United States Department of Labor
Employees' Compensation Appeals Board

K.M., Appellant	)	
and	)	**Docket No. 10-914**
	)	**Issued: December 10, 2010**
DEPARTMENT OF COMMERCE, BUREAU OF THE CENSUS, Boston, MA, Employer	)	

Appearances:
Alan J. Shapiro, Esq., for the appellant
Miriam D. Ozur, Esq., for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On February 5, 2010 appellant, through her representative, filed a timely appeal of the August 31, 2009 and January 14, 2010 merit decisions of the Office of Workers' Compensation Programs. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.

ISSUE

The issue is whether appellant was an "employee" of the United States within the meaning of the Federal Employees' Compensation Act at the time of her injury.

FACTUAL HISTORY

On January 16, 2009 appellant, then a former recruiting assistant, filed a traumatic injury claim for a right eye injury. On January 14, 2009 she was leaving her home office to meet with U.S. Census Bureau Manager John Veryzer in order to return recruiting kits and to discuss future job opportunities when a bungee chord securing the heaviest box snapped, causing a metal hook

to strike her right eye. Appellant submitted CA-16, CA-20 and OWCP-957 forms, an injury report, emergency room records and a copy of a receipt for her travel from the hospital.

The employing establishment controverted the claim on the basis that appellant was not an employee at the time of injury because her job had been terminated the day prior on January 13, 2009. The employing establishment submitted a termination report, dated January 13, 2009, a performance evaluation and a supplement to Form CA-16.

By letter dated February 3, 2009, the Office advised appellant that there was insufficient evidence to support her claim. It requested additional factual and medical information and asked that she clarify when her employment was terminated.

On February 6, 2009 appellant submitted an accident report and additional hospital records. She stated that on January 13, 2009 she was terminated from her job as a recruiting assistant, but she agreed to meet with Mr. Veryzer in order to return the kits and to discuss the possibility of continuing work. Appellant explained that she was exiting her home office when a bungee cord used to secure a heavy box snapped and caused a large metal hook to strike her right eye. She was transported to the hospital where she was treated for her injury and given prescriptions. Appellant contended that "but for" her appointment to return the kits and discuss the possibility of future work, she would not have brought the heavy boxes and the incident would not have occurred.

In a letter dated February 6, 2009, Louis R. Fox, an administrative officer, stated that Mr. Veryzer had agreed to meet with appellant on January 14, 2010 to discuss the potential for future work, not the continuation of work. In a February 17, 2009 letter, Mr. Veryzer stated that he informed appellant on January 13, 2010 that she was being laid off from the employing establishment and requested that she return her kit. They decided to meet the next day in order for her to return the kit and to discuss future employment opportunities.

In a March 12, 2009 decision, the Office denied appellant's compensation claim on the grounds that she was not a civil employee within the meaning of the Act at the time of the alleged injury. It found that she was a recruiting assistant employed by the employing establishment until January 13, 2009 and that she injured her right eye on January 14, 2009. The evidence did not establish, however, that she was an employee at the time of injury. Although appellant was on her way to a meeting with her former manager at the time of the incident, she was not being paid for this meeting and the purpose of the meeting was to discuss future opportunities for employment and possible rehire, not a continuation of current employment.

On March 19, 2009 appellant, through her representative, requested a hearing. She submitted additional evidence, including progress notes from Dr. Ivana Kyung Kim, a Board-certified ophthalmologist, and Dr. Anupama R. Anchala, a Board-certified ophthalmologist.[1]

In a decision dated May 14, 2009, the Branch of Hearings and Review vacated the March 12, 2009 decision and remanded the case for further development. The hearing

[1] Two SF-50 forms were submitted addressing appellant's hiring in a temporary position as of December 1, 2008 and her termination based on lack of work on January 19, 2009.

representative noted that the two SF-50 forms created a discrepancy regarding appellant's last day in her position. The hearing representative determined that the January 19, 2009 SF-50 form notation conflicted with statements from both appellant and her supervisor that she was terminated on January 13, 2009. The case was remanded to clarify the discrepancy regarding when appellant's termination was effective. The hearing representative directed the Office to pay for appellant's emergency room bills based on the CA-16 form issued by the employer.[2]

By letters dated May 22 and June 17, 2009, the Office contacted the employing establishment and requested an explanation regarding the effective date of termination.

On August 18, 2009 Raymond C. Ahlberg, an administrative specialist for workers' compensation, responded to the Office, stating that the effective date of appellant's termination was January 13, 2009. That was the date she was informed of her termination and the last date at which she earned wages. Mr. Ahlberg submitted copies of D-283 and D-282 forms and of appellant's payroll record, which all listed her last day of employment as January 13, 2009. He explained that the January 19, 2009 date on the Form SF-50 was the employer's personnel and payroll system's processing date for a terminated employee's last pay period. Since the system required the effective date of termination to only be shown as the day after the end of the pay period, the employing establishment could not list January 13, 2009, which was in the middle of a pay period, as appellant's effective date of termination.

By decision dated August 31, 2009, the Office denied appellant's claim for compensation on the grounds that she was not a civil employee at the time of her injury. It determined that the Form SF-50 termination date was a system processing date due to the employer's payroll system and that the Form D-283, Form D-282 and appellant's payroll record supported January 13, 2009 as the last day of earned wages. The Office found that appellant was terminated on January 13, 2009 and was not a civil employee when her injury occurred.

Appellant, through her representative, requested a telephone hearing that was held on December 3, 2009. A transcript was forwarded to the employer in accordance with Office procedure. On December 31, 2009 Lavonne M. Lewis and Robert Heitman, workers' compensation specialists, responded by reiterating that appellant's job had terminated before she was injured. They contended that bringing equipment back to the employer did not make appellant an employee as former employees were routinely asked to return government materials.

