United States Department of Labor
Employees' Compensation Appeals Board

C.B., Appellant	)	
and	)	**Docket No. 12-1849**
	)	**Issued: January 13, 2014**
DEPARTMENT OF HOMELAND SECURITY, TRANSPORTATION SECURITY ADMINISTRATION, Union, NJ, Employer	)	

Appearances:
Luretha M. Stribling, Esq., 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 August 31, 2012 appellant, through her attorney, filed a timely appeal from a June 7, 2012 merit decision of the Office of Workers' Compensation Programs (OWCP) rescinding acceptance of a traumatic injury claim and a July 25, 2012 overpayment decision. 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.

ISSUES

The issues are: (1) whether OWCP met its burden of proof to rescind acceptance of appellant's traumatic injury claim; (2) whether it properly found a $41,165.91 overpayment of compensation for the period March 10, 2011 to March 22, 2012 for medical treatment and related services rendered to her; and (3) whether OWCP abused its discretion by refusing to waive recovery of the overpayment.

[1] 5 U.S.C. § 8101 *et seq.*

On appeal, counsel does not contest the fact or amount of the overpayment. She asserts that repayment of the overpaid medical benefits would cause appellant significant financial hardship.

FACTUAL HISTORY

OWCP accepted that on February 14, 2011 appellant, then a 55-year-old security screener, sustained a right shoulder sprain and contusion, right hip contusion, intervertebral cervical disc disorder and cervical spondylosis when she slipped and fell on black ice in a parking lot while walking to a shuttle bus stop 30 minutes prior to her work shift. She stopped work on February 14, 2011 and sought emergency medical treatment. Appellant did not claim wage-loss compensation. The employing establishment did not issue an authorization for examination and/or treatment (Form CA-16). On June 14, 2011 OWCP authorized a cervical fusion with fixation device and allograft, performed on June 24, 2011.

In May 24 and 25, 2011 letters, the employing establishment stated that it did not own, maintain or control the parking lot where appellant was injured. It did not assign spaces within the lot and that she was not required to park there. The employing establishment subsidized part of the monthly parking fee for employees who wished to use the lot. Any airport employee was allowed to contract with the lot owner for a monthly parking space.

By decision dated July 8, 2011, OWCP rescinded its acceptance of appellant's traumatic injuries and authorization of the cervical fusion. It found that she was not injured in the performance of duty. OWCP found that the February 14, 2011 injuries occurred in a public parking lot that was not owned or controlled by the employing establishment.

In a July 20, 2011 letter, counsel requested an oral hearing. In a July 27, 2011 letter, she contended that the employing establishment parking subsidy brought the parking lot into the employing establishment's premises.

At the October 24, 2011 hearing, appellant explained that the parking lot where she fell on February 14, 2011 was controlled by Secure Parking Systems (SPS), whose employees issued pass cards and hang tags to employing establishment workers who wished to park in the lot. Employees paid $45.00 a month to park in the SPS lot, while the employing establishment paid the remaining $155.00 of the fee. SPS reserved the lot for airport employees, including employing establishment workers, custodial workers and other airport employees. It also operated a shuttle bus from the parking lot to and from the airport. Anyone authorized to park in the lot was also allowed to ride the shuttle bus. SPS coordinated the bus schedule with employing establishment work shifts. Appellant noted that she had the option of parking at the airport, but chose to use the SPS lot as it was less expensive.

By decision dated and finalized December 9, 2011, OWCP's hearing representative affirmed the rescission of acceptance of appellant's claim on the grounds that the parking lot in which she fell was not owned, controlled or maintained by the employing establishment. OWCP further found that she was not required to park in the SPS lot or to walk on the route to the shuttle bus where she fell.

In a March 2, 2012 letter, counsel requested reconsideration. She reiterated that the parking lot should be considered the employing establishments' premises as parking was an activity incidental to appellant's employment and the employing establishments paid part of the monthly parking fee. Counsel acknowledged that the employees of any airport business were also allowed to use the parking lot.

