United States Department of Labor
Employees' Compensation Appeals Board

J.H., Appellant	)	
and	)	**Docket No. 14-1219**
	)	**Issued: November 24, 2014**
DEPARTMENT OF HOMELAND SECURITY, TRANSPORTATION SECURITY ADMINISTRATION, Coppell, TX, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
PATRICIA HOWARD FITZGERALD, Judge
ALEC J. KOROMILAS, Alternate Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On May 1, 2014 appellant filed a timely appeal from the March 26, 2014 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 January 18, 2014.

FACTUAL HISTORY

On January 24, 2014 appellant, then a 68-year-old lead transportation security officer, filed a traumatic injury claim (Form CA-1) alleging that at 6:20 p.m. on January 18, 2014 he was

[1] 5 U.S.C. § 8101 *et seq.*

struck by a motor vehicle that had failed to yield the right of way at a pedestrian crosswalk located between an airport terminal and a parking garage. He claimed injuries of a cracked rib, bruised legs and hips, knee and leg sprain and cuts and scrapes of the hips, knees and elbows. Appellant's regular work shift was from 12:30 p.m. to 9:00 p.m., Friday through Tuesday. The employing establishment checked a box indicating that he was not injured in the performance of duty, as he was struck by a vehicle in a space not occupied by the employing establishment. It noted that the injury had been caused by a third party. The employing establishment controverted continuation of pay, noting that appellant was not performing screening and was not in a space controlled by the employing establishment.

In a note dated January 23, 2014, Dr. Allen R. Schneider, a Board-certified internist, stated that appellant was struck by a sport utility vehicle (SUV) in a crosswalk. He sustained a right rib fracture and contusions of the hips and knee. Dr. Schneider recommended that appellant return to work on January 31, 2014.

By letter dated February 12, 2014, OWCP advised appellant that the evidence submitted was insufficient to establish his claim. It noted that the evidence received was not sufficient to establish that he actually experienced the incident alleged to have caused injury and that the medical portion of his claim had also been found to be insufficient. OWCP requested that appellant respond to its queries and provide a physician's report which included findings on examination, the results of all x-ray and laboratory tests and a diagnosis and medical opinion with medical rationale explaining how the reported work incident caused or aggravated his claimed injury. It also requested that the employing establishment provide additional information as to whether it owned, operated or controlled the property where the injury occurred; the exact time of the injury; whether he was engaged in official duties at the time of injury requiring him to be off the premises; and whether he was riding in or driving a government-owned vehicle at the time of injury.

In a work activity status report dated January 19, 2014, Dr. Christopher L. Neill, a Board-certified obstetrician and gynecologist, diagnosed appellant with a contusion of the chest wall, elbow pain, hip and pelvic pain, knee pain and a knee/leg sprain. He recommended that appellant return to work on January 19, 2014 with restrictions of no lifting over 10 pounds, no prolonged standing or walking, no pushing or pulling over 20 pounds of force and no squatting or kneeling. Dr. Neill also stated that appellant should not use stairs or ladders, that he should be allowed to sit as needed and that he should be off work for the rest of his shift on January 19, 2014. In a narrative report of the same date, he reviewed appellant's history of injury and diagnosed a chest wall contusion, knee abrasion, knee strain, knee pain, hip abrasion, hip contusion, hip/pelvic pain, elbow abrasion, elbow contusion, elbow pain and a closed fracture of one rib.

Dr. Neill stated that appellant worked for the employing establishment at the Dallas Fort Worth International Airport and was struck by an SUV limousine at the airport at approximately 6:30 p.m. on January 18, 2014. Appellant told Dr. Neill that he was exiting the upper level of Terminal C and was within a crosswalk on the way to his car when the injury occurred. He was struck initially in the left knee, went up onto the hood of the vehicle and was thrown approximately 10 feet. Appellant was unsure how fast the vehicle was traveling at the time, but thought he landed on his right elbow, right anterior chest and right lateral knee area. Emergency

medical services responded to the scene and treated him on-site. Appellant declined to be transported to the hospital. Pain began immediately in his left knee, left chest, right hip and right lateral knee, while his anterior mid-chest wall appeared to be causing the greatest pain. Dr. Neill noted that appellant had a right total knee replacement and a "left quad removal." He stated that appellant should return for evaluation in two days or sooner if his condition worsened. On examination, Dr. Neill noted abrasions and tenderness of the olecranon and lateral epicondyle of the right elbow, abrasions of the right knee and abrasions and tenderness of the right hip.

