United States Department of Labor
Employees' Compensation Appeals Board

B.R., Appellant	)	
and	)	**Docket No. 11-153**
	)	**Issued: September 30, 2011**
DEPARTMENT OF THE NAVY, NAVAL MEDICAL CENTER, San Diego, CA, Employer	)	

Appearances:
Sally F. LaMacchia, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

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

JURISDICTION

On October 26, 2010 appellant, through her attorney, filed a timely appeal from a September 2, 2010 Office of Workers' Compensation Programs' (OWCP) merit decision denying her claim for an employment-related injury. Pursuant to the Federal Employees' Compensation Act (FECA)[1] and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.[2]

ISSUE

The issue is whether appellant established that she sustained an injury on December 7, 2009 while in the performance of duty.

[1] 5 U.S.C. § 8101 *et seq.*

[2] Following issuance of the September 2, 2010 OWCP decision and on appeal, appellant submitted new evidence. The Board is precluded from reviewing evidence which was not before OWCP at the time it issued its final decision. *See* 20 C.F.R. § 501.2(c)(1).

On appeal counsel contends that whether appellant was authorized to come into work early is not relevant to the claim and that she was at work a reasonable interval before the start of her work shift.

FACTUAL HISTORY

On December 9, 2009 appellant, a 62-year-old vocational nurse, filed a traumatic injury claim (Form CA-1) alleging that on December 7, 2009 she sustained a compound fracture of the radius and ulna of her left forearm when she slipped and fell due to a large pool of water from a rain leak on the floor. A witness stated that she came across a large puddle of water on the third floor which was marked with a "caution" sign, heard appellant fall and ran to assist her. Appellant's supervisor contended that the injury did not occur in the performance of duty in that it occurred at 4:30 p.m., 2 hours and 15 minutes before her regular shift began at 6:45 p.m. Appellant was not required to arrive at the workplace earlier than her scheduled start time.

By letter dated December 22, 2009, OWCP requested additional evidence from appellant in support of her claim and allotted 30 days for submission.

In a December 9, 2009 medical report, Dr. Dana C. Covey, a Board-certified orthopedic surgeon, diagnosed left open galleazzi fracture and performed surgery. He released appellant to light duty for 30 days after 21 days of leave.

In a December 11, 2009 radiological report, Dr. Scott Alexander, a Board-certified radiologist, diagnosed distal radius and ulna fractures and degenerative changes in the left wrist and hand. In a December 12, 2009 radiological report, Dr. Mark D. Stanley, a Board-certified radiologist, diagnosed postoperative changes status post plate and screw fixation of a distal radius fracture as well as dual pin fixation of the distal radial ulnar joint and the distal radius and ulna in near anatomic alignment without evidence of gross complications. In a December 28, 2009 radiological report, Dr. Dean Asher, a Board-certified radiologist, diagnosed left distal radius and ulna fractures status post open reduction internal fixation (ORIF) with retained hardware and no apparent complication.

In a December 23, 2009 medical report, Dr. James E. Toledano, a Board-certified orthopedic surgeon, diagnosed fracture of radius/ulna open and released appellant to work with restrictions.

In a December 28, 2009 narrative statement, appellant reported that she did not see the water puddle when she was walking down the hallway and fell on her left hand and arm. She was placed in a wheelchair and taken to the emergency room where they took x-rays and performed surgery. Appellant stated that she was not aware of what time it was because she was in too much pain. She came into work to complete her yearly annual update, like other staff members did, as it was overdue and she did not want to take away from patient care.

In a January 5, 2010 work capacity evaluation, Dr. Keith R. Fischer, a Board-certified family practitioner, released appellant to limited duty on February 8, 2010 with a two-month restriction on reaching, reaching above the shoulder, operating a motor vehicle at work, pushing, pulling, lifting, and repetitive wrist and elbow movements. In a January 5, 2010 attending

physician's report, he indicated that appellant was at work to do her work assessment duties when she fell and injured herself.

By decision dated January 29, 2010, OWCP denied appellant's claim on the grounds that the evidence submitted was not sufficient to establish that she was injured in the performance of duty. It explained that the evidence of record did not establish that she was on paid overtime or that it was customary for employee's to arrive to work two hours prior to the start of a work shift.

On March 5, 2010 OWCP received a January 26, 2010 report from Dr. Covey who released appellant to limited duty with restrictions and possible full duty on March 26, 2010.

On March 5, 2010 appellant filed a claim for compensation for the period January 22, to February 14, 2010. By letter dated March 9, 2010, OWCP notified appellant that, as her claim was denied in the January 29, 2010 decision, she was not entitled to compensation or medical benefits.

On June 14, 2010 appellant, through her attorney, filed a request for reconsideration. Counsel contended that when the injury occurred appellant was engaged in activity central to her duties and not her own personal convenience.

