United States Department of Labor
Employees' Compensation Appeals Board

B.I., Appellant	)	
and	)	**Docket No. 12-1069**
	)	**Issued: January 11, 2013**
DEPARTMENT OF VETERANS AFFAIRS, CLEVELAND VETERANS ADMINISTRATION MEDICAL CENTER, Cleveland, OH, 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
PATRICIA HOWARD FITZGERALD, Judge

JURISDICTION

On April 10, 2012 appellant filed a timely appeal from a January 3, 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 this case.

ISSUE

The issue is whether appellant sustained an injury on August 6, 2010 in the performance of duty.

FACTUAL HISTORY

On August 30, 2010 appellant, then a 56-year-old administrative support assistant, filed a traumatic injury claim alleging that on August 6, 2010 he sustained a psychological condition in

[1] 5 U.S.C. § 8101 *et seq.*

the performance of duty. The employing establishment controverted the claim on the grounds that he was not in the performance of duty at the time of the incident as he was on public property walking to his car.[2]

A police report indicates that on August 6, 2010 at 2:30 p.m. appellant was robbed at gunpoint while "walking from the hospital to the surface lot." The employing establishment's police officer related:

> "[Appellant] stated [that] he was walking from Mt. Sinai Drive through the grassy field to get to his car parked in the surface lot. He stated [that] he noticed a group of five males walking together. [Appellant] then saw four of them walk one direction and the other continued to follow him. When he got behind the garage and no one was around the male … pulled a handgun and told [him] to lie down on the ground. Once [appellant] was on the ground the male went through his pockets and took $730.00 cash and his cell phone."

By letter dated September 16, 2010, OWCP requested further factual and medical information, including a description of the distance between the employing establishment and the parking lot and rules regarding parking lot use.

A copy of the employing establishment's parking and traffic regulations indicate that employees can use approved off-site parking if properly registered with the police and displacing a decal. The employing establishment provided shuttle service from the off-site lots and the work location.

In an e-mail dated October 5, 2010, Tiffany Sims, appellant's supervisor, related that appellant told her that he was robbed "last week while he was walking to the Mt. Sinai parking garage." She stated:

> "After further reviewing the incident report and the time of the incident, I reviewed [appellant's] leave record. I found that he was not on any scheduled leave, nor did he have any leave request pending during the time of the incident (2:35 p.m.). In addition, [appellant's] tour of duty does not end until 4:30 p.m. Therefore, I do not know why he was in the area, when the incident occurred."

An employing establishment pamphlet about parking indicates, "Only medical center employees may park in the Mt. Sinai parking garage. Employees must display their [employing establishment] parking permit in the passenger's corner of their windshield. The shuttle bus runs about every 15 minutes from the garage to the hospital's main entrance."

By letter dated October 5, 2010, Donald R. Sambrook, an employing establishment official, indicated that appellant's work hours were from 8:00 a.m. until 4:30 p.m. and the

[2] The employing establishment initially inaccurately contended that the incident took place after work hours.

robbery occurred at 2:35 p.m. Appellant was not on leave at the time of the incident and was not fulfilling any work-related duties. Mr. Sambrook stated:

> "The Mt. Sinai [p]arking [g]arage and surface lot is leased by the [employing establishment]. Employees of our Wade Park Hospital park their personal vehicles there and are able to be picked up by a[n] [employing establishment] [s]huttle [b]us which takes them between the parking area and the [employing establishment] facility. The parking area borders Mt. Sinai Drive and East 105th Street. It is within a 5 [to] 10[-]minute walk to the [employing establishment] facility."

Mr. Sambrook asserted that the employing establishment was controverting the claim because appellant "was not on official business at the time he was confronted by the armed robbers on the Mt. Sinai grounds at 2:35 [p.m.]. [Appellant] had not submitted a leave request requesting that he be excused from work."

On October 8, 2010 appellant related that the employing establishment controlled the parking lot and that its police patrolled the area. He asserted that he did not know the assailant.

By decision dated October 18, 2010, OWCP denied appellant's claim after finding that he did not establish that he sustained an injury in the course of his employment. It found that he removed himself from coverage of FECA when he went to the parking garage during his work shift. OWCP noted that the employing establishment leased the parking garage and provided shuttle buses to the facility. It found that appellant had not explained why he went to the parking garage at that time or why he did not take a shuttle bus.

On October 15, 2011 appellant requested reconsideration. In a letter dated November 22, 2011, he asserted that he was on sick leave at the time of the August 10, 2010 incident and maintained that the employing establishment was "unable to provide any material evidence to the contrary."

By letter dated December 8, 2011, the employing establishment reiterated that appellant was not on scheduled leave at the time of the incident. It submitted a timecard showing that he was scheduled to work from 8:00 a.m. to 4:30 p.m. and that he had not requested leave.

In a decision dated January 3, 2012, OWCP denied modification of its October 18, 2010 decision. It found that he removed himself from coverage of FECA when he went to the garage two hours before his shift ended without explanation. OWCP determined that appellant had not established that he was on sick leave at the time of the robbery.

On appeal, appellant argued that a leave log showed that he was on approved sick leave at the time of the incident.

LEGAL PRECEDENT

FECA[3] provides for the payment of compensation for disability or death of an employee resulting from personal injury sustained while in the performance of duty.[4] The phrase sustained while in the performance of duty is regarded as the equivalent of the coverage formula commonly found in workers' compensation laws, namely, arising out of and in the course of employment.[5] In the course of employment relates to the elements of time, place and work activity.[6] To arise in the course of employment, an injury must occur at a time when the employee may reasonably be stated to be engaged in his master's business, at a place where he may reasonably be expected to be in connection with his employment and while he was reasonably fulfilling the duties of her employment or engaged in doing something incidental thereto.

