United States Department of Labor
Employees' Compensation Appeals Board

R.H., Appellant	)	
	)	
and	)	**Docket No. 09-322**
	)	**Issued: July 23, 2009**
DEPARTMENT OF THE TREASURY, INTERNAL REVENUE SERVICE, Richmond, VA, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
COLLEEN DUFFY KIKO, Judge

JURISDICTION

On November 13, 2008 appellant filed a timely appeal from an October 8, 2008 merit decision of the Office of Workers' Compensation Programs that denied her claim. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant met her burden of proof to establish that she sustained an injury in the performance of duty on May 19, 2008.

FACTUAL HISTORY

On August 25, 2008 appellant, a 58-year-old information technology specialist, filed a traumatic injury claim (Form CA-1) for facial scratches and bruises on both of her knees. She attributed her condition to a May 19, 2008 incident when, while commuting to work, as she exited the L'Enfant Plaza Virginia Railroad Express station, she fell face-first onto the ground. Appellant alleged that she sustained a deep scratch on her forehead, nose, the right side of her

chin and eyes. She alleged that her whole face and both knees were bruised and swollen. The employing establishment controverted the claim noting that appellant was arriving late to work on the day in question. The employing establishment also noted that appellant's alleged injury did not occur on government time or property, but that appellant fell on VRE property while she was transferring from a VRE train to a metro train on her way into work.

Appellant submitted no other evidence in support of her claim and by letter dated September 3, 2008 the Office notified her that the evidence of record was insufficient to support her claim. The Office provided a list of the type of evidence required to establish her claim.

Responding to the Office's September 3, 2008 letter, appellant submitted medical records from Doctors Community Hospital concerning treatment she received on May 8, 2008. None of the records were signed by a physician. One of the documents in this series of records stated that appellant had been diagnosed with shoulder strain, a minor head injury, neck strain and a scrape of the outer skin layers.

Appellant submitted a medical note, dated May 19, 2008, signed by John D. Gilbert, certified physician's assistant, prescribing Motrin, as well as two May 20, 2008 medical notes signed by Dr. John F. Mills, Board-certified in family medicine, prescribing medications and an electroencephalogram.

Appellant submitted no other evidence in support of her claim and by decision dated October 8, 2008 the Office denied appellant's claim because the evidence of record was insufficient to establish that she sustained an injury as defined by the Act.[1] While the Office noted that the evidence of record established that the claimed event occurred the Office denied her claim because the evidence of record lacked a diagnosed medical condition that could be connected to the identified employment-related event by a physician.

LEGAL PRECEDENT

An employee seeking benefits under the Act[2] has the burden of establishing the essential elements of his or her claim. These elements include the fact that the individual is an employee of the United States within the meaning of the Act, that the claim was filed within the applicable

[1] On appeal, appellant submitted additional medical evidence consisting of medical reports from several physicians and an October 28, 2008 accommodation letter from the Department of Heath and Human Services. The Board may not consider evidence for the first time on appeal which was not before the Office at the time it issued the final decision in the case. 20 C.F.R. § 501.2(c). *See J.T.,* 59 ECAB ___ (Docket No. 07-1898, issued January 7, 2008) (holding the Board's jurisdiction is limited to reviewing the evidence that was before the Office at the time of its final decision.) As this evidence was not part of the record when the Office issued its previous decision, the Board may not consider it for the first time as part of appellant's appeal.

