

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

---

**J.R., Appellant**

**and**

**DEPARTMENT OF HEALTH & HUMAN  
SERVICES, SOCIAL SECURITY  
ADMINISTRATION, New York, NY, Employer**

---

)  
)  
)  
)  
)  
)  
)  
)

**Docket No. 11-1398  
Issued: March 7, 2012**

*Appearances:*  
*Kirk Bigelow, for the appellant*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

RICHARD J. DASCHBACH, Chief Judge  
MICHAEL E. GROOM, Alternate Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On May 25, 2011 appellant, through his representative, filed a timely appeal from a December 7, 2010 merit decision of the Office of Workers' Compensation Programs (OWCP), which denied his claim for an employment-related injury. Pursuant to the Federal Employees' Compensation Act<sup>1</sup> (FECA) 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 met his burden of proof to establish that he sustained an injury on March 26, 2010 while in the performance of duty.

On appeal, appellant's representative contends that appellant was entitled to official time and was acting in the same capacity as the other attendees who were granted official time. He also contends that: (1) OWCP denied appellant the right to a representative at the time of the

---

<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

oral hearing; (2) OWCP denied appellant the right to have his representative testify as a witness at the oral hearing; and (3) OWCP failed to rule on whether appellant's proffered Exhibit 1, an August 27, 2010 letter to the employing establishment, was accepted.

### **FACTUAL HISTORY**

On April 16, 2010 appellant, a 63-year-old social insurance representative, filed a traumatic injury claim (Form CA-1) alleging that at 3:00 p.m. on March 26, 2010 he sustained injuries to his ribs, lip, hands and head when he tripped and fell on a sidewalk.

By letter dated May 5, 2010, OWCP advised appellant that the information submitted was insufficient to establish his claim. It requested additional evidence and allotted 30 days for submission.

On May 12, 2010 the employing establishment controverted appellant's claim. It stated that he was not in the performance of duty when the injury occurred. Appellant was on annual leave and approximately 945 miles away from the place where his last official duty was performed.

Appellant submitted a narrative statement dated May 21, 2010. His normal tour of duty was a flex-tour of 8:00 a.m. to 4:30 p.m., Monday through Friday. Appellant attended a union caucus meeting in Jacksonville, Florida from March 24 to 26, 2010. He would have requested official time to attend the meeting, however, union officials were allocated a limited amount of hours and once the allotment was used employees had to take their own leave for official union duties. On March 26, 2010 appellant was on annual leave. He checked out of the hotel in Jacksonville at approximately 11:00 a.m. Appellant was unable to get an earlier flight and had to take an 8:00 p.m. return flight from Jacksonville to New York City. He decided to have lunch in St. Augustine before the flight. When appellant arrived to have lunch, he fell on a sidewalk after parking the car. He reported the injury to local management on March 29, 2010 by telephone. Appellant stated that his representative, who was walking beside him, witnessed the incident. He noted that a police officer was at the scene and took a report. An emergency vehicle from the fire department was called and they examined appellant, who was given a cold compress to put over his swollen mouth which was bleeding.

In a March 28, 2010 emergency room report, appellant was diagnosed with rib contusion and hand sprain by an unidentified physician.

In an April 1, 2010 report, Dr. Paul Issack, a Board-certified orthopedic surgeon, diagnosed a minimally displaced fifth metacarpal base fracture and placed appellant in a short arm thumb spica cast. He reported a history that appellant tripped and fell on a sidewalk on March 26, 2010 and complained of pain in his right hand over the radial and ulnar borders but denied any other areas of pain. Dr. Issack stated that appellant had a past medical history of lumbar injury and foot pain.

In an April 3, 2010 radiological report, Dr. John Matthews, a Board-certified radiologist, diagnosed a nondisplaced fracture base of the fifth metacarpal. There was no evidence of any scaphoid fracture.