By decision dated June 7, 2012, OWCP affirmed the rescission of appellant's claim on the grounds that the parking subsidy was insufficient to bring the parking lot under the premises rule. It found that employing establishment workers were not required to use the SPS lot and they could choose to park at any airport lot.

In a June 28, 2012 letter, counsel requested reconsideration. She asserted that the employing establishment parking subsidy and involvement in the shuttle bus schedule, brought the SPS parking lot into the employing establishment's premises.[2] Counsel submitted an SPS parking client list including the employer, airlines, limousine companies, aircraft maintenance companies, airport food concessions and custodial companies. She also provided copies of appellant's SPS hang tag and access card. Counsel also submitted a December 9, 2011 letter from the Port Authority of New York and New Jersey, confirming that the lot where appellant fell was operated, controlled and maintained by SPS.

By notice dated June 25, 2012, OWCP found a $41,165.91 overpayment of compensation in appellant's case due to the rescission of her claim. It attached a listing of medical expenses paid in the case from the Employees' Compensation Fund to medical providers, totaling $41,165.91 from March 10, 2011 to March 22, 2012. OWCP found that the medical benefits constituted an overpayment of compensation. It requested that appellant complete an overpayment recovery questionnaire (Form OWCP-20) by providing information about her monthly income, assets and expenses. OWCP afforded her 30 days to submit financial information. Appellant submitted additional arguments asserting that the parking lot in which she fell was controlled by the employing establishment. She also provided correspondence regarding a third-party action against SPS. Appellant did not submit any financial information in response to the preliminary overpayment notice.

By decision dated July 25, 2012, OWCP finalized the overpayment, in the amount of $41,165.91 for the period March 10, 2011 to March 22, 2012. It found that appellant was not at fault in creating the overpayment. OWCP denied waiver as she did not timely submit any requested financial information.

LEGAL PRECEDENT -- ISSUE 1

Once OWCP accepts a claim, it has the burden of justifying termination or modification of compensation. This holds true where OWCP later decides that it has erroneously accepted a claim for compensation.[3] The Board has upheld OWCP's authority to reopen a claim at any time

[2] Counsel submitted a copy of the shuttle bus schedule, showing that it left the parking lot every 10 to 15 minutes, 24 hours a day.

[3] *See* 20 C.F.R. § 10.610; *R.M.*, Docket No. 07-1066 (issued February 6, 2009).

on its own motion under 5 U.S.C. § 8128 and, where supported by the evidence, set aside or modify a prior decision and issue a new decision.[4] The Board has noted, however, that the power to annul an award is not an arbitrary one and that an award for compensation can only be set aside in the manner provided by the compensation statute.[5] To establish that its prior acceptance was erroneous, OWCP is required to provide a clear explanation of its rationale for rescission.[6]

FECA provides for payment of compensation for disability or death of an employee resulting from personal injury sustained while in the performance of duty.[7] 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."[8] "In the course of employment" relates to the elements of time, place and work activity. 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 or her master's business, at a place when he or she may reasonably be expected to be in connection with his or her employment and while he or she was reasonably fulfilling the duties of his or her employment or engaged in doing something incidental thereto. As to the phrase "in the course of employment," the Board has accepted the general rule of workers' compensation law that, as to employees having fixed hours and places of work, injuries occurring on the premises of the employing establishment, while the employees are going to or from work, before or after working hours or at lunch time, are compensable.[9]

Regarding what constitutes the "premises" of an employing establishment, the Board has stated:

> "The term 'premises' as it is generally used in workmen's compensation law, is not synonymous with 'property.' The former does not depend on ownership, nor is it necessarily coextensive with the latter. In some cases 'premises' may include all the 'property' owned by the employing establishment; in other cases even

[4] *Eli Jacobs*, 32 ECAB 1147 (1981).

[5] *R.M.*, *supra* note 3; *Doris J. Wright*, 49 ECAB 230 (1997); *Shelby J. Rycroft*, 44 ECAB 795 (1993).

