

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

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K.P., Appellant)	
)	
and)	Docket No. 24-0065
)	Issued: February 27, 2024
DEPARTMENT OF HEALTH & HUMAN)	
SERVICES, CENTERS FOR DISEASE)	
CONTROL, Nairobi, Kenya, Employer)	
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Appearances:
Appellant, pro se
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 October 11, 2023 appellant filed a timely appeal from a July 18, 2023 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. § § 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant has met her burden of proof to establish a traumatic injury in the performance of duty on March 13, 2023, as alleged.

FACTUAL HISTORY

On May 1, 2023 appellant, then a 34-year-old general health science worker, filed a traumatic injury claim (Form CA-1) alleging that on March 13, 2023 she sustained neck and face

¹ 5 U.S.C. § 8101 *et seq.*

injuries when she was assaulted while exiting a festival in Watamu, Kenya. She further explained that she was deployed in Kenya and was assaulted when a policeman checked her handbag and asked for her cell phone passcode which she could not divulge pursuant to the employing establishment's policy. Appellant indicated that the injury occurred at approximately 2:00 a.m. She did not stop work.

The employing establishment checked the box "No" in response to whether appellant was in the performance of duty at the time of injury. It noted that she attended a festival that was not sponsored or hosted by the employing establishment. The employing establishment also noted that the incident allegedly occurred at 2:00 a.m., which was outside of appellant's scheduled duty hours of 7:00 a.m. to 4:30 p.m., Monday through Friday.

In e-mails dated April 3 and 26, 2023, appellant noted that her immediate supervisor was not aware of the incident and she preferred not to share the details.

In a letter dated May 4, 2023, C.A., a human resource specialist with the employing establishment, controverted the claim. She noted that the festival was not a sponsored event and the incident did not occur within appellant's scheduled duty hours. C.A. related that appellant's current supervisor, D.B., was notified on April 21, 2023, about the injury; however, D.B., failed to complete the form, as appellant was not under his supervision at the time of the incident and the employing establishment was unaware of the incident.

OWCP received a copy of a March 14, 2023 unsigned, note from Jan Langer, the owner of Kaleidoscope festival and Temple Point, apologizing for the incident that occurred at the festival. This note explained that the police officer who assaulted appellant was leaving the festival due to his prior misconduct, but unfortunately stopped appellant and abused his power.

OWCP received a note dated March 14, 2023, from Lichthaus Watamu Business, noting that it was seeking disciplinary action against the officer.

OWCP received a March 15, 2023 report from Dr. John Njenga, a foreign service medical provider at the Nairobi Health Unit, who related that appellant was assaulted by a plain clothes police officer when she refused to give up her cell phone. Dr. Njenga noted that appellant related that she was grabbed by her bra, slapped on the left side of her face, and her cell phone was taken. He indicated that she reported the incident and came in complaining of increased headache, especially on the left side, jaw pain accompanied by cracking sounds, and blurry left vision. Dr. Njenga also noted that appellant was reliving the incident and had anger and increased crying episodes.

OWCP received April 2 and 19, 2023 work excuses from Dr. Kenneth Boxer, an optometrist, who noted that appellant was seen for an eye examination.

In a May 8, 2023 development letter, OWCP, informed appellant that the evidence submitted was insufficient to establish her claim. It advised her of the type of factual and medical evidence needed and provided a questionnaire for her completion. OWCP requested further information to determine whether appellant was in the performance of duty at the time of her injury. It afforded her 60 days to submit the necessary evidence.

OWCP received e-mail correspondence dating from March 28 to May 4, 2023, between appellant and the employing establishment human resource office. In a March 28, 2023 statement, appellant reiterated the details of the March 13, 2023 incident. In a May 4, 2023 e-mail, she confirmed that the ambassador at the embassy set her tour of duty hours from 7 a.m. to 4:30 p.m., Monday to Thursday, and 7 a.m. to 12:30 p.m. on Fridays. Appellant indicated that she was not on temporary duty, but rather was on assignment with the employing establishment's Country Office of Kenya, based in Nairobi, Kenya, and that she was a permanent staff member and part of the embassy chief of mission with the employing establishment's office in Kenya. She indicated that she left Atlanta on May 6, 2022, and returned on March 21, 2023. Appellant alleged that the incident occurred as "a result of [employing establishment] guidance of not sharing my passcode." She indicated that she refused to give up her cell phone because it had confidential employing establishment data, which is what led to the assault.

