

**United States Department of Labor
Employees' Compensation Appeals Board**

W.F., Appellant

and

**DEPARTMENT OF THE NAVY,
MILITARY SEALIFT COMMAND,
Norfolk Naval Station, VA, Employer**

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**Docket No. 14-15
Issued: June 4, 2014**

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, Alternate Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On October 10, 2013 appellant, through his attorney, filed a timely appeal from an April 26, 2013 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.²

ISSUE

The issue is whether appellant sustained an injury in the performance of duty on June 15, 2012.

On appeal, appellant alleged that he established an injury in the performance of duty.

¹ 5 U.S.C. § 8101 *et seq.*

² Appellant requested an oral argument. By e-mail dated April 11, 2014, counsel informed the Board that appellant no longer wanted oral argument and requested that the Board proceed with a review of the record.

FACTUAL HISTORY

On June 26, 2012 appellant, then a 39-year-old seaman, filed a traumatic injury claim alleging that on June 15, 2012 he sustained a neck and back injury as a result of lifting a 50-pound piece of luggage at the airport. He stated that he was under orders from the employing establishment to travel to Italy for work. Appellant stopped work on June 15, 2012. He subsequently submitted a request for disability compensation from June 27 to July 28, 2012.

In a June 18, 2012 diagnostic test of the cervical spine, Dr. Glenn A. Call, a Board-certified diagnostic radiologist, noted appellant's complaints of post-traumatic neck pain. He reported no acute findings and mild early degenerative disc disease at C5-6 with loss of disc height.

In a June 22, 2012 magnetic resonance imaging (MRI) scan of the cervical spine, Dr. Donald W. Durrance, a Board-certified diagnostic radiologist, reported degenerative disc disease throughout the cervical spine greatest at C5-6 with loss of disc height, loss of disc signal and ventral spondylosis. He diagnosed degenerative disc changes and chronic findings greatest at C5-6 and normal variation of C4.

In a June 28, 2012 narrative report, Dr. Sara Vizcay, a family practitioner, noted that appellant worked for the employing establishment as a civilian able body seaman. She related that on June 15, 2012 he was at the airport when he picked up his 50-pound luggage and injured his neck and back. Dr. Vizcay noted that appellant went to the emergency room two days later. She reviewed his history and conducted an examination. Neurological reflexes were normal but appellant was unable to do some movements due to pain. Examination of the cervical spine revealed bilateral spasm and tenderness to palpation of C2-7. Upon examination of the lumbar spine, Dr. Vizcay observed bilateral spasm and tenderness on palpation from L1-S2. She also reported tenderness on palpation of the upper aspect of appellant's right kneecap and tibiofemoral joint. Dr. Vizcay diagnosed cervical strain, lumbar strain, left shoulder strain, right knee strain, headaches, insomnia and gastritis. She recommended further diagnostic testing, physical therapy and medication. In an attending physician's and duty status report, Dr. Vizcay checked a box marked "yes" that appellant's condition was caused or aggravated by the described employment activity. She indicated that he was totally disabled from June 28 to July 26, 2012.

Appellant also submitted patient discharge instructions from the emergency room in St. Petersburg, FL dated June 28, 2012.

By letter dated July 13, 2012, OWCP advised appellant that the evidence submitted was insufficient to establish that the alleged incident occurred as described or that he sustained a diagnosed condition as a result of the alleged incident. It requested that he submit additional evidence to establish his claim.

In a July 20, 2012 statement, appellant reported that he was in travel status from Norfolk, VA to Rome, Italy to work on the U.S.S. Mount Whitney. He stated that lifting personal luggage at the airport during check-in was part of the normal duties of every seaman traveling under orders. Appellant explained that he packed his sea bag with his uniforms, boots and personal

toiletries to arrive at the port where the vessel was located. He alleged that traveling under orders was no different than any other federal employee who was told to travel from one job site to another and, if an injury occurs during travel, it should be covered under FECA. Appellant also provided a July 31, 2012 termination during trial period report, which notified that he was terminated from his employment effective July 31, 2012.

