United States Department of Labor
Employees' Compensation Appeals Board

S.C., Appellant	)	
and	)	**Docket No. 10-1706**
	)	**Issued: May 9, 2011**
DEPARTMENT OF THE TREASURY, INTERNAL REVENUE SERVICE, Richmond, VA, Employer	)	

Appearances:
Alan J. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
RICHARD J. DASCHBACH, Chief Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On June 15, 2010 appellant, through her attorney, filed a timely appeal from a January 20, 2010 merit decision of the Office of Workers' Compensation Programs rescinding acceptance of her claim and a May 13, 2010 nonmerit decision denying her request for a hearing as untimely.[1] Pursuant to the Federal Employees' Compensation Act[2] and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether the Office properly rescinded acceptance of appellant's claim; and (2) whether it properly denied her request for an oral hearing under 5 U.S.C. § 8124 as untimely.

[1] The record also contains a March 5, 2010 overpayment decision; however, appellant has not appealed this decision and thus it is not before the Board. *See* 20 C.F.R. § 501.3(a).

[2] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On June 18, 2009 appellant, then a 38-year-old secretary, filed a claim alleging that on June 10, 2009 she sustained a broken tibia below her knee in the performance of duty. She related, "It was 8:30 p.m. and I was coming from Crystal City subway station from dinner walking towards the hotel. I saw a suspicious man walking behind me. I started walking faster. I walked to the median of the intersection of Jefferson and 23rd street fell off of cement." The employing establishment requested that the Office determine whether appellant was in the performance of duty at the time of her fall given that her tour of duty ended at 5:30 p.m. that afternoon.

On July 6, 2009 the Office requested additional information from appellant, including a detailed statement regarding her exact location at the time of her injury and a description of her activities. It noted that it did not appear that she was in the performance of duty at the time of her fall.

The record indicates that appellant was on travel status from June 8 to 12, 2009 in Crystal City, VA to attend training. On June 11, 2009 the Arlington County Fire Department responded to a fall injury at 20th Street South and the Jefferson Davis Highway in Arlington, VA. The call was received at 12:52 a.m. on June 11, 2009 and a medical transport unit was dispatched at 12:53 a.m. The unit arrived at the scene at 12:59 a.m. The emergency responder noted that appellant admitted to the use of alcohol and that there was alcohol on her breath.

Appellant was admitted to the hospital on June 11, 2009. Dr. Rajendra Borkar, a Board-certified internist, diagnosed a comminuted fracture of the right tibial plateau. Dr. Borkar related that appellant "states she was being followed and was trying to rush across the road median after having had [three] drinks and twisted her right leg and fell."

In a discharge summary dated June 16, 2009, Dr. Mahnaz Parveen, a Board-certified internist, diagnosed a comminuted fracture of the right tibial plateau due to an alcohol-related fall. He noted that appellant had a "long history of alcoholism." Dr. Parveen noted that she underwent an open reduction and internal fixation of the comminuted medial tibial plateau fracture.

On July 13, 2009 a supervisor related that appellant last performed her work duties on June 10, 2009 at 5:00 p.m. in the Sheraton Capital City in Arlington, Virginia. Appellant was injured less than a mile from her official duty station while returning from a restaurant to her hotel.

In response to the Office's request for additional information, appellant related that she was injured on June 10, 2009. She stated that she and a bystander called 911 after she fell but that the emergency responders had difficulty finding her because she was surrounded by high buildings. An ambulance took appellant to the hospital.

On July 29, 2009 the employing establishment controverted the claim. It noted that appellant's work duties ended at 5:00 p.m. and that, while she originally indicated that she was injured at 8:38 p.m. on June 10, 2009, the emergency medical services (EMS) report was dated

signed at 2:11 a.m. on June 11, 2009. The employing establishment also noted that appellant had been drinking alcohol before her fall.

On August 10, 2009 the Office accepted appellant's claim for a closed fracture of the right upper tibia. It paid her compensation for disability from July 29 through August 7, 2009. The Office noted that appellant returned to limited duty on August 10, 2009.

On January 13, 2010 appellant filed a claim for intermittent time lost from work for the period October 11 to 24, 2009.

By decision dated January 20, 2010, the Office rescinded acceptance of appellant's claim.[3] It found that, while she alleged that she fell injuring her leg at 8:30 p.m. on June 10, 2009, the EMS received a call to assist her at 12:52 a.m. and arrived on the scene at 12:59 a.m. The Office noted that appellant deviated from her work duties when she was outside her hotel near midnight, seven hours after her work duty ended. It consequently found that she was not injured in the performance of duty. The Office further determined that appellant's statements were of reduced probative value as she had been consuming alcohol at the time of injury.