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 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.[7]

An employee's presence at the employing establishment's premises during work hours, or a reasonable period before or after a duty shift, is insufficient, in and of itself, to establish entitlement to benefits for compensability. The claimant must also establish the concomitant requirement of an injury arising out of the employment. This encompasses not only the work setting, but also the causal concept that some factor of the employment caused or contributed to the claimed injury. In order for an injury to be considered as arising out of the employment, the facts of the case must show substantial employer benefit is derived or an employment requirement gave rise to the injury.[8]

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[3] *Supra* note 1.

[4] 5 U.S.C. § 8102(a).

[5] This construction makes the statute effective in those situations generally recognized as properly within the scope of workers' compensation law. *Bernard D. Blum*, 1 ECAB 1 (1947).

[6] *D.L.*, 58 ECAB 667 (2007).

[7] *See L.L.*, Docket No. 12-194 (issued June 5, 2012); *R.M.*, Docket No. 07-1066 (issued February 6, 2009).

[8] *See Cheryl Bowman*, 51 ECAB 519 (2000); *Shirlean Sanders*, 50 ECAB 299 (1999); *Charles Crawford*, 40 ECAB 474 (1989).

ANALYSIS

Appellant alleged that he sustained a psychological condition as a result of being robbed at gunpoint in a parking garage. OWCP found that he was not injured in the performance of duty on August 6, 2010 as he had deviated from his regular employment duties.

Appellant had fixed hours and a fixed place of employment. He was injured during his work tour behind a parking garage.[9] The employing establishment indicated that appellant was on the grounds of the parking garage at the time of the robbery. The parking garage was leased for and used solely by employees of the employing establishment. Employees were assigned a parking permit in order to use the garage. The employing establishment provided a shuttle bus to take employees from the garage to the main entrance of the hospital. Under these circumstances, the Board finds that the parking garage was part of the employing establishment's premises.[10]

OWCP denied appellant's claim because he left his work location prior to the end of his tour of duty, thereby removing himself from the performance of duty. As discussed, the mere fact that the employee was on the premises at the time of injury is not sufficient to establish entitlement to compensation benefits. It must also be established that he or she was engaged in activities which may be described as incidental to his or her employment, *i.e.*, that he or she was engaged in activities which fulfilled or were incidental to his or her employment duties. In *Mary Beth Smith*,[11] the employee left her office building to attend to her injured child who was located in another building at the employing establishment's day care center. When she entered the other building, the employee stumbled over the carpet and fractured her left foot. The Board stated:

> "Although appellant obtained permission from her supervisor to leave the building in which her workstation was located to attend to her injured child, her injury cannot be characterized as a 'special mission' authorized by the [employing establishment] to further the business or mission of the agency. Upon her departure from her workstation, [she] was no longer engaged in her master's business, but in a personal mission which was not related to the fulfillment of her employment duties or responsibilities. Whether a particular case is or is not within the scope of FECA depends upon the general test of whether the particular risk may be stated to be reasonably incidental to the employment, having in mind all relevant circumstances and the conditions under which the work is required to be performed.[12]

[9] It is unclear exactly where the robbery occurred. The premises of the employer are generally extended when an employee must travel a public thoroughfare to traverse between two premises of the employer. *See R.B.*, Docket No. 11-1320 (issued September 5, 2012). In a letter dated October 5, 2012, Mr. Sambrook indicated that appellant was on the grounds of the Mt. Sinai parking lot at the time of the robbery.

[10] *See D.L.*, 58 ECAB 217 (2007); *Idalaine L. Hollins-Williamson*, 55 ECAB 655 (2004); *Wilmar Lewis Prescott*, 22 ECAB 318 (1971).

[11] *Mary Beth Smith*, 47 ECAB 747 (1996).

[12] *Id*. at 749.

In *Robert A. Pszczolkowski*,[13] the claimant was injured during working hours in a parking lot on the premises of the employing establishment when he left his building to get personal mail from his vehicle and fell on ice. The Board held that he was not in the performance of duty as his action was not reasonably incidental to employment but constituted a personal mission unrelated to employment. The Board further found that obtaining his mail was not an activity necessary for personal comfort or ministration.[14]

Appellant was injured at 2:30 p.m. behind a parking garage located around a 5- to 10-minute walk from his duty station. His tour of duty ended at 4:30 p.m. Appellant indicated that he was on sick leave at the time of the injury. The employing establishment, however, asserted that he had not submitted a leave request at the time of the robbery and was not conducting any official business. Appellant has not submitted any evidence showing that he was engaged in any duty reasonably incidental to his employment at the time of the robbery. Accordingly, as he departed from his workstation for unknown reasons and without authorization, he was not in the performance of duty at the time of the August 6, 2010 incident.

On appeal, appellant argued that a leave log showed that he was on approved sick leave at the time of the incident and submitted supporting evidence. However, the Board cannot consider evidence that was not before OWCP at the time of its decision.[15] 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 and 20 C.F.R. §§ 10.605 through 10.607.

CONCLUSION

The Board finds that appellant has not established that he sustained an injury on August 6, 2010 in the performance of duty.

[13] Docket No. 01-1645 (issued April 11, 2002).

[14] *Id*.

[15] 20 C.F.R. § 501.2(c)(1).

ORDER

IT IS HEREBY ORDERED THAT the January 3, 2012 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 11, 2013
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board