



## **FACTUAL HISTORY**

On February 10, 2004 appellant, then a 49-year-old civilian pay technician, filed a traumatic injury claim alleging that on January 12, 2004 at approximately 4:45 p.m. she slipped off the curb in front of the employing establishment's medical center. Synthia Cain, an employing establishment supervisor, indicated on the claim form that appellant was off duty and was getting on a bus to go home.

The medical history taken from appellant's medical records on January 12, 2004 and a partial copy of an undated confidential incident report stated that appellant was going to the valet area to meet a van pool, when she stepped in a crack in the pavement in front of the hospital and twisted her ankle. In a January 28, 2004 memorandum, Dr. Khiem Vu, an employing establishment physician, indicated that appellant was being treated for an ankle sprain.

By letter dated March 23, 2004, the Office requested that the employing establishment provide further information concerning the boundaries of their premises, the location of the injury site and other information important to the adjudication of appellant's claim. The employing establishment was requested to submit such information within 30 days. Appellant was sent a duplicate of this letter. The Office did not receive any response from either the employing establishment or appellant.

By decision dated April 27, 2004, the Office denied appellant's claim as she had not established that her injury occurred in the performance of duty. The Office stated "We advised you of the deficiencies of your claim in a letter dated April 23, 2004 and gave you the opportunity to provide the necessary evidence. No further evidence was received."

On April 29, 2004 and thereafter, the Office received duplicate copies of medical evidence already of record, along with a copy of the Office's March 23, 2004 letter in which various handwritten responses to the Office's questions were submitted.

On July 29, 2004 appellant faxed to the Office an appeal request form, in which she requested an oral hearing on the April 27, 2004 decision.

By decision dated September 13, 2004, the Office's Branch of Hearings and Review advised appellant that her request for an oral hearing was denied as untimely and she was, therefore, not entitled to a hearing as a matter of right. The Office stated that it had further considered her request and found that the issue of whether appellant sustained an injury in the performance of her duties could be equally well addressed through a reconsideration application.

## **LEGAL PRECEDENT -- ISSUE 1**

An employee seeking benefits under the Federal Employees' Compensation Act<sup>1</sup> has the burden of establishing 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 the Act, that the claim was filed within the applicable time limitation of the Act, that an injury was sustained in the

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<sup>1</sup> 5 U.S.C. § 8101-8193.

performance of duty as alleged and that any disability and/or specific condition for which compensation is claimed are causally related to the employment injury.” 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.<sup>2</sup>

As a general rule, an off-premises injury sustained by an employee having fixed hours and place of work, while the employee is coming to or going from the employer’s premises, is not compensable because the injury does not arise out of and in the course of employment, but out of ordinary nonemployment hazards of the journey itself, which are shared by all travelers.<sup>3</sup> Certain exceptions to the premises rule have developed, where the hazards of the travel may fairly be considered dependent upon the particular facts and related to situations: (1) where the employment requires the employee to travel on the highways; (2) where the employer contracts to and does furnish transportation to and from work; (3) where the employee is subject to emergency call as in the case of firemen; and (4) where the employee uses the highway to do something incidental to his employment, with the knowledge and approval of the employer.<sup>4</sup>

### ANALYSIS -- ISSUE 1

The Office found in its April 27, 2004 decision, that the evidence supported that the claimed event occurred, but the evidence did not establish that the injury occurred within the performance of duty. Specifically, the Office noted that its April 23, 2004 letter had advised appellant of the deficiencies in her claim and she was provided with an opportunity to provide the necessary evidence, but she did not respond.

The Office is not a disinterested arbiter, but rather, performs the role of adjudicator on the one hand and gatherer of the relevant facts and protector of the compensation fund on the other, a role that imposes an obligation on the Office to see that its administrative processes are impartially and fairly conducted.<sup>5</sup> Although the claimant has the burden of establishing entitlement to compensation, the Office shares responsibility in the development of the evidence.<sup>6</sup> The Office is responsible for providing the claimant information about the procedures involved in establishing a claim, including detailed instructions for developing the required evidence and upon initial examination of the case should request all evidence necessary to adjudicate the case.<sup>7</sup>

The Office, however, did not discharge this responsibility before issuing its April 27, 2004 decision denying appellant’s claim for compensation for her January 12, 2004 injury. Although appellant received a copy of the Office’s March 23, 2004 letter to the employing

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<sup>2</sup> *Gary J. Watling*, 52 ECAB 357 (2001).

<sup>3</sup> *Dennis L. Forsgren (Linda N. Forsgren)*, 53 ECAB 174 (2001); *Connie J. Higgins (Charles H. Higgins)*, 53 ECAB 451 (2002).

<sup>4</sup> *Id.*

<sup>5</sup> *Thomas M. Lee*, 10 ECAB 175 (1958).

<sup>6</sup> *William J. Cantrell*, 34 ECAB 1233 (1983); *Gertrude E. Evans*, 26 ECAB 195 (1974).

<sup>7</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Development of Claims*, Chapter 2.800.3c (April 1993).

establishment, the Board notes that this letter specifically requested factual information from the employing establishment which directly lent itself to the nature of whether appellant's injury of January 12, 2004 occurred within the performance of duty. Office regulations provide that an employer who has reason to disagree with any aspect of the claimant's report shall submit a statement to the Office that specifically describes the factual allegation or argument with which it disagrees and provide evidence or argument to support its position.<sup>8</sup> The applicable regulation further provides that the employer may include supporting documents such as witness statements, medical reports or records or any other relevant information.<sup>9</sup> If the employer does not submit a written explanation to support the disagreement, the Office may accept the claimant's report of injury as established.<sup>10</sup>

The Board finds that the case is not in posture for decision. It is not clear whether the injury occurred on employing establishment's premises, whether the injury occurred more than 30 minutes outside of appellant's usual work hours and whether the employer contracts to and furnishes transportation to and from work. The Board further notes that the Office, prior to the April 27, 2004 decision, did not specifically advised appellant that the evidence she had submitted was insufficient to establish her claim or what type of factual or medical evidence was necessary to establish her claim.<sup>11</sup>

The Board will, therefore, set aside the April 27, 2004 denial and remand the case to the Office for proper development of the evidence, including a description of the specific evidence required to establish appellant's claim and information from the employing establishment pertaining to the injury site, to be followed by an appropriate final decision.<sup>12</sup>

### CONCLUSION

The Board finds that this case is not in posture for decision. Proper development of the evidence is warranted.

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<sup>8</sup> 20 C.F.R. § 10.117(a).

<sup>9</sup> *Id.*

<sup>10</sup> See 20 C.F.R. § 10.117(b); see also Federal (FECA) Procedure Manual, Part 2 -- Claims, *Occupational Illness*, Chapter 2.806.4(d)(1) (October 1995).

<sup>11</sup> See 20 C.F.R. § 10.121 (if the claimant submits insufficient evidence with the claim, the Office will inform the claimant of the additional evidence that is needed and allow the claimant at least 30 days to submit such evidence).

<sup>12</sup> In light of the resolution of this issue, it is not necessary for the Board to address the second issue of whether the Office properly denied appellant's request for an oral hearing.

**ORDER**

**IT IS HEREBY ORDERED THAT** the September 13 and April 27, 2004 decisions of the Office of Workers' Compensation Programs are set aside and the case remanded for further action consistent with this opinion.

Issued: July 7, 2005  
Washington, DC

Alec J. Koromilas  
Chairman

Colleen Duffy Kiko  
Member

David S. Gerson  
Alternate Member