United States Department of Labor
Employees' Compensation Appeals Board

MYRA L. ACOSTA, Appellant	)	
and	)	**Docket No. 05-821**
	)	**Issued: July 13, 2005**
DEPARTMENT OF THE ARMY, TRIPPLER ARMY MEDICAL CENTER, HI, Employer	)	

Appearances:
Myra L. Acosta, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chairman
COLLEEN DUFFY KIKO, Member
DAVID S. GERSON, Alternate Member

JURISDICTION

On February 22, 2005 appellant filed a timely appeal of merit decisions of the Office of Workers' Compensation Programs dated August 23 and December 7, 2004 that found that she was not in the performance of duty when she was injured on May 24, 2004. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review the merits of this case.

ISSUE

The issue is whether appellant's May 24, 2004 injury was sustained in the performance of duty.

FACTUAL HISTORY

On May 25, 2004 appellant, then a 54-year-old nursing assistant, filed a claim for compensation for a traumatic injury to her left hand and right knee sustained on May 24, 2004 at 5:55 a.m. when she tripped over the curb while crossing the employing establishment's parking lot. The employing establishment stated that appellant's regular work hours were from 7:00 a.m. to 3:30 p.m. Appellant submitted a May 26, 2004 medical report diagnosing a left hand sprain,

a July 1, 2004 medical report diagnosing reflex sympathetic dystrophy, and an August 11, 2004 medical report stating she had no signs of reflex sympathetic dystrophy.

On July 1, 2004 the Office requested further information from appellant and the employing establishment, including an explanation of why she was in the parking lot at 5:55 a.m. when her workday began at 7:00 a.m. The employing establishment replied that appellant was not performing job duties at 5:55 a.m. and that she was required to be at work by 6:45 a.m. every morning. On July 8, 2004 appellant replied that she always got to work early to have breakfast and most of all to avoid traffic. She stated that she prepared for her workday by opening the doors to the clinic and checking to see that the room was cleaned.

By decision dated August 23, 2004, the Office found that the evidence did not establish that appellant was injured in the performance of duty, as her early arrival was for personal comfort and did not directly contribute to the completion of her assigned duties.

By letter dated September 8, 2004, appellant requested reconsideration and stated that her arrival at 5:55 a.m. was not primarily for personal comfort and that her known work habit was to report for work earlier than her shift to prepare for the volume of work expected for the day. Appellant also contended that her May 24, 2004 injury was a recurrence of her work-related plantar fasciitis, as she was experiencing a flare-up that day and was in pain. She stated that the pain in her feet caused her to stumble. Appellant submitted a September 1, 2004 letter from Dr. Holly L. Olson, an obstetrician and gynecologist at the employing establishment, stating that appellant would often assist physicians before or after duty hours when they were taking care of patients who could not make it into the clinic during the normal duty day.

By decision dated December 7, 2004, the Office found that it was not a requirement that appellant arrive at work early to prepare for the day and that there was no medical evidence that her plantar fasciitis caused or contributed to her fall.

LEGAL PRECEDENT

The Federal Employees' Compensation Act[1] provides for payment of compensation for disability or death of an employee resulting from personal injury sustained while in the performance of duty.[2] 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."[3] "In the course of employment" relates to the elements of time, place and work activity. 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 employer's business, at a place when she may reasonably be expected to be in connection with her employment, and while she was reasonably fulfilling the duties of his employment or engaged in doing something incidental thereto.

[1] 5 U.S.C. §§ 8101-8193.

[2] 5 U.S.C. § 8102(a).

[3] *Bernard D. Blum*, 1 ECAB 1 (1947).

ANALYSIS

Appellant's May 24, 2004 injury occurred on the employing establishment's parking lot, which is part of its premises. However, it occurred 50 minutes before appellant was scheduled to begin work. The evidence shows that appellant was there that early to avoid traffic and to eat breakfast. The Board has held, in a case remarkably similar to the present one, that these activities are not preparatory activities reasonably incidental to work activities and are outside the scope of employment.[4] The Board reached the same result in another case involving arriving at work 45 minutes early to eat breakfast, finding that this act was "personal in nature inasmuch as appellant was not reasonably fulfilling the duties of his employment…."[5]

In her request for reconsideration of the Office's initial denial of her claim, appellant contended that she did not arrive early primarily for personal comfort but rather to prepare for work. The evidence does not support that this was the reason she was arriving at work 50 minutes before her starting time. The employing establishment stated that she was not performing job duties at that time. An employing establishment physician stated that appellant often assisting physicians before or after duty hours when they were taking care of patients who could not make it to the clinic during its normal hours, which began at 7:00 a.m. However, there is no evidence that there were any such patients on May 24, 2004, or that any preparatory activities appellant was required to perform required her to be at the employing establishment 50 minutes before the start of her work shift. There is also no evidence to support appellant's belated contention that her plantar fasciitis contributed to her tripping over a curb in the parking lot.

CONCLUSION

The evidence does not establish that appellant's May 24, 2004 injury was sustained in the performance of duty.

[4] *Nona J. Noel*, 36 ECAB 329 (1984).

[5] *George E. Franks*, 52 ECAB 474, 475 (2001).

ORDER

IT IS HEREBY ORDERED THAT the December 7 and August 23, 2004 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: July 13, 2005
Washington, DC

Alec J. Koromilas
Chairman

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member