United States Department of Labor
Employees' Compensation Appeals Board

L.L., Appellant	)	
and	)	**Docket No. 10-2384**
	)	**Issued: July 15, 2011**
DEPARTMENT OF THE AIR FORCE, MAINTENANCE DEPARTMENT, OFFUTT AIR FORCE BASE, NE, Employer	)	

Appearances:
Mandy L. Strigenz, Esq., for the appellant
Candyce D. Phoenix, Esq., for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On September 29, 2010 appellant filed a timely appeal from the August 20, 2010 merit decision of the Office of Workers' Compensation Programs (OWCP) denying his claim for a November 9, 2007 work injury. Pursuant to the Federal Employees' Compensation Act (FECA)[1] 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 met his burden of proof to establish that he sustained an injury in the performance of duty on November 9, 2007.

[1] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On November 9, 2007 appellant, then a 61-year-old maintenance mechanic supervisor, was under a fixed work schedule at Offutt Air Force Base which specified that he report to work at 7:30 a.m. and leave work at 4:15 p.m. each workday. He indicated in his statements that he arrived at the base in his personal vehicle on November 9, 2007 at 6:00 a.m., intending to have breakfast at a Burger King on the premises before reporting for his shift. The entrance at which appellant arrived, known as the Bellevue guard gate, was approximately one mile from his primary work location and led to a mall accessible by all those with authorized access to the base. Shortly after he passed through the Bellevue guard gate, automatic vehicle barriers quickly deployed in front of him and he was not able to stop his vehicle in time. Appellant crashed into the barriers and suffered injuries to his neck and right arm. Military police responded to the accident and appellant, at the request of his supervisor, completed an accident report. Appellant stopped work and used sick leave.

Appellant initially sought relief under the Federal Tort Claims Act (FTCA), 28 U.S.C. § 2671 *et seq*. In a May 11, 2010 decision, the United States District Court for the District of Nebraska issued a stay in his FTCA case and ordered him to seek relief under FECA. On June 25, 2010 appellant filed a traumatic injury claim (Form CA-1) alleging a November 9, 2007 work injury.

In an August 9, 2010 decision, OWCP denied appellant's claim on the grounds that he did not submit sufficient medical evidence to show that he sustained a work-related injury on November 9, 2007. Appellant then submitted medical reports in support of his claim.

In an August 20, 2010 decision, the Office affirmed its August 9, 2010 decision as modified to reflect that appellant did not establish that his claimed November 9, 2007 injury occurred in the performance of duty. OWCP accepted that appellant was on the employer premises at the time of his claimed injury, but found that the accident did not occur within a reasonable interval before the usual start of his work shift.

LEGAL PRECEDENT

Under FECA, a claimant bears the burden of proving all essential elements of a claim, including that the alleged injury occurred in the performance of duty.[2] Board precedent requires that an injury sustained in the performance of duty must have arisen: (1) at a time when the employee may reasonably be said to be engaged in his masters business; (2) at a place where he may reasonably be expected to be in connection with the employment; and (3) while he was reasonably fulfilling the duties of his employment or engaged in doing something incidental thereto.[3]

The Board has included within the performance of duty a reasonable time before and after work to allow for coming and going, as well as personal ministrations, such as lunch or

[2] 20 C.F.R. § 10.115.

[3] *Mary Keszler*, 38 ECAB 735 (1987).

bathroom breaks, engaged in for the benefit of the employer.[4] If the injury does not take place during those periods or on employer premises, the Board will place special emphasis on whether the employee was engaged in an activity related to fulfilling the duties of his employment.[5]

In *Nona J. Noel*[6] the employee was a civilian employed on a United States Air Force Base, with a regular working schedule comprised of fixed hours. She arrived one and a half hours before her scheduled start time, intending to eat breakfast at the noncommissioned Officers Club on base, when she fell on a sidewalk and sustained injuries. The Board found that eating breakfast on the premises conferred no substantial benefit to the employer and that there was no evidence that the employer expressly or impliedly required the employee to eat on the base. Considering both the time of the claimed injury and the lack of employer benefit, the Board ruled that the employee's activity was outside the scope of employment and her injuries were not compensable under FECA.[7]