[6] *Delphia Y. Jackson*, 55 ECAB 373 (2004); *Paul L. Stewart*, 54 ECAB 824 (2003); *Alice M. Roberts*, 42 ECAB 747 (1991).

[7] 5 U.S.C. § 8102(a).

[8] 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).

[9] *Narbik A. Karamian*, 40 ECAB 617, 618 (1989).

> though the employing establishment does not have ownership and control of the place where the injury occurred the place is nevertheless considered part of the 'premises.'"[10]

The Board has noted factors which determine whether a parking lot 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 employing establishment owned, maintained or controlled the parking facility, used the facility with the owner's special permission or provided parking for its employees.[11]

ANALYSIS -- ISSUE 1

Appellant sustained neck, shoulder and hip injuries when she slipped and fell in an icy parking lot while walking to a shuttle bus to her duty station. OWCP initially accepted the claim but subsequently rescinded it in a July 8, 2011 decision. It found that the parking lot was not part of the employing establishment's premises. The Board finds that the February 14, 2011 incident did not arise in the performance of duty because the parking lot where appellant fell was not part of the employing establishment's premises.

Appellant was in the process of coming to work for her tour of duty beginning at 3:30 a.m. She sustained an injury at 3:00 a.m., before commencing her employment duties. It is well established that, as to employees having fixed hours and place of work, injuries occurring on the premises while they are going to and coming from work before or after working hours or at lunchtime are compensable. If the injury occurs off the premises, it is not compensable.[12]

The Board finds that the evidence of record is insufficient to establish that the parking lot was part of the employing establishment premises. The Board notes that appellant's injury occurred on her way to work when she slipped and fell on black ice. The employing establishment explained that it did not own, lease, maintain or control the parking lot where the incident occurred. The lot was controlled and maintained by SPS. Employees could choose to use the SPS lot or park elsewhere at the airport. The employing establishment advised that its

[10] *Wilmar Lewis Prescott*, 22 ECAB 318, 321 (1971). Another exception to the rule is the proximity rule which the Board has defined by stating that under special circumstances the industrial premises are constructively extended to hazardous conditions, which are proximately located to the premises and may therefore be considered as hazards of the employing establishment. The main consideration in applying the rule is whether the conditions giving rise to the injury are causally connected to the employment. *See William L. McKenney*, 31 ECAB 861 (1980).

[11] *Roma A. Mortenson-Kindschi*, 57 ECAB 418 (2006).

[12] *Jon Louis Van Alstine*, 56 ECAB 136 (2004).

employees could contract with SPS to use the lot.[13] Although the employing establishment subsidized part of the monthly parking fee, SPS employees issued the access cards. Employees were not required to use the SPS lot.

The evidence submitted by appellant does not establish that the employing establishment's premises extended to the parking lot. Therefore, the exception regarding employing establishment parking lots does not apply as there was insufficient connection with the employing establishment or her duties.[14] The Board finds that the evidence is insufficient to establish that the parking lot should be considered part of the premises of the employing establishment.[15]

Under the facts of this case, it also cannot be stated that appellant's injury occurred within the special hazard exception to the premises rule. The Board has determined that under special circumstances the "premises rule" is extended to hazardous conditions which are proximately located to the premises and therefore may be considered as hazards of the employing establishment. 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 plant and that the special hazards of that route become the hazards of the employment. Factors that generally determine whether an off-premises point used by employees may be considered part of the "premises" include whether the employing establishment has contracted for exclusive use of the area and whether the area is maintained to see who may gain access to the premises.[16] As noted above, the employing establishment did not have contracts for the exclusive use of the parking lot in the area where appellant was injured. The parking lot was not an exclusive location in which she could park her vehicle. Appellant asserted at the hearing and an SPS contract list confirms, that the lot and shuttle bus were used by a variety of airport employees, including food service and custodial workers, airline employees and limousine companies.[17] Thus, this exception does not apply.

