United States Department of Labor
Employees' Compensation Appeals Board

M.L., Appellant	)	
and	)	**Docket No. 07-1620**
	)	**Issued: December 17, 2007**
U.S. POSTAL SERVICE, COLONIAL PARK STATION, New York, NY, Employer	)	

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
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On May 30, 2007 appellant filed a timely appeal from a decision of the Office of Workers' Compensation Programs dated November 1, 2006 which denied his claim and a decision dated April 5, 2007 which denied his request for a hearing. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over this case.

ISSUES

The issues are: (1) whether appellant met his burden of proof to establish that he sustained an employment-related injury on February 4, 2006; and (2) whether the Office properly denied his request for a hearing.

FACTUAL HISTORY

On February 9, 2006 appellant, then a 54-year-old part-time flexible letter carrier, filed a Form CA-1, traumatic injury claim, alleging that on February 4, 2006 while he was on his way to work, after exiting the subway at 5:57 a.m., he was chased and mugged on postal grounds at 6:10 a.m. He stopped work that day. The employing establishment indicated that appellant

began work at 8:00 a.m. In an attached statement, appellant said that he was chased from the subway exit by three armed men who caught up with him behind the employing establishment. They knocked him to the ground, hit him in the face and took his wallet, watch and cellular telephone. Appellant reported the incident to his supervisor who called 911. He stated that he was then taken to the police station and, after completing a report, he was taken by ambulance to St. Luke's Hospital. Appellant noted complaints of pain on the left side of his face and difficulty eating.[1] In support of his claim, he submitted emergency room notes dated February 4, 2006 containing a diagnosis of face contusion. Dr. Christopher Wang, a Board-certified internist, furnished a duty status report dated February 11, 2006 in which he noted findings of facial contusion, dizziness, bruise to the left elbow and lacerations to the right hand and both knees. He advised that appellant could not open his jaw and could not work.

By letter dated February 28, 2006, the Office informed appellant of the type of evidence needed to support his claim and, in a February 23, 2006 attending physician's report, Dr. Wang further diagnosed a head injury, temporomandibular joint injury, a laceration to appellant's left external ear and left elbow contusions. Dr. Wang checked "yes" that the diagnoses were employment related and advised that appellant could return to work on March 5, 2006. Appellant returned to work on March 6, 2006. In an April 6, 2006 decision, the Office denied the claim on the grounds that the injury was not sustained in the performance of duty, noting that it occurred two hours before the time that appellant was to begin work.

On June 12, 2006 appellant requested reconsideration and submitted a June 12, 2006 statement in which Valerie McDuffie, manager of customer service, advised that appellant's work tour began at 7:00 a.m. By decision dated November 1, 2006, the Office denied modification of the prior decision. On February 12, 2007 appellant requested a hearing and, by decision dated April 5, 2007, an Office hearing representative denied the request.

LEGAL PRECEDENT -- ISSUE 1

In providing for a compensation program for federal employees, Congress 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.[2] The phrase while in the performance of duty has been interpreted by the Board to be the equivalent of the commonly found prerequisite in workers' compensation law of arising out of and in the course of employment. The phrase course of employment is recognized as relating to the work situation and more particularly, relating to elements of time, place and circumstance.[3]

[1] On the statement appellant indicated that he exited the subway at 6:57 a.m. On the claim form, however, he indicated that he exited the subway at 5:57 a.m. and that the mugging occurred at 6:10 a.m.

[2] 5 U.S.C. § 8102(a).

[3] *See Annie L. Ivey*, 55 ECAB 480 (2004).

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 employer's 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.[4] The Board has accepted the general rule of workers' compensation law that an injury sustained by an employee having fixed hours and place of work while going to or coming from work is generally not compensable because it does not occur in the performance of duty. Exceptions to the rule have been declared by the courts and workers' compensation agencies. One such exception almost universally recognized is the premises rule: an injury that occurs to an employee going to or coming from work before or after working hours or at lunch, while on the premises of the employer, is compensable. This includes a reasonable interval before and after official working hours while the employee is on the premises engaging in preparatory or incidental acts. What constitutes a reasonable interval depends not only on the length of time involved, but also on the circumstances occasioning the interval and nature of the employment activity.[5]

Presence at the employing establishment's premises during work hours or a reasonable period before or after a duty shift is insufficient in and of itself, however, to establish entitlement to benefits for compensability. The claimant must also establish the concomitant requirement of an injury arising out of the employment. This encompasses not only the work setting, but also the causal concept that some factor of the employment caused or contributed to the claimed injury. In order for an injury to be considered as arising out of the employment, the facts of the case must show that substantial employer benefit is derived or an employment requirement gave rise to the injury.[6] 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 his or her employment. The Board has noted that the standard to be used in determining that an employee has deviated from his or her employment requires a showing that the deviation was aimed at reaching some specific personal objective.[7]

ANALYSIS -- ISSUE 1

The injury in this case occurred on the premises of the employing establishment at 6:10 a.m. Appellant's regular work tour began at 7:00 a.m. If an employee has fixed hours and place of work and is injured on the premises of the employing establishment while going to or from work, before or after working hours, or at lunch time, the injury would be compensable.[8]

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[4] *Id.*

[5] *William W. Knispel*, 56 ECAB ____ (Docket No. 05-674, issued July 25, 2005).