In a July 24, 2012 letter, Lynn Mokrzycki, the director of benefits division, controverted appellant's claim contending that he was not injured while in the performance of duty at the airport. She stated that he was authorized to depart for his first ship assignment on June 13, 2012 but he failed to board the scheduled flight. Ms. Mokrzycki reported that the employing establishment verified with the airlines that appellant rebooked his flight from June 13 to 15, 2012 as a personal request. The employing establishment verified that appellant checked out of his hotel on June 15, 2012. Ms. Mokrzycki pointed out that she did not know of appellant's whereabouts until June 18, 2012 when he requested leave. Appellant did not claim that he was too sick to fly out on June 15, 2012 until after his leave request was denied. Ms. Mokrzycki stated that his behavior and actions could not be accounted for after he checked out of the hotel at 9:30 a.m. on June 15, 2012. She further contended that there was no medical evidence to support that appellant sustained a specific diagnosed illness, other than his complaints of neck pain or to establish a causal relationship between an alleged incident and his medical symptoms.

The employing establishment submitted e-mails with appellant dated June 18, 2012. Appellant initially advised the employing establishment that it needed to find someone to replace him on the U.S.S. Mount Whitney and requested a work and sick day. He explained that he was on the telephone with the airline all morning and they located both of his bags in Houston. Appellant stated that he would like to discuss the matter further but could not at this time. He noted that this was the earliest he could get to a laptop. The employing establishment responded that appellant's leave was not approved and informed him that he was currently in absence without official leave (AWOL) status for failure to meet ships movement. Appellant was advised that, once he returned to the pool, he would be removed from AWOL status and would face disciplinary action. He responded that he was injured and became very sick when he made it to the airport and was currently seeking medical attention.

In a June 20, 2012 e-mail to Angelo Ventura, a civil service mariner, appellant stated that he had a recent hospital stay and was waiting to see a neurosurgeon on advice of his physicians. He noted that the employing establishment informed him that he was AWOL. Appellant explained that he did not have the ability to communicate freely due to the hospital rules and his sickness.

In a June 26, 2012 e-mail, Terri Siewinski, a marine placement specialist, requested immediate termination of appellant. She noted that he was a new employee, hired on March 12, 2012, and given his first ship assignment to travel on June 13, 2012 from Norfolk, VA to Rome, Italy to the U.S.S. Mount Whitney, arriving on June 14, 2012. Ms. Siewinski noted that appellant claimed that his flight was overbooked and he could not be rebooked until two days later. Appellant missed the second flight that was due to arrive in Rome on June 18, 2012. Ms. Siewinski noted that he had missed two scheduled flights and both times did not contact the employing establishment until the ship's agent had already contacted them to let them know that

he did not show up in Rome at the scheduled arrival time. She pointed out that appellant claimed that he was injured at the airport but he had yet to submit anything to the medical department.

The employing establishment submitted a request and authorization for temporary-duty (TDY) travel order issued on June 5, 2012 which authorized appellant to travel by air from Norfolk, VA to the U.S.S. Mount Whitney in Italy on June 13, 2012. It provided an e-ticket receipt which demonstrated that appellant was booked on a flight to depart from Norfolk, VA on June 13, 2012 and arrive in Rome, Italy on June 14, 2012.

In an August 1, 2012 duty status report, Dr. Vizcay noted a date of injury of June 15, 2012. She described that appellant was lifting a 50-pound luggage and sustained injuries to his neck, back, arm, knee, legs and shoulder. Dr. Vizcay diagnosed cervical disc syndrome and lumbar disc symptoms. She indicated that appellant could not work for four weeks.

