United States Department of Labor
Employees' Compensation Appeals Board

C.K., Appellant	)	
	)	**Docket No. 12-1347**
and	)	**Issued: January 17, 2013**
	)	
DEPARTMENT OF THE AIR FORCE, ENGINEERING DEPARTMENT, WRIGHT-PATTERSON AIR FORCE BASE, OH, Employer	)	

Appearances:
John J. Scaccia, Esq., for the appellant
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 June 6, 2012 appellant, through his attorney, filed a timely appeal from the December 9, 2011 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 met his burden of proof to establish that he sustained an injury in the performance of duty on April 23, 2010.

[1] 5 U.S.C. §§ 8101-8193.

FACTUAL HISTORY

On January 21, 2011 appellant, then a 61-year-old mechanical engineer, filed a traumatic injury claim (Form CA-1) alleging that he sustained injury to his low back and right hip at 3:30 p.m. on April 23, 2010 when he reached high above his head to remove a heavy box from the top of a tall cabinet. He stated that the injury occurred in Building 18 at 1950 Fifth Street in Beavercreek, OH. A portion of the form was completed by appellant's supervisor who indicated that he first received notice of the claimed April 23, 2010 injury on April 27, 2010. Appellant's supervisor noted that appellant's duty station was at 1950 Fifth Street. He stated that, at the time of the claimed injury on April 23, 2010, appellant was on administrative leave "but came into the office to remove boxes of personal belongings in preparation for [April 30, 2010] retirement." Appellant did in fact retire from the employing establishment on April 30, 2010 and no work time or pay was lost due to the claimed injury.

In a February 26, 2011 statement, appellant indicated that he sustained an injury on Friday, April 23, 2010, which was one week prior to his retirement date. He indicated that, on that afternoon, everyone had left for the day and a heavy box fell on him when he was trying to remove it from a tall cabinet. Appellant described how his back and leg pain grew progressively worse and noted that he advised his supervisor of the injury on April 26, 2010. He indicated that he sought treatment for his condition from a chiropractor and asserted that the employing establishment did not provide adequate assistance in filing the proper papers for his claim. Appellant claimed that he was not advised that he should have first sought treatment from his primary physician.

Appellant submitted an Ohio workers' compensation form which was completed in part by himself on August 6, 2010 and in part on September 30, 2010 by Shawn M. Howell, an attending chiropractor. In his portion of the form, appellant provided a description of the April 23, 2010 accident which was similar to that provided on his Form CA-1. Dr. Howell provided a diagnosis of lumbosacral sprain/strain but did not discuss the cause of the diagnosis.

In a March 17, 2010 letter, OWCP requested that appellant submit additional factual and medical evidence in support of his claim. It informed him of the situations in which reports from chiropractors would constitute medical evidence.

In an April 16, 2011 statement, appellant discussed his efforts to obtain medical evidence regarding the injuries he believed he sustained on April 23, 2010. He submitted medical documents from an April 28, 2010 visit to an emergency room which showed examination findings of tender right back musculature with slight spasm. There was no discussion of the April 23, 2010 accident. The documents show that appellant was prescribed pain medication.

In an April 22, 2011 decision, OWCP denied appellant's claim that he sustained an injury in the performance of duty on April 23, 2010. Regarding the reason for the denial, it stated, "Specifically your case is denied because the evidence is not sufficient to establish that the event(s) occurred as you described. The reason for this finding is that there was no history of injury in the emergency room report. Still, we cannot consider the chiropractor's medical [evidence] as he is not a medical doctor as defined by Labor Department."

