United States Department of Labor
Employees' Compensation Appeals Board

J.H., Appellant	)	
and	)	**Docket No. 10-185**
	)	**Issued: July 19, 2010**
DEPARTMENT OF HOMELAND SECURITY, U.S. CUSTOMS & BORDER PROTECTION, Rosemont, IL, 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
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On October 26, 2009 appellant filed a timely appeal of the April 28, 2009 merit decision of the Office of Workers' Compensation Programs, which found that he did not sustain an injury in the performance of duty on December 8, 2008. 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 met his burden of proof to establish that he sustained an injury in the performance of duty on December 8, 2008.

FACTUAL HISTORY

On December 9, 2008 appellant, a 51-year-old customs and border protection officer, filed a traumatic injury claim alleging that he sustained a torn rotator cuff injury at 8:25 a.m. on December 8, 2008 as he was leaving his home to go to work. He walked two steps from the house, slipped on ice and fell on his shoulder while attempting to avoid landing on his firearm.

Appellant's supervisor indicated that appellant's fixed hours were 8:30 a.m. to 5:00 p.m. He controverted the fact that appellant was injured in the performance of duty, as he was preparing to go to work when the injury occurred.

Appellant submitted medical reports from Dr. John C. Kefalas, a Board-certified orthopedic surgeon, dated December 19, 2008 through April 21, 2009, reflecting his treatment of appellant for a right rotator cuff tear. By letter dated April 22, 2009, the Office advised appellant of the factual and medical evidence needed to establish his claim.

In an April 28, 2009 decision, the Office denied appellant's claim. It found that he had not established that he was injured while in the performance of duty, as he was not on the employee's premises when the incident occurred and there was no exception that applied to the general rule that injuries occurring while going to or coming from work are not compensable as they do not arise out of and in the course of employment.[1]

LEGAL PRECEDENT

The Federal Employees' Compensation Act[2] provides for the payment of compensation benefits for disability or death of an employee resulting from personal injury sustained while in the performance of duty. The phrase while in the performance of duty in the Act has been interpreted by the Board to be the equivalent of the commonly found prerequisite in workers' compensation law of arising out of and in the course of employment.[3]

In addressing this issue, the Board has generally held that, in the compensation field, to occur in the course of employment, an injury must occur at a time when the employee may reasonably be said to be engaged in his or her master's business, at a place where he or she may reasonably be expected to be in connection with the employment and while he or she was reasonably fulfilling the duties of his or her employment or engaged in doing something incidental thereto.[4]

The Board has stated, as a general rule, that off-premises injuries sustained by employees having fixed hours and place 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 but are merely the ordinary, nonemployment hazards of the journey itself, which are shared by all travelers.[5] Due primarily to the myriad factual situations presented by individual cases over the years, certain exceptions to the general rule have developed where the hazards of the travel may fairly be considered a

[1] The Board notes that appellant submitted additional evidence after the Office rendered its April 28, 2009 decision. The Board's jurisdiction is limited to reviewing the evidence that was before the Office at the time of its final decision. Therefore, this additional evidence cannot be considered by the Board. 20 C.F.R. § 501.2(c); *Dennis E. Maddy*, 47 ECAB 259 (1995); *James C. Campbell*, 5 ECAB 35, 36 n.2 (1952).

[2] 5 U.S.C. § 8102(a).

[3] *Bernard D. Blum*, 1 ECAB 1 (1947).

[4] *James E. Chadden, Sr.*, 40 ECAB 312 (1988).

