

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ADAM DUMOT and U.S. POSTAL SERVICE,
POST OFFICE, Cleveland, OH

*Docket No. 00-2317; Submitted on the Record;
Issued September 13, 2001*

DECISION and ORDER

Before DAVID S. GERSON, A. PETER KANJORSKI,
PRISCILLA ANNE SCHWAB

The issue is whether appellant sustained a compensable injury while in the performance of duty.

On September 9, 1998 appellant, then a 73-year-old manager, filed a traumatic injury claim alleging that he fractured his left hip while he was getting out of his vehicle. He was reaching into the back of his vehicle for his canes when his left leg twisted under him and he fell to the ground.

In an emergency room report dated September 9, 1998, Dr. Eric Anderson indicated that appellant complained of pain in his left knee, hip and ankle after he fell while getting out of a car and noted that appellant was unable to walk.

In an admitting report dated September 9, 1998, Dr. Gordon R. Bell, appellant's attending Board-certified orthopedic surgeon, diagnosed left femoral fracture and recommended a total hip replacement. Dr. Bell noted that appellant had a history of polio, colitis and left total knee replacement in 1989. He indicated that appellant stated that he fell while at work and was unable to get up.

In an October 16, 1998 report, Dr. Bell noted:

“My understanding of [appellant]'s prior condition is that he has been very stiff for many years and because of the stiffness used canes to ambulate safely. I am not aware as to whether or not he had pain in that hip, but even if so, the injury sustained by him was a fracture, not an arthritic condition of the hip and therefore the surgery itself was performed to fix the injury sustained while he was apparently getting out of his truck at work.”

By decision dated November 6, 1998, the Office denied the claim, finding that the fall arose out of personal difficulty.

Appellant requested an oral hearing, which was held on April 27, 1999. By decision dated July 16, 1999, the Office hearing representative affirmed the denial of appellant's claim.

The Board finds that appellant's fall at work on September 9, 1998 was sustained while in the performance of duty within the meaning of the Federal Employees' Compensation Act.¹

An employee who claims benefits under the Act has the burden of establishing the occurrence of an injury at the time, place and in the manner alleged, by preponderance of the reliable, probative and substantial evidence.² Congress did not contemplate an insurance program against any and every injury, illness or mishap that might befall an employee contemporaneous or coincidental with her employment; liability does not attach merely upon the existence of an employee/employer relation.³ Instead, Congress provided for the payment of compensation for disability or death of an employee 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 requisite in workers' compensation law of "arising out of and in the course of employment."

"In the course of employment" deals with the work setting, the locale, and the time of injury whereas "arising out of employment" encompasses not only the work setting but also a causal concept, the requirement being that an employment factor caused the injury.⁴ In addressing the issue, the Board stated:

"In the compensation field, to occur in the course of employment, in general, an injury must occur: (1) at the time when the employee may reasonably be said to be engaged in his 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 something incidental thereto."⁵

In order for an injury to be considered as "arising out of the employment," the facts of the case must show some "substantial employer benefit or an employer requirement" which gave rise to the injury.⁶

It is a general rule that where an injury arises in the course of employment, occurs within the period of employment at a place where the employee reasonably may be and takes place while the employee is fulfilling his duties or is engaged in doing something incidental thereto,

¹ 5 U.S.C. §§ 8101-8193.

² *William Sircovitch*, 38 ECAB 756 (1987).

³ *Christine Lawrence*, 36 ECAB 422 (1985); *Minnie M. Heubner*, 2 ECAB 20 (1948).

⁴ *Denis F. Rafferty*, 16 ECAB 413 (1965).

⁵ *Carmen B. Gutierrez*, 7 ECAB 58 (1954).

⁶ *Eugene G. Chin*, 39 ECAB 598 (1988); *Nona J. Noel*, 36 ECAB 329 (1984).

the injury is compensable unless it is established to be within an exception to the general rule.⁷ It is clear from the record that appellant's duties required that he drive to many facilities in the course of his employment. On the date of the injury, he had parked in his handicap parking space on the employing establishment premises. The Board finds that he was in the performance of duty at the time of the injury.

Under the workers' compensation statutory scheme, an injury does not include "any injury or condition preexisting at the time of employment with the employer against whom a claim is made. However, Larson's treatise of workers' compensation law states:

"[A] preexisting disease or infirmity of the employee does not disqualify a claim under the 'arising out of employment' requirement if the employment aggravated the disease or infirmity to produce the death or disability for which compensation is sought. This is sometimes expressed by saying that the employer takes the employee as it finds that employee."⁸

Thus, the issue in this case becomes whether appellant's work duties aggravated his infirmity to produce the disability for which he is claiming compensation. Appellant was in the performance of duty when he reached for his canes while getting out of his vehicle to perform his employment duties. He fell and fractured his left hip as a result of this work activity. Therefore, the fall did not occur solely as a result of a nonoccupational pathology, since there was contribution by the reaching into the back of the truck for his crutch. A review of the record shows that there is no credible evidence, either medical or factual, attributing appellant's condition to anything other than his employment. Both Drs. Bell and Anderson attributed appellant's injury to his fall at work. The evidence establishes that appellant's preexisting condition was aggravated by work factors and, thus, appellant sustained an injury while in the performance of duty.

⁷ *Albert E. Herrmann, Jr.*, 35 ECAB 167 (1983); *Gertrude E. Evans (Wesley E. Evans)*, 26 ECAB 195 (1974).

⁸ 1 Larson, *The Law of Workers' Compensation* § 9.02; see *Pauline Finley*, 19 ECAB 481 (1968).

The July 16, 1999 decision of the Office of Workers' Compensation Programs is hereby reversed and the case is remanded to the Office to determine the nature and extent of any disability causally related to the September 9, 1998 fall.

Dated, Washington, DC
September 13, 2001

David S. Gerson
Member

A. Peter Kanjorski
Alternate Member

Priscilla Anne Schwab
Alternate Member