In a January 14, 2010 decision, an Office hearing representative affirmed the August 31, 2009 Office decision. The hearing representative determined that returning to her former place of employment to discuss future employment possibilities and to return government equipment did not establish that appellant was injured while performing a service similar to a civil

[2] Federal (FECA) Procedure Manual, Part 5 -- Benefit Payments, *Principles of Bill Adjudication*, Chapter 5.204.2(a) (January 1996) provides that a completed Form CA-16 obligates the Office to pay for any injury-related treatment performed by the physician or medical facility identified in Part A. In this case, the employing establishment issued appellant a Form CA-16 to take to the emergency room on the date of the incident. Thus, the Office was required to enter the Form CA-16 into its computer system to ensure payment of the emergency room bills.

employee. The hearing representative found that appellant was injured while performing a task of a former employee and as an individual seeking possible further employment; therefore, she was not a civil employee at the time of injury.

LEGAL PRECEDENT

An employee seeking compensation under the Act[3] has the burden of establishing the essential elements of her claim by the weight of the reliable, probative and substantial evidence,[4] including that she is an "employee" within the meaning of the Act[5] and that she filed her claim within the applicable time limitation.[6] The employee must also establish that she sustained an injury in the performance of duty as alleged and that her disability for work, if any, was causally related to the employment injury.[7]

Section 8102(a) of the Act provides that compensation can only be paid for the "disability or death of an employee resulting from personal injury sustained while in the performance of duty."[8] For purposes of awarding compensation benefits under the Act, section 8101(1) defines "employee," in relevant part, as a "civil officer or employee in any branch of the Government of the United States" or as "an individual rendering personal service to the United States similar to the service of a civil officer or employee of the United States."[9] In determining whether a claimant is an employee for purposes of compensation, the Board will consider the particular facts and circumstances surrounding his or her employment.[10]

ANALYSIS

The Board finds that the circumstances surrounding appellant's employment demonstrate that she was not a civil employee of the United States at the time of her injury on January 14, 2009. The Office accepted that she was a recruiting assistant for the employer from December 1, 2008 to January 13, 2009 and that she sustained injury to her right eye on January 14, 2009, following her termination.

The record establishes that appellant's employment was terminated on January 13, 2009. Both the employing establishment and appellant stated that she was notified of her termination on January 13, 2009. Moreover, appellant's employment and payroll records establish that her

[3] 5 U.S.C. §§ 8101-8193.

[4] *J.P.*, 59 ECAB 178 (2007); *Joseph M. Whelan*, 20 ECAB 55, 57 (1968).

[5] *See M.H.*, 59 ECAB 461 (2008); *Emiliana de Guzman (Mother of Elpedio Mercado)*, 4 ECAB 357, 359 (1951); *see* 5 U.S.C. § 8101(1).

[6] *R.C.*, 59 ECAB 427 (2008); *Kathryn A. O'Donnell*, 7 ECAB 227, 231 (1954); *see* 5 U.S.C. § 8122.

[7] *G.T.*, 59 ECAB 447 (2008); *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

[8] 5 U.S.C. § 8102(a).

[9] *Id.* at § 8101(1).

[10] *Wendy S. Warner*, 38 ECAB 103 (1986).

last day of employment and earned wages was January 13, 2009. Her injury, on the other hand, occurred on January 14, 2009 after she was no longer employed or earning wages. As the injury occurred after appellant was no longer a federal civil employee, she is not entitled to compensation under the Act.[11]

Appellant contended that "but for" the fact that she was requested to return certain government materials and to meet with her former manager to discuss potential job opportunities, she would not have been injured. This assertion is insufficient to establish an employee and employer relationship. On December 31, 2009 Mr. Heitman noted that former employees were routinely asked to return government materials following employment. Similarly, in a February 6, 2009 letter, Mr. Veryzer noted that the purpose of the meeting was to discuss future employment opportunities. Appellant was not receiving wages from her former employer or any other benefit. She voluntarily chose to meet with her former manager and was not performing a service similar to that of a civil employee.[12] She attended the meeting for her own benefit to discuss potential job opportunities and was not yet an "employee" as of the time of injury. Accordingly, her activities on returning government materials are insufficient to establish her status as a civil employee of the United States within the meaning of the Act.[13] As noted in the memorandum in justification from the Director of the Office, appellant was already meeting with her former supervisor who asked that she return certain materials. Appellant did not meet her burden of proof to establish entitlement to compensation.[14]

CONCLUSION

The Board finds that appellant was not an "employee" of the United States for purposes of compensation at the time of her injury.[15]

[11] *See Lloyd E. Griffin, Jr.*, 46 ECAB 979 (1995) (denying claim for compensation because alleged treatments that led to his alcoholism occurred after he had retired from federal employment, and thus, the claimant was not an "employee" as defined under the Act when the claimed incidents occurred).

[12] *See Larry Knoke*, 39 ECAB 353 (1998) (denying claim for injury incurred while undergoing preemployment testing on the grounds that the claimant was receiving no pay from the employing establishment, was providing no identifiable service to the potential employer and had received no guarantee of employment).

[13] *Sandra Davis*, 50 ECAB 450 (1999); *William K. Bowen*, 49 ECAB 248 (1997).

[14] *Perez A. Brooks*, 7 ECAB 480 (1955); *Harold Hendrix*, 1 ECAB 54, 55 (1947).

[15] The Board notes that appellant submitted additional evidence to the record following the January 14, 2010 decision. Since the Board's jurisdiction is limited to evidence that was before the Office at the time it issued its final decision, the Board may not consider this evidence for the first time on appeal. *See* 20 C.F.R. § 501.2(c)(1).

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated January 14, 2010 and August 31, 2009 are affirmed.

Issued: December 10, 2010
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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