By letter dated February 23, 2010, postmarked February 24, 2010, appellant requested a telephone hearing on the January 20, 2010 decision. By decision dated May 13, 2010, the Office denied her request for a hearing under 5 U.S.C. § 8124 as it was untimely.

LEGAL PRECEDENT -- ISSUE 1

Section 8128 of the Act provides that the Secretary of Labor may review an award for or against payment of compensation at any time on her own motion or application.[4] The Board has upheld the Office's authority to set aside or modify a prior decision and issue a new decision under section 8128 of the Act.[5] The power to annul an award, however, is not an arbitrary one and an award for compensation can only be set aside in the manner provided by the compensation statute.[6]

Workers' compensation authorities generally recognize that compensation awards may be corrected, in the discretion of the compensation agency and in conformity with statutory provision, where there is good cause for so doing, such as mistake or fraud.[7] It is well established that, once the Office accepts the claim, it has the burden of justifying the termination or modification of compensation benefits.[8] The Office's burden of justifying termination or

[3] In a decision dated March 5, 2010, the Office determined that appellant received an overpayment of compensation in the amount of $ 1,404.37 because it had rescinded acceptance of her claim.

[4] 5 U.S.C. § 8128; *see also M.E.*, 58 ECAB 694 (2007).

[5] *John W. Graves*, 52 ECAB 160 (2000).

[6] *See* 20 C.F.R. § 10.610; *Cary S. Brenner*, 55 ECAB 739 (2004); *Stephen N. Elliott*, 53 ECAB 659 (2002).

[7] *L.C.*, 58 ECAB 493 (2007).

[8] *Andrew Wolfgang-Masters*, 56 ECAB 411 (2005).

modification of compensation holds true where the Office later decides that it has erroneously accepted a claim of compensation. In establishing that its prior acceptance was erroneous, the Office is required to provide a clear explanation of its rationale for rescission.[9]

The Board has recognized that Larson, in his treatise, *The Law of Workers' Compensation*, sets forth the general criteria for performance of duty as it relates to travel employees or employees on temporary-duty assignments as follows:

> "Employees whose work entails travel away from the employer's premises are held in the majority of jurisdictions to be within the course of their employment continuously during the trip, except when a distinct departure on a personal errand is shown. Thus, injuries arising out of the necessity of sleeping in hotels or eating in restaurants away from home are usually held compensable."[10]

To determine whether an injury occurs in a place where the employee may reasonably be or constitutes a deviation from employment, the Board will focus on the nature of the activity in which the employee was engaged and whether it is reasonably incidental to the employee's work assignment or represents such a departure from the work assignment that the employee becomes engaged in personal activities unrelated to his or her employment. The standard to be used in determining that an employee has deviated from his or her employment requires a showing that the deviation was "aimed at reaching some specific personal objective."[11] The Board has recognized that there are limitations to coverage or employees in travel status. When the employee deviates from the normal incidents of his or her trip and engages in activities, personal or otherwise, which are not reasonably incidental to the duties of the temporary assignment contemplated by the employer, the employee ceases to be under the protection of the Act and any injury occurring during these deviations is not compensable.[12]

ANALYSIS -- ISSUE 1

On August 10, 2009 the Office accepted that appellant sustained a closed fracture of the right upper tibia on June 10, 2009 when she slipped and fell. By decision dated January 20, 2010, it rescinded acceptance of her claim after finding that she was not in the performance of duty at the time of her injury. The issue is whether the Office met its burden of proof to rescind its acceptance of appellant's injury.[13]

The employing establishment authorized appellant's travel to attend a training program from June 8 to 12, 2009. Appellant's training session ended on June 10, 2009 at 5:00 p.m. She

[9] *See Amelia S. Jefferson*, 57 ECAB 183 (2005); *Delphia Y. Jackson*, 55 ECAB 373 (2004).

[10] *Larson's Workers' Compensation Law*, § 25.01 (2009); *see also Susan A. Filkins*, 57 ECAB 630 (2006); *Ann P. Drennan*, 47 ECAB 750 (1996); *Lawrence J. Kolodzi*, 44 ECAB 818 (1993); *Richard Michael Landry*, 39 ECAB 232 (1987) and cases cited therein.

