

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

B.B., claiming as widow of G.B., Appellant

and

**DEPARTMENT OF JUSTICE, BUREAU OF
PRISONS, Adelanto, CA, Employer**

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**Docket No. 14-2000
Issued: July 9, 2015**

Appearances:

*Brett E. Blumstein, Esq., for the appellant
Office of Solicitor, for the Director*

Case Submitted on the Record

DECISION AND ORDER

Before:

CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On September 17, 2014 appellant, through counsel, filed a timely appeal from an August 26, 2014 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.

ISSUE

The issue is whether OWCP properly denied appellant's claim for survivor benefits as the employee's death on March 8, 2012 did not occur in the performance of duty.

FACTUAL HISTORY

On March 14, 2012 appellant filed a claim for survivor's benefits (Form CA-5) in connection with the March 8, 2012 death of the employee. She indicated that on March 8, 2012

¹ 5 U.S.C. §§ 8101-8193.

the employee, then a 32-year-old correctional officer, was “murdered [by] gunshot.”² The employing establishment submitted an official superior’s report of the employee’s death (Form CA-6) which listed the date and time of the employee’s death as March 8, 2012 at approximately 9:45 p.m. and indicated that the death occurred at the Embassy Suites Hotel in Lompoc, CA. The immediate cause of death was listed as “gunshot wound” and, fellow correctional officer, Timothy McNally, was listed as the third party who caused the employee’s death.³

The record contains a Travel Authorization/Advance Form showing that on March 8, 2012 the employee was on travel-duty status for the purpose of attending training. The travel duty started on February 27, 2012 and was intended to last until March 9, 2012.⁴

OWCP received a Santa Barbara County death certificate, issued on March 20, 2012, which indicated that the employee died on March 8, 2012 in a “hotel room” in Lompoc, CA, that the cause of death was “pending investigation,” and that the employee had not been embalmed.⁵

In an October 18, 2012 letter, OWCP requested that appellant submit additional factual and medical evidence in support of her claim for survivor’s benefits.

Appellant submitted an amended version of the Santa Barbara County death certificate, issued on May 31, 2012, which now listed the cause of death as “gunshot wound of neck.” This amended death certificate is not entirely legible.

In a March 12, 2012 autopsy report, the physician who performed the autopsy indicated that there was a gunshot wound to the employee’s left anterolateral neck and that the injury was the immediate cause of death. The gunshot wound was described as a distant-range gunshot wound with secondary damage to the vasculature of the left side of the neck, anterior cervical spine, and right jugular vein. The wound track through the body was noted to be right to left, somewhat downward at a 30-degree angle without significant deviation in an anterior-posterior plane.

OWCP received a toxicology report dated April 18, 2012 which indicated that the employee had Methylenedioxypropylamphetamine (commonly known as a main component of “bath salts”) in his system at the level of 180 nanograms per milliliter. The toxicology report noted that this was a synthetic stimulant reported to have affects similar to Methylphenidate at low doses and cocaine at higher doses. It was indicated that the adverse effects of this drug were insomnia, severe agitation/anxiety, panic attacks, kidney pain, stomach cramps, tachycardia,

² Appellant submitted various documents, including a marriage certificate memorializing her marriage to the employee on January 23, 2003, birth certificates for her dependents, and a statement of funeral expenses for the employee. On the Form CA-5 she indicated that she was not living at the same address as the employee at the time of his death. In a statement signed on December 16, 2013, appellant attested to the fact that she was not legally separated or divorced from the employee at the time of his death on March 8, 2012.

³ It appears that Mr. McNally was a prison guard for the employing establishment, but was not on travel-duty status on March 8, 2012.

⁴ The employee’s regular duty station was in Adelanto, CA.

⁵ The document lists appellant as the employee’s spouse at the time of his death on March 8, 2012.

hypertension, dilated pupils, tinnitus, peripheral neuropathies, and dizziness. The employee also had Methylone at the level of 8.2 nanograms per milliliter in his blood. Methylone is the main ingredient in a designer drug called “Explosion” which can cause euphoria, agitation, sweating, nausea, vomiting, dilated pupils, seizures, hyponatremia, and confusion when the drug is used in bath salts. The presence of a designer psychedelic tryptamine, 5-MeO DALT, was also noted. This drug is an unscheduled pharmacological agent in the United States. The employee also tested positive for Lidocaine, an anesthetic often used as a “cutting” agent for drugs of abuse.

