United States Department of Labor
Employees' Compensation Appeals Board

J.W., Appellant	)	
and	)	**Docket No. 12-896**
	)	**Issued: August 23, 2012**
DEPARTMENT OF DEFENSE, DEFENSE LOGISTICS AGENCY, Columbus, OH, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On March 15, 2012 appellant, through her attorney, filed a timely appeal of a February 14, 2012 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[1] (FECA) 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 a traumatic injury in the performance of duty on December 16, 2010.

FACTUAL HISTORY

On June 13, 2011 appellant, then a 47-year-old contract specialist, filed a traumatic injury claim alleging that she displaced a lumbar disc on December 16, 2010 when she slipped on a wet

[1] 5 U.S.C. § 8101 *et seq.*

floor at Kid City, a children's clothing store in Philadelphia, PA. The next morning, she departed for Columbus, OH, her regular duty station, at 10:19 a.m. OWCP informed appellant in a July 5, 2011 letter that additional evidence was needed to establish her claim. It gave her 30 days to submit a factual statement detailing the December 16, 2010 incident and a medical report from a physician explaining how the event caused a lower back condition.

Appellant specified in a July 22, 2011 statement that she was teaching a contracts course at the Defense Supply Center Philadelphia on December 16, 2010 as part of a five-day, temporary-duty assignment.[2] After she left the facility around 5:05 p.m., she traveled one-half block to Kid City, where she sustained a back injury around 5:15 p.m. In a December 16, 2010 accident report, appellant reiterated that she slipped on a wet floor in the front of the store.

In December 16, 2010 emergency department records, Dr. Brian J. Clohessy, an osteopath specializing in emergency medicine, diagnosed knee and ankle pain. January 10 and April 13, 2011 radiological tests conducted by Dr. Robert M. Lemming, a Board-certified diagnostic radiologist, exhibited L5-S1 central disc herniation and canal stenosis as well as minimal L4-L5 disc bulge and levoscoliosis.

In May 13, June 10 and July 11, 2011 notes, Dr. Cynthia G. Olsen, a Board-certified family practitioner, diagnosed lumbar disc herniation and opined that appellant was disabled. She detailed in a June 15, 2011 attending physician's report that appellant sustained lumbar intervertebral disc displacement, lumbar spinal stenosis, neuritis and lumbago due to a fall on December 16, 2010. Dr. Olsen checked the "no" box in response to a form question asking whether the condition was employment related, clarifying that appellant was shopping when she slipped on a wet floor.[3]

Dr. Cynthia Z. Africk, a Board-certified neurological surgeon, stated in a July 20, 2011 note that a July 6, 2011 magnetic resonance imaging (MRI) scan showed L5-S1 disc degeneration and protrusion. In July 21 and 29, 2011 status reports, Dr. Townsend Smith, a Board-certified anesthesiologist, excused appellant from work until August 22, 2011.[4]

In an undated letter, Beverly A. Brooks, appellant's supervisor and chief of the employing establishment's acquisition/contracting team, confirmed that appellant was at the Defense Supply Center Philadelphia for a temporary-duty assignment on December 16, 2010, but only became aware of her back condition in April 2011. On May 12, 2011 appellant informed Ms. Brooks that she was shopping when she fell and injured her right ankle on December 16, 2010.

[2] The case record contains a November 9, 2010 authorization request for a five-day, temporary-duty assignment in Philadelphia starting December 13, 2010 and various receipts for lodging, parking, toll, car rental and air travel. Flight itineraries showed that appellant arrived in Philadelphia on December 13, 2010 and departed for Columbus on December 17, 2010.

[3] Dr. Olsen pointed out that appellant previously sustained right knee sprain, torn right meniscus, lumbar degenerative disc disease and sciatica between 2005 and 2009.

[4] The case record also contains Dr. Africk's September 8, 2011 status report advising that appellant be placed on restricted duty.

By decision dated August 9, 2011, OWCP denied appellant's claim, finding the evidence insufficient to establish that an injury arose out of and in the course of her employment.

Appellant requested a telephonic hearing, which was held on December 6, 2011. She testified that she entered Kid City on December 16, 2010 to use the bathroom and then purchase a pair of gloves due to the increasing snowfall.

Ms. Brooks asserted in a December 20, 2011 statement that appellant finished her final contracts class at 3:00 p.m. as scheduled on December 16, 2010 and had the discretion to end it earlier on account of inclement weather. In or around January 2011, she overheard appellant telling coworkers that she was Christmas shopping for her children when she slipped and twisted her ankle.[5] In a December 28, 2011 e-mail, Gary A. Fidler, chief of the employing establishment's training division, indicated that appellant told him on May 12, 2011 that she stopped at Kid City to buy stocking stuffers.[6]

On February 14, 2012 an OWCP hearing representative affirmed the August 9, 2011 decision.

