United States Department of Labor
Employees' Compensation Appeals Board

R.S., Appellant	)	
and	)	**Docket No. 13-1348**
	)	**Issued: November 25, 2013**
DEPARTMENT OF HOMELAND SECURITY, U.S. CUSTOMS & BORDER PROTECTION, San Francisco, CA, Employer	)	

Appearances:
Henry E. Leinen, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
PATRICIA HOWARD FITZGERALD, Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On May 14, 2013 appellant, through counsel, filed a timely appeal from a December 4, 2012 decision of the Office of Workers' Compensation Programs (OWCP) that denied his claim. Pursuant to the Federal Employees' Compensation Act[1] (FECA) 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 sustained an injury in the performance of duty on February 7, 2012.

On appeal appellant's attorney asserts that, as appellant is a public safety officer as described in 5 U.S.C. § 8336(c) and 5 U.S.C. § 3796(a)(1), the February 7, 2012 injury occurred in the performance of duty.

[1] 5 U.S.C. §§ 8101-8193.

FACTUAL HISTORY

On March 19, 2012 appellant, then a 61-year-old customs and border protection officer, filed a traumatic injury claim alleging that on February 7, 2012, as he was preparing to enter his privately-owned vehicle at his home, he sustained three gunshot wounds to the upper torso and right upper extremity. He indicated that he was in full uniform and was on his way to work. The employing establishment indicated that appellant's fixed hours were 7:30 a.m. to 3:30 p.m., Monday through Friday and challenged the claim, asserting that he did not sustain the injury in the performance of duty as he was at his home when attacked. Appellant stopped work that day.

By letter dated March 30, 2012, OWCP informed appellant of the evidence needed to support his claim, including a copy of any police reports. In a form questionnaire dated April 26, 2012, appellant indicated that, after he was shot, he was transported by ambulance to Eden Hospital Medical Center where he underwent surgery and was hospitalized until February 24, 2012. He indicated that the assault occurred at 5:50 a.m. on February 7, 2012 in his home driveway as he was entering his vehicle for work at San Francisco International Airport. Appellant stated that he was in his duty uniform with a service weapon that he carried 24 hours a day, seven days a week. He further indicated that the assailant was stalking his wife and he had asked him to stop his inappropriate behavior. Appellant advised that there were no witnesses to the assault and did not provide a copy of a police report.

Dr. Steven A. Curran, Board-certified in family medicine, advised on March 15, 2012 that appellant was expected to fully recover for light-duty work around June 1, 2012. In an attending physician's report dated March 30, 2012, he indicated that appellant sustained a gunshot wound while wearing a uniform and carrying his service weapon. Dr. Curran diagnosed traumatic pneumothorax and indicated by a check "no," that the diagnosis was not caused or aggravated by employment activity. He advised that appellant was hospitalized from February 7 to 24, 2012 and indicated that he would have permanent extensive scarring of the chest wall and lungs and could resume regular duty on August 7, 2012.

By decision dated May 2, 2012, OWCP denied the claim on the grounds that appellant had failed to establish an injury in the performance of duty. On May 21, 2012 appellant, through his attorney, requested a hearing and submitted additional medical evidence.

In a discharge summary dated February 26, 2012, Dr. Neeru Agarwal, an osteopath, indicated that appellant was admitted on February 7, 2012, status post three gunshot wounds to the chest. He described appellant's hospital care and indicated that he was discharged on February 24, 2012 with medications and instructions for home health therapies. Discharge diagnoses included status post gunshot wounds to the chest, status post thoracotomy, status post right upper lobectomy, respiratory failure, severe malnutrition, multifocal atrial tachycardia and paroxysmal atrial fibrillation, anemia and pneumonia. In office treatment notes dated March 1 to April 10, 2012, Dr. Curran described appellant's continued care. In April 12, 2012 correspondence, he indicated that, in his medical opinion, the injuries appellant suffered occurred in the performance of duty because he was in uniform and carrying his service weapon. Appellant also submitted a July 17, 2012 letter regarding his claim with the victim compensation program of the State of California. The letter indicated that he had filed a workers' compensation claim.

At the hearing, held on September 18, 2012, appellant's attorney argued that the Public Safety Officers' Benefit Act was applicable in this case. Appellant testified that he was a safety officer at San Francisco International Airport and used his private vehicle to report to duty at other airports such as San Jose and Oakland and also used his private vehicle to go to the gun range for practice. He indicated that, on the date of injury, he was in full uniform with his service weapon, and was walking to his vehicle when he was shot. Appellant maintained that, because he was a safety officer, he was on duty 24 hours a day seven days a week, for such duties as making arrests and stopping felonies.

In correspondence dated October 24, 2012, Edward Fortenberry, Mission Support Branch Chief at the employing establishment, asserted that appellant was not covered under the Public Safety Officers' Benefit Act (PSOBA) and that federal employees were not deemed to be peace officers under the California penal code except in limited circumstances, which were not present in appellant's case. He advised that appellant's travel to work was not an authorized commute and his travel did not fit under the exceptions under FECA. Mr. Fortenberry further indicated that appellant was not required to wear his uniform on his way to work and was not required or mandated to carry a firearm while off duty.

In a December 4, 2012 decision, an OWCP hearing representative affirmed the May 2, 2012 decision. The hearing representative noted that the PSOBA was not applicable in considering coverage under FECA and concluded that appellant was not in the performance of duty when injured on February 7, 2012.

