

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of KEITH W. LONGEY and DEPARTMENT OF VETERANS AFFAIRS,
VETERANS ADMINISTRATION MEDICAL CENTER, Providence, RI

*Docket No. 01-491; Submitted on the Record;
Issued November 6, 2001*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issue is whether appellant sustained an injury in the performance of duty on October 19, 1998.

On November 20, 1998 appellant, then a 54-year-old vocational rehabilitation specialist, filed a traumatic injury claim alleging that a supervisor assaulted him at approximately 12:50 p.m., on October 19, 1998 and caused injury to his left foot while walking on a street. On the claim form appellant asserted that his supervisor, Alice Brew, "pursued [him] across the street and in trying to stop [him] from walking to a store, 'jostled' [him], causing loss of balance striking left foot on the raised sidewalk." On the reverse side of the claim form, Ms. Brew noted that appellant was not injured in the performance of duty, as the alleged injury occurred during his unpaid lunch break off premises. She further noted that appellant did not notify her on October 19, 1998 of a work-related injury and that he did not stop work.

On December 22, 1998 the employing establishment controverted the claim, asserting that appellant did not notify his supervisor of his alleged injury until November 20, 1998; that there were no witnesses to the injury and that the alleged injury occurred off premises while appellant was on his lunch break. A representative of the employing establishment indicated that on the day in question, Ms. Brew was simply trying to discuss an assignment with appellant, when he walked away from her and left the building. The representative indicated that, although Ms. Brew followed appellant out of the building, she never assaulted him. The employing establishment submitted additional documentation, including grievance papers filed by appellant related to the October 19, 1998 incident, a letter of apology from Ms. Brew dated October 26, 1998 and a witness statement from Ms. Brew dated November 20, 1998. In the statement, Ms. Brew asserted:

"On October 19, 1998 [appellant] and I left the [employing establishment] together. As we approached the corner of Dabol and Elmwood, [appellant] crossed over to the opposite sidewalk. He was hobbling slightly from a foot

injury he had since August. I crossed a little behind him, reading to him from a paper I had in my hand. I did notice that in a few feet, the sidewalk on Elmwood has a raised section from a tree root. (A few yards further is a serious raised piece of sidewalk which you actually must step over.) “I put out my hand to stop [appellant], touching his arm. I was unaware that my touching his arm caused him to become unbalanced as he claims. I did not witness his stumbling, nor did I hear him falling or stumbling. I returned directly to the [employing establishment] not observing him any further.

“When he reentered the [employing establishment] some ten minutes hence, he never mentioned that he had been injured. He made mention of our having been seen disagreeing in the street, but he did not mention any injury that day.

“On November 22, 1998 [appellant] came in with a formal grievance against me, accusing me of ‘jostling’ him and causing injury to his foot.”

On February 9, 1999 a claims examiner from the Office of Workers’ Compensation Programs conducted a teleconference with Ms. Brew and reviewed evidence submitted by appellant and the employing establishment. The Office subsequently received a statement from Gary Roy, an employing establishment staff member dated October 22, 1998 regarding the October 19, 1998 incident. In the statement, Mr. Roy asserted:

“Upon my return from lunch, I could not help but overhear a rather loud discussion between [Ms.] Brew and [appellant]. From what I could hear, the gist of the conversation bore [Ms. Brew] telling [appellant] to attend the individual staff meetings of MHBSS in order to introduce the 1988 CFC Campaign. My sense is that [appellant] found a problem in complying with [Ms. Brew’s] request. “From within my office, I noticed the discussion stem from the kitchen to the foyer area of the [employing establishment] as [appellant] was walking away from [Ms. Brew] as she was talking to him. She tried to show [appellant] a sample of CFC forms that I attached to the MHBSS staff person’s CFC packet. At that point, however, [appellant] had neither an interest in seeing the form nor an interest in discussing the form. As [appellant] was walking away from [Ms. Brew], she asked quite loudly, ‘Where are you going? Do n[o]t walk away from me when I [a]m talking to you!’ [Appellant] replied in the same t[on]e, ‘I’m going to lunch!’ Then he walked out the door. [Ms. Brewer] in turn followed him out the door unto Elmwood Avenue.”

Appellant submitted medical evidence, including a report dated November 9, 1998 which indicated that [he] had a 12-year history of diabetes and had been complaining of swelling in his left foot without any history of trauma since July 1998. In a report dated November 20, 1998,

Dr. Glen Dubler, a Board-certified orthopedic surgeon indicated that appellant was seen for a follow-up for diabetic foot care with Charcot midfoot dislocation. He further stated:

“[Appellant] today informs me that he was assaulted on the job on October 19, 1998 at which time he stumbled, misstepped and sustained injury to his left foot. It is apparent from the radiographic record that the Charcot dislocation of the midfoot was not present prior to that date and was present subsequent to that date on x-rays. It is, therefore, my opinion based on the history obtained and the radiographic records that the October 19, 1998 occupational assault resulted in the severe injury to the left foot with Lisfranc dislocation.”

