United States Department of Labor
Employees' Compensation Appeals Board

M.H., Appellant	)	
and	)	**Docket No. 20-1164**
	)	**Issued: September 6, 2023**
DEPARTMENT OF THE ARMY, ABERDEEN PROVING GROUND, Aberdeen, MD, Employer	)	

Appearances:
Steven Larkin, 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
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On May 18, 2020 appellant, through her representative**,** filed a timely appeal from an April 20, 2020 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.[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 April 20, 2020 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 her burden of proof to establish an injury in the performance of duty on January 16, 2020, as alleged.

FACTUAL HISTORY

On January 27, 2020 appellant, then a 44-year-old administrative support specialist, filed a traumatic injury claim (Form CA-1) alleging that at 7:55 a.m. on Thursday, January 16, 2020 she fractured her right hand in two places when she tripped and fell over an uneven sidewalk when participating in the employing establishment's Dr. Martin Luther King, Jr. 5K run/walk while in the performance of duty. Her regular work hours were 7:30 a.m. to 4:00 p.m., Monday through Friday. Appellant stopped work on the date of injury. She returned to work with restrictions on January 21, 2020, but stopped work again on February 14, 2020. On the reverse side of the claim form, the employing establishment controverted the claim on the basis of performance of duty, acknowledging that appellant had participated "in a work[-]sponsored fun run."

In a January 29, 2020 witness statement, a Noncommissioned Officer-in-Charge, B.R. indicated that on January 16, 2020 he saw appellant trip on the sidewalk and fall while walking along the designated route during the 5K run/walk. He provided medical assistance and took appellant to an ambulance.

Medical records from January 16, 2020 indicate that appellant was taken by ambulance to a hospital emergency department for a traumatic injury to right hand, where Dr. Milan Vora, a Board-certified emergency medicine specialist, diagnosed right hand fracture. In a January 16, 2020 certificate of medical clearance, Dr. Slavomir A. Bilinski, a family medicine specialist, also diagnosed right hand fracture and held appellant off work. Reports from Dr. Ramon A. DeJesus, a Board-certified orthopedic hand surgeon, dated January 22 and 24, and February 12, 2020, indicate that a splint was applied to appellant's right hand, and she was released to light-duty work with restrictions starting January 21, 2020. In a series of reports commencing February 14, 2020, Dr. DeJesus held appellant off work, noting that she could not bear weight on her right hand.

In a February 25, 2020 letter, the employing establishment challenged appellant's claim. It indicated that the 5K run/walk was a voluntary activity, in which appellant chose to participate. Additionally, the employing establishment derived no substantial benefit from appellant's participation.

A copy of an employing establishment 5K run/walk event poster was submitted. The poster listed the events that were being held in celebration of Dr. Martin Luther King, Jr.'s birthday, noting that a 5K run/walk on January 16, 2020 was scheduled to begin at 7:00 a.m. at the post exchange (PX). The poster contained an image of Dr. Martin Luther King, Jr. and the words "Volunteer," "**I WANT YOU . . .** REMEMBER! CELEBRATE! ACT!" (Emphasis in the original.)

In a development letter dated March 16, 2020, OWCP informed appellant of the deficiencies of her claim. It advised her of the type of factual and medical evidence needed to establish her claim and provided a questionnaire for her completion. In a separate development letter of even date, OWCP requested that the employing establishment provide information

regarding the circumstances of the claimed January 16, 2020 event, including whether such participation was required and whether the employing establishment derived any benefit from her participation in the activity. It noted that the evidence indicated that appellant was injured while engaged in recreational activity or a physical fitness program and requested that the employing establishment further address whether appellant's participation was required; whether other employees were required, persuaded, or permitted to participate in the activity; and whether the employing establishment provided leadership, equipment or facilities for the activity. OWCP afforded both parties 30 days to respond.

In a March 17, 2020 response, the employing establishment acknowledged that the run/walk event was held on the employing establishment premises during business hours, but asserted that employees were not required to participate in the activity. It argued that it did not derive any benefit from the activity and did not provide anything in sponsorship of the event. The employing establishment further asserted that participation in the event did not violate any rules or regulations.

In a March 26, 2020 letter, the employing establishment further responded to OWCP's development letter, reiterating its prior contentions. Additionally, it noted that its Equal Employment Opportunity (EEO) office hosted the 5K run/walk and provided leadership for the event.