[11] *See Thomas E. Keplinger*, 46 ECAB 699 (1995); *Dannie G. Frezzell*, 40 ECAB 1291 (1989).

[12] *See Jose H. Pico*, 46 ECAB 750 (1995); *Evelyn S. Ibarra*, 45 ECAB 840 (1994).

[13] *See Deborah S. Stein*, 56 ECAB 494 (2005).

alleged that at 8:30 p.m. on June 10, 2009 she slipped and fell crossing the median at the intersection of Jefferson and 23rd Street returning to her hotel from the Crystal City Metro station after eating dinner. The EMS, however, received an emergency call at 12:52 a.m. on June 11, 2009. It dispatched a unit that arrived at appellant's location at 12:59 a.m. June 11, 2009. Appellant was taken by ambulance to the hospital, where Dr. Borkar related that she fell when she attempted to cross the road after having three alcoholic drinks. Her allegation that she was injured at 8:30 p.m. on June 10, 2009 is not credible in view of the evidence. Appellant indicated that it took a great deal of time for the EMS services to locate her after her fall because of high buildings. According to the EMS report, however, it reached her within 10 minutes of receiving the emergency call. It thus appears that appellant's injury occurred shortly after midnight on June 11, 2009.

As a traveling employee, appellant is normally covered for all activities reasonably incidental to the employment.[14] However, when the employee deviates from the normal incidents of his or her trip and engages in activities, personal or otherwise, that are not reasonably incidental to the duties of the temporary assignment contemplated by the employer, the employee ceases to be under the protection of the Act and any injury occurring during these deviations is not compensable.[15]

The evidence does not support that at the time of appellant's fall she was engaged in activities reasonably incidental to her employment. Her work duties ended for the day at 5:00 p.m. but she was not injured until seven hours later. Appellant has not explained why she was away from her hotel after midnight or the circumstances surrounding her consumption of alcohol prior to her injury. In *Ronell Smith*,[16] appellant drank beer with her supervisor at three different establishments prior to being struck by an automobile returning to her hotel. The Board found that she was engaged in an identifiable deviation and had removed herself from the protection of the Act at the time of her injury. Similarly, in *Lydia Muse Shields (John Marcellus Shields)*,[17] the deceased employee was on a temporary-duty assignment. His whereabouts were unaccounted from 8:00 p.m. to 3:00 a.m. when he was seen alighting from a taxi. The employee began to walk towards his hotel when he fell to the ground and hit his head. The Board determined that the employee's fatal injury was not sustained in the performance of duty, as there was no indication why he returned to the hotel so late and no evidence that his death occurred during the course of an ordinary incident of his mission. In *Conchita A. Elfano (Domingo P. Elfano)*,[18] the deceased employee was on a temporary-duty assignment at a navy base. He left the base at 11:30 p.m. and went to a nearby night club, where he remained until 4:00 a.m. The employee was fatally injured by a bullet when returning to the base in a taxi cab. The Board found that the injury was not sustained in the performance of duty as he had deviated

[14] *See L.A.*, Docket No. 09-2278 (issued September 27, 2010); *Kathleen M. Fava (John R. Malley)*, 49 ECAB 519 (1998).

[15] *Id*.

[16] 47 ECAB 781 (1996).

[17] 2 ECAB 162 (1949).

[18] 15 ECAB 373 (1964).

from the normal activities incidental to his employment for purposes that were personal and diversionary in nature. In *Kathleen M. Fava (John R. Malley)*, the Board found that the Office properly rescinded acceptance of the claim where the evidence reflected that the employee, who was in travel status, was injured walking to a van after leaving a sports bar.[19]

The Board finds that, similar to those cases cited, the Office has met its burden of proof to show that appellant was not engaged in normal, ordinary and natural activities reasonably incidental to her temporary-duty assignment but rather had undergone a temporary, personal diversion. Appellant's actions away from her hotel in the middle of the night constitute a personal deviation not arising out of the necessity of her employment.[20] Even though she was returning to her hotel, the Board has held that an injury may not be compensable even though an employee is returning to his or her temporary residence at the time of injury or death.[21] Appellant's injury on June 11, 2009 was not reasonably incidental to her temporary duty status nor a recreational activity covered by the Act. Therefore, as she had removed herself from the course of employment at the time of injury, the Office properly rescinded its acceptance of the claim.

