

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

C.S., Appellant)

and)

U.S. POSTAL SERVICE, CASTLE ROCK POST)
OFFICE, Castle Rock, WA, Employer)

**Docket No. 06-1068
Issued: October 18, 2006**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On April 6, 2006 appellant filed a timely appeal from the Office of Workers' Compensation Programs' merit decision dated November 9, 2005, denying her claim that she sustained an injury in the performance of duty on August 29, 2005 and a December 28, 2005 nonmerit decision denying her request for reconsideration. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over both the merit and nonmerit issues of this case.

ISSUES

The issues are: (1) whether appellant sustained a right patella injury while in the performance of duty on August 29, 2005; and (2) whether the Office properly denied her request for reconsideration pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On September 1, 2005 appellant, a 35-year-old rural carrier associate, filed a traumatic injury claim alleging that at 6:45 a.m. on August 29, 2005¹ she fractured her right patella in an automobile accident which occurred due to a slick road on a curve. On the back of the form the employing establishment replied with a question mark as to whether the accident occurred in the performance of duty. The employing establishment stated that the Office needed to make the determination of whether the injury was in the performance of duty as appellant was on her way to work. Her regular work hours were listed as 6:45 a.m. to 14:45 or 3:45 p.m. and her regular workday as Saturday.

In an August 29, 2005 report, Dr. Bruce G. Blackstone, a treating Board-certified orthopedic surgeon, diagnosed a “comminuted fracture of the lateral border of the patella, which was open” on August 29, 2005.

In a letter dated October 5, 2005, the Office advised appellant that the information submitted in support of her claim was insufficient to establish that she sustained an injury while in the performance of duty. She was requested to submit additional information in support of her claim for compensation.

Appellant submitted medical evidence in support of her claim, which included rehabilitation progress notes by physical therapists, an August 31, 2005 surgical report by Dr. Blackstone and reports dated August 31, 2005 by Dr. Daniel L. Trimberger, II, a treating Board-certified emergency room physician.

Dr. Trimberger noted that appellant was admitted to the emergency room on August 29, 2005 due to an automobile accident. He diagnosed an acute patella fracture and right knee deep laceration. An x-ray interpretation of the right knee showed a “[c]omminuted, displaced, vertical fracture.” In another report dated August 31, 2005, Dr. Trimberger reported the history of the automobile accident on August 29, 2005. Dr. Blackstone diagnosed right Grade 2 open patella fracture. He performed an irrigation and debridement procedure on the right knee.

By decision dated November 9, 2005, the Office denied appellant’s claim on the grounds that the evidence of record failed to demonstrate that the claimed injury occurred in the performance of duty.

In a letter dated November 22, 2005, appellant requested reconsideration noting that she required a “privately own[ed] vehicle for the purpose of mail delivery.” Appellant also noted that she did not “have a fixed workplace or hours except for Saturdays” and that she was to report for duty on Monday August 29, 2005 to substitute for a carrier who had just retired. In an August 5, 2004 call-in notice, the employing establishment informed appellant that she was being considered for the rural carrier position and that an interview was scheduled. The

¹ Appellant noted the date of injury as August 28, 2005, but the employing establishment indicated that the correct date was August 29, 2005.

employing establishment informed appellant that a rural carrier “must have an excellent driving record and a vehicle adequate for delivering the mail.”²

Appellant also submitted responses to specific questions posed by the Office. She replied that she delayed in filing the claim as she was attempting to secure a witness statement; that appellant was *en route* to report for work at the employing establishment; that she was driving a privately owned vehicle she was required to use to deliver mail; and that the vehicle was a critical part of her job.

By decision dated December 28, 2005, the Office denied appellant’s request for reconsideration of the merits.³

LEGAL PRECEDENT

An employee seeking benefits under the Federal Employees’ Compensation Act⁴ has the burden of establishing the essential elements of 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 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.⁵

Congress, in providing for a compensation program for federal employees, did not contemplate an insurance program against each and every injury, illness or mishap that might befall an employee contemporaneous or coincidental with her employment; liability does not attach merely upon the existence of an employee/employer relation.⁶ 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.” The Board has interpreted the phrase

² The Board notes the record contains information about another claimant.

³ Subsequent to the Office’s December 28, 2005 decision appellant submitted additional evidence to the Office. The Board’s jurisdiction is limited to evidence that was before the Office at the time the Office issued its final decision. See 20 C.F.R. § 501.2(c); *Ricky Greenwood*, 57 ECAB ___ (Docket No. 05-1739, issued March 10, 2006). The Board may not consider this evidence for the first time on appeal.