By letter dated June 24, 2010, the employing establishment controverted appellant's claim, reiterating that her injury did not occur during her normal work hours. It reported that appellant's regular work schedule was 6:45 p.m. to 7:15 a.m. and she came into work early to complete an overdue yearly annual update. Appellant was not required to arrive at the workplace earlier than her scheduled start time and was not on prior authorized overtime.

By decision dated September 2, 2010, OWCP denied modification of its January 29, 2010 decision, finding that there was no evidence that appellant was authorized to come to work early. It found that appellant did not establish that other employees came to work early to complete work so not to take away from patient care or that her employer condoned or encouraged such a practice.[3]

LEGAL PRECEDENT

In providing for a compensation program for federal employees, Congress did not contemplate an insurance program against any and every injury, illness or mishap that might befall an employee contemporaneous or coincidental with his or her employment. Liability does not attach merely upon the existence of an employee-employer relationship. Instead, Congress provided for the payment of compensation for disability or death of an employee resulting from personal injury sustained while in the performance of duty.[4] The phrase while in the performance of duty 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

[3] By letter dated September 15, 2010, OWCP accepted appellant's September 10, 2010 petition to withdraw her hearing request.

[4] *See* 5 U.S.C. § 8102(a).

employment. The phrase course of employment is recognized as relating to the work situation and more particularly, relating to elements of time, place and circumstance.[5]

In the compensation field, to occur in the course of employment, in general, an injury must occur: (1) at a time when the employee may reasonably be said to be engaged in his employer's business; (2) at a place where he 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.[6]

The Board has accepted the general rule of workers' compensation law that, as to employees having fixed hours of work, injuries occurring on the premises of the employing establishment, while the employee is going to or from work, before or after working hours or at lunch time, are compensable.[7] Given this rule, the Board has noted that the course of employment for employees having a fixed time and place of work includes a reasonable time while the employee is on the premises engaged in preparatory or incidental acts. However, presence at the employing establishment's premises during work hours or a reasonable period before or after a duty shift is insufficient, in and of itself, to establish entitlement to benefits for compensability. The claimant must also establish the concomitant requirement of an injury arising out of the employment. This encompasses not only the work setting, but also the causal concept that some factor of the employment caused or contributed to the claimed 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.[8]

In determining whether an injury occurs in a place where the employee may reasonably be or constitutes a deviation from the course of 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 represented such a departure from the work assignment that the employee becomes engaged in personal activities, unrelated to his or her employment. The Board has noted that 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.[9]

The Board has permitted relief for employees on employer premises when the claimed injury occurred during a reasonable time before or after work or, in the case of injuries occurring far outside regular work hours, when the employee was acting in service of the employer.[10] In *John F. Castro*,[11] an employee was injured in an automobile accident at a naval station five

[5] *See Annie L. Ivey*, 55 ECAB 480 (2004). *See also Alan G. Williams*, 52 ECAB 180 (2000).

[6] *Id.*

[7] *See James P. Schilling*, 54 ECAB 641 (2000). *See also Narbik A. Karamian*, 40 ECAB 617 (1989).

[8] *See Eileen R. Gibbons*, 52 ECAB 209 (2001). *See also Cheryl Bowman*, 51 ECAB 519 (2000); *Shirlean Sanders*, 50 ECAB 299 (1999); *Charles Crawford*, 40 ECAB 474 (1989).

[9] *See Rebecca LeMaster*, 50 ECAB 254 (1999).

[10] *See William W. Knispel*, 56 ECAB 639 (2005).

[11] Docket No. 03-1653 (issued May 14, 2004).

minutes after the end of his shift.[12] It found that such a short time period fell within the scope of a reasonable interval before going to or leaving from work. In *Catherine Callen*,[13] the employee was found to be in the performance of duty under FECA for an injury sustained on the employer premises six hours after the end of her regular shift, primarily because she remained on the premises to complete a project at the request of her employer.[14] In *Nona J. Noel*,[15] the employee arrived one and one-half hours prior to the start of her workday to avoid heavy traffic and to eat breakfast at the Noncommissioned Officer's (NCO) Club where she sustained an injury. The Board found that the act of having breakfast, coupled with the length of time appellant arrived at her employer's premises prior to her official starting time to avoid heavy traffic, placed her activity outside the scope of the employment. In *T.F.*,[16] the employee sustained an injury when she tripped on a loose floor tile 25 minutes before her work shift began at 6:00 a.m. She was on the premises of her employer in the vicinity of her work cubicle. The Board affirmed the denial of compensability under FECA, noting that finding a good parking place, drinking coffee, having breakfast and putting her lunch away were personal activities and not reasonably incidental to the work of her employer. The Board found that her presence at the premises some 25 minutes prior to the commencement of her work shift did not constitute a reasonable interval under the circumstances.

ANALYSIS

The Board finds that appellant's injury was not sustained in the performance of duty.

