

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of PATRICK M. MOONEY and DEPARTMENT OF THE TREASURY,  
CUSTOMS SERVICE, Albuquerque, N.M.

*Docket No. 97-428; Submitted on the Record;  
Issued December 22, 1998*

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DECISION and ORDER

Before GEORGE E. RIVERS, MICHAEL E. GROOM,  
BRADLEY T. KNOTT

The issue is whether appellant established that his broken tooth occurred in the performance of duty.

On August 18, 1995 appellant, then a 41-year-old customs pilot alleged that on August 17, 1995, while he was on temporary duty at Howard's Air Force Base in Panama, he woke up in the middle of the night with fragments of his tooth in his mouth and sustained a fractured front tooth. A witness stated that on August 17, 1995 at or about 7 a.m., he observed appellant with a fractured tooth which he had not observed prior to August 17, 1995 and that appellant possessed the fractured tooth. Appellant's supervisor stated that appellant was not injured in the performance of duty but during a customs sponsored "[word is illegible]" in Panama.

Appellant submitted his travel authorization to Panama (Form 4835) and medical bills to support his claim.

By letter dated March 20, 1996, the Office requested additional information, particularly a report from his treating physician.

Appellant additionally submitted a health insurance claim form on which Dr. Michael W. Bailey, a dentist, indicated on August 17, 1995 that appellant had a fractured clinical crown tooth (No. 10) and also indicated treatment for a defective restoration (Nos. 18 and 19).

By letter dated March 23, 1996, appellant stated that on August 17, 1995, the day after he arrived in Panama, he awoke around 4 a.m. and discovered that one of his four front teeth had broken in two and a piece of the tooth was in his mouth. He stated he did not know the cause of the fracture and on August 17, 1995 he reported the incident at 7:30 a.m. to his supervisor and sought medical treatment. Upon his return to the United States a month later, he sought additional treatment.

By decision dated April 11, 1996, the Office denied the claim, stating that the evidence of record failed to establish that an injury was sustained, as alleged.

By letter dated May 10, 1996, which was date stamped May 14, 1996, appellant requested a review of the written record.

By decision dated June 18, 1996, the Office's Branch of Hearings and Review denied appellant's request for written review of the record, stating that appellant's request for review of the written record was postmarked May 14, 1996, more than 30 days after the Office issued the April 11, 1996 decision, and that therefore appellant's request was untimely. The Branch of Hearings and Review informed appellant that he could request reconsideration by the Office and submit additional evidence.

By letter dated August 6, 1996, appellant requested reconsideration of the Office's decision.

By letter dated September 19, 1996, the Office denied appellant's reconsideration request.

The Board finds that appellant's fractured tooth occurred in the performance of duty.

Under the Federal Employees' Compensation Act, an employee on travel duty is in the performance of duty 24 hours a day except when he deviates and takes himself out of the performance of duty for purely personal pursuits.<sup>1</sup> It is the Office's burden to show that such a deviation occurred.<sup>2</sup> In this case, appellant traveled to Howard's Air Force Base in Panama for temporary duty as directed by the employing establishment. On August 17, 1995 he fractured his tooth in the middle of the night while he was sleeping. A witness reported on appellant's CA-1 that he observed that appellant had a fractured tooth on August 17, 1995 and appellant's tooth had not been fractured prior to that date. Appellant also reported that he had fractured his tooth to his supervisor on August 17, 1995 and sought treatment for it on that date. As appellant's only purpose at Howard's Air Force Base in Panama was to perform temporary duty as directed by the employing establishment, his fractured tooth was sustained in the performance of duty because it occurred while appellant was under the 24-hour coverage of the Act. The Office has not submitted any evidence which would show that the fractured tooth was caused by any deviation by appellant for purely personal pursuits.<sup>3</sup>

The Board finds that the Office properly denied appellant's request for a hearing.

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<sup>1</sup> *Michael J. Koll, Jr.*, 37 ECAB 340, 341 (1996).

<sup>2</sup> *Id.*; *Theresa B. L. Grissom*, 18 ECAB 193 (1966).

<sup>3</sup> Based on the Board's finding, the denial of appellant's hearing is moot.

The decisions of the Office of Workers' Compensation Programs dated September 19 and April 11, 1996 denying appellant's claim for compensation are hereby reversed, and the case is remanded for payment of the appropriate benefits.

Dated, Washington, D.C.  
December 22, 1998

George E. Rivers  
Member

Michael E. Groom  
Alternate Member

Bradley T. Knott  
Alternate Member