LEGAL PRECEDENT

An employee seeking benefits under FECA 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 FECA, that the claim was timely filed within the applicable time limitation period of FECA, 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. Regardless of whether the asserted claim involves traumatic injury or occupational disease, an employee must satisfy this burden of proof.[2]

FECA provides for the payment of compensation for the disability or death of an employee resulting from personal injury sustained while in the performance of duty.[3] 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. Liability does not attach merely upon the existence of an employee-employer relation. 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.[4] The phrase "sustained while in the performance of

[2] *Gary J. Watling*, 52 ECAB 278 (2001).

[3] 5 U.S.C. § 8102(a).

[4] *Id.*

duty" in FECA is regarded as the equivalent of the commonly found requisite in workers' compensation law of arising out of and in the course of employment.[5] The phrase "course of employment" is recognized as relating to the work situation, and more particularly, relating to elements of time, place and circumstance.[6] In addressing this issue, the Board has stated that 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 his or her employer's business; (2) at a place where she may reasonably be expected to be in connection with the employment; and (3) while he or she was reasonably fulfilling the duties of his or her employment or engaged in doing something incidental thereto.[7]

This alone is not sufficient to establish entitlement to benefits for compensability. The concomitant requirement of an injury "arising out of the employment" must be shown, and this encompasses not only the work setting but also a causal concept, the requirement being that the employment caused the injury. In order for an injury to be considered as arising out of the employment, the facts of the case must show some substantial employer benefit is derived or an employment requirement gave rise to the injury.[8]

The Board has also recognized as a general rule that off-premises injuries sustained by employees having fixed hours and place of work, while going to or coming from work, are not compensable as they do not arise out of and in the course of employment. Rather such injuries are merely the ordinary, nonemployment hazards of the journey itself, which are shared by all travelers.[9] Due primarily to the myriad of factual situations presented by individual cases over the years, certain exceptions to the general rule have developed where the hazards of travel may fairly be considered a hazard of employment. Exceptions to the general coming and going rule have been recognized, which are dependent upon the relative facts to each claim: (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 calls, as in the case of firemen; (4) where the employee uses the highway to do something incidental to his or her employment with the knowledge and approval of the employer; and (5) where the employee is required to travel during a curfew established by local, municipal, county or state authorities because of civil disturbances or other reasons.[10]

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

[6] *Alan G. Williams*, 52 ECAB 180 (2000).

[7] *Id*.

[8] *Eileen R. Gibbons*, 52 ECAB 209 (2001).

[9] *See Phyllis A. Sjoberg*, 57 ECAB 409 (2006).

[10] *Melvin Silver*, 45 ECAB 677 (1994); *see* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Performance of Duty*, Chapter 2.804.6(a)(1) (August 1992).

ANALYSIS

Applying the principles described above to the circumstances of the present case, the Board finds that appellant did not sustain an injury in the performance of duty when he was shot in the driveway of his home on February 7, 2012.

Appellant was not injured on the employing establishment premises. Although he maintained that, because he used his car to travel between airports and to attend target practice, he acknowledged that he was injured in his driveway before entering his car. Appellant had not begun his commute to work. As noted, the general coming and going rule would preclude coverage under FECA for this injury.[11] Appellant must establish that an exception to the general rule is applicable in this case. There are, however, no recognized exceptions that are applicable under these circumstances. No evidence was presented as to an emergency call, a contract by the employer for transportation, a requirement of travel by highways or use of the highway for an incident of employment with knowledge and approval of the employer. With respect to a special errand, there is no indication that the employing establishment expressly or impliedly agreed that employment service should begin when appellant exited his home on February 7, 2012. There is also no evidence of any special inconvenience, hazard or urgency of travel that would bring the assault within coverage under FECA. Likewise, the record does not establish that appellant was in a travel status at the time of injury and there is no indication that he was reimbursed for travel to the employing establishment.

On appeal, appellant contended that he was in the performance of duty at the time of the alleged injury because he is expected to be "on call" at all times, was in full uniform, and was carrying his service weapon the morning of the injury. The employing establishment challenged the claim, and Mr. Fortenberry, an employing establishment branch chief, indicated that appellant was not required to wear his uniform on his way to work and was not required nor mandated to carry a firearm while off duty. The evidence of record does not establish that he was on call at the time of the February 7, 2012 assault. The Board has not extended the course of employment to include activities performed at home or in preparation for travel to a temporary work site.[12] Appellant was not performing any work duties at the time of the assault. He was simply walking to his car in preparation for his commute to work.[13] The Board finds that the evidence of record does not establish that an exception to the coming and going rule was applicable in this case.

As to references cited by counsel to the United States Code, 5 U.S.C. § 8336(c) covers retirement benefits and 42 U.S.C. § 37796(a)(1) covers payment of death benefits. Neither is applicable to a claim for workers' compensation benefits under FECA.[14] Neither OWCP nor the

[11] *J.H.*, Docket No. 10-185 (issued July 19, 2010); *Phyllis A. Sjoberg supra* note 9.

[12] *C.V.*, 58 ECAB 159 (2006).

[13] *See D.M.*, Docket No. 13-165 (issued March 19, 2013).

[14] Federal (FECA) Procedure Manual, Part 0 -- Introduction to FECA & DFEC, *Introduction*, Chapter 0.100.2 (October 2010); *see Anneliese Ross*, 42 ECAB 371 (1991).

Board has the authority to enlarge the terms of or to make an award of benefits under any terms other than those specified in the statute.[15]

The Board therefore concludes that the evidence of record does not establish that appellant was in the performance of duty at the time of the February 7, 2012 assault, and OWCP properly denied his claim.[16]

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

CONCLUSION

The Board finds that appellant did not establish that he sustained an injury in the performance of duty on February 7, 2012.

ORDER

IT IS HEREBY ORDERED THAT the December 4, 2012 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 25, 2013
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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

[15] *E.G.*, 59 ECAB 599 (2008).

[16] *J.H.*, *supra* note 11.