In an August 1, 2012 report, Dr. Samy F. Bishai, Board-certified in emergency medicine, related appellant's complaints of neck and low back pain, radicular pain down the left shoulder and arm, numbness of the fingers of the left hand, numbness in the left big toe and right knee pain. He stated that the injury occurred when appellant moved a bag of luggage weighing 50 pounds at the airport and jerked his neck while he lifted the bag. Appellant informed Dr. Bishai that he had to put the bag down immediately because he felt a severe, sharp pain in his neck and back. Dr. Bishai noted that appellant also twisted his right knee joint because his body was torqued when he felt pain and dropped the bag. He reviewed appellant's history and noted that x-rays of the cervical spine demonstrated early degenerative changes, mostly seen at C5-6. A MRI scan of the cervical spine also showed the presence of concentric bulging annulus and moderately severe foraminal stenosis on the left. Upon examination of the cervical spine, Dr. Bishai observed tenderness and paraspinal muscle spasm of moderate intensity. Examination of the dorsolumbar spine revealed tenderness overlying the dorsolumbar spine in the midline and paraspinal muscle spasm of the dorsolumbar region of the spine. Straight leg raise testing was 30 degrees on both right and left sides. Sciatic nerve stretching test was positive on both right and sides.

Upon examination of the right knee, Dr. Bishai observed slight swelling of the right knee joint and tenderness overlying the joint line both medially and laterally. He diagnosed cervical strain, cervical disc syndrome, degenerative disc disease of the cervical spine, lumbosacral strain, lumbar disc syndrome, internal derangement of the right knee joint and radiculopathy of the left leg and shoulder. Dr. Bishai opined that appellant's current symptoms were definitely a result of the injuries that he sustained in the accident of June 15, 2012. He explained that the mechanism of injury was the heavy lifting of the bag weighing 50 pounds, which caused the injury to the neck, back and right lower extremity. Dr. Bishai stated that appellant's symptoms were the result of a combination of factors. He noted that, for the right knee joint, it was a new injury to the joint and the neck injury was an aggravation of a preexisting condition based on the MRI scan findings that indicated some chronicity. Dr. Bishai reported that the causal relationship between the symptoms of appellant and the work accident of June 15, 2012 was quite clear and obvious.

On August 17, 2012 OWCP contacted the employing establishment to confirm that appellant was originally scheduled to take a flight on June 13, 2012 but he changed it to June 15, 2012.

In a decision dated August 17, 2012, OWCP denied appellant's claim. It found insufficient evidence to establish that the June 15, 2012 employment incident occurred as alleged. OWCP noted that the June 15, 2012 lifting incident was not sustained in the performance of duty.

In a letter dated October 11, 2012, appellant, through his representative, requested reconsideration. He stated that he never claimed that he did not board the airplane on June 15, 2012 but that his injury occurred prior to boarding the plane. Appellant became so ill that he had to leave the airport and seek medical attention. On June 15, 2012 he arrived at the airport and picked up his bag weighing approximately 50 pounds when he felt a sharp, intense pain in his neck going down both sides of his back to his legs and toes. Appellant went to the emergency room and was told that he had damage to his neck. He pointed out that he was traveling on June 15, 2012 because he was under orders to report to the U.S.S. Mount Whitney in Italy. Appellant contended that the medical evidence from Dr. Bishai established a causal relationship between the June 15, 2012 incident and his medical condition.

In a September 26, 2012 MRI scan of the lumbar spine, Dr. Mark J. Timken, a Board-certified diagnostic radiologist, observed lower lumbar levoscoliosis and normal height of the vertebrae. He also noted broad-based disc herniation at L5-S1 level and postlateral disc bulge in combination with facet arthropathy.

In a September 26, 2012 MRI scan of the right knee, Dr. Timken observed minimal joint effusion and patellofemoral fluid collection. He found no meniscal or ligamentous scar.

