United States Department of Labor
Employees' Compensation Appeals Board

L.L., Appellant	)	
and	)	**Docket No. 10-16**
	)	**Issued: October 1, 2010**
DEPARTMENT OF THE ARMY, CAMP ARIFJAN, Kuwait, AE, 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
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On September 30, 2009 appellant filed a timely appeal from April 20 and June 26, 2009 merit decisions of the Office of Workers' Compensation Programs denying her traumatic injury and occupational disease claims. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether appellant sustained a condition due to exposure to toxic fumes as a result of factors of her federal employment; (2) whether she has a cervical condition causally related to work factors; (3) whether appellant sustained a stress-related condition in the performance of duty; (4) whether she was injured on November 22, 2006 in the performance of duty; and (5) whether appellant sustained an injury on June 19, 2008 in the performance of duty.

FACTUAL HISTORY

On February 9, 2009 appellant, then a 52-year-old budget analyst, filed an occupational disease claim alleging that she experienced compression of the cervical spine at C3-4, multiple

thoracic and lumbar disc protrusions, an injury to the femur of the left leg and numbness of the hands and feet due to factors of her federal employment. She related that she worked 12 hours a day not including overtime from October 2006 to November 2008. Appellant indicated that she "lived off post in Kuwait and came in contact with toxic fumes from the oil plumes daily…."

On February 17, 2009 the Office requested additional factual and medical information from appellant. It reviewed her statement and noted that she claimed both physical conditions due to injuries on November 22, 2006 and June 19, 2008 and a psychological condition due to work factors. The Office asked that she clarify whether she was claiming a psychological, physical or pulmonary condition.

In a statement received February 18, 2009, appellant related that in November 2006 she lived on the premises of the employing establishment. She took bus transportation to work. At 8:00 a.m. on November 22, 2006 appellant lost her balance on the bus and fell forward onto the steps, bruising her left leg. She sought treatment the next day. Appellant moved off the premises of the employing establishment on December 9, 2006. In December 2006, she noticed a rash on her left leg. The clinic at the employing establishment diagnosed a staph infection due to appellant November 2006 injury. In August 2007, appellant became stressed and tired from working 13 to 14 hours a day 6 days a week. She requested leave to rest but it was denied. Appellant experienced high blood pressure. On June 19, 2008 she was riding in a private taxicab from her apartment in Kuwait to pick up her nontactical vehicle that was being repaired. Appellant stated:

> "This was part of my duties to maintain my assigned vehicle. I was the passenger in the front seat of a local civilian taxi when the driver was not looking and he struck a parked white commercial truck that was stopped halfway out in the road…. The traffic accident occurred on my passenger side and I received most of the major impact from the right front bumper to the right crease of the passenger door."

After the accident appellant's left side was numb from her hip to her left foot. She obtained treatment at the emergency room. Over the next several months appellant experienced numbness and tingling in her hands and feet. On December 1, 2008 a magnetic resonance imaging (MRI) scan study showed severe compression of the spine at C3-4. Appellant was medically evacuated to Germany for surgery.

On November 23, 2006 Martha Feenaghty diagnosed a contusion of the lower leg after a fall from a vehicle. She noted that appellant described the injury as occurring when she fell forward on a bus and hit her left leg.

On January 28, 2007 a health care provider at the employing establishment's clinic, Karen Phelps, evaluated appellant for a skin rash seven days after trauma to her left lower extremity. She diagnosed cellulitis and folliculitis.

On June 19, 2008 appellant received treatment at the employing establishment clinic following a motor vehicle accident. She related that she was a passenger in a taxicab that struck another motor vehicle. Appellant complained of a bruised feeling on the right side of her body

"and some numbness in her right foot." The health care provider diagnosed a contusion of the shoulder, upper arm and thigh with intact skin surface.

On December 10, 2008 Dr. Cynthia B. Piccirilli, a Board-certified neurosurgeon, discussed appellant's history of a June 2008 motor vehicle accident with "left-sided numbness that lasted one day and then resolved." Appellant experienced numbness of her hands and feet in September 2008 and in October 2008 her neck began to "lock up." Dr. Piccirilli diagnosed possible cervical cord compression. She noted that an MRI scan study of the cervical spine showed severe degenerative disc disease at C3-4 with stenosis and cord changes and recommended surgery.

