United States Department of Labor
Employees' Compensation Appeals Board

A.K., Appellant	)	
and	)	**Docket No. 09-2032**
	)	**Issued: August 3, 2010**
DEPARTMENT OF VETERANS AFFAIRS, VETERANS HEALTH ADMINISTRATION, Dublin, GA, Employer	)	

Appearances:
Alan J. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On August 4, 2009 appellant, through his attorney, filed a timely appeal from an October 1, 2008 merit decision of the Office of Workers' Compensation Programs denying his traumatic injury claim and a July 13, 2009 decision denying further merit review. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.[1]

ISSUES

The issues are: (1) whether appellant established that he sustained an injury in the performance of duty on January 2, 2008; and (2) whether the Office properly denied reconsideration of the merits of the claim pursuant to 5 U.S.C. § 8128(a).

[1] For Office decisions issued prior to November 19, 2008, a claimant had up to one year to file an appeal. An appeal of Office decisions issued on and after November 19, 2008 must be filed within 180 days of the decision. 20 C.F.R. § 501.3(e).

FACTUAL HISTORY

On January 15, 2008 appellant, then a 49-year-old program support assistant, filed a traumatic injury claim alleging that on January 2, 2008 he experienced a pop in his left knee. He claimed that at 11:30 a.m., after assisting a veteran to the compensation and pension office, he noticed the post office was open. Appellant stated that he rushed to his vehicle, cutting across the grass, and lost his footing. The employing establishment controverted the claim on the grounds that there were different accounts regarding the circumstances of the injury. It noted that appellant's regular-duty hours were from 8:00 a.m. to 4:30 p.m.

By letter dated January 18, 2008, the Office notified appellant of the deficiencies in his claim and requested he provide additional factual and medical evidence.

In a January 2, 2008 medical record, Chris May, a physician's assistant, relayed that, while at work, appellant went outside to get his jacket from his vehicle and his right knee suddenly popped.

On January 29, 2008 appellant stated that his regular-duty hours were from 7:00 a.m. to 4:30 p.m. and that he was allotted a 30-minute break and two 15-minute breaks. He noted that at the time of his injury, he was on the employing establishment's premises. Appellant was returning to his vehicle to pick up his work head set that he had accidentally worn home the night prior and left in his vehicle. He questioned whether he was required to request a break to retrieve a headset from his vehicle and whether he was on official duty if he returned to his vehicle to mail a letter after assisting a veteran to the front door.

In an undated statement, the employing establishment relayed appellant's statement that he had taken a veteran to the compensation and pension office and then returned to his vehicle to retrieve something when he felt his knee pop while walking on the grass. Appellant stated that he was going to the post office, which was located near the compensation and pension office. The employing establishment contended that appellant was not on break or lunch when the incident occurred.

By decision dated February 25, 2008, the Office denied appellant's claim on the grounds that he did not submit sufficient factual evidence to establish that the claimed incident occurred as alleged. It found inconsistent accounts as to the circumstances surrounding the incident.

On March 12, 2008 appellant, through his attorney, requested an oral hearing before an Office hearing representative that took place on July 15, 2008. Appellant stated that on January 2, 2008 he was called to assist a veteran with issues relating to pension and compensation. While waiting for the veteran's appointment, he ran to his vehicle, cutting across the grass, to retrieve a personal envelope when he felt his right leg give way. Appellant also grabbed his identification badge, which he saw hanging in his vehicle. He returned to the building, provided the veteran with information and went back upstairs to his office. During this time, he felt a pinching in his right knee, which he immediately reported to a coworker and then a supervisor. He sought treatment that day.

In a March 26, 2008 statement, William Curtis Clark stated that on January 2, 2008 he had an appointment in the compensation and pension office at the employing establishment medical center. He arrived for his appointment early and contacted appellant, who was his previous military coworker, for assistance in locating information. Appellant met him at front and subsequently went somewhere and returned with employment documents. Mr. Clark stated that he was not aware of when or where the alleged injury occurred.

On March 12, 2008 Mr. May, the physician's assistant, stated that appellant advised him that his prior statement, that appellant had injured himself while getting his jacket from the vehicle, was incorrect. Rather, appellant stated that he was going to his vehicle to get his identification card after going to the post office when the injury occurred. Mr. May claimed that he did not know why he thought that appellant was returning to his vehicle to retrieve his jacket and that the nurse's notes on that date did not mention a jacket.