Appellant submitted a report from Dr. James Lippincott, a Board-certified family practitioner, dated December 29, 1998 in which he stated that appellant required light duty upon return to work in January 1999 due to significant problems stemming from ulceration of his foot, secondary to diabetic vasculopathy in a Charcot joint. He submitted another report from Dr. Dubler dated February 8, 1999, which generally related appellant's history of the alleged work injury and indicated that appellant was treated for a fracture dislocation with Charcot arthropathy involving the left foot.

By decision dated June 3, 1999, the Office denied appellant's claim on the grounds that the evidence failed to establish that the injury occurred in the performance of duty as alleged.

On June 30, 1999 appellant requested an oral hearing, which was held April 27, 2000. During the hearing, appellant provided testimony and affidavits from Ms. Brew and Dr. Bauer, which were reviewed by the Office's Branch of Hearings and Review.

The Office also received a letter from Dr. Lippincott dated December 3, 1999 which discussed in detail appellant's treatment since September 1998. He reported that appellant had diabetes for a number of years that had been poorly controlled and that his condition had worsened over the previous year because of his problems associated with the Charcot joint and chronic swelling of his feet. Dr. Lippincott indicated that in September 1998 appellant was seen for an x-ray, which returned unremarkable. He related that appellant was involved in an altercation at work and was seen on October 27, 1998; however, x-rays were not repeated at that time. [Dr. Lippincott] stated that appellant was later seen in November and had significant discomfort in his left foot and x-rays performed at that time showed a question of an early Charcot joint complicated by neuropathy and borderline creatinine.

By decision dated August 31, 2000, an Office hearing representative found that the evidence of record failed to substantiate that appellant was in the performance of duty when the alleged injury occurred.

The Board finds that appellant did not meet his burden of proof to establish that he sustained an injury in the performance of duty on October 19, 1998.

The Federal Employees' Compensation 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. The term while in the performance of duty has been interpreted to be the

equivalent of the commonly found prerequisite in workers' compensation or arising out of and in the course of employment. The phrase in the course of employment is recognized as relating to the work situation and more particularly, relating to elements of time, place and circumstance. In the compensation field, to occur in the course of employment, an injury must occur: (1) at a time when the employee may be reasonably said to be engaged in the master's business; (2) at a place where he may reasonably be expected to be in connection with the employment; and (3) while he was reasonably fulfilling the duties of his employment or engaged in doing something incidental thereto. This alone is not sufficient to establish entitlement to benefits for compensability. The concomitant requirement of an injury arising out of the employment must be shown and this encompasses not only the work setting but also a causal concept, the requirement being that the employment caused the injury. In order for an injury to be considered as arising out of the employment, the facts of the case must show substantial employer benefit is derived or an employment requirement gave rise to the injury.¹

In the present case, appellant alleged that Ms. Brew, his supervisor physically assaulted him on October 19, 1998 while he was walking to lunch and that this incident caused him to lose balance on a sidewalk resulting in injury to his left foot. Initially, the Board finds that at the time of the alleged assault, appellant was carrying out the employing establishment's business, even though the alleged assault occurred off premises. The record establishes that Ms. Brew followed appellant out of the employing establishment to continue a discussion regarding work matters after appellant notified her that he was going to lunch.

Appellant, however, has not established factual allegation that a physical injury occurred at this time. Ms. Brew maintains that, although she and appellant discussed business with raised voices while leaving the employing establishment at appellant's lunch break, no physical injury took place. Regarding the incident on the street, Ms. Brew stated: "I put out my hand to stop [appellant], touching his arm. I was unaware that my touching his arm caused him to become unbalanced as he claims. I did not witness his stumbling, nor did I hear him falling or stumbling." Ms. Brew further noted that appellant did not indicate that he had been injured and did not report any injury for 31 days. Moreover, appellant has failed to submit any evidence corroborating his assertion that he was the victim of a physical assault on October 19, 1998. In this regard, the statement from Mr. Roy only corroborates that appellant and Ms. Brew had a loud verbal exchange while exiting the work premises on October 19, 1998. Mr. Roy fails to corroborate that Ms. Brew assaulted appellant or that appellant sustained an injury. The medical evidence establishes that appellant had a long-standing history with diabetes, which caused problems of pain and swelling in his feet and Charcot joint. Appellant had reported the history of injury to his physician, who explained that his foot condition could have been exacerbated by a stumbling incident, however, such evidence does not support that he sustained an injury on October 19, 1998. Appellant has not established that he sustained an injury on October 19, 1998, as alleged.

¹ 5 U.S.C. § 8102(a).

Accordingly, the decision of the Office of Workers' Compensation Programs dated August 31, 2000 is affirmed.

Dated, Washington, DC
November 6, 2001

David S. Gerson
Member

Willie T.C. Thomas
Member

Michael E. Groom
Alternate Member