OWCP received a narrative report that was produced by Officer Corey Cox of the Lompoc Police Department on March 10, 2012. Officer Cox noted that he was dispatched to investigate suspicious text messages in which Mr. McNally had indicated that he had shot his friend in the neck.⁶ Officer Cox contacted a coworker of Mr. McNally’s who indicated that he had been invited to “hang out” with Mr. McNally and the employee in the employee’s hotel room at the Embassy Suites Hotel, in Lompoc, CA, but noted that he declined the invitation because he had recently had an argument with Mr. McNally. Officer Cox and a Sergeant Stetz then traveled to the Embassy Suites Hotel and hotel staff directed them to Room 113. Through an opening in a curtain they observed several beer cans as well as several energy drink cans. Officer Cox gained entry through a sliding door and discovered the employee’s body. Paramedics arrived shortly thereafter and confirmed that the employee was deceased. Several officers then traveled to Mr. McNally’s residence in Lompoc, CA, and he was taken into custody without incident.

A supplemental report was completed on March 10, 2012 by Officer Agustin Arias, who discussed the investigation that was carried out in Room 113 of the Embassy Suites Hotel by a team of officers. A coworker of the employee informed the officers that, at approximately 7:00 p.m. on March 8, 2012, he had drunk a couple beers with the employee at the hospitality hour provided by the Embassy Suites Hotel. Another individual stated that he had seen the employee in Room 113 before dinner and indicated that he saw a person there he knew by the name “Scrappy” who was supposed to give the employee a tattoo. Officer Arias indicated that the individual explained that the employee was sitting on the couch and Scrappy was in a chair next to the couch and that both seemed to be in good spirits. A pistol was observed in a holster on the table and nothing was noted to be out of the ordinary.

Officer Arias then traveled to the Lompoc Police Department and interviewed Mr. McNally after reading his Miranda rights. Mr. McNally stated that he was in the hotel room with the employee on March 8, 2012 and indicated that they had been drinking for most of the day and were “messing around.” The employee was sitting on the bathtub near the toilet as if he was going to throw up. Mr. McNally stated that he started to make fun of the employee by calling him a “sissy.” He indicated that his handgun was in his hand while he was standing approximately 14 feet from the employee, and that the employee stated “what the [...]” or “[...] off.”⁷ Mr. McNally indicated that the gun then discharged and the employee was struck in the

⁶ The messages from Mr. McNally included, “I just shot my friend in the damn neck he’s [...] dead” and “Why the [...] was I [...] around with that damn loaded [...] gun.”

⁷ An investigator indicated that the forensic evidence suggested that Mr. McNally was standing much closer to the employee when the gun discharged as a shell casing was found in the bathtub.

neck. He characterized the gun discharge as an accident and stated that he knew he should not have had it out because he had been drinking.

An investigator indicated that he did not believe that the shooting was accidental due to the extensive gun training Mr. McNally had received as a prison guard and that the crime scene evidence was not supportive of the position from which the shooting was alleged to have occurred. He further noted that Mr. McNally had not called the police or attempted to provide first aid to the employee.

OWCP requested assistance from an OWCP medical adviser to understand the toxicology report and the extent to which the worker was impaired based on the record. It prepared a statement of accepted facts, drafted specific questions, and submitted these to Dr. Ellen Pichey, a Board-certified occupational medicine specialist. On March 19, 2014 Dr. Pichey stated that the toxicology report revealed significant levels of Methylenedioxypyrovalerone and Methylone, two designer compounds found in bath salts that would produce a severe amphetamine-like response. She stated that, from the levels recorded in the toxicology report, it was unlikely that there was a great time lag (*i.e.*, days) from consumption, but noted that it is difficult to assess or quantify the effect and metabolic breakdown of the drug as these vary by individual. Dr. Pichey indicated that it was likely that the drug was ingested and present in such a concentration that the employee would have been impaired at the time of his death.

In a March 20, 2014 decision, OWCP denied appellant's claim for survivor benefits because it had not been established that the employee's death on March 8, 2012 occurred in the performance of duty. It found that, at the time of his death, the employee had deviated from his employment through his actions, including ingesting drugs.