Appellant disagreed with the decision and requested a telephone hearing with an OWCP hearing representative. During the hearing held on September 19, 2011, appellant's counsel indicated that, at the time of the April 23, 2010 accident, appellant and the employing establishment had just concluded negotiations regarding a discrimination case. Appellant was on administrative leave with pay pending his retirement and other matters associated with the settlement. He wished to retrieve personal items during this period and was given a time to come into work when he would be escorted through the premises and be watched as he retrieved his belongings. Counsel stated that appellant injured himself while reaching up to try to remove a box from a height. He asserted that appellant was still employed when the injury occurred and that he had since retired from the employing establishment in accordance with the negotiated agreement. Counsel claimed that the April 23, 2010 injury occurred in a time and place that had been designated by the employing establishment. Appellant initially tried to heal himself of the injury and, when his back spasms did not subside, he went to see a chiropractor. His family physician was aware of this situation and stated that it was appropriate for him to seek treatment from a chiropractor.

Appellant testified that, when the injury occurred on April 23, 2010, he was in his place of employment and he was on administrative leave with pay due to an agreement with the employing establishment. He denied that there was any disciplinary action against him that would have put his job in jeopardy. Appellant indicated that, in accordance with the agreement with the employing establishment, he had made arrangements to retrieve his personal belongings for his and the employing establishment's convenience. On April 23, 2010 he went to the base to meet with supervisors and coworkers regarding removal of his belongings. Appellant ordinarily would come in between the hours of 9:00 a.m. and 4:00 p.m. for this purpose on the days leading up to April 30, 2010, his intended last day of employment. He arrived at the base at approximately 9:30 a.m. or perhaps later on April 23, 2010 and was being paid for this day. Appellant indicated that he continued the process that he had started days before, which typically involved going through drawers, getting his personal property, taking it to his car, and then leaving the base. As it was getting closer to 4:00 p.m. on April 23, 2010, he was in the office with nobody else present. Appellant had two more boxes of personal items to retrieve, which were located up on top of a cabinet above his head. He noted there was no ladder or dolly or any other device available to help him retrieve or move these boxes. Appellant stood on his toes, grabbed the box and pulled it. The box came down faster than he expected and seemed a lot heavier than he had expected. Appellant indicated that he tried to hold onto the box and that it bent his body backwards and to the right. He managed to put the box on a chair and roll it to his car and then he left the base. Appellant left a voice mail over the weekend in order to report what had happened. He asserted that he knew that he hurt himself but he did not initially know the extent of his injury. Appellant stated that his condition got worse and that on April 24, 2010 he advised his family physician that he was in a great deal of pain and would be going to the chiropractor on Monday. He also called his supervisor to tell him the same thing. At the request of his supervisor, he provided a handwritten statement about the injury on his last day of work, April 30, 2010. Appellant described the treatment he received from his chiropractor. He asserted that no one from the employing establishment helped him to file his claim and that no one told him that he would not be allowed to see a chiropractor for a work injury.

After the hearing, appellant submitted additional evidence concerning his treatment. In an October 3, 2011 report, Dr. Sarah Khavari, an attending Board-certified family practitioner, provided a history of injury and discussion of medical treatment following appellant's accident at work on April 23, 2010. She indicated that she agreed with Dr. Howell's assessment and had diagnosed appellant with a lumbosacral sprain/strain in connection with the work incident. Dr. Khavari noted that she saw appellant in her office on May 14, 2010 and had diagnosed him with a lumbar strain due to the mechanism of injury and examination findings. She indicated that appellant had been treated for preexisting subluxation and scoliosis prior to the work injury. In an October 17, 2011 report, Dr. Howell provided an overview of appellant's medical history and asserted that the work incident of April 23, 2010 directly caused him to sustain a lumbosacral sprain/strain but did not affect his underlying, preexisting conditions.

In a December 9, 2011 decision, OWCP's hearing representative affirmed OWCP's April 22, 2011 decision. He indicated that he was modifying OWCP's April 22, 2011 decision to reflect that appellant's claim was denied because the evidence failed to establish that he was injured in the performance of duty on April 23, 2010. OWCP's hearing representative noted that, although appellant was on the premises at the time of the claimed April 23, 2010 injury, he was on administrative leave awaiting his retirement at the time of his accident and was performing the personal chore of cleaning out his office rather than any action which provided substantial benefit to the employing establishment.

