United States Department of Labor
Employees' Compensation Appeals Board

M.L., Appellant	)	
and	)	**Docket No. 12-286**
	)	**Issued: June 4, 2012**
DEPARTMENT OF THE TREASURY, INTERNAL REVENUE SERVICE, Richmond, 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
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On November 23, 2011 appellant filed a timely appeal of the November 1, 2011 merit decision of the Office of Workers' Compensation Programs (OWCP) which found that she did not sustain an injury in the performance of duty on September 13, 2011. 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 met her burden of proof to establish that she sustained an injury in the performance of duty on September 13, 2011.

[1] 5 U.S.C. § 8101 *et seq.*

[2] The Board notes that, following the issuance of the November 1, 2011 OWCP decision, 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, appellant contends that she was in the course of her employment because the employing establishment instructed her to walk on the street where she fell.

FACTUAL HISTORY

On September 13, 2011 appellant, then a 48-year-old tax examiner, filed a traumatic injury claim (Form CA-1) alleging that at 5:40 a.m. that day, she sustained injuries to her right knee, right thumb and wrist when she tripped and fell on a rock while walking across the street from the train station to work. She stopped work that day. Appellant's supervisor noted that appellant's fixed shift hours were 6:00 a.m. to 2:30 p.m. and reported that appellant fell in the street outside the building as she was crossing the street to arrive at work when she tripped on a rock.

Appellant submitted an emergency room report dated September 13, 2011.

In a September 15, 2011 attending physician's report, Dr. Angeles Gonzalez-Prado, a Board-certified internist, diagnosed contusion, abrasion and laceration based on his findings of decreased range of motion of the right shoulder, swollen right knee, laceration of the right thumb and abrasion of the right knee. He noted that it was unknown whether or not appellant's conditions were caused or aggravated by her fall. Dr. Gonzalez-Prado opined that appellant was totally disabled and advised her not to return to work.

In an October 26, 2011 letter, OWCP notified appellant of the deficiencies of her claim and requested additional evidence. It allotted 30 days for submission. Appellant did not respond.

By decision dated November 1, 2011, OWCP denied appellant's claim finding that the evidence submitted did not establish that she was injured in the performance of duty.

LEGAL PRECEDENT

FECA provides for the payment of compensation for the disability or death of an employee resulting from personal injury sustained while in the performance of duty.[3] The phrase sustained while in the performance of duty in FECA is regarded as the equivalent of the commonly found requisite in workers' compensation law of arising out of and in the course of employment.[4]

To arise in the course of employment, an injury must occur at a time when the employee may reasonably be said to be engaged in the master's business, at a place where he may reasonably be expected to be in connection with the employment and while he was reasonably fulfilling the duties of his employment or engaged in doing something incidental thereto.[5] In

[3] 5 U.S.C. § 8102(a).

[4] *See Valerie C. Boward*, 50 ECAB 126 (1998).

[5] *See R.A.*, 59 ECAB 581 (2008); *Mary Keszler*, 38 ECAB 735 (1987).

deciding whether an injury is covered by FECA,[6] the test is whether, under all the circumstances, a causal relationship exists between the employment itself, or the conditions under which it is required to be performed and the resultant injury.[7]

The Board has recognized as a general rule that off-premises injuries sustained by employees having fixed hours and places of work while going to or coming from work or during a lunch period, are not compensable, as they do not arise out of and in the course of employment. Rather, such injuries are merely the ordinary, nonemployment hazards of the journey itself, which are shared by all travelers, subject to certain exceptions.[8] Underlying some of these exceptions is the principle that course of employment should extend to any injury that occurred at a point where the employee was within the range of dangers associated with the employment.[9] The most common ground of extension is that the off-premises point at which the injury occurred lies on the only route, or at least on the normal route, which employees must traverse to reach the premises, and that therefore the special hazards of that route become the hazards of the employment.[10] This exception contains two components. The first is the presence of a special hazard at the particular off-premises point. The second is the close association of the access route with the premises, so far as going and coming are concerned.[11] The main consideration in applying this rule is whether the conditions giving rise to the injury are causally connected to the employment.[12]

ANALYSIS

Appellant alleged that she tripped and fell on a rock while walking across the street from the train station to work on September 13, 2011. The Board finds that she has not established that her injury occurred in the performance of duty.