[2] 5 U.S.C. §§ 8101-8193.

time limitation, that an injury was sustained while in the performance of duty[3] as alleged and that any disability and/or specific condition for which compensation is claimed are causally related to the employment injury.[4] These are the essential elements of each and every compensation claim regardless of whether the claim is predicated on a traumatic injury or an occupational disease.[5]

Regarding performance of duty, the Board has recognized as a general rule that off-premises injuries sustained by employees having fixed hours and places of work, while going to or coming from work, are not compensable as they do not arise out of and in the course of employment. Such injuries are merely the ordinary, nonemployment hazards of the journey itself, which are shared by all travelers.[6] Certain exceptions to this rule have developed where the hazards of the travel are dependent on particular situations: (1) where the employment requires the employee to travel on the highways; (2) where the employer contracts to and does furnish transportation to and from work; (3) where the employee is subject to emergency call as in the case of firemen; and (4) where the employee uses the highway to do something incidental to his employment, with the knowledge and approval of the employer.[7]

Professor Larson, in his treatise on workers' compensation, notes that coverage is usually afforded in cases involving a deliberate and substantial payment for the expense of travel, or the provision of an automobile under the employee's control.[8] However, under most circumstances, the travel must be sufficiently important in itself to be regarded as part of the service performed and therefore within the performance of the employee's duties.[9] The Office's procedures also

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[3] The term "while in the performance of duty" has been interpreted to be the equivalent of the commonly found prerequisite in workers' compensation of 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 she 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. *Robert W. Walulis*, 51 ECAB 122 (1999). 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. *Cheryl Bowman*, 51 ECAB 519 (2000); *Charles Crawford*, 40 ECAB 474 (1989).

[4] *Joe D. Cameron*, 41 ECAB 153 (1989).

[5] *See Irene St. John*, 50 ECAB 521 (1999); *Michael E. Smith*, 50 ECAB 313 (1999).

[6] *Mary Kokich*, 52 ECAB 239 (2001); *Eileen R. Gibbons*, 52 ECAB 209 (2001).

[7] *Dennis L. Forsgren (Linda N. Forsgren)*, 53 ECAB 174 (2001); *Gabe Brooks*, 51 ECAB 184 (1999); *see Mary Margaret Grant*, 48 ECAB 969 (1997); *see generally* A. Larson, *The Law of Workers' Compensation* § 13.01 (2000) (explaining the coming and going rule).

[8] Larson, *supra* note 7 at § 14.07(1) (2000); *see also Mary Margaret Grant*, *supra* note 7.

[9] Larson, *supra* note 7 at § 14.07(3).

provide an exception for employees required to travel during a curfew established by local, municipal, county or state authorities because of civil disturbances or for other reasons.[10]

ANALYSIS

While the Office denied appellant's claim on the grounds that she had not established an injury causally related to her fall, the Board finds that appellant has not established that she was in the performance of duty at the time of the fall. Appellant was injured on May 19, 2008 when she fell while exiting the L'Enfant Plaza VRE station. The injuries occurred during appellant's morning commute and during a time when appellant was not on government time, as she had not reached her place of employment, or government property. Generally, an injury occurring on such a commute would not be covered under the Act unless an exception to the coming and going rule applies.[11] Appellant submitted no evidence establishing that her travel on the VRE or presence at the L'Enfant Plaza VRE station was a requirement of her employment. Therefore, she has not established an exception to the coming and going rule in this regard. As appellant did not allege facts establishing any of the other exceptions to the rule were applicable, she established no exception to the coming and going rule and, further, that her injuries were nothing more than ordinary, nonemployment hazards of the journey itself, which are shared by all travelers.

Appellant has not established that the May 19, 2008 injury occurred in the performance of duty. She established no exception to the coming and going rule.

CONCLUSION

The Board finds that appellant has not met her burden of proof to establish that she sustained an injury in the performance of duty on May 19, 2008.

[10] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Performance of Duty*, Chapter 2.804.6(f) (August 1992). In such cases, the official superior should be requested to submit: (a) the reason the employee was requested to report for duty; (b) whether other employees were given administrative leave because of the curfew; and (c) whether the injury resulted from a specific hazard caused by the imposition of the curfew, such as an attack by rioting citizens.

[11] *See Jimmie Brooks*, 54 ECAB 248 (2002). *See also Jon Louis Van Alstine*, 56 ECAB 136 (2004).

ORDER

IT IS HEREBY ORDERED THAT the October 8, 2008 decision of the Office of Workers' Compensation Programs is affirmed as modified.

Issued: July 23, 2009
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board