On August 8, 2008 appellant's supervisor stated that appellant's duties did not include working directly with veterans or addressing compensation and pension inquiries. She advised that he did not notify her of an injury on January 2, 2008.

In an August 12, 2008 letter, the employing establishment stated that appellant's duties did not include compensation and pension issues. Appellant's supervisor was under the impression that appellant was being courteous in assisting a veteran he met on the way to the post office located within the facility. The employing establishment pointed to several inconsistencies in the factual evidence and noted that appellant initially filed a claim for a left knee injury, as opposed to the subsequently diagnosed right knee injury.

In a September 8, 2008 brief, appellant, through his attorney, argued that he was performing his duties when his injury occurred. He was assisting a fellow veteran and during the course of assistance, realized he had left his identification badge, communication headset and an item of personal correspondence in his vehicle. Appellant contended that he was reasonably engaged in employment-related activities when the injury occurred. In the alternative, he argued that the time he spent assisting Mr. Clark would be considered an authorized break reasonably incidental to his employment resulting in a compensable injury. Appellant contended that the factual discrepancies of record were immaterial to the claim as he was on the job and in the course of his employment at all times.

Appellant provided a time line of events from January 2 through February 10, 2008. On January 2, 2008 he received a call regarding a veteran he knew personally who requested assistance. He went downstairs to speak with the veteran regarding employment at the employing establishment. Appellant went upstairs to collect some information and noticed the post office was open. He remembered he had some letters to mail and jogged over to his vehicle. Appellant cut across the grass because it was cold outside and he was not wearing a coat; he slipped, but did not fall, and experienced a pop from his right knee with some slight pain. Appellant retrieved the letters from his vehicle and grabbed his identification badge, which was hanging in his rear-view mirror. He jogged back to the building, gave some information to the veteran and then dropped off his letters at the post office before returning to his office. He informed a coworker of the injury, who called his supervisor, and went to the health clinic where he was examined by Mr. May.

By decision dated October 1, 2008, an Office hearing representative affirmed the February 25, 2008 decision, finding that appellant did not sustain an injury in the performance of duty. She determined that appellant left his work area for a purely personal reason, to retrieve something from his vehicle, which removed him from the performance of his duties. The hearing representative noted that appellant later contended that he also retrieved an identification badge, but found that his earlier statements were more accurate and truthful.

On July 6, 2009 appellant requested reconsideration. He stated that he was misled by the employing establishment and his coworkers regarding the handling of his claim. Appellant alleged that his claim was initially granted but later denied after the employing establishment realized that his right knee required surgery. He paid for the surgery, contending he was injured while at work serving his fellow veterans.

By decision dated July 13, 2009, the Office denied appellant's request for reconsideration on the grounds that he did not show that the Office erroneously applied or interpreted a specific point of law; advance a previously unconsidered legal argument or submit new and relevant evidence.

LEGAL PRECEDENT -- ISSUE 1

An employee seeking compensation under the Federal Employees' Compensation Act[2] has the burden of establishing the essential elements of his claim by the weight of the reliable, probative and substantial evidence,[3] including that he is an "employee" within the meaning of the Act[4] and that he filed his claim within the applicable time limitation.[5] The employee must also establish that he sustained an injury in the performance of duty as alleged and that his disability for work, if any, was causally related to the employment injury.[6]

Congress, in providing for a compensation program for federal employees, 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. It is not sufficient under general principles of workers' compensation law to predicate liability merely upon the existence of an employee-employer relationship.[7]

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[2] 5 U.S.C. §§ 8101-8193.

[3] *J.P.*, 59 ECAB ___ (Docket No. 07-1159, issued November 15, 2007); *Joseph M. Whelan*, 20 ECAB 55, 57 (1968).

[4] *See M.H.*, 59 ECAB ___ (Docket No. 08-120, issued April 17, 2008); *Emiliana de Guzman (Mother of Elpedio Mercado)*, 4 ECAB 357, 359 (1951); *see* 5 U.S.C. § 8101(1).

