

**United States Department of Labor
Employees' Compensation Appeals Board**

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M.H., Appellant)	
)	
and)	Docket No. 11-644
)	Issued: September 30, 2011
U.S. POSTAL SERVICE, POST OFFICE,)	
New York, NY, 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
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On January 10, 2011 appellant filed a timely appeal from a November 19, 2010 merit decision of the Office of Workers' Compensation Programs (OWCP) which denied his traumatic injury 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 this case.

ISSUE

The issue is whether appellant sustained an injury in the performance of duty on October 1, 2010.

FACTUAL HISTORY

On October 1, 2010 appellant, then a 40-year-old driver, filed a traumatic injury claim alleging that on October 1, 2010 he experienced pain in his lower back when another car ran a light and struck his vehicle at the intersection of 10th Avenue and 36th Street, at 1:13 a.m.

¹ 5 U.S.C. § 8101 *et seq.*

Appellant's supervisor noted on the reverse of the claim form that appellant's work hours were from 12:35 a.m. until 9:05 a.m. His supervisor also checked a box indicating that the injury occurred in the performance of duty.

In October 1, 2010 hospital records, a registered nurse noted that appellant was treated in the emergency room on the same day. Appellant was diagnosed with a lumbosacral muscle strain and prescribed medication for pain and anxiety. He was advised to see his treating physician.

On October 8, 2010 OWCP advised appellant that the evidence submitted was insufficient to support his claim and requested additional evidence. It requested a more detailed description of the alleged October 1, 2010 incident, including how and where he hit the other vehicle, from where he was coming and going, statements from any persons who witnessed the injury or had immediate knowledge of it and an accident report. OWCP also requested a medical report from appellant's treating physician, which included a history of injury, firm diagnosis, findings and test results, treatment provided and a physician's opinion, based on medical rationale, explaining how the diagnosed condition was caused or aggravated by the claimed injury. It also requested additional evidence from the employing establishment.

In an October 6, 2010 medical referral, Dr. Thomas Ortiz, a Board-certified family practitioner, noted that appellant sprained his left knee, lumbosacral and neck and that he was in a traffic accident.

In a November 4, 2010 work excuse slip, a physician's assistant stated that appellant was unable to work from October 1 to November 14, 2010 due to illness and disability.

Appellant also submitted various physical therapy reports dated October 12 to 14, 2010 and handwritten physical therapy progress records dated October 18 to November 3, 2010.

In a decision dated November 19, 2010, OWCP denied appellant's claim on the grounds of insufficient factual evidence establishing fact of injury in the performance of duty. The decision noted that he had not submitted the requested evidence detailing: "where you hit the other vehicle, where you came from and where you were heading to, submission of witness statements and police report..." OWCP also noted that appellant had submitted insufficient medical evidence establishing that he sustained a diagnosed condition causally related to the alleged incident.

LEGAL PRECEDENT

An employee seeking benefits under FECA has the burden of proof to establish the essential elements of his claim by the weight of the reliable, probative and substantial evidence² including that he sustained an injury in the performance of duty and that any specific condition or disability for work for which he claims compensation is causally related to that employment

² *J.P.*, 59 ECAB 178 (2007); *Joseph M. Whelan*, 20 ECAB 55, 58 (1968).

injury.³ To determine whether a federal employee has sustained a traumatic injury in the performance of duty, it first must be determined whether “fact of injury” has been established.⁴ There are two components involved in establishing fact of injury. First, the employee must submit sufficient evidence to establish that he actually experienced the employment incident at the time, place and in the manner alleged.⁵ Second, the employee must submit evidence, generally only in the form of probative medical evidence, to establish that the employment incident caused a personal injury.⁶

FECA provides for payment of compensation for the disability or death of an employee resulting from personal injury sustained while in the performance of duty.⁷ 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 employment.” In addressing the issue, the Board has stated that for an incident 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 or her master’s business; (2) at a place where he or she may reasonably be expected to be on connection with the employment; and (3) while he or she was reasonably fulfilling the duties of his or her employment or engaged in doing something incidental thereto.⁸

ANALYSIS

Appellant alleged that on October 1, 2010 he sustained a back injury when another car struck his vehicle at the intersection of 10th Avenue and 36th Street. As part of his burden of proof, he must establish all the elements of his claim, including that the October 1, 2010 incident occurred in the performance of duty at the time, place and in the manner alleged. OWCP denied appellant’s claim finding that he did not provide sufficient details describing the incident to establish that it occurred in the performance of duty.

The Board finds that appellant failed to establish that he sustained an injury in the performance of duty on October 1, 2010.

Appellant’s occupation of “driver” requires that he perform employment duties in a vehicle, off the employing establishment’s premises. While the record reflects that the incident occurred during his work hours, he has not sufficiently described the alleged October 1, 2010 incident to establish that it occurred in the performance of duty.⁹ Appellant has alleged that the

³ *G.T.*, 59 ECAB 447 (2008); *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989); *M.M.*, Docket No. 08-1510 (issued November 25, 2010).

⁴ *S.P.*, 59 ECAB 184 (2007); *Alvin V. Gadd*, 57 ECAB 172 (2005).

⁵ *Bonnie A. Contreras*, 57 ECAB 364 (2006); *Edward C. Lawrence*, 19 ECAB 442 (1968).

⁶ *David Apgar*, 57 ECAB 137 (2005); *John J. Carlone*, 41 ECAB 354 (1989).

⁷ 5 U.S.C. § 8102(a).

⁸ *J.E.*, 59 ECAB 119 (2007).

⁹ See *Dennis M. Mascarenas*, 49 ECAB 215, 218 (1997).

accident occurred at the intersection of 10th Avenue and 36th Street. This information is not sufficient to establish his claim because it does not establish that he was at a place where he was reasonably expected to be and at a time when he was fulfilling duties of his employment. Appellant failed to describe the purpose of his trip, and describe why he was at the said intersection at the time of the accident. In a letter dated October 8, 2010, OWCP advised appellant of the deficiencies of his claim and requested additional factual evidence to establish that the alleged vehicle accident occurred as alleged. Appellant did not submit any additional statements describing the alleged October 1, 2010 incident or providing additional details. Thus, he did not submit sufficient evidence to establish that the October 1, 2010 incident occurred 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 did not meet his burden of proof to establish that he sustained an injury in the performance of duty on October 1, 2010.¹⁰

¹⁰ The Board notes that appellant submitted additional evidence following the November 19, 2010 merit decision. Since the Board's jurisdiction is limited to evidence that was before OWCP 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); *Sandra D. Pruitt*, 57 ECAB 126 (2005). Appellant may submit that evidence to OWCP along with a request for reconsideration.

ORDER

IT IS HEREBY ORDERED THAT the November 19, 2010 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 30, 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