LEGAL PRECEDENT

An employee seeking compensation under FECA has the burden of establishing the essential elements of her claim by the weight of reliable, probative and substantial evidence,[7] including that she is an "employee" within the meaning of FECA and that she filed her claim within the applicable time limitation.[8] The employee must also establish that she sustained an injury in the performance of duty as alleged and that her disability for work, if any, was causally related to the employment injury.[9]

FECA provides for the payment of compensation for the disability or death of an employee resulting from a personal injury sustained while in the performance of duty. The phrase "sustained while in the performance of duty" has been interpreted by the Board to be the equivalent of "arising out of and in the course of employment," the coverage formula commonly found in other workers' compensation laws.[10] "In the course of employment" deals with the work setting, locale and time of injury. "Arising out of the employment" encompasses not only the work setting, but also the requirement that an employment factor caused the injury.[11]

[5] Ms. Brooks further noted that bathrooms were available near appellant's classroom and throughout the work facility.

[6] The employing establishment provided a separate December 20, 2011 statement that reiterated these allegations.

[7] *J.P.*, 59 ECAB 178 (2007); *Joseph M. Whelan*, 20 ECAB 55, 57 (1968).

[8] *R.C.*, 59 ECAB 427 (2008).

[9] *Id.*; *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

[10] *C.O.*, Docket No. 09-217 (issued October 21, 2009).

[11] *A.K.*, Docket No. 09-2032 (issued August 3, 2010).

An employee on travel status, temporary-duty assignment, or a special mission for her employer is in the performance of duty and, therefore, under the protection of FECA 24 hours a day with respect to any injury resulting from activities essential or incidental to her special duties. Such activities include eating, returning to the hotel where the employee is staying after eating dinner, and engaging in reasonable activities within a short distance of the hotel. However, when a claimant voluntarily deviates from such activities and engages in matters, personal or otherwise, that are not incidental to the duties of her temporary assignment, she ceases to be under the protection of FECA. Any injury occurring during these deviations is not compensable. Examples include visiting relatives or friends while on official travel status, visiting nightclubs and bars, skiing at a location 60 miles from where an employee is undergoing training and taking a boat trip during nonworking hours to view a private construction site. In determining whether an injury occurs while in the performance of duty or during a deviation, the Board will focus on the nature of the activity in which the employee is 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 her employment.[12]

ANALYSIS

The case record supports that appellant taught a contracts course at the Defense Supply Center Philadelphia on December 16, 2010 as part of an authorized temporary-duty assignment. Later that day, after she left the work facility, she slipped on a wet floor while shopping at Kid City. Appellant testified at the December 6, 2011 telephonic hearing that she bought gloves for herself at the store.[13] Employing establishment officials maintained, on the other hand, that she bought Christmas presents for her children. Regardless of which items appellant actually purchased, the Board finds that she was undertaking a personal errand.[14] She did not provide any evidence to establish that shopping at Kid City, whether for gloves or Christmas presents, was reasonably incidental to her teaching responsibilities at the Defense Supply Center Philadelphia or any other aspect of her temporary-duty assignment. Because appellant voluntarily engaged in a recreational diversion on December 16, 2010 that deviated from activities essential or incidental to her employment, her back injury was not compensable.[15]

[12] *Id.*

[13] The Board notes that appellant's testimony during the December 6, 2011 telephonic hearing, namely that she entered Kid City to use the bathroom, implied that she engaged in an activity incidental to her temporary-duty assignment. *See Lenneth W. Richard*, 49 ECAB 337 (1998). *Cf. B.C.*, Docket No. 09-653 (issued December 24, 2009) (finding that appellant, who had eaten dinner and purchased souvenirs at a shopping mall, remained in the performance of duty when she broke her left leg in the parking lot because dinner was incidental to a meeting with a contractor and constituted a "reasonable necessity"). Appellant's assertion, however, conflicts with Dr. Olsen's June 15, 2011 attending physician's report, which specified that she was shopping at the time of her injury on December 16, 2010. Moreover, Ms. Brooks indicated that restrooms were available near appellant's classroom and throughout the work facility. *Cf. Stephen Elliot*, 53 ECAB 659 (2002) (securing coffee off-premises when the employer made coffee available on-site was a matter of personal preference, not an activity incidental to appellant's duties).

[14] *L.A.*, Docket No. 09-2278 (issued September 27, 2010).

[15] *S.C.*, Docket No. 08-2440 (issued June 22, 2009).

Counsel contends on appeal that the February 14, 2012 decision is contrary to fact and law. In view of the totality of the evidence, the Board finds that appellant did not satisfy her burden of proof.[16]

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 establish that she sustained a traumatic injury in the performance of duty on December 16, 2010.

ORDER

IT IS HEREBY ORDERED THAT the February 14, 2012 decision of the Office of Workers' Compensation Programs be affirmed.

Issued: August 23, 2012
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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

[16] Since appellant did not meet her burden of proof to establish that she was injured while in the performance of duty, it is not necessary to consider the medical evidence with regard to causal relationship.