United States Department of Labor
Employees' Compensation Appeals Board

L.L., Appellant	)	
and	)	**Docket No. 12-194**
	)	**Issued: June 5, 2012**
DEPARTMENT OF THE TREASURY, INTERNAL REVENUE SERVICE, OGDEN ACCOUNTS MANAGEMENT, Ogden, UT, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On November 2, 2011 appellant filed a timely appeal from decisions of the Office of Workers' Compensation Programs (OWCP) dated July 26 and September 29, 2011 that denied her claim. 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 this case.[2]

ISSUE

The issue is whether appellant sustained an injury in the performance of duty on March 7, 2011.

[1] 5 U.S.C. §§ 8101-8193.

[2] The Board notes that the employing establishment submitted evidence to OWCP following the September 29, 2011 decision and that appellant submitted evidence with her appeal to the Board. The Board cannot consider this evidence, however, as its review of the case is limited to the evidence that was before OWCP when it rendered its final decision. 20 C.F.R. § 501.2(c).

On appeal, appellant generally asserts that her claim is compensable.

FACTUAL HISTORY

On March 10, 2011 appellant, then a 53-year-old contact representative, filed a traumatic injury claim, alleging that she injured her right elbow, hand and arm when she slipped in the parking lot at work on March 7, 2011, an icy, snowy day. She indicated that the fall occurred at 6:47 p.m. Gerald West, an employing establishment supervisor, indicated that appellant's duty hours were 10:15 a.m. to 6:45 p.m. Monday through Friday, and that she fell as she was leaving the building after the end of her shift. He authorized medical treatment on a Form CA-16 on March 10, 2011.

In support of her claim, appellant submitted medical reports dated March 10 and 24, 2011 with illegible signatures. These provided physical examination findings and diagnoses of right shoulder and wrist sprains. Joelle Creager, a nurse practitioner, provided a March 10, 2011 attending physician's report in which she noted the history of injury and advised that appellant should wear a brace and not lift over 5 to 10 pounds at work. An April 7, 2011 right wrist magnetic resonance imaging (MRI) scan demonstrated osteoarthritic changes, a possible small tear of the scapholunate ligament and no evidence of an acute fracture. In an April 22, 2011 emergency department report, Dr. Warren S. Downs, Board-certified in emergency medicine, noted that appellant presented with a complaint of right elbow pain and her report that she fell on March 7, 2011. He found elbow tenderness on examination and diagnosed elbow pain and possible elbow fracture. An April 22, 2011 right elbow x-ray demonstrated a possible nondisplaced radial head fracture versus artifact. On April 28, 2011 Dr. Neil B. Callister, a Board-certified orthopedic surgeon, noted the history of injury. He reviewed the x-ray and MRI scan studies and provided physical examination findings. Dr. Callister diagnosed right lateral epicondylitis due to a direct blow mechanism from a fall at work six weeks previously and a right wrist sprain, with no evidence of fracture. In a May 26, 2011 report, he advised that appellant's condition was improving.

In letters dated June 21, 2011, OWCP informed appellant of the type of evidence needed to establish her claim. It noted that her medical expenses had exceeded $1,500.00 and thus more evidence was needed regarding the circumstances of her claimed injury. OWCP asked the employing establishment to provide information regarding the parking lot where the injury occurred. Each was advised to submit the requested information within 30 days.

By decision dated July 26, 2011, OWCP denied the claim on the grounds that it did not occur in the performance of duty. It noted that neither appellant nor the employing establishment had responded to the June 21, 2011 requests. On August 2, 2011 appellant requested a review of the written record. By letter dated September 2, 2011, OWCP's hearing representative again requested that the employing establishment provide information regarding appellant's claim. The employing establishment was given 20 days from the date of the letter to respond.

In a September 29, 2011 decision, OWCP's hearing representative noted that the employing establishment had not responded to her September 2, 2011 letter and affirmed the July 26, 2011 decision.