⁴ 5 U.S.C. §§ 8101-8193.

⁵ *Gary J. Watling*, 52 ECAB 357 (2001).

⁶ *Cemeish E. Williams*, 57 ECAB ___ (Docket No. 06-274, issued March 16, 2006); *Bruce A. Henderson*, 39 ECAB 692 (1988); *Minnie M. Huebner*, 2 ECAB 20 (1948).

“while in the performance of duty” to be the equivalent of the commonly found prerequisite in workers’ compensation law of “rising out of and in the course of employment.”⁷ In addressing this issue the Board has stated:

“In the compensation field, to occur in the course of employment, in general, an injury must occur: (1) at a time when the employee may reasonably be said to be engaged in [her] master’s business; (2) at a place where [s]he may reasonably be expected to be in connection with the employment; and (3) while [s]he was reasonably fulfilling the duties of [her] employment or engaged in doing something incidental thereto.”⁸

In determining whether an injury occurs in a place where the employee may reasonably be or constitutes a deviation from the course of employment, the Board will focus on the nature of the activity in which the employee was engaged and whether it is reasonably incidental to the employee’s work assignment or represented such a departure from the work assignment that the employee becomes engaged in personal activities unrelated to her employment.⁹

The Office’s procedure manual includes letter carriers in the first of four general classes of off-premises workers.¹⁰ In determining whether this class of employees has sustained an injury in the performance of duty, the factual evidence must be examined to ascertain whether, at the time of injury, the employee is within the period of the employment, at a place where the employee reasonably may be and while the employee is fulfilling employment duties or engaged in activities reasonably incidental thereto.¹¹

The Board notes that proceedings under the Act are not adversarial in nature nor is the Office a disinterested arbiter. While the claimant has the burden to establish entitlement to compensation benefits, the Office shares responsibility in the development of the evidence. It has the obligation to see that justice is done.¹²

⁷ *Roma A. Mortenson-Kindschi*, 57 ECAB ____ (Docket No. 05-977, issued February 10, 2006); *Bernard D. Blum*, 1 ECAB 1, 2 (1947).

⁸ *Bonnie A. Contreras*, 57 ECAB ____ (Docket No. 06-167, issued February 7, 2006); *Melvin Silver*, 45 ECAB 677 (1994); *Carmen B. Gutierrez (Neville R. Baugh)*, 7 ECAB 58, 59 (1954).

⁹ See *David P. Sawchuk*, 57 ECAB ____ (Docket No. 05-1635, issued January 13, 2006).

¹⁰ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Performance of Duty*, Chapter 2.804.5a(1) (August 1992). See *David P. Sawchuk*, *supra* note 9; *Donna K. Schuler*, 38 ECAB 273 (1986).

¹¹ *Thomas E. Keplinger*, 46 ECAB 699 (1995); see also Federal (FECA) Procedure Manual, Part 2 -- Claims, *Performance of Duty*, Chapter 2.804.5b (August 1992).

¹² *Donald R. Gervasi*, 57 ECAB ____ (Docket No. 05-1622, issued December 21, 2005).

ANALYSIS

The Board finds that this case is not in posture for decision.

Appellant's regular work hours were 6:45 a.m. to 3:45 p.m. on Saturdays. Her injury was sustained on Monday August 29, 2005 at 6: 45 a.m. On the back of the CA-1 form, the employing establishment questioned whether the injury was in the performance of duty as appellant was on her way to work. Appellant alleged that, at the time of the injury, she was in the process of going to work in her own vehicle which she used for work business. She explained that she was substituting for a carrier who had retired. While driving to the employing establishment she fractured her right patella when her automobile skidded at a curve on a slick road. The record contains no evidence that the Office requested any information from the employing establishment as to appellant's work status on the date the injury occurred. While her fixed scheduled workday was Saturday, the record does contain evidence that she worked days other than her scheduled workday. The Office did not inquire as to whether appellant had been scheduled to work that day or whether she was called in by the employing establishment to work. Without answers to these questions, the Board is unable to determine whether appellant's injury was sustained in the performance of duty based on the evidence currently of record.

CONCLUSION

The Board finds that this case is not in posture for decision. The case will be remanded for further development as to whether appellant was injured in the performance of duty. In view of the disposition of the first issue, the Board finds that it is unnecessary to address the second issue in this case.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated December 28 and November 9, 2005 are set aside and the case is remanded for further consideration consistent with this opinion.

Issued: October 18, 2006
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board