[5] *Gabe Brooks*, 51 ECAB 184 (1999); *Robert F. Hart*, 36 ECAB 186, 191 (1984).

hazard of the employment. These recognized exceptions are dependent upon the particular facts and related to 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 calls as in the case of firemen; and (4) where the employee uses the highway to do something incidental to her employment with the knowledge and approval of the employer.[6]

The Board has also recognized the "special errand" exception to the going to and coming from work rule. When the employee is to perform a "special errand," the employer is deemed to have agreed, expressly or impliedly, that the employment service should begin when the employee leaves home to perform the errand. Ordinarily, cases falling within this exception involve travel which differs in time, or route, or because of an intermediate stop, from the trip which is normally taken between home and work. In such a case, the hazard encountered in the trip may differ somewhat from that involved in normally going to and returning from work. However, the essence of the exception is not found in the fact that a greater or different hazard is encountered but in the agreement to undertake a special task. For this reason, coverage is afforded from the time the employee leaves home, even though in time and route the journey may be, in part, identical to that normally followed in going to work.[7]

Another exception, often related to the "special errand" situation, affords coverage of the compensation law to the employee who leaves his place of employment under direction to continue his work at home or who, as a consistent and recognized practice, performs part of his work at home. The scope of this exception is not as definite as the special errand exception. It is clear that it does not mean that an employee who carries home business papers or tools of his trade is by that fact covered by the compensation law during his journey to and from work. However, where the work is done at home by the direction of and for the benefit of the employer or where the work is regularly performed at home with the knowledge and consent of the employer or where there is an essential continuity of the work done at home and that performed at the regular place of employment, the journey between home and work is in the course of the employment.[8]

ANALYSIS

The Board finds that appellant failed to establish that he sustained an injury while in the performance of duty on December 8, 2008.

Appellant was not injured on the employing establishment premises. Rather, he was injured two steps outside his residence while he was on his way to work. As noted, the general coming and going rule would preclude coverage under the Act for this injury.[9] Appellant must establish that an exception to the general rule is applicable in this case. There are, however, no

[6] *Joan K. Phillips*, 54 ECAB 172 (2002); *see also Janet Rorrer*, 47 ECAB 764, 768 (1996).

[7] *Elmer L. Cooke*, 16 ECAB 163 (1964).

[8] *Id.*

[9] *See supra* note 5.

recognized exceptions that are applicable under these circumstances. No evidence was presented as to an emergency call, a contract by the employer for transportation, a requirement of travel by highways or use of the highway for an incident of employment with knowledge and approval of the employer. With respect to a special errand, there is no indication that the employing establishment expressly or impliedly agreed that employment service should begin when appellant left home on December 8, 2008, nor any special inconvenience, hazard or urgency of travel that would bring it within coverage under the Act. The record does not establish that appellant was in a travel status at the time of injury and there is no indication that he was reimbursed for travel to the employing establishment.[10]

On appeal, appellant contended that he was in the performance of duty at the time of the alleged injury. He stated that he works from home and is expected to be "on call" at all times. Appellant allegedly receives calls at all hours of the day and night regarding work. He also stated that he was in full uniform and was carrying a sidearm the morning of the injury. The Board has recognized a limited exception to the coming and going rule when an employee performs work regularly at home with the knowledge and consent of the employer or where there is an essential continuity of the work done at home and that performed at the regular place of employment.[11] Evidence received prior to the Office's April 28, 2009 decision does not provide any details regarding the nature and extent of the activity that may have been performed at home, knowledge and consent of the employer or other relevant information. As noted, the Board's jurisdiction is limited to reviewing the evidence that was before the Office at the time of its final decision. Therefore, evidence submitted after the final decision cannot be considered by the Board.

The Board finds that the evidence of record does not establish that an exception to the coming and going rule was applicable in this case. Appellant was not in the performance of duty at the time of the December 8, 2008 incident and the Office properly denied the claim.

CONCLUSION

The Board finds that appellant's alleged injury of December 8, 2008 was not sustained while in the performance of duty.

[10] For cases involving travel to a training seminar, see *Sondra J. Mills*, 33 ECAB 1092 (1982); *see also Janet R. Landesberg*, 50 ECAB 538 (1999).

[11] *See Phyllis A. Sjoberg*, 57 ECAB 409 (2006); *Connie J. Higgins (Charles H. Higgins)*, 53 ECAB 451 (2002); *Melvin Silver*, 45 ECAB 677 (1994).

ORDER

IT IS HEREBY ORDERED THAT the April 28, 2009 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 19, 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