[6] *Howard M. Faverman*, 57 ECAB ____ (Docket No. 05-1496, issued October 19, 2005).

[7] *Rebecca LeMaster*, 50 ECAB 254 (1999).

[8] *William W. Knispel*, *supra* note 5.

This includes a reasonable interval before and after official working hours while the employee is on the premises engaged in preparatory or incidental acts. What constitutes a reasonable interval before and after official working hours depends not only on the length of time involved, but also on the circumstances occasioning the interval and the nature of the activity.[9]

The Board finds that in this case appellant was on the employing establishment premises at 6:10 a.m. solely for personal reasons. He explained that he was on his way to work when he was chased from the subway exit and mugged on employing establishment premises. Appellant's work tour began at 7:00 a.m., and he did not identify any specific preparatory or incidental activity related to his employment that required him to be present 50 minutes before his tour of duty began. There is no evidence that the employing establishment expressly or impliedly required his presence on the premises prior to his official hours. Accordingly, the Board finds that appellant's presence on the premises 50 minutes prior to the commencement of his tour of duty on the morning of the accident was not reasonable.

Appellant's arrival at the employing establishment prior to official starting time does not automatically place his activities outside the scope of the employment.[10] To establish fact of 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.[11] 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 or requirement" which gave rise to the injury.[12] It is incumbent upon appellant to establish that it arose out of his employment. In other words, some contributing or causal employment factor must be established.

In this case, however, the record does not support that appellant's activity prior to work on February 4, 2006 furthered his master's business, or provided a substantial benefit to the employer. His presence on the premises at the time of injury was not required as a condition of his employment, and he was not involved in any preparatory activity reasonably incidental to his employment activities on the morning of the claimed injury. There is no evidence of record to show that, other than as a matter of personal convenience, appellant chose to arrive at the employing establishment early.[13] As the record does not establish that appellant's injury resulted from any employment-related factor, he failed to establish that he sustained an injury in the performance of duty.

LEGAL PRECEDENT -- ISSUE 2

Any claimant dissatisfied with a decision of the Office shall be afforded an opportunity for an oral hearing or, in lieu thereof, a review of the written record. A request for either an oral

[9] *Id.*

[10] *See Howard M. Faverman, supra* note 6.

[11] *Id.*

[12] *Id.*

[13] *Id.*

hearing or a review of the written record must be submitted in writing, within 30 days of the date of the decision for which a hearing is sought. If the request is not made within 30 days or if it is made after a reconsideration request, a claimant is not entitled to a hearing or a review of the written record as a matter of right.[14] The Board has held that the Office, in its broad discretionary authority in the administration of the Federal Employees' Compensation Act,[15] has the power to hold hearings in certain circumstances where no legal provision was made for such hearings and that the Office must exercise this discretionary authority in deciding whether to grant a hearing.[16] The Office's procedures, which require the Office to exercise its discretion to grant or deny a hearing when the request is untimely or made after reconsideration, are a proper interpretation of the Act and Board precedent.[17]

ANALYSIS -- ISSUE 2

In this case, in its April 5, 2007 decision, the Office denied appellant's request for a hearing on the grounds that he had previously requested reconsideration with the Office. The Board finds that the Office properly determined that appellant was not, as a matter of right, entitled to a hearing since he had previously requested reconsideration on June 14, 2006. While the Office also has the discretionary power to grant a hearing request when a claimant is not entitled to a hearing as a matter of right, the Office, in its April 4, 2007 decision, properly exercised its discretion by stating that it had considered the matter in relation to the issue involved and had denied appellant's request on the basis that the issue in this case could be addressed through a reconsideration application. The Board has held that, as the only limitation on the Office's authority is reasonableness, abuse of discretion is generally shown through proof of manifest error, clearly unreasonable exercise of judgment, or actions taken which are contrary to both logic and probable deduction from established facts.[18] In the present case, the evidence of record does not indicate that the Office committed any act in connection with its denial of appellant's hearing request which could be found to be an abuse of discretion. Appellant retains the right to request reconsideration with the Office.[19]

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 February 4, 2006. The Board further finds that the Office properly denied his request for a hearing.

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[14] *Claudio Vazquez*, 52 ECAB 496 (2001).

[15] 5 U.S.C. §§ 8101-8193.

[16] *Marilyn F. Wilson*, 52 ECAB 347 (2001).

[17] *Claudio Vazquez, supra* note 14.

[18] *Id.; see Daniel J. Perea*, 42 ECAB 214, 221 (1990).

[19] 20 C.F.R. § 10.607. The Board notes that appellant submitted evidence with his appeal to the Board. The Board cannot consider this evidence, however, as its jurisdiction on appeal is limited to a review of the evidence that was before the Office at the time of its final decision. *Steven S. Saleh*, 55 ECAB 169 (2003).

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated April 5, 2007 and November 1, 2006 be affirmed.

Issued: December 17, 2007
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

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