a federal holiday, fell on Monday on February 21, 2022 which was her nonscheduled workday. The employing establishment's 2022 policy identified in lieu of days for that year with February 18, 2022 designated as appellant's in lieu of day for the February 21, 2022 holiday. Appellant's timesheet summary for the period February 13 to 26, 2022 noted that the holiday code was used for February 18, 2022. While appellant was correct in her assertion that the leave calendar was incorrect and conflicted with the 2022 policy, the payroll system also showed her schedule and timecard. The record establishes

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

[8] *See L.E.*, *id. M.T.*, Docket No. 17-1695 (issued May 15, 2018); *S.F.*, Docket No. 09-2172 (issued August 23, 2010); *Valerie C. Boward*, 50 ECAB 126 (1998).

[9] *L.B.*, Docket No. 19-0765 (issued August 20, 2019); *G.R.*, Docket No. 16-0544 (issued June 15, 2017); *Cheryl Bowman*, 51 ECAB 519 (2000).

[10] *A.S.*, Docket No. 18-1381 (issued April 8, 2019); *Roma A. Mortenson-Kindschi*, 57 ECAB 418 (2006); *Mary Keszler*, 38 ECAB 735, 739 (1987).

[11] *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).

that she had available resources in the form of the "payroll system and the policy, to determine her in lieu of holiday. Under the circumstances of this case, the Board finds that appellant did not sustain an injury in the performance of duty on February 18, 2022 as she was neither scheduled to work nor requested to work on that day. Thus, the Board finds that she has not met her burden of proof.

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 a traumatic injury in the performance of duty on February 18, 2022, as alleged.

ORDER

IT IS HEREBY ORDERED THAT the September 27, 2022 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 2, 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