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."[2] The phrase "sustained 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."[3] The phrase "in the course of employment" is recognized as relating to the work situation, and more particularly, relating to elements of time, place and circumstance. 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."[4] This alone is not sufficient to establish entitlement to benefits for compensability. The concomitant requirement of an injury "arising out of the employment" must be shown, and this encompasses not only the work setting but also a causal concept, the requirement being that the employment caused the injury.[5] In order for an injury to be considered as arising out of the employment, the facts of the case must show some substantial employer benefit is derived or an employment requirement gave rise to the injury.[6]

[2] 5 U.S.C. § 8102(a).

[3] *Charles Crawford*, 40 ECAB 474, 476-77 (1989).

[4] *Mary Keszler*, 38 ECAB 735, 739 (1987).

[5] *Eugene G. Chin*, 39 ECAB 598, 602 (1988).

Coverage has been denied in a number of cases when the employee was engaged in a personal action that did not substantially benefit the employer rather than performing a work duty or some action incidental thereto. For example, in *J.B.*,[7] coverage was denied when the employee was injured while going to her car in order to retrieve her personal cell phone.[8]

ANALYSIS

On January 21, 2011 appellant filed a traumatic injury claim alleging that he sustained injury to his low back and right hip at 3:30 p.m. on April 23, 2010. He indicated that the injury occurred in his office on the employing establishment premises when he reached high above his head to remove a heavy box from the top of a tall cabinet. Appellant asserted that, at the time of the April 23, 2010 accident, he was on administrative leave with pay pending his retirement on April 30, 2010. He claimed that he was given time to come into work in order to retrieve personal items prior to his retirement. The injury occurred while he was retrieving a box of personal items which he intended to take to his car.

Although the April 23, 2010 accident occurred in his regular workplace, appellant was not injured during scheduled work hours, nor was he injured in the course of performing any duties in connection with his actual employment. Rather, he was on a personal mission collecting personal items in preparation for his retirement. Appellant testified that in the days leading up to his intended retirement he was allowed by the employing establishment to come into the office during nonscheduled hours between 9:00 a.m. and 4:00 p.m. to collect his belongings and bring them home. The injury occurred when appellant pulled down a box of his personal belongings to take to his car. There is no indication that this activity was a requirement of appellant's employment, that appellant was present at the workplace for any reason related to his actual employment duties or that the employing establishment derived some substantial benefit from the activity which caused injury. At the time of the accident on April 23, 2010, appellant was not reasonably fulfilling the duties of his employment or engaged in doing something incidental thereto.[9] Appellant's retrieval of personal items from his office in anticipation of his retirement primarily benefited him, not the employing establishment.[10]

On appeal, appellant provided a list of reasons he felt that his actions on April 23, 2010 provided a benefit to the employing establishment, such as purging his e-mail account of messages and separating proprietary from nonproprietary documents. However, appellant did not submit evidence showing that his actions actually provided such benefits to the employing establishment, nor did he explain how the specific action he engaged in at time of the April 23, 2010 incident provided substantial benefit to the employing establishment. At the time of the

[7] Docket No. 11-106 (issued August 17, 2011).

[8] *See also Margaret Gonzalez,* 41 ECAB 748, 751-54 (1990) (finding that pushing a coworker's vehicle outside of work hours was not related to the employee's reasonable fulfillment of her employment duties or of something incidental thereto).

[9] *See supra* note 4.

[10] *See supra* notes 7 and 8 for cases in which coverage was denied when the employees were engaged in personal actions rather than performing work duties or actions incidental thereto.

incident he had already sorted through documents and other items, separated personal items from work items and placed his personal items into the box that he intended to take to his car. He was engaging in the personal action of taking nonwork items to his car in order to take them home when the accident occurred. Appellant was not working on duty, nor was he performing work duties or actions incidental to his work duties.

For these reasons, appellant was not in the performance of duty when the accident occurred on April 23, 2010 and he did not sustain an injury in the performance of duty.

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 his burden of proof to establish that he sustained an injury in the performance of duty on April 23, 2010.

ORDER

IT IS HEREBY ORDERED THAT the December 9, 2011 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 17, 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