

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

MICHAEL KOSOWSKI, Appellant

and

**NEW YORK CITY POLICE DEPARTMENT,
New York, NY, Employer**

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**Docket No. 04-2263
Issued November 22, 2005**

Appearances:
Eric Nelson, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

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

JURISDICTION

On September 10, 2004 appellant filed a timely appeal of a June 14, 2004 merit decision of the Office of Workers' Compensation Programs, denying his claim on the grounds that his September 11, 2001 injuries did not fall within the purview of 5 U.S.C. § 8191. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d), the Board has jurisdiction over the merits of the claim.

ISSUE

The issue is whether appellant's September 11, 2001 injury falls within the purview of 5 U.S.C. § 8191.

FACTUAL HISTORY

On March 4, 2004 appellant, then a 47-year-old New York City police officer, filed a notice of law enforcement officer's injury or occupational disease claim (Form CA-721a), alleging that he sustained injuries to his right back, neck and hip bone and suffered nerve damage and decreased lung capacity at the World Trade Center during a terrorist attack on the United States on September 11, 2001. He stated that he was hit by falling debris while he was

evacuating civilians from the North and South Towers and was blown against a wall when the South Tower collapsed. Appellant identified three witnesses, to-wit: Lieutenant Roger Perino, Detective Hugh McGroogh and Detective Joseph Colalluzo.

Appellant submitted a variety of documents, including a statement from his supervising officer dated November 19, 2003 attesting to his heroic efforts on September 11, 2001. In a March 16, 2004 attending physician's report, Dr. Henry Birnbaum, a Board-certified physiatrist, noted that appellant was injured on September 11, 2001 and provided diagnoses of cervical disc herniation with radiculopathy, lumbar disc displacement and right hip tendinitis. In an August 18, 2003 letter, Dr. James L. Bruno, a Board-certified internist, addressed treatment of appellant since November 8, 2003 for shortness of breath, dyspnea on exertion, GERD, OSA and asthma bronchitis resulting from exposure to debris at "ground zero" on September 11, 2001. A July 21, 2003 letter from Dr. Bruno reflects that he treated appellant once a month since October 2002 for injuries to his neck, back and hip sustained on September 11, 2001. In a memorandum dated October 21, 2003, the employing establishment's medical board indicated that appellant could no longer perform his duties as a result of injuries sustained on September 11, 2001. A July 22, 2003 letter from his chiropractor, Dr. Jerylyn Jacob, noted treatment of appellant for injuries related to September 11, 2001 and diagnosed lumbar radiculopathy, lumbar intervertebral disc syndrome and cervical radiculopathy. Hospital emergency room records dated September 15, 2001 address a history of the September 11, 2001 injury as reported by appellant and diagnoses of eye irritation and shoulder sprain.

By letter dated March 29, 2004, the Office advised appellant that the information submitted was insufficient to establish his claim and requested additional information regarding his medical condition and his involvement in activities cited in 5 U.S.C. § 8191. Specifically, the Office sought evidence indicating that he was preventing a crime against the United States, protecting a person held for the commission of a crime against the United States or apprehending an individual for a crime against the United States. He did not submit any additional evidence or information.

By decision dated June 14, 2004, the Office denied appellant's claim, finding that there was insufficient evidence presented to establish that he was engaged in the apprehension of a person sought for the commission of a crime against the United States; that he was guarding or protecting a person held for the commission of a crime against the United States or as a material witness in connection with such crime; or that he was engaged in the prevention of a federal crime.

LEGAL PRECEDENT

Under the Federal Employees' Compensation Act,¹ an individual seeking compensation benefits has the burden of proof to establish the essential elements of his claim, including the fact that he is an employee of the United States within the meaning of the Act.²

¹ 5 U.S.C. §§ 8101-8193.

² *Morris W. Farlow*, 48 ECAB 659 (1997).

In pertinent part, 5 U.S.C. § 8191 provides that an eligible officer is any person who is determined by the Secretary of Labor in her discretion to have been on any given occasion --

“(1) A law enforcement officer and to have been engaged on that occasion in the apprehension or attempted apprehension of any person --

(A) for the commission of a crime against the United States; or

(B) who at that time was sought by a law enforcement authority of the United States for the commission of a crime against the United States; or

(C) who at that time was sought as a material witness in a criminal proceeding instituted by the United States; or

“(2) a law enforcement officer and to have been engaged on that occasion in protecting or guarding a person held for the commission of a crime against the United States or as a material witness in connection with such a crime; or

“(3) a law enforcement officer and to have been engaged on that occasion in the lawful prevention of, or lawful attempt to prevent, the commission of a crime against the United States....”³

The Board has recognized that the issue of whether a law enforcement officer was attempting to apprehend someone for or prevent the commission of a federal crime, turns initially on the question of whether, at the time the injury was sustained, the local law enforcement officer knew that a federal crime or potential federal crime was being committed, and, therefore, formed the intent to apprehend someone for or to prevent the commission of, a federal crime.⁴ Knowledge of a potential federal crime at the time of injury or death does not, alone establish eligibility to receive benefits under the Act.⁵ The claimant must establish that the activities in which he was engaged at the time of injury constituted the apprehension or attempted apprehension of a federal offender or the lawful prevention of or lawful attempt to prevent, the commission of a federal crime.⁶

ANALYSIS

The Board finds that appellant is not entitled to coverage under section 8191 of the Act for the injuries he sustained on September 11, 2001 at the World Trade Center.