Although the December 7, 2009 incident occurred on the employing establishment's premises, it did not occur during appellant's regular work shift or during a lunch or recreation period as a regular incident of her employment. In order for an injury to be considered as arising out of the employment, the facts of the case must show some substantial employer benefit or requirement which gave rise to the injury.[17] It is incumbent upon appellant to establish that it arose out of her employment. In other words, some contributing or causal employment factor must be established.

Appellant has not shown that her presence at the employing establishment on December 7, 2009 at 4:30 p.m. was a reasonable interval before work. Her usual work shift began at 6:45 p.m. Appellant's presence on the premises is not alone sufficient to establish compensability. She arrived to work 2 hours and 15 minutes before the start of her shift and

[12] *Id.*

[13] 47 ECAB 192 (1995).

[14] The Board found that, although the employee had been cautioned about unauthorized overtime and did not request it on the date-of-injury, there was not an express prohibition concerning her overtime work. Rather, the support staff was routinely requested by attorneys to work overtime and management was generally aware that they were on the premises after regular duty tour hours. *See id.*

[15] 36 ECAB 329 (1984).

[16] Docket No. 09-154 (issued July 16, 2009).

[17] *See Dwight D. Henderson*, 46 ECAB 441 (1995).

such an early arrival is outside the scope of reasonable allowance for entrance and egress.[18] Appellant entered the premises well before the usual start of her work shift. The Board had held that what constitutes a reasonable interval before a work shift begins depends not only on the length of time involved, but also on the circumstances for the time interval and nature of the employment activity.[19] The employing establishment reported that it had not directed appellant to perform any services related to her work as a vocational nurse prior to her normal tour of duty and that she was not authorized to work overtime. There is no evidence that the employer in this case expressly or impliedly required appellant's presence on the premises prior to her regular hours. There is no evidence that appellant sought approval by her supervisor to be on the premises prior to her regular-duty hours in order to prepare for her daily activities or to work on an overdue annual report. Accordingly, the Board finds that appellant's presence on the premises some 2 hours and 15 minutes prior to the commencement of her tour of duty on the morning of the accident was not reasonable.[20]

Appellant's arrival at the employing establishment prior to official starting time does not automatically place her activities outside the scope of the employment.[21] She stated that she arrived early to work at 4:30 p.m. in order to complete a yearly annual update that was overdue. However, unlike *Catherine Callen*,[22] there is no evidence that the employer expressly or impliedly required appellant's presence on the premises outside of her regular duty hours in order to complete this work assignment. There is no evidence that her supervisor was ever made aware that she would be present on the premises before her regular duty hours.[23] Appellant did not submit sufficient evidence to establish that the employing establishment condoned or encouraged employees to come into work early in order to complete work assignments, such as yearly annual updates, in order not to take away from patient care. Only as a matter of personal convenience did she choose to arrive at the premises of her employer early on December 7, 2009. The Board finds that the act of arriving at work early without authorized overtime or authorization by a supervisor, places appellant's injury outside the scope of the employment.

[18] *See L.L.*, Docket No. 10-2384 (issued July 15, 2011).

[19] *See Maryann Battista*, 50 ECAB 343 (1999). *See also Narbik A. Karamian* at 618 *supra* note 7; (citing *Clayton Varner*, 37 ECAB 248 (1985)).

[20] *See Howard M. Faverman*, 57 ECAB 151 (2005). *Cf. Cemeish E. Williams*, 57 ECAB 509 (2006) (where claimant arrived for duty 15 or 30 minutes prior to her scheduled shift and was adjusting her uniform tie and reaching for her bag when the injury occurred on the escalator on the way to sign in for her afternoon shift; the Board found that when the injury occurred, appellant was on the premises for a reasonable time before her specific working hours in preparation for her shift, thereby providing the employing establishment some substantial benefit from the activity involved).

[21] *See James E. Chadden*, 40 ECAB 312, 315 (1988) (stating that claimant's arrival at the employing establishment a half hour prior to his official starting time was not so early as to place claimant's activity outside the scope of employment).

[22] *See supra* note 13.

[23] *See supra* note 14. *See also S.D.*, Docket No. 10-1391 (issued August 24, 2011) (The Board found that the employee was not in the performance of duty when she was injured in the lobby while assisting a coworker to gain entry through the handicap door before her work shift began. She arrived early in order to secure a desired parking space close to her employment.

On appeal counsel contends that the issue of whether appellant was authorized to come into work early is irrelevant and that she was at work a reasonable interval before the start of her work shift. The Board finds that the issue of whether she was authorized to be at work some two hours before her official work tour is relevant. For the reasons stated above, the Board finds that appellant's injury was not sustained in the performance of duty.

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

CONCLUSION

The Board finds that appellant has not established that she sustained injury on December 7, 2009 while in the performance of duty.

ORDER

IT IS HEREBY ORDERED THAT the September 2, 2010 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 30, 2011
Washington, DC

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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