Appellant, through counsel, requested reconsideration. In a May 25, 2014 brief, counsel argued that the employee's death on March 8, 2012 occurred while he was in the performance of duty. He stated that injuries arising out of the necessity of sleeping in hotels or eating in restaurants are usually compensable and that travel status resumes after a personal errand is completed. Counsel argued that intoxication was not the proximate cause of the employee's death and that Mr. McNally killed the employee by his own will. He noted that the employee was in his hotel room when he was murdered and asserted that being in his hotel room was incidental to his travel-duty status and kept him in the performance of duty. Counsel stated that, at the time of his death, the employee was not ingesting bath salts as he had done so many hours beforehand. He argued that OWCP had no actual evidence that the employee was intoxicated at the time of his death, or that the then-legal bath salts had any effect on the employee at the time he was murdered. Counsel submitted an article showing that in December 2013 Mr. McNally was convicted of second-degree murder in the death of the employee and sentenced to 25 years to life in prison.

In an August 26, 2014 decision, OWCP affirmed its March 20, 2014 decision denying appellant's claim for survivor benefits. It again found that the employee's actions removed him from the performance of duty at the time of his death on March 8, 2012.

LEGAL PRECEDENT

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.⁸ The phrase sustained while in the performance of 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.⁹

To arise in the course of employment, an injury must occur at a time when the employee may reasonably be stated to be engaged in the master's business, at a place where he or she may reasonably be expected to be in connection with the employment, and while he or she was reasonably fulfilling the duties of his or her employment or engaged in doing something incidental thereto.¹⁰ In deciding whether an injury is covered by FECA, the test is whether, under all the circumstances, a causal relationship exists between the employment itself or the conditions under which it is required to be performed and the resultant injury.¹¹

The general rule regarding coverage of employees on travel-duty status or on temporary-duty assignments is set forth in Professor Larson's *The Law of Workers' Compensation Law*:

"An employee whose work entails travel away from the employer's premises is generally considered to be within the course of his or her employment continuously during the trip, except when there is a distinct departure on a personal errand. Thus, injuries flowing from sleeping in hotels or eating in restaurants away from home are usually compensable."¹²

The Board has similarly recognized that FECA covers an employee 24 hours a day when the employee is on travel-duty status and engaged in activities essential or incidental to such duties.¹³ To determine whether an injury occurs in a place where an employee may reasonably be or constitutes a deviation from employment, the Board will focus on the nature of the activity in which an employee was engaged and whether it is reasonably incidental to an employee's work assignment or represents such a departure from the work assignment that an employee becomes engaged in personal activities unrelated to his or her employment. 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.¹⁴ The Board has recognized that there are limitations to coverage of employees in travel status. When an

⁸ 5 U.S.C. § 8102(a).

⁹ *Valerie C. Boward*, 50 ECAB 126 (1998).

¹⁰ *R.A.*, 59 ECAB 581 (2008).

¹¹ *Mark Love*, 52 ECAB 490 (2001).

¹² A. Larson, *The Law of Workers' Compensation Law* § 25.01 (2015).

¹³ *M.M.*, Docket No. 12-298 (issued November 19, 2012).

¹⁴ *See S.C.*, Docket No. 10-1706 (issued May 9, 2011).

employee 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 employer, the employee ceases to be under the protection of FECA and any injury occurring during these deviations is not compensable.¹⁵

ANALYSIS

On March 14, 2012 appellant filed a claim for survivor's benefits in connection with the March 8, 2012 death of the employee. She indicated that on March 8, 2012 the employee, who was on travel duty status at the time, was murdered by gunshot. OWCP denied appellant's claim because the evidence established that the employee had deviated from the performance of duty and therefore was not covered by FECA at the time of his death.

The Board finds that OWCP properly denied appellant's claim for survivor benefits as the employee's death on March 8, 2012 did not occur in the performance of duty.

In the present case, the record shows that on the evening of March 8, 2012 the employee had finished his work-related training, consumed alcohol at a hospitality hour at his hotel, and returned to his hotel room with Mr. McNally.¹⁶ While the precise time that the employee ingested bath salts is not clear from the record, a postmortem toxicology report showed that a significant amount of the drug was in his system. Dr. Pichey, a Board-certified occupational medicine specialist serving as an OWCP medical adviser, reviewed the toxicology report and indicated that, from the levels observed in the toxicology report, it was unlikely that there was a great time lag from consumption. She provided an opinion that it was likely that the drug was ingested and present in such a concentration that the employee would have been impaired at the time of his death.

