United States Department of Labor
Employees' Compensation Appeals Board

L.M., Appellant	)	
and	)	**Docket No. 11-373**
	)	**Issued: September 22, 2011**
U.S. POSTAL SERVICE, NORTHERN VIRGINIA DISTRICT, Merrifield, VA, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
RICHARD J. DASCHBACH, Chief Judge
ALEC J. KOROMILAS, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On December 8, 2010 appellant filed a timely appeal of the November 15, 2010 decision of the Office of Workers' Compensation Programs (OWCP) denying her claim. 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 the 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 February 13, 2006.

FACTUAL HISTORY

On February 13, 2006 appellant, then a 45-year-old distribution clerk/sales associate, filed a traumatic injury claim alleging that she sustained injuries on that date when, after a weekend snowfall, she slipped on ice on an unplowed back lot at the employing establishment.

[1] 5 U.S.C. § 8101 *et seq.*

She listed the time of the incident as 6:20 a.m. The employing establishment controverted the claim alleging that appellant was reporting to work when the incident happened. The employing establishment indicated that her regular hours were from 7:00 a.m. until 4:00 p.m.

By letter to appellant dated October 18, 2006, OWCP informed her that evidence was not sufficient to support that she was injured while in the performance of duty and asked her to explain why she was on the parking lot 40 minutes prior to the start of her tour of duty. In a response appellant alleged that her reason for being at work early was that on Monday mornings the clerks always come in early as Monday is the worst day and the workload is heavy. She further noted that the weekend brought snow and ice. Appellant stated that the custodian was to take care of the lot but that the ramp and steps were covered with ice and snow. She stated that she had surgery two weeks prior to the incident and fell on her back. Appellant noted that there were no witnesses that saw her fall. She stated that it was suggested to her to not start work, but to hit the clock and wait until a supervisor came in to file an accident report. Appellant stated that her supervisor told her to not punch the clock but to fill out an accident report and go to the doctor immediately. In an October 31, 2006 letter, she indicated that she started work for the employing establishment as a letter carrier in 1988 and she described her work history and duties. Appellant described the impact of her employment injuries on her life.

In a December 5, 2006 decision, OWCP denied appellant's claim as it found that the evidence did not establish that she was injured in the performance of duty.

By request dated December 5, 2006 but received by the OWCP on January 9, 2007, appellant requested review of the written record.

By decision dated May 21, 2007, OWCP denied appellant's request for review of the written record as it was untimely filed and because the issue could equally well be addressed by requesting reconsideration and submitting new evidence.

On June 6, 2007 appellant filed another request for written record review. On January 7, 2009 she submitted a November 22, 2007 statement, Fulton Toulson who stated that he has been employed as a window clerk at the employing establishment for over 32 years, and that since he began working it was common practice to report to work prior to your scheduled reporting time during bad weather because many people live great distances from work and are unable to get to work on time and the clerks who come in early are asked to punch on and help the carriers. Mr. Toulson noted that most of your veterans clerks report early to avoid heavy traffic. There is also a statement dated March 27, 2007 and signed by four individuals indicating that, during their employment with the employing establishment, it is common for employees to come to work earlier than their regular time because of inclement weather or to get ahead of traffic congestion. The statement indicated that occasionally these employees are allowed to punch the clock and start working and other times they wait in the break room for their regular starting time.

No action was taken on appellant's June 6, 2007 request for a review of the written record until January 12, 2009 when OWCP acknowledged receiving it.

On February 9, 2009 appellant requested reconsideration. On May 27, 2009 OWCP denied her request for reconsideration as it found that it was not timely filed and did not present clear evidence of error.

Appellant filed a timely appeal to the Board and by order dated May 18, 2010, the Board remanded the case. The Board found that OWCP failed to respond to appellant's second request for review of the written record until well after 90 days, and that this delay by OWCP effectively exhausted appellant's opportunity to obtain a merit review of the December 5, 2006 merit decision. Accordingly, this Board remanded the case for OWCP to reopen the case record and issue an appropriate decision on the merits in order to preserve appellant's appeal rights.

By decision dated May 24, 2010, OWCP denied appellant's request for a second hearing.

On November 15, 2010 OWCP reviewed appellant's case on the merits but determined that the December 5, 2006 decision remained in force.