On December 29, 2008 appellant received treatment from a physician's assistant at the employing establishment's clinic subsequent to a fusion on December 11, 2008 of her C3-4 cervical disc.[1] In a clinic note dated February 1, 2009, a health care provider for the employing establishment evaluated her for low back pain. He indicated that appellant's symptoms began after a June 2008 motor vehicle accident.

On February 13, 2009 the employing establishment advised the Office to "please be aware that the incident which occurred June 19, 2008 was on a scheduled day off for [appellant]."

In an undated form report, Dr. Amiel Bethel, a Board-certified neurosurgeon, diagnosed cervical and lumbar degenerative disc disease and cervical spondylosis. She provided the history of injury as appellant experiencing an injury while on a bus in Kuwait in November 2006 and a motor vehicle accident in June 2008 and having cervical and lumbar degenerative disc disease. Dr. Bethel checked "yes" that the condition was caused or aggravated by employment.

By decision dated April 20, 2009, the Office denied appellant's claim for an injury due to factors of her federal employment. It found that there was insufficient evidence to show that her work duties caused a diagnosed condition and noted that it could not determine what she was claiming as she had mentioned various conditions and dates. The Office advised appellant that it was not sure whether she was claiming a physical, psychological or pulmonary condition. It found that she had not submitted the factual information necessary for the Office to identify what she was claiming and thus had not established an injury as a result of factors of her federal employment.

By letter dated April 14, 2009, appellant related that she was claiming both an injury on November 2006 when she fell on a bus going to her duty station and a motor vehicle accident in June 2008 traveling to a military installation to pick up her assigned vehicle. She underwent a cervical fusion at C3-4 but continued to have numbness, tingling and pain. Appellant stated, "I worked over 60 hours a week and the increased range of motion of my neck sitting at my computer and similarly muscle forces applied, in my case the symptoms that I had nerve root

[1] The physician's assistant noted, "In June 2008, [appellant] was involved in a motor vehicle accident and developed left-sided numbness that lasted one day then resolved. Since August/September 2008 she developed numbness in her hands and feet, which were intermittent and unpredictable, generally lasting 15[to] 30 minutes."

compression and spinal cord damage." She asserted that working conditions placed her at "increased risk" of development of degenerative disc disease.

On April 28, 2009 appellant requested a review of the written record. In a report dated April 20, 2009, Dr. Stephen G. Smaldore, an osteopath who is Board-certified in family practice, related that appellant was "currently suffering from multiple musculoskeletal complaints which have resulted from [the] accident which occurred while she was stationed in the Middle East … one in November 2006 and another in June 2008. These eventually led to an anterior cervical discectomy and fusion." Dr. Smaldore noted that she did not have pain in her neck or back prior to the above incidents.

By letter dated April 29, 2009, appellant related that she was claiming two traumatic injuries that occurred on November 22, 2006 and June 19, 2008. She noted that her spinal cord condition due to the injuries was not found until she had an MRI scan study on December 1, 2008. Appellant asserted that the clinic records established that she sustained injuries in a combat zone and that she was an emergency essential personal with on-call and irregular work hours.[2]

By decision dated June 26, 2009, the hearing representative affirmed the April 20, 2009 decision as modified to reflect his findings. He considered each condition alleged on the claim form and in her statements. The hearing representative determined that she had not established exposure to toxic fumes in Kuwait and had not provided a detailed statement in support of her allegations that she sustained stress and hypertension due to work factors or any supporting medical evidence. He further found that there was no medical evidence attributing a cervical condition to working at a computer. Regarding appellant's traumatic injury claims, the hearing representative concluded that her fall on a bus on November 22, 2006 was not compensable because she was injured off the premises. He also found that she was not in the performance of duty at the time of her June 19, 2008 motor vehicle accident as there was no evidence that she was engaged in a special errand at the time for her employer. The hearing representative advised that even if the June 19, 2008 motor vehicle accident occurred in the performance of duty, the medical evidence was insufficient to show that she sustained a cervical condition as a result of the accident.

On appeal, appellant argues that she provided a letter from her senior rater stating that she was an emergency personnel worker available 24 hours a day and that part of her duty was to maintain her vehicle.

LEGAL PRECEDENT -- ISSUES 1 & 2

An employee seeking benefits under the Federal Employees' Compensation Act[3] 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 the Act, that the claim was filed within the applicable time limitation; that an injury was sustained while in the

[2] Appellant submitted a functional capacity evaluation dated April 30, 2009.

[3] 5 U.S.C. §§ 8101-8193.