[5] *R.C.*, 59 ECAB ___ (Docket No. 07-1731, issued April 7, 2008); *Kathryn A. O'Donnell*, 7 ECAB 227, 231 (1954); *see* 5 U.S.C. § 8122.

[6] *G.T.*, 59 ECAB ___ (Docket No. 07-1345, issued April 11, 2008); *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

[7] *George A. Fenske*, 11 ECAB 471 (1960).

Congress has provided for the payment of compensation for disability or death resulting from personal injury sustained while in the performance of duty.[8] The Board has interpreted the phrase "while in the performance of duty" 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" deals with the work setting, the locale and the time of injury. "Arising out of the employment" encompasses not only the work setting, but also a causal concept, the requirement being that an employment factor caused the injury.[10]

In the compensation field, it is generally held that an injury arises out of and in the course of employment when it takes place: (a) within the period of employment; (b) at a place where the employee may reasonably be expected to be in connection with the employment; (c) while he is reasonably fulfilling the duties of the employment or engaged in doing something incidental thereto; and (d) when it is the result of a risk involved in the employment, or the risk is incidental to the employment or the conditions under which the employment is performed.[11]

ANALYSIS -- ISSUE 1

The issue is whether appellant established that he sustained a right knee injury on January 2, 2008 while in the performance of duty.

The evidence of record is relatively consistent regarding the basic facts surrounding appellant's alleged right knee injury. The employing establishment did not dispute that the January 2, 2008 incident occurred during appellant's working hours, while he was on the premises of the employing establishment. Further, the statements by appellant, the employing establishment and other witnesses are consistent in alleging that at the time of the incident, appellant had left his office to personally assist a previous military coworker, Mr. Clark. He noticed the post office was open and subsequently rushed to his vehicle to retrieve an item of personal correspondence when he slipped on the grass.

The mere fact that appellant was on the premises and on duty at the time of injury is not sufficient to establish entitlement to compensation benefits. It must also be established that appellant was engaged in activities which may be described as incidental to his employment, *i.e.*, that he was engaged in activities which fulfilled his employment duties or responsibilities thereto.[12]

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[8] 5 U.S.C. § 8102(a).

[9] *See Timothy K. Burns*, 44 ECAB 291 (1992); *Jerry L. Sweeden*, 41 ECAB 721 (1990); *Christine Lawrence*, 36 ECAB 422 (1985).

[10] *See Larry J. Thomas*, 44 ECAB 291 (1992).

[11] *Mary Beth Smith*, 47 ECAB 747 (1996).

[12] *See Barbara D. Heavener*, 53 ECAB 142 (2001).

In the case of *Barbara D. Heavener*,[13] the Board found an employee's fall while on the premises of the employing establishment was not in the performance of duty. The employee left her office building to retrieve an address book from her vehicle. The Board found that she was engaged in a personal mission unrelated to her employment and not activities reasonably incidental to her employment. Similarly, appellant's injury occurred while on the way to his vehicle to retrieve personal items.[14] His action was personal in nature and not related to the employing establishment's business or reasonably incidental to his employment.[15] The Board finds that appellant's activities cannot be likened to incidental acts, such as using a toilet facility,[16] drinking coffee or similar beverages[17] or eating a snack during a recognized break in the daily work hours,[18] which are generally recognized as personal ministrations that do not take the employee out of the course of his employment.[19] The departure of appellant from his workstation to retrieve personal items is not considered an activity necessary for personal comfort or ministration or incidental to his employment.[20]

The Board notes that appellant testified at the July 15, 2008 oral hearing that while returning to his vehicle to retrieve a piece of mail, he noticed his identification badge hanging in his vehicle. This was the first time appellant mentioned retrieving his identification badge.[21] The Board notes that this fact is not sufficient to find that his activities arose out of his employment. Appellant's motive for returning to his vehicle was purely personal in nature, to retrieve an item of personal correspondence. That he incidentally found his identification badge in his vehicle after the alleged injury and during the course of his personal mission is not

[13] *Id.*

[14] The Board notes that appellant's injury occurred while he was rushing out to his vehicle and not while he was aiding his former military coworker. Therefore, the issue of whether appellant's providing of assistance to Mr. Clark was in the scope of his employment is not relevant to the analysis in this case.