Appellant's slip and fall in the parking lot did not occur in the performance of duty. It did not occur on the employing establishment's premises as the parking lot was not under the exclusive control of the employing establishment as noted above. At the time of her injury, appellant had fixed hours and place of work and had not yet reported to work. Her injury was an ordinary, nonemployment hazard of the journey to work itself, which is shared by all travelers. The ice was a hazard common to all travelers and was not a hazard related to the employment.[18]

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[13] *See Rosa M. Thomas-Hunter*, 42 ECAB 500, 504-05 (1991) (mere use of a parking facility, alone, is not sufficient to bring the parking lot within the "premises" of the employing establishment).

[14] 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 this parking for its employees. *See Edythe Erdman*, 36 ECAB 597, 599 (1985).

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

[16] *Supra* note 11.

[17] The Board also notes that the special hazard exception to the premises rule also does not apply as the route to appellant's car that day was personal to her, depending upon which space she parked in. *See supra* note 15.

[18] *See Jimmie Brooks*, 54 ECAB 248 (2002).

The Board has generally held that conditions caused by weather, including ice, are dangers inherent to the commuting public and do not constitute special hazards.[19]

Therefore, the Board finds that the parking lot where appellant fell was not within the employing establishment's premises and the February 14, 2011 injuries were not sustained within the performance of duty.

LEGAL PRECEDENT -- ISSUE 2

Section 8102(a) of FECA provides that the United States shall pay compensation for the disability or death of an employee resulting from personal injury sustained while in the performance of his duty.[20] Medical benefits under FECA are defined under Section 8103 as "the services, appliances and supplies prescribed or recommended by a qualified physician, which the Secretary of Labor considers likely to cure, give relief, reduce the degree or period of disability or aid in lessening the amount of the monthly compensation."[21] Medical benefits include amounts paid out of the Employees' Compensation Fund for medical treatment.[22]

An overpayment can occur when OWCP rescinds acceptance of a claim and subsequently seeks reimbursement of benefits paid from the Employees' Compensation Fund on behalf of the claimant.[23] Section 8129(a) of FECA provides, in pertinent part, that when "an overpayment has been made to an individual under this subchapter because of an error of fact or law, adjustment shall be made under regulations prescribed by the Secretary of Labor by decreasing later payments to which an individual is entitled."[24]

ANALYSIS -- ISSUE 2

OWCP initially accepted that appellant sustained neck, shoulder and hip injuries when she fell in an icy parking lot on February 14, 2011. It authorized a cervical fusion, performed on June 24, 2011. After the employing establishment provided additional information to establish that the parking lot where appellant fell was not within its premises, OWCP rescinded its

[19] *G.N.*, Docket No. 12-261 (issued July 23, 2012).

[20] 5 U.S.C. § 8102(a).

[21] *Id.* at § 8103(a).

[22] 20 C.F.R. § 10.5(a); *see also* 5 U.S.C. § 8101(12).

[23] *R.M.*, *supra* note 3.

[24] 5 U.S.C. § 8129(a).

acceptance of the claim by decision dated July 8, 2011. Pursuant to a hearing and subsequent request for reconsideration, it affirmed its rescission on December 9, 2011 and June 7, 2012.[25] By July 25, 2012 decision, OWCP found an overpayment of $45,165.91 for medical expenses paid to healthcare providers after the claim was accepted.

As OWCP properly rescinded the claim, medical benefits paid in appellant's case from the Employees' Compensation Fund are now repayable to OWCP, who provided a detailed accounting of the $41,165.91 in medical benefits paid in her case to treat the injuries sustained on February 14, 2011, injuries later shown not to have arisen in the performance of duty. The Board finds that the $41,165.91 in medical benefits constitutes an overpayment of compensation. OWCP's July 25, 2012 decision finding a $41,165.91 overpayment of compensation is thus proper under the facts and circumstances of this case. The Boards notes that on appeal, counsel did not contest the fact or amount of the overpayment.