In an October 1, 2012 report, Dr. Bishai provided physical findings and an opinion on causal relationship similar to his previous August 1, 2012 report. He noted that he was responding to a letter from OWCP regarding fact of injury. Dr. Bishai stated that factually the injury did occur and the accident or employment factor had caused this injury. He provided a medical diagnosis and explained the connection between the injuries that occurred and the symptoms linked to the activities at work on June 15, 2012.

In an October 1, 2012 duty status report, Dr. Vizcay stated that appellant could not work.

Appellant provided a printout from the Norfolk Plaza Hotel which indicated that he checked out of his room at 9:30 a.m. on June 15, 2012.

By decision dated February 8, 2013, OWCP denied modification of the August 17, 2012 decision. It found that the evidence failed to establish that the injury occurred in the performance of duty.

In a letter dated March 18, 2013, appellant, through his attorney, requested reconsideration. He noted that he previously submitted a statement that explained what occurred on June 15 to 18, 2012 when he arrived at the hospital. Appellant stated that there was no question that he was in official travel capacity when the injury occurred on June 15, 2012 as the

employing establishment still wanted him to report for duty in Rome, Italy. He pointed out that he submitted a check-in ticket for his luggage on June 15, 2012 which demonstrated that he was at the airport terminal and made an attempt to make the flight. Appellant explained that the only reason why he did not make the flight was because he became sick from the pain.

In a March 1, 2013 letter, appellant stated that he had evidence to show where he was from June 15 to 18, 2012 as supported by receipts from the airport and his debit card. On Friday, June 15, 2012 he checked out of the hotel in Norfolk and went to the airport where he was injured and became sick. Appellant attempted to fly and checked his luggage but vomited on his shirt. He left the airport and slept in his truck because he was too sick to drive safely. Early the next morning, appellant left, stopped at Emporia, VA for gas, then drove to Florence, SC, Lake City, FL and Ocala, FL and arrived in St. Petersburg, FL on June 16, 2012. He explained that on June 17, 2012 his neck was painful and he could not move. On June 18, 2012 appellant went to the hospital.

In a decision dated April 26, 2013, OWCP modified the February 8, 2013 decision. It found that the evidence was sufficient to establish that the June 15, 2012 incident occurred as alleged but did not arise in the performance of duty. OWCP found that appellant was not within the scope of his employment when the June 15, 2012 incident occurred. Appellant failed to notify the employing establishment of the incident until a remote time after and he engaged in subsequent travel without notification or approval from the employing establishment.

LEGAL PRECEDENT

An employee seeking benefits under FECA³ has the burden of proof to establish the essential elements of his or her claim by the weight of the reliable, probative and substantial evidence⁴ including that he or she sustained an injury in the performance of duty and that any specific condition or disability for work for which he or she claims compensation is causally related to that employment injury.⁵

FECA provides for the payment of compensation for the disability or death of an employee resulting from a personal injury sustained while in the performance of duty. The phrase sustained while in the performance of duty has been interpreted by the Board to be the equivalent of arising out of and in the course of employment, the coverage formula commonly found in other workers' compensation laws. In the course of employment deals with the work setting, locale and time of injury. A rising out of the employment encompasses not only the work setting but also the requirement that an employment factor caused the injury.⁶

An employee on travel status, TDY status or special mission for his or her employing establishment is in the performance of duty and therefore under the protection of FECA 24 hours

³ 5 U.S.C. §§ 8101-8193.

⁴ *J.P.*, 59 ECAB 178 (2007); *Joseph M. Whelan*, 20 ECAB 55, 58 (1968).