LEGAL PRECEDENT

Under FECA, a claimant bears the burden of proving all essential elements of a claim, including that the alleged injury occurred in the performance of duty.[2] Board precedent requires that an injury sustained in the performance of duty must have arisen: (1) at a time when the employee may reasonably be said to be engaged in his masters 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.[3]

As to employees having fixed hours and a fixed place of work, injuries occurring on the premises while they are going to and from work before or after working hours are compensable.[4] The course of employment for such employees embraces a reasonable interval before or after official working hours while the employee is on the premises engaged in preparatory or incidental acts. What constitutes a reasonable interval depends not only on the length of time involved but also on the circumstances occasioning the interval and the nature of the employee's activity.[5]

The Board has included within the performance of duty a reasonable time before and after work to allow for coming and going, as well as personal ministrations, such as lunch or bathroom breaks, engaged in for the benefit of the employer.[6] If the injury does not take place during those periods or on employer's premises, the Board will place special emphasis on

[2] 20 C.F.R. § 10.115.

[3] *Mary Keszler*, 38 ECAB 735 (1987).

[4] *J.O.*, Docket No. 09-1432 (issued February 3, 2010).

[5] *Id.*

[6] *George E. Franks*, 52 ECAB 474 (2001).

whether the employee was engaged in an activity related to fulfilling the duties of his employment.[7]

In *L.L.*, the Board found that an appellant that arrived at work 90 minutes prior to his scheduled shift for the purpose of eating breakfast at Burger King was not in the performance of duty as the explanation for his early arrival was solely for his personal benefit.[8] Arriving early for the purpose of eating breakfast was also found not to be in the performance of duty in *T.F.*,[9] and *George E. Franks*.[10] However, in *John F. Castro,*[11] the Board granted recovery when an employee was injured in an automobile accident at the naval station five minutes after the end of his shift.[12] Furthermore, 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 for her employer.

ANALYSIS

The Board finds that this case is not in posture for decision.

The Board rejects OWCP's finding that appellant was not in the performance of duty because she arrived at work 40 minutes early. The evidence indicates that there had been a snowfall on the weekend and that appellant arrived 40 minutes early in order to make accommodations for the bad roads. One must take into account the totality of circumstances when considering whether it was reasonable for appellant to arrive 40 minutes early to work. Although arriving this early would not be reasonable under normal circumstances, an attempt to deal with a commute involving snow and ice would amount to unusual circumstances that can justify appellant's early arrival. Furthermore, unlike in the cases where claimant's arrived early to eat breakfast or administer to personal needs, appellant stated that she arrived early because on Mondays clerks often arrived early and were occasionally told to clock in early to deal with the heavier workload on Mondays. Appellant's contention that she arrived early to assist the employing establishment finds support in the statement of Mr. Toulson, who indicated that it was common practice to report to work prior to your scheduled reporting time in bad weather because many people live great distances from work and are unable to get to work so clerks that come in early are often asked to punch on and help the carriers. Furthermore, there is a statement signed by four other colleagues of appellant indicating that it was common for employees to work earlier than their regular time in inclement weather. They noted that occasionally the employees are allowed to punch the clock and start working but that other times they wait in the break room

[7] *See Venicee Howell*, 48 ECAB 414 (1997).

[8] Docket No. 10-2384 (issued July 15, 2011).

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

[10] 52 ECAB 474 (2001).

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

[12] *Id.*

[13] 47 ECAB 192 (1995).

for their regular starting time. These statements indicate that appellant arrived early in order to be of assistance to the employing establishment rather than to attend to personal business.

However, the Board finds that this case needs further development. OWCP never rendered a finding as to whether appellant's injury occurred on the premises of the employing establishment. The general rule of workers' compensation law, as to employees having fixed hours and places of work, is that injuries occurring on the premises of the employing establishment, while appellant is going to or from work, are compensable.[14] On remand, the employing establishment must determine whether the location of appellant's fall was on the premises of the employing establishment. If appellant's fall was on the employing establishment's premises, then OWCP shall evaluate appellant's claim and determine if the medical evidence establishes that she sustained an injury in the performance of duty.

CONCLUSION

The Board finds that this case is not in posture for decision.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated November 15, 2010 is set aside and the case remanded for further development consistent with this decision of the Board.

Issued: September 22, 2011
Washington, DC

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

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

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

[14] *D.W.*, Docket No. 08-2318 (issued May 20, 2009); *Narbik A. Karamian*, 40 ECAB 617, 618 (1989).