[15] *Id. See also Valerie C. Boward*, 50 ECAB 126 (1998) (where the Board found that an injury arising out of an employee's washing her car windows while on the employing establishment's premises did not occur in the performance of duty because she was engaging in a personal activity unrelated to her employment); *Mary Beth Smith*, 47 ECAB 747 (1996) (where the employee's injury on the employer's premise while picking up her child from day care did not occur in the performance of duty as her activity was purely personal in nature.)

[16] *See V.O.*, 59 ECAB ___ (Docket No. 07-1684, issued May 2, 2008); *Frank M. Escalante*, 13 ECAB 160 (1961).

[17] *See Helen L. Gunderson*, 7 ECAB 707 (1955).

[18] *See Mary Kokich*, 52 ECAB 239 (2001).

[19] *See Mary M. Martin*, 34 ECAB 525 (where the Board held that taking a walk was not an activity closely related to personal ministrations.)

[20] *See Robert A. Pszczolkowski*, Docket No. 01-1645 (issued April 11, 2002) (where an employee fell on the employing establishment's premises while retrieving personal mail from his vehicle; the Board found that the employee's actions constituted a personal mission unrelated to his employment duties; the Board also found that his actions did not fall under the exception for activities undertaken for an employee's personal comfort or ministration).

[21] The employee's statements must be consistent with the surrounding facts and circumstances and his or her subsequent course of action. *See generally, Irene St. John*, 50 ECAB 521 (1999).

sufficient to find that the errand was related or incidental to the fulfillment of his employment duties.

Therefore, the Board finds that the January 2, 2008 incident did not occur within the performance of duty.

LEGAL PRECEDENT -- ISSUE 2

Section 8128(a) of the Act[22] does not entitle a claimant to a review of an Office decision as a matter of right. This section vests the Office with discretionary authority to determine whether it will review an award for or against compensation.[23] The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a).[24]

To require the Office to reopen a case for merit review under section 8128(a) of the Act,[25] the Office's regulations provide that the evidence or argument submitted by a claimant must: (1) show that the Office erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by the Office; or (3) constitute relevant and pertinent new evidence not previously considered by the Office.[26] To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant also must file his or her application for review within one year of the date of that decision.[27] When a claimant fails to meet one of the above standards, the Office will deny the application for reconsideration without reopening the case for review on the merits.[28]

ANALYSIS -- ISSUE 2

Appellant did not submit any additional evidence with his request for reconsideration. Therefore, the issue is whether he advanced a previously unconsidered legal argument or showed that the Office erroneously applied or interpreted a specific point of law.

In a July 6, 2009 statement, appellant claimed that the employing establishment and his coworkers lied to him regarding the handling of his claim. He further alleged that his claim was only denied after the employing establishment realized that his injury required surgery and that he was required to pay for his right knee surgery himself, despite the fact that he was injured while at work serving his fellow veterans.

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[22] 5 U.S.C. §§ 8101-8193.

[23] *Id*. at § 8128(a).

[24] *Annette Louise*, 54 ECAB 783, 789-90 (2003).

[25] 5 U.S.C. §§ 8101-8193. Under section 8128 of the Act, "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on her own motion or on application." 5 U.S.C. § 8128(a).

[26] 20 C.F.R. § 10.606(b)(2).

[27] *Id*. at § 10.607(a).

[28] *Id*. at § 10.608(b).

Appellant did not provide any evidence to support his contentions that his case was mishandled by the employing establishment or that he was provided false information during the development of his case. While a reopening of a case may be predicated solely on a legal premise not previously considered, such reopening is not required, as in the present case, where the legal contention does not have a reasonable color of validity.[29]

The Board finds that appellant did not show that the Office erroneously applied or interpreted a specific point of law, advance a relevant legal argument not previously considered by the Office or submit relevant and pertinent new evidence not previously considered by the Office. Accordingly, the Office properly denied merit review of appellant's claim.

CONCLUSION

The Board finds that appellant did not establish that he sustained an injury in the performance of duty on January 2, 2008. The Board also finds that the Office denied his request for reconsideration pursuant to 5 U.S.C. § 8128(a).

ORDER

IT IS HEREBY ORDERED THAT the July 13, 2009 and October 1, 2008 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: August 3, 2010
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

[29] *See Elaine M. Borghini*, 57 ECAB 549 (2006).