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.[4] These are the essential elements of each and every compensation claim regardless of whether the claim is predicated on a traumatic injury or an occupational disease.[5]

To establish that an injury was sustained in the performance of duty in an occupational disease claim, a claimant must submit the following: (1) medical evidence establishing the presence or existence of the disease or condition for which compensation is claimed;[6] (2) a factual statement identifying employment factors alleged to have caused or contributed to the presence or occurrence of the disease or condition;[7] and (3) medical evidence establishing the employment factors identified by the claimant were the proximate cause of the condition for which compensation is claimed or, stated differently, medical evidence establishing that the diagnosed condition is causally related to the employment factors identified by the claimant.[8]

The medical evidence required to establish causal relationship generally is rationalized medical opinion evidence. Rationalized medical opinion evidence is medical evidence, which includes a physician's rationalized opinion on the issue of whether there is a causal relationship between the claimant's diagnosed condition and the implicated employment factors.[9] The opinion of the physician must be based on a complete factual and medical background of the claimant,[10] must be one of reasonable medical certainty[11] explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.[12]

ANALYSIS -- ISSUES 1 & 2

On her claim form, appellant related that she was exposed to toxic fumes from oil wells while living in Kuwait. She did not, however, as requested by the Office, identify any condition resulting from toxic fume exposure or submit any medical evidence attributing a diagnosed condition to exposure to toxic fumes. Consequently, appellant has not met her burden of proof to

[4] *Tracey P. Spillane*, 54 ECAB 608 (2003); *Elaine Pendleton*, 40 ECAB 1143 (1989).

[5] *See Ellen L. Noble*, 55 ECAB 530 (2004).

[6] *Michael R. Shaffer*, 55 ECAB 386 (2004).

[7] *Marlon Vera*, 54 ECAB 834 (2003); *Roger Williams*, 52 ECAB 468 (2001).

[8] *Beverly A. Spencer*, 55 ECAB 501 (2004).

[9] *Conrad Hightower*, 54 ECAB 796 (2003); *Leslie C. Moore*, 52 ECAB 132 (2000).

[10] *Tomas Martinez*, 54 ECAB 623 (2003); *Gary J. Watling*, 52 ECAB 278 (2001).

[11] *John W. Montoya*, 54 ECAB 306 (2003).

[12] *Judy C. Rogers*, 54 ECAB 693 (2003).

establish an essential element of her claim as she has not submitted a factual statement alleging a condition claimed due to exposure to toxic fumes.[13]

Appellant further attributed her cervical condition to working on a computer. The Office accepted the occurrence of the identified work factor. The issue, therefore, is whether the medical evidence establishes a causal relationship between the claimed conditions and the identified employment factors.

Appellant submitted clinic notes describing her treatment at the employing establishment's health clinic from 2006 to 2009. None of the health care providers, however, found that she had a cervical condition as a result of working on a computer. In a report dated December 10, 2008, Dr. Piccirilli diagnosed possible cervical cord compression. She discussed appellant's history of a motor vehicle accident in June 2008 with subsequent numbness in the hands and feet. In an undated form report, Dr. Bethel diagnosed cervical and lumbar degenerative disc disease and cervical spondylosis. She listed the history of injury as a bus accident in November 2006 and a motor vehicle accident in June 2008 and also cervical and lumbar degenerative disc disease. Dr. Betel checked "yes" that the diagnosed conditions were due to employment. As there is no medical evidence from a physician supporting that appellant sustained a cervical condition due to the identified work factor of working on a computer, she has not met her burden of proof.[14]

LEGAL PRECEDENT -- ISSUE 3

To establish that an injury was sustained in the performance of duty in an occupational disease claim, a claimant must submit the following: (1) medical evidence establishing the presence or existence of the disease or condition for which compensation is claimed;[15] (2) a factual statement identifying employment factors alleged to have caused or contributed to the presence or occurrence of the disease or condition;[16] and (3) medical evidence establishing the employment factors identified by the claimant were the proximate cause of the condition for which compensation is claimed or, stated differently, medical evidence establishing that the diagnosed condition is causally related to the employment factors identified by the claimant.[17]

Workers' compensation law does not apply to each and every injury or illness that is somehow related to an employee's employment. There are situations where an injury or an

[13] *See A.D.*, 58 ECAB 149 (2006) (a claimant's burden of proof in an occupational disease claim includes the submission of a factual statement identifying the employment factors alleged to have caused or contributed to the disease or condition claimed).