In a May 6, 2010 report, Dr. Issack diagnosed right lateral epicondylitis. In another May 6, 2010 report, he diagnosed healed metacarpal fracture. Dr. Issack advised that appellant complained of right wrist and elbow pain, but had no pain about the base of the metacarpal.

By decision dated June 14, 2010, OWCP denied appellant's claim finding that he was not in the performance of duty at the time of the March 26, 2010 incident. It explained "that since the purpose of your trip was not to act in a representational capacity, at the time of your injury you were not in the performance of duty." OWCP noted that appellant was 945 miles away from the employing establishment's premises while on annual leave.

On June 18, 2010 appellant, through his representative, requested an oral hearing before an OWCP hearing representative.

Appellant submitted an August 27, 2010 letter to the employing establishment. He requested the employing establishment to correct its controversion. Appellant stated that the employing establishment was aware that he attended the union caucus meeting on March 26, 2010 and that he had previously depleted his official time allocation and was not able to request official time to attend the meeting. He contended that because other employees who attended the meeting were approved for official time by the employing establishment, the nature of the meeting was official business and the distance away from his regular duty station had no relevance to whether he was in the performance of duty.

At the October 21, 2010 oral hearing, appellant testified that he had attended the annual union meeting for the past 17 years and previously received official time. He was paid travel and *per diem* by the employing establishment until a new contract began in 2005 which reduced the union's official time use and did away with reimbursement of travel and *per diem*. On March 26, 2010 appellant was in travel status and paid for the travel, including the plane ticket and the hotel, himself. He did not request official time because his allotted time had expired. At the time of the incident, appellant was waiting for his return flight and stopped *en route* to the airport for lunch. He requested to file his August 27, 2010 letter to the employing establishment and an OWCP hearing representative agreed to add it to the case record.

On November 22, 2010 appellant moved to admit his August 27, 2010 letter to the employing establishment as appellant's Exhibit 1 and the caucus agenda of March 25, 2010 as appellant's Exhibit 2. He also raised objections to his representative not being allowed to represent him and testify as a witness at the hearing.

By decision dated December 7, 2010, an OWCP hearing representative affirmed the June 14, 2010 decision. As appellant was not on official time, he was not engaged in any representational functions "benefiting either a specific employee or his agency," he was in a leave status and therefore he was not in the performance of duty at the time of his injury.

### **LEGAL PRECEDENT**

Congress, in providing a compensation program for federal employees, did not contemplate an insurance program against any and every injury, illness or mishap that might befall an employee contemporaneous or coincidental with his or her employment. Liability does

not attach merely upon the existence of an employee employer relationship.<sup>2</sup> Instead, Congress provided for the payment of compensation for personal injuries sustained while in the performance of duty. 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. The phrase "course of employment" is recognized as relating to the work situation and more particularly, relating to elements of time, place and circumstance.<sup>3</sup> In addressing this issue, the Board has stated: In the compensation field, 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 in 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.<sup>4</sup>

The Board has recognized as a general rule that off-premises injuries sustained by employees having fixed hours and place of work while going to or coming from work, are not compensable.<sup>5</sup>

With respect to whether injuries arising in the course of union activities are related to the employment, the general rule is that union activities are personal, that attendance at a union meeting, for example, is exclusively for the personal benefit of the employee and devoid of any mutual employer-employee benefit.<sup>6</sup> Under the procedure manual, OWCP has recognized that certain representational functions performed by employee representatives benefit both the employee and the employing establishment.<sup>7</sup> With regard to representational functions and when a person is considered to be on official time, OWCP's procedure manual provides: "When an employee claims to have been injured while performing representational functions, an inquiry should be made to the official superior to determine whether the employee had been granted 'official time' or in emergency cases, would have been granted official time if there had been time to request it. If so, the claimant should be considered to have been in the performance of duty."<sup>8</sup>

---

<sup>2</sup> See *Janet M. Abner*, 53 ECAB 275, 277-78 (2002).