In a more recent case, the Board denied compensation to an employee who tripped on a loose floorboard after arriving at work 25 minutes early to get coffee and breakfast.[8] In *William W. Knispel*,[9] the Board found that a claimed injury did not occur in the performance of duty when an employee stayed late to catch a public bus and was subsequently injured in a bicycle accident on the employer premises 45 minutes after his shift ended. In *George E. Franks*,[10] an employee failed to establish an injury in the performance of duty with respect to a fall in the parking lot of an Army base that occurred 45 minutes prior to the start of his shift. The Board found that the action he was performing at the time, getting coffee and breakfast, was solely personal in nature.

The Board has permitted relief for employees on employer premises when the claimed injury occurred during a reasonable time before or after work or, in the case of injuries occurring far outside regular work hours, when the employee was acting in service of the employer.[11] For example, in *John F. Castro*,[12] the Board granted recovery when an employee was injured in an automobile accident at a naval station five minutes after the end of his shift.[13] It found that such a short time period fell within the scope of a reasonable interval before coming to or leaving

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

[5] *See Venicee Howell*, 48 ECAB 414 (1997); *Narbik A. Karamian*, 40 ECAB 617 (1989).

[6] 36 ECAB 329 (1984).

[7] *Id.*

[8] *T.F.,* Docket No. 09-154 (issued July 16, 2009).

[9] 56 ECAB 639 (2005).

[10] 52 ECAB 474 (2001).

[11] *See William W. Knispel, supra* note 8.

[12] Docket No. 03-1653 (issued May 14, 2004).

[13] *Id*.

from work. However, in *Catherine Callen*,[14] the employee was found to be in the performance of duty under FECA for an injury sustained on the employer premises six hours after the end of her regular shift, primarily because she remained on the premises to complete a project for her employer.

ANALYSIS

The Board finds that appellant's claimed injury on November 9, 2007 did not occur in the performance of duty and the Office properly denied his claim on this basis.

In the present case, appellant has not shown that his presence on the Offutt Air Force Base on November 9, 2007 was during a reasonable interval before work. His usual work shift began at 7:30 a.m. and he arrived at work at 6:00 a.m. on November 9, 2006. At the time of his November 9, 2007 accident, appellant had entered the base and was traveling on a road accessible only to authorized base personnel. However, mere presence on the employer's premises would not alone be sufficient to establish appellant's claim. Appellant arrived to work one and a half hours before the start of his shift and such an early arrival is outside the scope of reasonable allowance for entrance and egress. The time he entered the base before the usual start of his work shift was more than the five minutes in *John F. Castro*,[15] where the employee's claim was accepted, and identical to the time interval before work of one and a half hours in *Nona J. Noel*, where the employee's claim was denied.[16]

Appellant did not show that he was on the premises at the time of his accident to perform any job duties or actions otherwise incidental to his work. He arrived early for the purpose of eating breakfast at Burger King. Similar to the circumstance of other Board cases delineated above, appellant's eating breakfast before his shift, under the facts of the present case, would not be in the service of the employing establishment.[17] There is no indication that his job duties (express or implied) required him to arrive so early or to eat breakfast at Burger King. Appellant's early arrival was solely for his personal benefit. Consequently, his injuries were not sustained in the performance of duty.

CONCLUSION

The Board finds that appellant did not meet his burden of proof to establish that he sustained an injury in the performance of duty on November 9, 2007.

[14] 47 ECAB 192 (1995).

[15] *See supra* note 8.

[16] *See supra* notes 6 and 7.

[17] *See supra* notes 6, 7, 8 and 9.

ORDER

IT IS HEREBY ORDERED THAT the August 20, 2010 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 15, 2011
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board