OWCP received progress notes dated April 2, 17, and 19, 2023, from Dr. Boxer and Dr. Sudha Cheekati, an internist.

In a letter dated June 7, 2023, OWCP notified appellant that an interim review of her case was performed on June 7, 2023, and that the evidence was insufficient to accept her claim. It explained that an employee on travel status, a temporary-duty assignment, or a special mission for her employer was in the performance of duty and therefore under the protection of FECA for 24 hours per day with respect to any injury that resulted from activities essential or incidental to her special duties. OWCP noted that examples of such activities included eating, returning to a hotel after eating dinner, and engaging in reasonable activities within a short distance of the hotel where the employee is staying. However, it further advised that when a claimant voluntarily deviates from such activities and engages in matters, personal or otherwise, which are not incidental to the duties of his or her temporary assignment, then the employee ceases to be under the protection of FECA and any injury that occurs during these deviations is not compensable. OWCP requested that appellant submit evidence that supported that her participation in the festival was not of personal choice and that she was in the performance of her work duties. It requested documentation which supported that she was on assignment in Kenya at the time of the injury and noted that she was afforded 60 days from its May 8, 2023 letter to submit the requested information.

OWCP continued to receive medical progress reports dated from March 12 to May 22, 2023.

In a June 19, 2023 statement, appellant related that she was on permanent assignment to the employing establishment's Kenya office, that her status was "on assignment," and that she was not on temporary-duty status. She noted that she had to submit a travel request any time she was outside of Nairobi. Appellant argued that the hostile environment and assault occurred because she would not share the passcode to her cell phone which contained confidential employing establishment data, e-mail, and correspondence. She related that as part of embassy security training and as an employing establishment employee, she was trained not to share passcodes, that her cell phone had a time-based, one-time password and push multi-factor authentication, and that she was following work guidance and policy in not sharing the passcode to her cell phone. Appellant explained that she may not have access to all relevant documents as the employing

establishment's Kenya country director took over communications with the State Department, and she was left out of the loop.

By decision dated July 18, 2023, OWCP denied appellant's claim as she was not in the performance of duty. It found that the evidence was insufficient to establish that the injury and/or medical condition arose during the course of employment and within the scope of compensable work factors. OWCP explained that appellant had not provided any evidence that attendance at the Kaleidoscope Festival was in the performance of duty. It found that when an employee voluntarily engages in matters that are personal or otherwise not incidental to the duties of their temporary assignment, they cease to be under the protection of FECA. OWCP concluded, that the claim was denied because the requirements were not met to establish that appellant sustained an injury and/or medical condition during the course of employment and within the scope of compensable work factors, as defined by the FECA.

LEGAL PRECEDENT

An employee seeking benefits under FECA² 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 timely filed within the applicable time limitation period of FECA,³ 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.⁴ 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.⁵

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 of 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."⁶

The Board has interpreted "while in the performance of duty" to be the equivalent of the commonly found requisite in workers' compensation law of arising out of and in the course of employment. The phrase "in the course of employment" encompasses the work setting, the locale, and the time of injury. The phrase "arising out of the employment" encompasses not only the

² *Id.*

³ *See J.F.*, Docket No. 22-0151 (issued September 26, 2023); *J.P.*, Docket No. 19-0129 (issued April 26, 2019); *S.B.*, Docket No. 17-1779 (issued February 7, 2018); *Joe D. Cameron*, 41 ECAB 153 (1989).

⁴ *J.M.*, Docket No. 17-0284 (issued February 7, 2018); *R.C.*, 59 ECAB 427 (2008); *James E. Chadden, Sr.*, 40 ECAB 312 (1988).

⁵ *R.R.*, Docket No. 19-0048 (issued April 25, 2019); *L.M.*, Docket No. 13-1402 (issued February 7, 2014); *Delores C. Ellyett*, 41 ECAB 992 (1990).