[14] Appellant has the burden of establishing by the weight of the reliable, probative and substantial evidence that his or her condition was caused or adversely affected by the employment. As part of this burden, the claimant must present rationalized medical opinion evidence, based on a complete factual and medical background, showing causal relationship. *See Elizabeth H. Kramm (Leonard O. Kramm),* 57 ECAB 117 (2005).

[15] *Michael R. Shaffer*, 55 ECAB 386 (2004).

[16] *Marlon Vera*, 54 ECAB 834 (2003); *Roger Williams*, 52 ECAB 468 (2001).

[17] *Beverly A. Spencer*, 55 ECAB 501 (2004).

illness has some connection with the employment but nevertheless does not come within the concept or coverage of workers' compensation. Where the disability results from an employee's emotional reaction to his regular or specially assigned duties or to a requirement imposed by the employment, the disability comes within the coverage of the Act.[18] On the other hand, the disability is not covered where it results from such factors as an employee's fear of a reduction-in-force or his frustration from not being permitted to work in a particular environment or to hold a particular position.[19]

ANALYSIS -- ISSUE 3

Appellant alleged that she experienced stress due to working long hours and the employing establishment denying her request for leave. She did not, however, provide any further detail regarding her allegations. It is appellant's burden to submit a detailed description of the employment factors or conditions that he or she believes caused or adversely affected the condition or conditions for which compensation is claimed.[20] Additionally, there is no medical evidence of record diagnosing either an emotional condition or a stress-related condition. As part of her burden of proof, appellant must submit a well-reasoned medical opinion from a qualified physician explaining how her exposure to a compensable work factor caused or aggravated a diagnosed emotional or physical injury.[21] As she has submitted no competent medical opinion to support one of the essential elements of her claim for an emotional condition or stress-related hypertension, she has not met her burden of proof.

LEGAL PRECEDENT -- ISSUE 4

The Act provides for the payment of compensation for disability or death of an employee resulting from personal injury sustained while in the performance of duty.[22] The phrase sustained while in the performance of duty is regarded as the equivalent of the coverage formula commonly found in workers' compensation laws, namely, arising out of and in the course of employment.[23] In the course of employment relates to the elements of time, place and work activity.[24] To arise in the course of employment, an injury must occur at a time when the employee may reasonably be said to be engaged in her master's business, at a place when she may reasonably be expected to be in connection with her employment and while she was reasonably fulfilling the duties of her employment or engaged in doing something incidental thereto. As to the phrase in the course of employment, the Board has accepted the general rule of

[18] 5 U.S.C. § 8101-8193; *Trudy A. Scott*, 52 ECAB 309 (2001); *Lillian Cutler*, 28 ECAB 125 (1976).

[19] *Gregorio E. Conde*, 52 ECAB 410 (2001).

[20] *David Apgar*, 57 ECAB 137 (2006); *Penelope C. Owens*, 54 ECAB 684 (2003).

[21] *See L.D.*, 58 ECAB 344 (2007); *Beverly R. Jones*, 55 ECAB 411 (2004).

[22] 5 U.S.C. § 8102(a).

[23] This construction makes the statute effective in those situations generally recognized as properly within the scope of workers' compensation law. *Bernard D. Blum*, 1 ECAB 1 (1947).

[24] *D.L.*, 58 ECAB 667 (2007).

workers' compensation law that, as to employees having fixed hours and places of work, injuries occurring on the premises of the employing establishment, while the employees are going to and from work, before or after work hours or at lunch time, are compensable.[25] The Board has stated, as a general rule, that off-premises injuries sustained by employees having fixed hours and places 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, but are merely the ordinary, nonemployment hazards of the journey itself, which are shared by all travelers.[26]

ANALYSIS -- ISSUE 4

Appellant alleged that she sustained an injury on November 22, 2006 when she slipped and fell on a bus traveling to work. The hearing representative found that the injury was not covered because she was not on the premises of the employing establishment. However, at the time of the bus injury appellant indicated that she lived on the premises of the employing establishment and was traveling to her duty station. The Board has accepted that, as a general matter, injuries occurring on the premises of the employing establishment, while the employee is going to or from work, before or after working hours or at lunchtime are compensable.[27] In *Emma Varnerin, M.D.*,[28] an employee who rented a room from the employing establishment was injured while walking from her living quarters on one part of the employing establishment's grounds to the building where she worked. The employee slipped on the steps of her dormitory walking out of the building on her way to work. The Board held that the employee was in the course of employment once she left her living quarters because she was on the premises of the employing establishment.