In an April 1, 2020 statement, appellant indicated that while she was not required to participate, the employing establishment strongly encouraged participation in the activities by sending e-mails regarding the event and placing posters in the work area. She asserted that participation in the 5K run/walk on January 16, 2020 was intended to help to build a more cohesive relationship between the different organizations at the employing establishment through interaction of the participants, which allowed for the employing establishment to be seen as an active supporter of community activities to develop better community relations. Appellant indicated that everyone was invited to participate in the activities. She denied that any rules were violated during her participation in the 5K run/walk, which took place on the employing establishment's premises during her work hours. Appellant indicated that she was paid regular pay up to the time of her injury and then received administrative leave for the balance of the day after the injury. She attached December 10, 2019 and January 6, 2020 e-mails from the employing establishment, which advised that the employing establishment would be celebrating the Dr. Martin Luther King, Jr. holiday through a series of events over the course of one month, cumulating with a 5K walk/run. The agency Director explained that Dr. Martin Luther King, Jr., "always encouraged giving back to the community, and [the employing establishment] will honor his service and dedication, and memory in advance of the Martin Luther King holiday in January." The agency Director indicated that each individual unit may host their own volunteer events or take part in preplanned volunteer events in celebration of the Martin Luther King, Jr., holiday. Each unit was to track employee volunteer hours for one month and the unit with the most volunteer hours would be presented with an award at the 5K walk/run on January 16, 2020. Appellant also attached a January 13, 2020 e-mail distributed to all employees, wherein the agency Director indicated that the employing establishment and the U.S. Army Communications-Electronics Command were hosting the 5K run/walk on January 16, 2020. The agency Director concluded, "We look forward to seeing you there!" OWCP also received a map of the 5K run/walk route and appellant's timecard, which indicated that on January 16, 2020 she was on the clock, in regular pay status at the time that she was injured.

OWCP continued to receive medical evidence.

By decision dated April 20, 2020, OWCP denied appellant's claim, finding that she was not in the performance of duty when injured on January 16, 2020.

LEGAL PRECEDENT

An employee seeking benefits under FECA[4] 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,[5] 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.[6] 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.[7]

FECA provides for the payment of compensation for "the disability or death of an employee resulting from personal injury sustained while in the performance of duty."[8] 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."[9] The phrase "in the course of employment" is recognized as relating to the work situation, and more particularly, relating to elements of time, place, and circumstance. To arise in the course of employment, an injury must occur at a time when the employee may reasonably be said to be engaged in the master's business, at a place where he or she may reasonably be expected to be in connection with the employment, and while he or she was reasonably fulfilling the duties of his or her employment or engaged in doing something incidental thereto."[10] This alone is not sufficient 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.[11]

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[4] *Supra* note 2.

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

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

[7] *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).

[8] 5 U.S.C. § 8102(a).

[9] *A.K.*, Docket No. 16-1133 (issued December 19, 2016); *Charles Crawford*, 40 ECAB 474, 476-77 (1989).

[10] *See A.S.*, Docket No. 18-1381 (issued April 8, 2019); *D.L.*, 58 ECAB 667 (2007); *Mary Keszler*, 38 ECAB 735, 739 (1987).

[11] *M.T.*, Docket No. 16-0927 (issued February 13, 2017); *Vitaliy Y. Matviiv*, 57 ECAB 193 (2005); *Eugene G. Chin*, 39 ECAB 598 (1988).

With regard to recreational or social activities, the Board has held that such activities arise in the course of employment when: (1) they occur on the premises during a lunch or recreational period as a regular incident of the employment; (2) the employing establishment, by expressly or impliedly requiring participation or by making the activity part of the service of the employee, brings the activity within the orbit of employment; or (3) the employing establishment derives substantial direct benefit from the activity beyond the intangible value of improvement in employee health and morale is common to all kinds of recreation and social life.[12]

ANALYSIS

The Board finds that appellant has met her burden of proof to establish a traumatic incident in the performance of duty on January 16, 2020, as alleged.

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.[13] On her Form CA-1, appellant claimed that on January 16, 2020 she fractured her right hand when she tripped and fell at 7:55 a.m. while participating in the Dr. Martin Luther King, Jr. 5K run/walk in the performance of duty. The employing establishment controverted the claim, contending that appellant's alleged injury did not occur in the performance of duty.

