

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of KATHRYNE LYONS and DEPARTMENT OF DEFENSE,
DEFENSE PERSONNEL SUPPORT CENTER, Philadelphia, Pa.

*Docket No. 96-984; Submitted on the Record;
Issued January 27, 1998*

DECISION and ORDER

Before GEORGE E. RIVERS, DAVID S. GERSON,
MICHAEL E. GROOM

The issue is whether appellant sustained an injury in the performance of duty on September 6, 1994.

The Board has duly reviewed the case record and finds that appellant did not establish that she sustained an injury in the performance of duty.

Congress, in providing for a compensation program for federal employees, did not contemplate an insurance program against any and every injury, illness, or mishap that might befall employee contemporaneous or coincidental with his or her employment. It is not sufficient under general principles of workers' compensation law to predicate liability merely upon the existence of an employee-employer relationship.¹ Congress has provided for the payment of compensation for disability or death resulting from personal injury sustained while in the performance of duty. The Board has interpreted the phrase "while in the performance of duty" to be the equivalent of the commonly found prerequisite in workers' compensation law of "arising out of and in the course of employment."² "In the course of employment" deals with the work setting, the locale, and the time of injury, whereas "arising out of the employment" encompasses not only the work setting, but also a causal concept, the requirement being that an employment factor caused the injury.³ In the compensation field, it is generally held that an injury arises out of and in the course of employment when it takes place: (a) within the period of employment; (b) at the place where the employee may reasonably be expected to be in connection with the employment; (c) while he is reasonably fulfilling the duties of the employment or engaged in doing something incidental thereto; and (d) when it is the result of a

¹ *George A. Fenske*, 11 ECAB 471 (1960).

² *Timothy K. Burns*, 44 ECAB 291 (1992); *Jerry L. Sweeden*, 41 ECAB 721 (1990).

³ *Larry J. Thomas*, 44 ECAB 291 (1992).

risk involved in the employment, or the risk is incidental to the employment or to the conditions under which the employment is performed.⁴

The facts in this case indicate that on September 6, 1994 appellant, then a 55-year-old quality assurance specialist, filed a traumatic injury claim, stating that she injured her right ankle, head, left shoulder, elbow, hip and hand when she fell in a “depression or gully” while on a 3-mile walk at 6:20 a.m. on September 6, 1994. She indicated that every morning she walked 3 miles around the employing establishment compound between 5:45 a.m. and 6:30 a.m. On the reverse of the form, appellant’s supervisor indicated that appellant’s regular work hours were 6:30 a.m. to 5:00 p.m. and that the injury occurred prior to official duty hours. Appellant stopped work that day and returned to work on September 12, 1997.

Following a request by the Office of Workers’ Compensation Programs, appellant submitted a statement, advising:

“On September 6, 1994, after parking my car, going to my desk and leaving my lunch box and signing in for 6:30 [a.m.], I took a walk around the [c]ompound as many employees do in the morning and at lunch. At approximately 6:20 a.m. on my way back to my building I stepped on the edge of a pothole which cause[d] my ankle to twist, throwing me to the ground.”

A September 12, 1994 employing establishment incident report indicated that at approximately 6:20 a.m. on September 6, 1994, as appellant was taking her daily walk around the compound which she did “for the exercise,” she stepped in a hole and twisted her ankle. By decision dated May 15, 1995, the Office denied appellant’s claim on the grounds that her injury did not occur while she was in the performance of duty. The Office found that, while the injury occurred on government property, appellant was engaged in a voluntary recreational activity that was not required by her position.

On June 7, 1995 appellant requested reconsideration and submitted information regarding injury compensation and a “walk at work” program at the employing establishment. In a July 11, 1995 decision, the Office denied modification of the prior decision, finding that the fact that appellant came to work early to engage in a personal activity was of no benefit to and was not required by the employing establishment. Appellant again timely requested reconsideration, stating that the “one and only” reason that she always arrived at work one-half hour early was to secure a “decent” parking spot. She contended that her injury was covered because at the time she was injured: (1) as she was using government facilities for her health, her activity was reasonably associated with employment; (2) she was within reasonable time limits before regular duty hours; (3) she had finished her morning walk and was on her way to work when she fell; (4) she came to work early to secure a good parking place; and (5) she fell in parking facilities. On August 10, 1995 the employing establishment advised the Office that the pothole in question was located a few feet from the entrance to appellant’s worksite and “posed a serious tripping hazard to anyone traversing the area regardless of activity.”

⁴ *Mary Beth Smith*, 47 ECAB ____ (Docket No. 95-1604, issued August 26, 1996).

By decision dated October 25, 1995, the Office again denied modification, stating that appellant's recreational walking was not within the performance of duty as it was not a regular incident of employment, and that the employing establishment did not expressly or impliedly require her participation and did not derive a substantial benefit from the activity beyond the intangible value of improvement in employee health and morale. The Office noted that appellant's presence on the premises at the time of injury was for her own convenience, noting that she had been on the premises since 5:45 a.m. and was engaged in personal activities at 6:20 a.m. when she was injured.

In the present case, appellant sustained a fracture to her right foot when she fell in a pothole on employing establishment property at 6:20 a.m. on September 6, 1994 while engaged in a 3-mile walk prior to reporting to work at 6:30 a.m. However, the mere fact that an injury occurred on the employing establishment premises prior to work is insufficient to bring the injury within appellant's performance of duty. The injury did not occur during appellant's regular work shift or during lunch or a recreation period that was a regular incident of employment. Some substantial employer benefit or an employer requirement must be shown in order to consider the activity involved as arising out of employment.⁵ Appellant was not engaged in the duties of her work with the employing establishment or in activities which would be characterized as reasonably incidental to the conditions of her employment. Rather, she arrived at work approximately 45 minutes before her official workday began in order to secure a better parking place and to engage in personal exercise. Her supervisor noted that the injury had not occurred in the performance of duty as it occurred prior to official duty hours. There is no evidence that the employing establishment expressly or impliedly required appellant's presence on the premises prior to her official hours as part of any organized exercise program. Only as a matter of personal convenience did appellant choose to arrive to work early on September 6, 1994. The Board, therefore, finds that, as there is no evidence that appellant's injury resulted from any employment-related factors, appellant did not sustain an injury in the performance of duty.⁶

⁵ See *Dwight D. Henderson*, 46 ECAB ____ (Docket No. 93-2399, issued January 23, 1995); *Nona J. Noel*, 36 ECAB 329 (1984).

⁶ *Timothy K. Burns*, *supra* note 2.

The decisions of the Office of Workers' Compensation Programs dated October 25, July 11 and May 15, 1995 are hereby affirmed.

Dated, Washington, D.C.
January 27, 1998

George E. Rivers
Member

David S. Gerson
Member

Michael E. Groom
Alternate Member