⁶ *See* 5 U.S.C. § 8102(a); *see M.B.*, Docket No. 20-1072 (issued November 10, 2022); *J.N.*, Docket No. 19-0045 (issued June 3, 2019).

work setting, but also a causal concept with the requirement being that an employment factor caused the injury. In addressing this issue, the Board has held that in the compensation field, to occur in the course of employment, as a general rule, an injury must occur: (1) at a time when the employee may reasonably be said to be engaged in his or her employer's business; (2) at a place where he or she may reasonably be expected to be in connection with the employment; and (3) while he or she was reasonably fulfilling the duties of his or her employment or engaged in doing something incidental thereto.⁷ In deciding whether an injury is covered by FECA, the test is whether, under all the circumstances, a causal relationship exists between the employment itself, or the conditions under which it is required to be performed, and the resultant injury.⁸

OWCP's procedures further provide that the protection of FECA is not limited to injuries, which occur on the industrial premises, and it contains provisions regarding the necessary information to be obtained when an employee has claimed that an injury occurred while on travel status.⁹ FECA covers an employee 24 hours a day when the employee is on travel status and engaged in activities essential or incidental to such duties.¹⁰

ANALYSIS

The Board finds that appellant has not met her burden of proof to establish a traumatic injury in the performance of duty on March 13, 2023, as alleged.

On her Form CA-1 appellant indicated that on March 13, 2023, she was assaulted upon exiting a festival at 2:00 am, while assigned in Kenya. She explained that the assault occurred when she refused to give her cell phone and pass code to the assailant. The employing establishment checked the box "No" in response to whether appellant was in the performance of duty and controverted the claim. It noted that appellant attended a festival that was not sponsored or hosted by the employing establishment and that the incident occurred at 2:00 a.m., which was outside of appellant's scheduled duty hours of 7:00 a.m. to 4:30 p.m., Monday to Thursday, and 7:00 a.m. to 12:30 p.m. on Fridays.

In a June 19, 2023 statement, appellant indicated that she was on permanent assignment to the employing establishment's office in Nairobi, Kenya and that she was not on temporary-duty travel status. In fact, she noted that she had to submit a travel request any time she was outside of Nairobi. The Board finds that the evidence indicates that appellant was on a permanent assignment

⁷ *K.G.*, Docket No. 18-1725 (issued May 15, 2019); *Kathryn S. Graham Wilburn*, 49 ECAB 458 (1998).

⁸ *See K.K.*, Docket No. 21-0538 (issued July 25, 2022); *J.C.*, Docket No. 17-0095 (issued November 3, 2017); *Mark Love*, 52 ECAB 490 (2001).

⁹ *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Performance of Duty*, Chapter 2.804.5 (August 1992). For injuries sustained in a travel status the record must contain evidence showing when and where the employee last performed official duty, the distance between the place of injury and the place where official duty was last performed, between what points the employee was traveling when injured, the purpose of the trip, when and where the employee was next expected to perform official duty, whether at the time of the injury the employee was riding in or driving a government-owned vehicle, and whether the employee's travel expenses were reimbursable.

¹⁰ *S.T.*, Docket No. 16-1710 (issued September 27, 2017); *L.A.*, Docket No. 09-2278 (issued September 27, 2010); *Ann P. Drennan*, 47 ECAB 750 (1996); *Richard Michael Landry*, 39 ECAB 232 (1987) and cases cited therein.

to the employing establishment's Nairobi, Kenya office, and that appellant was not on travel status when the incident occurred. As noted, FECA covers the employee 24 hours per day for work-related injuries that occur when the employee is on travel status; however, in this case appellant was not on travel status.¹¹

Therefore, as a general rule, appellant was required to show that the incident occurred during her work hours and in the performance of her employment duties.¹² She did not dispute that her regular work hours were 7:00 a.m. to 4:30 p.m., Monday to Thursday, and 7:00 a.m. to 12:30 p.m. on Fridays, and that the alleged incident occurred at 2:00 a.m., outside of her work hours.

Further, appellant did not allege that she attended the festival at the request of the employing establishment or to fulfill any employment duties. The Board further notes that the employer denied that it sponsored or otherwise requested appellant to attend the festival.

As there is no evidence of record to substantiate a traumatic injury in the performance of duty on March 13, 2023, as alleged, the Board finds that appellant 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 that a traumatic injury occurred in the performance of duty on March 13, 2023, as alleged.

¹¹ *Id.*

¹² *Supra* note 7.

ORDER

IT IS HEREBY ORDERED THAT the July 18, 2023 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: February 27, 2024
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