⁵ *G.T.*, 59 ECAB 447 (2008); *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

⁶ *A.K.*, Docket No. 09-2032 (issued August 3, 2010); *C.O.*, Docket No. 09-217 (issued October 21, 2009).

a day with respect to any injury that results from activities essential or incidental to the employment duties. When the employee, however, deviates from the normal incidents of his or her trip and engages in activities, personal or otherwise, which are not reasonably incidental to the duties of the temporary assignment contemplated by the employing establishment, the employee ceases to be under the protection of FECA and any injury occurring during such deviation is not compensable.⁷ In determining whether an injury occurs while in the performance of duty or during a deviation, the Board will focus on the nature of the activity in which the employee is engaged and whether it is reasonably incidental to the employee's work assignment or represents such a departure from the work assignment that the employee becomes engaged in personal activities unrelated to his or her employment.⁸

ANALYSIS

Appellant alleged injury to his neck, back and right knee on June 15, 2012 while on travel status to his new duty station. By decision dated April 26, 2013, OWCP denied his claim finding that he was not within the scope of his employment at the time of the June 15, 2012 incident. The Board finds that appellant did not establish that the June 15, 2012 incident occurred in the performance of duty.

The employing establishment authorized appellant to travel on June 13, 2012 from Norfolk, VA to his new duty station on the U.S.S. Mount Whitney in Italy. Appellant was authorized to travel that day, arriving in Italy on June 14, 2012. An employee on travel status is in the performance of duty and therefore under the protection of FECA 24 hours a day with respect to any injury that results from activities essential or incidental to the employment duties. When the employee, however, deviates from the normal incidents of his or her trip and engages in activities, personal or otherwise, which are not reasonably incidental to the duties of the temporary assignment contemplated by the employing establishment, the employee ceases to be under the protection of FECA and any injury occurring during such deviation is not compensable.⁹

The record establishes that appellant missed his June 13, 2012 flight. He claimed that the flight was overbooked and he could not rebook until June 15, 2012, two days later. The employing establishment advised that appellant did not contact or notify anyone of the missed flight. Appellant alleged injury on June 15, 2012 because he was under orders to travel to work on the U.S.S Mount Whitney in Italy. He has failed, however, to establish that he was engaged in authorized activity incidental to his employment while at the airport on June 15, 2012. In *D.P.*,¹⁰ the employee claimed a traumatic injury as a result of a motor vehicle accident while returning from a TDY assignment. The accident occurred at 7:30 p.m. on February 2, 2007. Travel orders demonstrated that the employee was to leave the training site on February 2, 2007 at 8:00 a.m. and arrive in Lincoln, NE at 5:00 p.m. that day. The Board found that the employee

⁷ Janet Kidd (*James Kidd*), 47 ECAB 670 (1996); *William K. O'Connor*, 4 ECAB 21 (1950).

⁸ *A.K.*, *supra* note 6.

⁹ *Supra* note 7.

¹⁰ Docket No. 08-258 (issued May 7, 2008).

was not engaged in authorized travel at the time of the accident because she was supposed to have returned to her duty station by 5:00 p.m. In this case, appellant failed to establish that he was engaged in an authorized activity incidental to his employment when he returned to the airport on June 15, 2012, two days after his authorized flight. The TDY authorization form issued on June 5, 2012 establishes that appellant was authorized to depart from Norfolk, VA on June 13, 2012. An e-ticket receipt notes that appellant was booked on a June 13, 2012 departure flight from Norfolk, VA on June 13, 2012 to arrive in Rome, Italy on June 14, 2012. The record does not contain any evidence to establish that he was traveling on June 15, 2012 as part of his employment duties on travel status. Appellant's authorized travel should have ended on June 14, 2012 when he was supposed to have arrived in Rome, Italy. He did not provide any documentation to establish that he made the employing establishment aware of his rescheduled flight on June 15, 2012 and authorized such a detour from his approved travel itinerary. Accordingly, appellant has failed to establish that he was performing an activity incidental to his employment when he returned to the airport on June 15, 2012.¹¹