<sup>3</sup> See *Annie L. Ivey*, 55 ECAB 480 (2004). See also *Alan G. Williams*, 52 ECAB 180 (2000).

<sup>4</sup> *Id.*

<sup>5</sup> See *Phyllis A. Sjoberg*, 57 ECAB 409 (2006).

<sup>6</sup> See *Kelly Y. Simpson*, 57 ECAB 197 (2005).

<sup>7</sup> See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Performance of Duty*, Chapter 2.804.16 (March 2011).

<sup>8</sup> *Id.* at Chapter 2.804.16e; see also *Bernard Redmond*, 45 ECAB 298 (1994). Chapter 2.804.16c of OWCP's procedures defines official time as "time granted to an employee by the agency to perform representational functions, when the employee would otherwise have been in duty status, without charge to leave or loss of pay."

## ANALYSIS

Appellant is an employee with fixed hours and place of work. At the time of injury, he was *en route* to the airport the day after an annual union meeting and stopped to have lunch while in an annual leave status when he sustained an injury. Appellant argued that he was in the performance of duty as he was doing something incidental to his employment with the knowledge and approval of the employer, *i.e.*, attending a regularly scheduled union meeting. He also argued that, although he was not on official time, he was entitled to official time and acting in the same capacity as the other attendees who had been granted official time and his attendance at the meeting was in a representational capacity.<sup>9</sup>

In *K.L.*,<sup>10</sup> the employee injured her left shoulder and neck in an automobile accident. She stated that she was traveling from the employing establishment to another medical center for a meeting when her vehicle was struck from behind at a red light. Her supervisor stated that she was not in the performance of duty at the time of her injury as she was traveling to attend a union meeting regarding the internal business of the labor organization. There was no evidence that she planned to engage in any specific representational functions and she did not submit evidence to establish that any matters on which she met pertained to a representational function. As such, the Board found that the union meeting was a personal activity unrelated to her federal employment. Both the employee and her supervisor noted that, based on her union position, she was entitled to use up to four hours a day of official time. Both agreed, however, that her time sheet did not reflect that she was on official time at the time of injury and that she was in a regular duty status when her injury occurred. As the claimant was not on official time, her union activity was considered to be personal rather than representational and her injury did not arise in the performance of duty.

In this case, appellant was not on the premises at the time of the injury, but instead was on the way to an airport to return from Florida to New York. The Board must focus on the nature of the activities in which he was engaged to determine whether or not they were reasonably incidental to his employment or whether he was engaged in personal activities unrelated to his employment. As established in the record, the union meeting which he attended was for the personal benefit of the employee as a union officer rather than in a representational capacity as a union steward with a mutual benefit to the union and the employing establishment. There is no evidence of record that appellant planned to engage in specific representational functions as a union steward on March 26, 2010. Appellant did not submit evidence to establish that any matters on which he met pertained to his representational functions. As such, the Board

---

<sup>9</sup> It appears appellant is implying that he was in travel status while in attendance at the union meeting. Under FECA, an employee on travel status or a temporary-duty assignment or special mission for his employer is in the performance of duty and therefore under the protection of FECA 24 hours a day with respect to any injury that results from activities essential or incidental to his special duties. *See Ann P. Drennan*, 47 ECAB 750 (1996); *Janet Kidd (James Kidd)*, 47 ECAB 670 (1996); *William K. O Connor*, 4 ECAB 21 (1950). In this case, as the Board finds that the employing establishment did not authorize appellant's attendance in order to perform a representational function with mutual benefit to the union and the employing establishment, he was not in travel status and he was not in the performance of duty under the protection of FECA at the time of injury.

<sup>10</sup> Docket No. 06-2154 (issued February 8, 2007).

finds that he was not acting in a representational capacity at the time of his injury. Therefore, the union meeting must be considered a personal activity unrelated to his employment.