LEGAL PRECEDENT -- ISSUE 2

Section 8124(b) of the Act, concerning a claimant's entitlement to a hearing, states that: "Before review under section 8128(a) of this title, a claimant for compensation not satisfied with a decision of the Secretary ... is entitled, on request made within 30 days after the date of issuance of the decision, to a hearing on his claim before a representative of the Secretary."[22] As section 8124(b)(1) is unequivocal in setting forth the time limitation for requesting a hearing, a claimant is not entitled to a hearing as a matter of right unless the request is made within the requisite 30 days.[23]

Section 10.615 of Title 20 of the Code of Federal Regulations provide, "A hearing is a review of an adverse decision by a hearing representative. Initially, the claimant can choose between two formats: An oral hearing or a review of the written record."[24]

Section 10.616(a) further provides, "A claimant injured on or after July 4, 1966, who had received a final adverse decision by the district Office may obtain a hearing by writing to the

[19] 49 ECAB 519 (1998). The Board further determined, however, that injuries sustained when he returned to the hotel were compensable as his deviation had ended.

[20] *Ronelle Smith*, 47 ECAB 781 (1986); *Lawrence J. Kolodzi*, 44 ECAB 818 (1993).

[21] *See Ronelle Smith*, *id.*; *Conchita A. Elefano*, *supra* note 18. *But see William T. Bodily*, 52 ECAB 509 (2001). In *Bodily*, the employee was robbed at gunpoint away from his hotel under unclear circumstances. The Board found that he had deviated from employment and that the deviation did not cease until the police arrived to drive him back to his hotel.

[22] 5 U.S.C. § 8124(b)(1).

[23] *Leona B. Jacobs*, 55 ECAB 753 (2004).

[24] 20 C.F.R. § 10.615.

address specified in the decision. The hearing request must be sent within 30 days (as determined by postmark or other carrier's date marking) of the date of the decision for which a hearing is sought."[25]

The Office, in its broad discretionary authority in the administration of the Act, has the power to hold hearings in certain circumstances where no legal provision was made for such hearings and the Office must exercise this discretionary authority in deciding whether to grant a hearing. Specifically, the Board has held that the Office has the discretion to grant or deny a hearing request on a claim involving an injury sustained prior to the enactment of the 1966 amendments to the Act which provided the right to a hearing, when the request is made after the 30-day period established for requesting a hearing, or when the request is for a second hearing on the same issue.[26] The Office's procedures, which require the Office to exercise its discretion to grant or deny a hearing when a hearing request is untimely or made after reconsideration under section 8128(a), are a proper interpretation of the Act and Board precedent.[27]

ANALYSIS -- ISSUE 2

The Office issued a decision on January 20, 2010 rescinding acceptance of appellant's claim. Appellant sought a telephone hearing by letter dated February 23, 2010 and postmarked February 24, 2010. The Office denied her hearing request as untimely by decision dated May 13, 2010. As appellant's request for a hearing was postmarked February 24, 2010, more than 30 days after the Office issued its January 20, 2010 decision, she was not entitled to a hearing as a matter of right.

The Office has the discretionary power to grant a hearing or review of the written record when a claimant is not entitled to a hearing or review as a matter or right.[28] It properly exercised its discretion by stating that it had considered the matter in relation to the issue involved and denied appellant's request for a telephone hearing on the basis that the case could be resolved by submitting additional evidence to the Office in a reconsideration request. The Board has held that the only limitation on the Office's discretionary authority is reasonableness. An abuse of discretion is generally shown through proof of manifest error, clearly unreasonable exercise of judgment or actions taken which are contrary to both logic and probable deduction from established facts.[29] The evidence of record does not establish that the Office committed any action in connection with its denial of appellant's request for an oral hearing by telephone which could be found to be an abuse of discretion. For these reasons, the Office properly denied her request for an oral hearing as untimely under section 8124 of the Act.

[25] *Id*. at § 10.616(a).

[26] *See André Thyratron*, 54 ECAB 257 (2002).

[27] *See Peggy R. Lee*¸ 46 ECAB 527 (1995); *Sandra F. Powell*, 45 ECAB 877 (1994).

[28] *See Afegalai L. Boone*, 53 ECAB 533 (2002); *William F. Osborne*, 46 ECAB 198 (1994).

[29] *See André Thyratron*, *supra* note 26.

CONCLUSION

The Board finds that the Office properly rescinded acceptance of appellant's claim. The Board further finds that it properly denied her request for an oral hearing under 5 U.S.C. § 8124 as untimely.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated May 13 and January 20, 2010 are affirmed.

Issued: May 9, 2011
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board