With regard to time, based on appellant's statement on the claim form, the incident occurred at 5:40 a.m. shortly before her shift was to begin at 6:00 a.m. Appellant was still on her way to the employing establishment and had not yet begun her work. The Board has held that the mere fact that an injury occurs during the workday is not sufficient, in and of itself, to bring an injury within the performance of duty. For compensability, the concomitant requirement of an injury, arising out of the employment, must also be shown.[13] On appeal, appellant contends that she was in the course of her employment because she was instructed to walk on the street

[6] 5 U.S.C. §§ 8101-8193.

[7] *See Mark Love*, 52 ECAB 490 (2001).

[8] *See T.M.*, Docket No. 11-528 (issued December 13, 2011); *John M. Byrd*, 53 ECAB 684 (2002); *see also Gabe Brooks*, 51 ECAB 184 (1999); *Thomas P. White*, 37 ECAB 728 (1986); *Robert F. Hart*, 36 ECAB 186 (1984).

[9] *See R.O.*, Docket No. 08-2088 (issued May 18, 2009).

[10] *See Shirley Borgos*, 31 ECAB 222, 223 (1979).

[11] *See* Larson, *The Law of Workers' Compensation* § 13.01(3) (2006).

[12] *See Jimmie Brooks*, 22 ECAB 318, 321 (1971).

[13] *See William W. Knispel*, 56 ECAB 639 (2005); *Luis A. Velez*, 56 ECAB 592 (2005).

where she fell. The fact that the employing establishment assented to the road of travel to work where appellant tripped and fell, does not change the established criteria for an injury sustained in the performance of duty under FECA.[14]

In *Idalaine L. Hollins-Williamson*,[15] the employee fell and injured her left side while walking from a parking lot to the employing establishment building on a snow-covered public sidewalk. The Board found that the employee had not shown that the sidewalk on which she fell was used exclusively or principally by employees of the employing establishment for the convenience of the employer. The evidence of record supported that the sidewalk where the incident occurred was not owned, operated or maintained by the employing establishment and was open to the public. The employee's injury was not in the performance of duty.

The Board has held that, even if a public sidewalk were the customary means of access to the employing establishment for its employees, this did not alter the public nature of the sidewalk or render it a part of the employing establishment's premises.[16] In this case, there is no evidence to support that the use of the road was restricted to the employees of the employing establishment or that the employing establishment owned, operated or maintained the road where the incident occurred. The road was open to the general public. The Board finds that the hazard that caused appellant's injury, a rock on a public street, is a hazard commonly faced by all pedestrians. Therefore, there was no special hazard at the off-premises point.[17] The evidence of record does not establish that appellant was engaged on any special errand when she left her home to commute to her place of employment. There is no evidence which would establish that appellant's journey to work on the date of injury was an integral part of any errand or special task either expressly or impliedly agreed to by the employing establishment. Rather, her travel on that date appears to conform to her regular work schedule and her normal morning commute in going to the office. The Board finds that appellant was not in the performance of duty on September 13, 2011 as the injury occurred while she was exposed to an ordinary, off-premises nonemployment hazard of the journey shared by all travelers.[18]

While appellant's employment is the cause of her journey between home and the employing establishment, workers' compensation was not intended to protect her against all the perils of such journey.[19] The Board finds that the established exceptions mentioned above do not apply in her case. Appellant was not reasonably fulfilling the duties of her employment or doing something incidental to the fulfillment of her job duties. She had not begun her tour of duty and was walking on a public road toward the employing establishment. As noted, an employee going to work who had been injured off-premises is not in the course of employment.[20] As appellant

[14] *See T.G.*, Docket No. 10-920 (issued February 18, 2011).

[15] 55 ECAB 655 (2004).

[16] *See R.O., supra* note 9.

[17] *See id.*; *see also Robert F. Hart, supra* note 8.

[18] *See Shirley Borgos, supra* note 10; *D.K.*, Docket No. 11-1029 (issued February 1, 2012).

[19] *See Asia Lynn Doster*, 50 ECAB 351 (1999).

[20] *See C.P.*, Docket No. 11-1432 (issued January 23, 2012).

was not in the course of employment at the time of the September 13, 2011 incident, OWCP properly denied the claim for compensation.

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 her burden of proof to establish that she sustained an injury in the performance of duty on September 13, 2011.

ORDER

IT IS HEREBY ORDERED THAT the November 1, 2011 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 4, 2012
Washington, DC

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

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

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