On September 11, 2001 appellant was acting in his capacity as a law enforcement officer when he engaged in search and rescue efforts at the World Trade Center during and after the

³ 5 U.S.C. § 8191.

⁴ *Joel Goldberg*, 45 ECAB 448, 452 (1994).

⁵ *See Jean Ann Nalley (Guy David Nalley)*, 38 ECAB 561, 565 (1987).

⁶ *See Kenneth Dudonis*, 37 ECAB 287, 293 (1986).

terrorist attack. He did not allege that he was engaged on that occasion in the apprehension or attempted apprehension of a person for the commission of a crime against the United States or who was sought at that time as a material witness in a criminal proceeding instituted by the United States. Therefore, the Board finds that appellant is not entitled to coverage under parts (1) or (2) of section 8191.

Appellant contends, however, that he is entitled to coverage under part (3) of section 8191, as he engaged on that occasion in the lawful prevention of a crime against the United States by rescuing individuals from the World Trade Center, thereby preventing them from being victims of crimes. The Board has recognized that the issue of whether a local law enforcement officer was attempting to prevent the commission of a federal crime turns initially on the question of whether, at the time the injury was sustained, the officer had knowledge that a federal crime was being or about to be committed and, therefore, formed the intent to prevent the commission of a federal crime.⁷ In the instant case, the record does not reflect, nor has appellant alleged, that he had the intent to prevent the commission of a federal crime or that he knew that a federal crime was being committed. The evidence reveals that he was hit by falling debris while he was engaged in rescue activities evacuating civilians from the North and South World Trade Center Towers and was blown against a wall when the South Tower collapsed. These facts are not in dispute and are supported by witnesses. However, appellant submitted no evidence that he possessed the intent to prevent the commission of a federal crime. The Board finds that at the time of his injury, appellant did not have the intent to prevent the commission of a crime, but rather was performing his duties as a police officer in rescuing civilians from the World Trade Center.

While the Act is remedial in nature and should be broadly and liberally construed in accord with its purpose, the primary rule of statutory construction is to give effect to legislative intent.⁸ Although section 8191 does not explicitly state that in order to be eligible an officer must be aware of a federal link, the legislative history supports that the local officer must be purposely, not accidentally, engaged in the federal law enforcement activity.⁹ The purpose of the section 8191 was to provide compensation benefits for state and local enforcement officers who expose themselves to the dangers of enforcing federal laws or providing assistance to federal authorities.¹⁰ Although appellant may have been generally aware of a federal crime, his activities in rescuing and assisting to evacuate people from the towers do not constitute an attempt to prevent the commission of a federal crime.

⁷ See *Morris W. Farlow*, *supra* note 2. The Board found that appellant was not entitled to coverage under the Act after he received a gunshot wound to the head during a routine traffic stop. It was determined after the fact that the driver was a possible federal offender. The decision was based on the facts: (1) appellant had no knowledge that the occupants of the vehicle were federal offenders; and (2) that the officer was not, at the time of the incident, apprehending the shooter. See also *Alfred A. Danna*, 47 ECAB 789 (1996); *Fred A. Olsen*, 40 ECAB 767 (1989).

⁸ *Morris W. Farlow*, *supra* note 2.

⁹ See *Lance D. Coleman*, 41 ECAB 604, 614 n.10 (1990) (listing congressional comments to this effect).

¹⁰ *Morris W. Farlow*, *supra* note 2, citing Congressional Record September 14, 1967, pages 25, 567.

Appellant's argument that he prevented the commission of a crime against citizens of the United States by rescuing individuals from the World Trade Center is without merit. His search and rescue effort cannot be construed as "the lawful prevention of or lawful attempt to prevent the commission of a crime against the United States." While appellant's actions may have saved lives, he did not act with the intent to prevent the commission of a federal crime. The Board finds that his lack of intent to prevent the commission of a federal crime precludes coverage under section 8191. Although appellant acted in a heroic manner on September 11, 2001 in the performance of his duties, the Board has no power to enlarge the specific terms of the statute or to grant benefits on a basis other than that provided by the Act.¹¹

CONCLUSION

The Board finds that appellant's September 11, 2001 injury does not fall within the purview of 5 U.S.C. § 8191.

ORDER

IT IS HEREBY ORDERED THAT the June 14, 2004 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 21, 2005
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Willie T.C. Thomas, Alternate Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

¹¹ *Morris W. Farlow, supra* note 2.