On January 21, 2014 Dr. Neill recommended that appellant return to work on that date with restrictions of no lifting over 10 pounds, no pushing or pulling over 20 pounds of force and no squatting or kneeling. In progress notes of the same date, he examined appellant, noting abrasions of the right elbow, abrasions of the right knee and tenderness, abrasions and ecchymosis of the right hip. Dr. Neill recommended that appellant return for evaluation in seven days or sooner if his condition worsened.

By decision dated March 26, 2014, OWCP denied appellant's claim for compensation. It found that he did not submit sufficient medical evidence to establish a causal relationship between his diagnosed conditions and the incident of January 18, 2014.

LEGAL PRECEDENT

An employee seeking benefits under FECA[2] has the burden of establishing the essential elements of his or her claim, including the fact that the individual is an "employee of the United States" within the meaning of FECA, that the claim was timely filed within the applicable time limitation period of FECA, that an injury[3] was sustained in the performance of duty as alleged and that any disability or medical condition for which compensation is claimed is causally related to the employment injury.[4]

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.[5] 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.[6] 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

[2] *Id*.

[3] OWCP's regulations define a traumatic injury as a condition of the body caused by a specific event or incident or series of events of incidents, within a single workday or shift. Such condition must be caused by external force, including stress or strain, which is identifiable as to time and place of occurrence and member or function of the body affected. 20 C.F.R. § 10.5(ee).

[4] *T.H.*, 59 ECAB 388, 393 (2008); *see Steven S. Saleh*, 55 ECAB 169, 171-72 (2003); *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

[5] 5 U.S.C. § 8102(a).

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

employee may reasonably be stated 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.[7] Whereas arising out of the employment addresses the causal connection between the employment and the injury, arising in the course of employment pertains to work connection as to time, place and activity.[8] For the purposes of determining entitlement to compensation under FECA, arising in the course of employment (*i.e.*, performance of duty) must be established before arising out of the employment (*i.e.*, causal relation) can be addressed.[9]

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 are compensable.[10] 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 employ[ing] [establishment]; in other cases even though [it] does not have ownership and control of the place where the injury occurred the place is nevertheless considered part of the 'premises.'"[11]

The Board notes that the mere fact that an alleged injury did not occur on the employing establishment premises would not be fatal to an employee's claim.[12] With regards to off-

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

[8] *See also G.W.*, Docket No, 12-1416 (issued January 16, 2013). *See Robert J. Eglinton*, 40 ECAB 195, 199 (1988).

[9] *Kenneth B. Wright*, 44 ECAB 176, 181 (1992).

[10] *Narbik A. Karamian*, 40 ECAB 617, 618 (1989). The Board has also applied this general rule of workers' compensation law in circumstances where the employee was on an authorized break. *See Eileen R. Gibbons*, 52 ECAB 209, 211 (2001).

[11] *Wilmar Lewis Prescott*, 22 ECAB 318, 321 (1971). The Board has also stated, "The 'premises' of the employ[ing] [establishment], as that term is used in workmen's compensation law, are not necessarily coterminous with the property owned by the employ[ing] [establishment]; [they] may be broader or narrower and are dependent more on the relationship of the property to the employment than on the status or extent of legal title." *Dollie J. Braxton*, 37 ECAB 186, 188-89 (1985). The proximity rule dictates 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, 865 (1980).