The Board finds that the employee's ingestion of mind-altering drugs would not be reasonably expected by the employing establishment as a travel-duty activity, and it constituted a deviation from the normal incidents of his employment such that he was removed from the performance of duty. The employee transitioned from the normal activities of a person in a travel status to using recreational drugs with a known fellow traveler. No reasonable person could state that this is an activity within the realm of acceptable behavior for a federal worker and a correctional officer on travel-duty status. Moreover, it is not reasonable to take such a drug when firearms are readily available. At the time of his injury, the employee was not engaged in activities reasonably incidental to his temporary-duty assignment, but rather was engaged in activities that constituted a deviation from the performance of duty. He engaged in a voluntary deviation by taking mind-altering, nonscheduled drugs for recreational use. The employee was not engaged in any activity arising out of his employment. While Mr. McNally was convicted of the murder of the employee, the employee's voluntary ingestion of mind-altering drugs placed him in a dangerous situation. The evidence of record reveals that the

¹⁵ See *Evelyn S. Ibarra*, 45 ECAB 840 (1994).

¹⁶ Testimony of record also indicates that the employee had been drinking alcohol with Mr. McNally for much of that day.

employee had been drinking and that significant substance abuse resulted in significant impairment.

The Board has addressed the types of circumstances that constitute a deviation from the performance of duty while on travel-duty status. In *Ronelle Smith*,¹⁷ the employee drank beer with her supervisor at three different establishments prior to being struck by an automobile returning to her hotel. The Board found that she was engaged in an identifiable deviation and had removed herself from the protection of FECA at the time of her injury. Similarly, in *Lydia Muse Shields (John Marcellus Shields)*,¹⁸ the deceased employee was on a temporary-duty assignment. His whereabouts were unknown from 8:00 p.m. to 3:00 a.m. when he was seen leaving a taxicab. The employee began to walk toward his hotel when he fell to the ground and hit his head. The Board determined that the employee's fatal injury was not sustained in the performance of duty, as there was no explanation as to why he had returned to the hotel so late and no evidence that his death occurred during the course of an ordinary incident of his mission.

In *Conchita A. Elefano (Domingo P. Elefano)*,¹⁹ the deceased employee was on a temporary-duty assignment at a navy base. He left the base at 11:30 p.m. and went to a nearby night club, where he remained until 4:00 a.m. The employee was fatally injured by a bullet when returning to the base in a taxicab. The Board found that the injury was not sustained in the performance of duty as he had deviated from the normal activities incidental to his employment for purposes that were personal and diversionary in nature. In *Richard Michael Landry*,²⁰ the Board found that the employee on travel-duty status was not in the performance of duty when he was thrown from the bed of a truck while traveling between nightclubs after 1:30 a.m. In *Kathleen M. Fava (John F. Malley)*,²¹ the Board found that OWCP properly rescinded acceptance of the claim where the evidence reflected that the employee, who was in travel status, was injured walking to a van after leaving a sports bar.

The Board finds that, similar to those cases cited, OWCP has met its burden of proof in the present case to show that the employee was not engaged in normal, ordinary, and natural activities reasonably incidental to his temporary-duty assignment, but rather had undergone a temporary, personal diversion. The employee's actions constitute a personal deviation not arising out of the necessity of his employment.²² The employee's death on March 8, 2012 was not reasonably incidental to his temporary-duty status and therefore did not occur in the performance of duty within the meaning of FECA. As the employee had removed himself from the course of employment at the time of his death, OWCP properly denied appellant's claim for survivor's benefits.

¹⁷ 47 ECAB 781 (1996).

¹⁸ 2 ECAB 162 (1949).

¹⁹ 15 ECAB 373 (1964).

²⁰ 39 ECAB 232 (1987).

²¹ 49 ECAB 519 (1998).

²² See *S.C.*, *supra* note 14.

Before OWCP and on appeal, counsel stated that the employee was in his hotel room when he was killed and asserted that being in his hotel room was incidental to his travel-duty status assignment and kept him in the performance of duty. However, this argument ignores the fact that the employee took himself out the performance of duty through his own actions. Counsel also argued that the employee was not intoxicated at the time of his death, but the evidence of record, including witness testimony and the toxicology report as interpreted by Dr. Pichey, provides strong evidence that he was in fact intoxicated.²³

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 OWCP properly denied appellant's claim for survivor benefits as the employee's death on March 8, 2012 did not occur in the performance of duty.

²³ Counsel also cited a portion of OWCP procedures which indicates that certain evidence must be gathered when intoxication may be the proximate cause of the injury or death and argued that OWCP did not follow these procedures. See Federal (FECA) Procedure Manual, Chapter 2 -- Claims, *Performance of Duty*, Chapter 2.804.14c (August 1992). However, a review of the evidence of record reveals that OWCP properly followed its procedures in this regard.

ORDER

IT IS HEREBY ORDERED THAT the August 26, 2014 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 9, 2015
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

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