LEGAL PRECEDENT -- ISSUE 3

Section 8129(a) of FECA[26] provides that, where an overpayment of compensation has been made because of an error of fact or law, adjustments shall be made by decreasing later payments to which an individual is entitled.[27] The only exception to this requirement is found in section 8129(b) of FECA, which provides that adjustments or recovery may not be made when incorrect payments have been made to an individual who is without fault and when such adjustment or recovery would defeat the purpose of FECA or would be against equity and good conscience.[28]

Thus, a finding that appellant was without fault is not sufficient, in and of itself, for OWCP to waive the overpayment.[29] OWCP must exercise its discretion to determine whether recovery of the overpayment would "defeat the purpose of [FECA] or would be against equity and good conscience," pursuant to the guidelines provided in sections 10.434-10.437 of the implementing federal regulations.[30]

Section 10.438 of FECA's implementing regulations provide that the individual who received the overpayment is responsible for providing information about income, expenses and

[25] The Board notes that during the pendency of this appeal, OWCP issued an October 1, 2012 decision affirming the rescission of the claim. This decision, however, is null and void as the Board and OWCP may not simultaneously have jurisdiction over the same issue. As the Board had jurisdiction over the rescission issue, OWCP may not issue a decision regarding the same issue on appeal before the Board. *See Terry L. Smith*, 51 ECAB 182 (1999); *Arlonia B. Taylor*, 44 ECAB 591 (1993); *Russell E. Lerman*, 43 ECAB 770 (1992); *Douglas E. Billings*, 41 ECAB 880 (1990).

[26] 5 U.S.C. § 8129(a).

[27] *Id*.

[28] 5 U.S.C. § 8129(b).

[29] *James Lloyd Otte*, 48 ECAB 334, 338 (1997); *see William J. Murphy*, 40 ECAB 569, 571 (1989).

[30] 20 C.F.R. §§ 10.434-10.437.

assets as specified by OWCP. This information is needed to determine whether or not recovery of an overpayment would defeat the purpose of FECA or be against equity and good conscience. Failure to submit the requested information within 30 days of the request shall result in the denial of waiver and no further request for waiver shall be considered until the requested information is furnished.[31]

As the only limitation on OWCP's authority is reasonableness, abuse of discretion is generally shown through proof of manifest error, clearly unreasonable exercise of judgment or actions taken which are contrary to both logic and probable deductions from known facts.[32]

ANALYSIS -- ISSUE 3

In this case, appellant was found to be without fault in creation of the overpayment. Accompanying the June 25, 2012 preliminary notice of overpayment, OWCP provided her an overpayment recovery questionnaire to obtain information about her monthly income, assets and expenses. Appellant did not return the questionnaire or otherwise provide any financial information. Under the implementing regulations, OWCP could not determine whether recovery of the overpayment would defeat the purpose of FECA or be against equity and good conscience. Therefore, it properly denied waiver of recovery.[33]

On appeal, counsel does not contest the fact or amount of the overpayment. She contends that appellant would experience significant financial hardship by repaying the overpayment. As appellant did not provide any financial information as requested, OWCP properly denied waiver of recovery of the overpayment.[34]

CONCLUSION

The Board finds that OWCP met its burden of proof in rescinding appellant's claim on the grounds that she was not injured in the performance of duty. The Board further finds that it properly found an overpayment of compensation. The Board further finds that OWCP properly denied waiver of recovery of the overpayment.

[31] *Id.* at § 10.438; *Linda Hilton*, 52 ECAB 476 (2001).

[32] *Daniel J. Perea*, 42 ECAB 214 (1990).

[33] 20 C.F.R. § 10.438; *Linda Hilton*, *supra* note 31.

[34] With respect to the recovery of the overpayment, the Board's jurisdiction is limited to those cases where OWCP seeks recovery from continuing compensation benefits. *D.R.*, 59 ECAB 148 (2007); *Miguel A. Muniz*, 54 ECAB 217 (2002). Therefore, the Board does not have jurisdiction over the recovery issue in this case.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated July 25 and June 7, 2012 are affirmed.

Issued: January 13, 2014
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