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, the Office shares responsibility in the development of the evidence to see that justice is done.[29] Appellant asserted that on November 22, 2006 she was living on the premises of the employing establishment and that she rode a bus to work. It is not clear from her statement, however, whether the bus was on the premises of the employing establishment at the time of her alleged fall. The case will be remanded for the Office to further develop the factual evidence to determine whether appellant was in the performance of duty at the time of the November 22, 2006 incident.

LEGAL PRECEDENT -- ISSUE 5

The Board has recognized, as a general rule, that off-premises injuries sustained by employees having fixed hours and places of work, (while going to or coming from work), are not

[25] *See Idalaine L. Hollins-Williamson*, 55 ECAB 655 (2004).

[26] *See Denise A. Curray*, 51 ECAB 158 (1999).

[27] *Diane Bensmiller*, 48 ECAB 675 (1997).

[28] 14 ECAB 253 (1963).

[29] *Phillip L. Barnes*, 55 ECAB 426 (2004).

compensable as they do not arise out of and in the course of employment.[30] Such injuries are merely the ordinary, nonemployment hazards of the journey itself which are dependent upon the particular facts relative to each claim. These exceptions pertain to the following instances: (1) where the employment requires the employee to travel on 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 a fireman; and (4) where the employee uses the highway to do something incidental to his/her employment with the knowledge and approval of the employer.[31]

There are four categories of "off-premises" employees recognized by the Office in its procedure manual:

> "(1) Messengers, letter carriers and chauffeurs who, by the nature of their work, perform service away from the employer's premises;
>
> "(2) Traveling auditors and inspectors whose work requires them to be in a travel status;
>
> "(3) Workers having a fixed place of employment who are sent on errands or special missions by the employer; and
>
> "(4) Workers who perform services at home for their employer."[32]

ANALYSIS -- ISSUE 5

Appellant contended that she was injured on June 19, 2008 riding in a commercial taxicab from her apartment to her work location to pick up a nontactical vehicle that was undergoing repairs. She also argued that she did not have fixed hours of employment but was instead an emergency essential worker with irregular work hours.

In a February 13, 2009 statement, the employing establishment indicated that June 19, 2008 was a scheduled day off for appellant. It did not provide any further information, however, such as addressing whether it was part of her assigned work duties to pick up her vehicle on that date. The Office did not request any statement from the employing establishment regarding appellant's claimed June 19, 2008 motor vehicle accident.[33] Although it is appellant's burden to

[30] *Paul R. Gabriel*, 50 ECAB 156 (1998).

[31] *Id*.

[32] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Performance of Duty*, Chapter 2.804.5(a) (August 1992); *see also Godfrey L. Smith*, 44 ECAB 738 (1993).

[33] The Office's procedure manual provides: "If the agency has factual evidence which is necessary to make a decision in the claim such as exposure data, the [claims examiner] should make a written request with a copy to the claimant, indicating a time period within which the agency should reply. The agency should be advised that if it fails to provide the requested information, a decision will be made on the basis of available evidence and that the claimant's statements, if sufficiently clear and detailed, may be accepted on matters in which he or she is knowledgeable." Federal (FECA) Procedure Manual, *supra* note 32 at Chapter 2.800.7(a) (January 2004); *see also* 20 C.F.R. § 10.117(b).

establish her claim, the Office is not a disinterested arbiter but, rather, shares responsibility in the development of the evidence, particularly when such evidence is of the character normally obtained from the employing establishment or other government source.[34] On remand, the Office should further develop the factual evidence to determine whether she had a fixed time and place of employment or whether she was an off-premises employee. If appellant had a fixed time and place of employment, it should determine whether she falls under one of the exceptions to the premises rule. Following this and any other development deemed necessary to determine whether the June 19, 2008 incident occurred in the performance of duty, it should issue a *de novo* decision.

CONCLUSION

The Board finds that appellant has not established that she sustained a condition due to exposure to toxic fumes as a result of factors of her federal employment or a cervical or stress-related condition causally related to work factors. The Board further finds that the case is not in posture for decision regarding whether she was injured on November 22, 2006 and June 19, 2008 in the performance of duty.

[34] *See Claudia A. Dixon*, 47 ECAB 168 (1995).

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated June 26 and April 20, 2009 are affirmed in part and set aside in part and the case is remanded for further proceedings consistent with this opinion of the Board.

Issued: October 1, 2010
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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