LEGAL PRECEDENT

OWCP regulations, at 20 C.F.R. § 10.5(ee) define a traumatic injury as a condition of the body caused by a specific event or incident or series of events or incidents within a single workday or shift.[3] To determine whether a federal employee has sustained a traumatic injury in the performance of duty, it must first be determined whether a "fact of injury" has been established. First, the employee must submit sufficient evidence to establish that he or she actually experienced the employment incident at the time, place and in the manner alleged. Second, the employee must submit sufficient evidence, generally only in the form of medical evidence to establish that the employment incident caused a personal injury.[4]

In the compensation field, to occur in the course of employment, an injury must occur: (1) at a time when the employee may be reasonably said to be engaged in the master's business; (2) at a place where he or she may reasonably be expected to be in connection with the employment; and (3) while he or she was reasonably fulfilling the duties of the employment or engaged in doing something incidental thereto.[5]

Regarding employees having fixed hours and a fixed place of work, the Board has accepted the general rule of workers' compensation law that injuries occurring on the premises of the employing establishment, while the employees are going to and from work before or after working hours or at lunchtime are compensable.[6] The course of employment for such employees includes acts which minister to their personal comfort within the time and space limits of their employment.[7] On the other hand, when a claimant departs from her workstation without authorization to retrieve personal items, such activity is not considered an activity necessary for personal comfort or ministration or incidental to her employment.[8] In defining what constitutes the premises of an employing establishment, the Board has stated that the "premises" of the employer, as the term is used in workmen's compensation law, are not necessarily coterminous with the property owned by the employer; they may be broader or narrower and are dependent more on the relationship of the property to the employment than on the status or extent of the legal title.[9]

The Board has pointed out that factors which determine whether a parking area used by employees may be considered a part of the employing establishment's "premises" include whether the employing establishment contracted for the exclusive use by its employees of the parking area, whether parking spaces on the lot were assigned by the employing establishment to

[3] 20 C.F.R. § 10.5(ee); *Ellen L. Noble*, 55 ECAB 530 (2004).

[4] *Gloria J. McPherson*, 51 ECAB 441 (2000).

[5] *R.A.*, 59 ECAB 581 (2008).

[6] *F.S.*, Docket No. 09-1573 (issued April 6, 2010).

[7] *R.H.*, Docket No. 09-13 (issued March 6, 2009); A. Larson, *The Law of Workers' Compensation* § 21 (2007).

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

[9] *Idalaine L. Hollins-Williamson*, 55 ECAB 655 (2004).

its employees, whether the parking areas were checked to see that no unauthorized cars were parked in the lot, whether parking was provided without cost to the employees, whether the public was permitted to use the lot and whether other parking was available to the employees. Mere use of a parking facility, alone, is not sufficient to bring the parking lot within the "premises" of the employing establishment. The premises doctrine is applied to those cases where it is affirmatively demonstrated that the employer owned, maintained or controlled the parking facility, used the facility with the owner's special permission or provided parking for its employees.[10]

ANALYSIS

Appellant has established that she is a federal employee and that the March 7, 2011 fall occurred at a reasonable time regarding her employment since she fell several minutes after her shift ended.[11] The record, however, does not clearly establish that the parking lot where the fall occurred was part of the employment premises. In the case at hand, OWCP requested information from the employing establishment on two occasions regarding the parking lot where the incident occurred. However, the employing establishment did not timely respond to either request.

Although it is a claimant's burden to establish his or her claim, OWCP is not a disinterested arbiter but, rather, shares responsibility in the development of the evidence, particularly when such evidence is of the character normally obtained from the employing establishment or other government source.[12] Proceedings under FECA are not adversarial in nature nor is OWCP a disinterested arbiter. Once OWCP has begun an investigation of a claim, it must pursue the evidence as far as reasonably possible. OWCP has an obligation to see that justice is done.[13]

In this case, before denying appellant's claim, OWCP must ascertain whether the parking lot where the incident occurred was the employing establishment's premises. It must again attempt to get information from the employing establishment, especially as this is not the type of information readily available to appellant. Accordingly, the Board finds this case is not in posture for decision and the case must be remanded to OWCP. On remand, OWCP should obtain additional information from the employing establishment regarding access, ownership and control of the parking lot where the March 7, 2011 incident occurred. After such development deemed necessary, it shall issue an appropriate merit decision regarding appellant's claim.

CONCLUSION

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

[10] *R.M.*, Docket No. 07-1066 (issued February 6, 2009).

[11] *See D.M.*, Docket No. 10-1723 (issued August 23, 2011).

[12] *See N.S.*, 59 ECAB 422 (2008).

[13] *A.A.*, 59 ECAB 726 (2008).

ORDER

IT IS HEREBY ORDERED THAT the September 29 and July 26, 2011 decisions of the Office of Workers' Compensation Programs are set aside and the case is remanded to OWCP for proceedings consistent with this opinion of the Board.

Issued: June 5, 2012
Washington, DC

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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