Appellant noted that he had attended the annual union meeting for the past 17 years and had previously received official time and was paid travel and *per diem*; however, in 2005 a new contract reduced the amount of authorized official time and reimbursement for travel or *per diem*. On March 26, 2010 he was on annual leave status and paid for the travel himself. Appellant had not requested nor been granted official time because his allotted time had expired. There is no dispute that he was 945 miles away from the place where his last official duty was performed or that he was in an annual leave status for which he was not compensated at the time of the injury. As appellant was not on official time, his union activity can reasonably be considered to be personal rather than representational in nature and his injury therefore did not occur in the performance of duty.<sup>11</sup>

There is no evidence that appellant's injury resulted from any employment-related factors. Appellant was not in a place he could reasonably be expected to be in furtherance of his employer's business. He did not establish that he was performing something incidental to that business rather than a personal activity unrelated to his job duties or his representational status as a union official. Appellant's injury on March 26, 2010 did not occur in the performance of duty. The Board finds that OWCP properly denied his claim.

On appeal, appellant's representative contends that OWCP denied appellant the right to a representative at the time of the oral hearing. Section 10.700 of OWCP's regulations allow a claimant to appoint one individual to represent his or her interests but require that the appointment be made in writing.<sup>12</sup> At the time of the October 21, 2010 hearing, however, appellant had not provided OWCP with written notice of his designation of a representative. Section 10.617 of OWCP's regulations allows testimony at oral hearings but does not bind the hearing representative to common law or statutory rules of evidence and grants broad discretion as to how to conduct the hearing.<sup>13</sup> Mr. Bigelow was not designated as appellant's representative at the time of the oral hearing. The Board finds that he was not entitled to represent appellant at the hearing and the hearing representative did not abuse her discretion in refusing to allow appellant a representative at the hearing.<sup>14</sup> Appellant further contends that OWCP denied him the right to have his representative testify as a witness at the oral hearing. Under section 10.619 a claimant may request a subpoena, but the decision to grant or deny such a request is within the discretion of the hearing representative.<sup>15</sup> Appellant requested witness testimony from his representative at the oral hearing. However, he did not demonstrate why oral testimony from the

---

<sup>11</sup> *Id.*

<sup>12</sup> 20 C.F.R. § 10.700(a).

<sup>13</sup> *Id.* at § 10.617(c).

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* at § 10.619. See *P.L.*, Docket No. 11-15 (issued August 18, 2011); *E.S.*, Docket No. 09-2019 (issued July 26, 2010).

requested witness was the best way to ascertain the facts.<sup>16</sup> Appellant noted that his representative was with him when the injury occurred. The fact of the March 26, 2010 injury is not in dispute. As noted, the relevant issue is whether appellant was in the performance of duty when injured. The Board finds that the hearing representative, acted within her discretion in denying his request for witness testimony. Appellant's representative also contends that OWCP failed to rule on whether appellant's proffered Exhibit 1, an August 27, 2010 letter to the employing establishment, was accepted. During the October 21, 2010 oral hearing, appellant requested to file the August 27, 2010 letter and an OWCP hearing representative agreed to add it to the case record. On November 22, 2010 he moved to admit his August 27, 2010 letter to the employing establishment as appellant's Exhibit 1 and the caucus agenda of March 25, 2010 as appellant's Exhibit 2. The Board notes that both documents were added to the case record and reviewed by an OWCP hearing representative. Therefore, appellant's evidence was of record and considered below.

### **CONCLUSION**

The Board finds that appellant has not met his burden to establish that he sustained an injury on March 26, 2010 while in the performance of duty.

---

<sup>16</sup> Subpoenas are issued for witnesses only where oral testimony is the best way to ascertain the facts. 20 C.F.R. § 10.619.

**ORDER**

**IT IS HEREBY ORDERED THAT** the December 7, 2010 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 7, 2012  
Washington, DC

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

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

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