The employing establishment did not know where appellant was after he missed his scheduled June 13, 2012 flight. It was first notified that he was missing after he failed to arrive in Rome, Italy on June 14, 2012. The employing establishment did not authorize him to make arrangements for another flight to reach his duty station. According to Professor Larson's treatise on workers' compensation, coverage is usually afforded in cases involving a deliberate and substantial payment for the expense of travel or the provision of an automobile under the employee's control.¹² Under most circumstances, the travel must be authorized by the employing establishment and sufficiently important to be regarded as part of appellant's official service.¹³ In this case, the travel documents reflect that appellant was authorized to travel from Norfolk, VA on June 13, 2012 and was expected to arrive at his new duty station in Italy on June 14, 2012. The June 15, 2012 incident at the airport in Norfolk, VA occurred at a location where he was not authorized or expected to be as of that date. In *G.H.*,¹⁴ the Board found that an injury did not occur in the performance of duty as travel was authorized only for travel between the claimant's home and his federal employment; not from his private-sector job to his federal employment. In this case, appellant was not authorized to return to the airport on June 15, 2012. He has not provided any evidence to establish that when he returned to the airport in Norfolk, VA on June 15, 2012 he was performing an activity incidental to his employment. The Board finds that appellant was not in the performance of duty when he checked his bag on June 15, 2012.

¹¹ Compare *L.A.*, Docket No. 09-2278 (issued September 27, 2010) (OWCP found that the employee was injured in the performance of duty when she fell down at the airport after she had completed a personal deviation in Seattle, WA. The employing establishment was aware of her personal travel arrangements in Seattle, WA and had arranged and paid for her flight from Seattle to Japan to return to her duty station). In this case, however, the record does not contain any evidence that the employing establishment was aware of or authorized him to rebook his departure flight to June 15, 2012.

¹² See generally A. Larson, *the Law of Workers' Compensation* § 13.01 (2000).

¹³ See *Gabe Brooks*, 51 ECAB 184 (1999); see also *Mary Margaret Grant*, 48 ECAB 969 (1997).

¹⁴ Docket No. 11-1119 (issued December 12, 2011).

The record supports that appellant deviated from his employment duties and removed himself from the coverage of FECA when he missed his initial flight on June 13, 2012. Appellant rebooked his flight to June 15, 2012 without notice to the employing establishment. In various statements, he alleged that the initial June 13, 2012 flight was overbooked and the airlines could not get him on another flight until June 15, 2012. Appellant did not provide any evidence, such as a revised itinerary or travel voucher from the airline or the employing establishment to support his contention that he was unable to board the flight on June 13, 2012. On the contrary, the employing establishment verified with the airline that he rebooked his flight to June 15, 2012 as a personal request. In *S.C.*,¹⁵ the employee was in travel status to attend a training program when she alleged that she slipped and fell when returning to her hotel after eating dinner. The record established, however, that she was injured shortly after midnight on June 11, 2009 and that the last training session was completed on June 10, 2009 at 5:00 p.m. The Board found that the employee was not injured until seven hours after her work duties ended for the day and that she failed to explain why she was away from her hotel after midnight. The Board held that her actions constituted a substantial deviation from the normal incidents of her trip. In this case, appellant deviated from his authorized travel when he rebooked his June 13, 2012 flight to June 15, 2012 for personal reasons without notifying the employing establishment of his changed flight. He has not provided a valid explanation for why he rebooked his June 13, 2012 flight or for his whereabouts from June 13 to 15, 2012. Because the June 15, 2012 incident occurred after appellant had deviated from the normal activities incidental to his employment for purposes that were personal in nature, the Board finds that he was not injured in the performance of duty.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 a traumatic injury in the performance of duty on June 15, 2012.

¹⁵ Docket No. 10-1706 (issued May 9, 2011).

¹⁶ See *Ronell Smith*, 47 ECAB 781 (1986) (where the Board found that the employee was engaged in an identifiable deviation when she drank beer with her supervisor at three different establishments prior to being struck by an automobile on her way back to her hotel).

ORDER

IT IS HEREBY ORDERED THAT the April 26, 2013 merit decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 4, 2014
Washington, DC

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

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

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