As noted above, the Board has held that recreational activities can arise in the course of employment when: (1) they occur on the premises during a lunch or recreational period as a regular incident of the employment; (2) the employing establishment, by expressly or impliedly requiring participation or by making the activity part of the service of the employee, brings the activity within the orbit of employment; or (3) the employing establishment derives substantial benefit from the activity beyond the imaginable value of improvement in employee health and morale is common to all kinds of recreation and social life.[14] Furthermore, OWCP's procedures provide that employees who are injured while exercising or participating in a recreational activity during authorized lunch or break periods in a designated area of the employing establishment premises have the coverage of FECA whether or not the exercise or recreation was part of a structured physical fitness program.[15]

Herein, with regard to the first criterion, there is no factual dispute that appellant's injury took place on the employing establishment's premises during the course of her employment. The employing establishment has acknowledged that the January 16, 2020 incident occurred on the premises and during regular work hours.

[12] *See T.L.*, Docket No. 19-0805 (issued November 18, 2019); *L.B.*, Docket No. 19-0765 (issued August 20, 2019); *S.B.*, Docket No. 11-1637 (issued April 12, 2012); *Ricky A. Paylor*, 57 ECAB 568 (2006); *Kenneth B. Wright*, 44 ECAB 176 (1992).

[13] *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).

[14] *Supra* note 12.

[15] *See N.B.*, Docket No. 20-1446 (issued March 19, 2021).

With regard to the second criterion, the Board finds that the employing establishment encouraged participation such that it made the activity part of the service of the employee. On the reverse side of the claim form, appellant's supervisor acknowledged that appellant was injured while participating "in a work[-]sponsored" run. In response to OWCP's development letter, the employing establishment indicated that, although not required, employees were encouraged to participate in the 5K run/walk event. Also, the employing establishment acknowledged that its EEO office hosted the voluntary 5K walk/run and provided leadership for the event. The case record contains a copy of an employing establishment 5K run/walk event poster, which listed the events that were being held in celebration of Dr. Martin Luther King, Jr.'s birthday, including the 5K run/walk. The poster contained an image of Dr. Martin Luther King, Jr. and the words "Volunteer," "**I WANT YOU . . .** REMEMBER! CELEBRATE! ACT!" (Emphasis in the original.) In December 10, 2019 and January 6, 2020 e-mails, the employing establishment advised that it would be celebrating the Dr. Martin Luther King, Jr. holiday through a series of events over the course of one month, cumulating with a 5K walk/run. The agency Director indicated that each individual unit may host their own volunteer events or take part in pre-planned events in celebration of the Martin Luther King, Jr., holiday. Each unit was to track employee volunteer hours for one month and the unit with the most volunteer hours would be presented with an award at the 5K walk/run on January 16, 2020. Appellant also attached a January 13, 2020 e-mail distributed to all employees, wherein the agency Director indicated that the employing establishment and the U.S. Army Communications-Electronics Command were hosting the 5K run/walk on January 16, 2020. The Director concluded, "We look forward to seeing you there!" OWCP also received appellant's timecard, which indicated that on January 16, 2020 she was on the clock, in regular pay status at the time that she was injured. Therefore, the Board finds that the appellant has satisfied the second criterion.

With regard to the third criterion, the Board finds that appellant has established that the employing establishment derived a substantial direct benefit from appellant's participation in the 5K run/walk. In response to OWCP's development letter, the employing establishment acknowledged that the 5K run/walk was intended to raise the morale of the workforce. However, the case record supports appellant's contention that participation in the 5K run/walk on January 16, 2020 was intended to help to build a more cohesive relationship between the different organizations at the employing establishment through interaction of the participants, which allowed for the employing establishment to be seen as an active supporter of community activities to develop better community relations. The case record includes December 10, 2019 and January 6, 2020 e-mails from the employing establishment, wherein the agency Director explained that Dr. Martin Luther King, Jr., "always encouraged giving back to the community, and [the employing establishment] will honor his service and dedication, and memory in advance of the Martin Luther King holiday in January." Therefore, the Board finds that appellant has satisfied the third criterion.

As such, the Board finds that appellant was within the performance of duty on January 16, 2020, as alleged. The case shall therefore be remanded to determine whether she has sustained an injury causally related to the accepted January 16, 2020 employment incident.

After any further development as deemed necessary, OWCP shall issue a *de novo* decision.

CONCLUSION

The Board finds that appellant has met her burden of proof to establish a traumatic incident in the performance of duty on January 16, 2020, as alleged.

ORDER

IT IS HEREBY ORDERED THAT the April 20, 2020 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: September 6, 2023
Washington, DC

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

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

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