[12] As a general rule, off-premises injuries sustained by employees having fixed hours and place of work, are not compensable. However, exceptions to the general rule have been made in order to protect activities that are so closely related to the employment itself as to be incidental thereto (*see Betty R. Rutherford*, 40 ECAB 496, 499 (1989)) or which are in the nature of necessary personal comfort or ministration. *See Mary M. Martin*, 34 ECAB 525, 527 (1983). *See, e.g., Harris Cohen*, 8 ECAB 457, 457-58 (1954) (incident occurred while the employee was obtaining coffee); *Abraham Katz*, 6 ECAB 218, 218-19 (1953) (incident occurring while the employee was on the way to the lavatory).

premises breaks, the operative principle used to determine whether the off-premises injury is within the course of employment is whether the employing establishment, in all of the circumstances including duration, shortness of off-premises distance and limitations of off-premises activity during the interval, can be deemed to have retained authority over the employee. If so, the off-premises injury may be found to be within the performance of duty.[13]

OWCP is not a disinterested arbiter but rather performs the role of adjudicator on the one hand and gatherer of relevant facts and protector of the compensation fund on the other, a role that imposes an obligation on OWCP to see that its administrative processes are impartially and fairly conducted.[14] While a claimant has the burden of proof to establish entitlement to compensation, OWCP shares responsibility in the development of the claim.[15]

ANALYSIS

Appellant stated that at 6:20 p.m. on January 18, 2014 he was struck by a vehicle that had failed to yield the right of way at a pedestrian crosswalk between an airport terminal and a parking garage. This incident occurred during his regular work hours of 12:30 p.m. to 9:00 p.m., Friday through Tuesday. OWCP accepted that the incident occurred as alleged but denied his claim on the basis that he had not established a causal relationship between his diagnosed conditions and the incident of January 18, 2014. Based on the evidence of record, the Board is unable to determine whether his injury occurred in the performance of duty. The Board finds therefore that the case is not in posture for decision.

The Board notes that OWCP did not adequately develop the evidence to support the finding that appellant was within the performance of duty. OWCP did not make findings of fact regarding whether the injury took place at a time when he may reasonably be stated to be engaged in the master's business, at a place where he may reasonably be expected to be in connection with the employment or while he was reasonably fulfilling the duties of his employment or engaged in doing something incidental thereto.[16] The decision of March 26, 2014 is devoid of analysis on these issues, which are clearly relevant to appellant's entitlement to compensation.

On the Form CA-1, the employing establishment controverted continuation of pay and contended that appellant was not within the performance of duty at the time of his injury, explaining that he was not within an employing establishment-controlled space. While OWCP began development on this issue by sending development letters to the employing establishment and to appellant on February 12, 2014, neither he nor the employing establishment responded. It stated that he was within the performance of duty at the time of the incident of January 18, 2014, but did not analyze this issue in its decision.

[13] *See Lola M. Thomas*, 37 ECAB 572-74 (1986).

[14] *Thomas M. Lee*, 10 ECAB 175, 177 (1958).

[15] *See William J. Cantrell*, 34 ECAB 1233, 1237 (1983); *Gertrude E. Evans*, 26 ECAB 195, 200 (1974).

[16] *See supra* note 7.

On appeal, appellant argues that he was walking to his car to retrieve paperwork needed for his job when he was struck by an SUV and that this action should suffice to establish that he was on duty in a marked crosswalk. However, he did not raise this contention before OWCP at the time of its final decision.

The Board reviewed a similar case in *J.B.*,[17] the employee was a transportation security officer who claimed multiple injuries as a result of being struck by a shuttle bus in the crosswalk of an airport. OWCP requested and received additional information from the employing establishment and the employee relevant to the issue of whether she was injured in the performance of duty. The Board found that the pedestrian crosswalk outside the airport terminal was not considered to be part of the employing establishment's premises, as it did not own, control or maintain the area outside the airport and this was an area that was open to the public. The Board further found that this area did not constitute a hazardous condition proximately located to the premises of the employing establishment such that it could be constructively considered part of its premises under the proximity rule, as motor vehicle traffic was a hazard common to all travelers on the road outside the airport building. The Board noted that even if the location of the appellant's traumatic incident was considered to be part of the employing establishment's premises, it must also be established that appellant was engaged in activities that were reasonably incidental to her employment. The Board found that searching for a cellphone, even with the permission of her supervisor, was not reasonably incidental to her employment.

In *T.M.*, the employee was a security screener who claimed head injuries as a result of being struck by the mirror of a passing shuttle on a pedestrian walkway near a parking lot outside of an airport. OWCP requested and received additional information from the employing establishment relevant to the issue of whether she was injured in the performance of duty, but did not receive information requested from appellant on this issue. The Board found that the pedestrian walkway was not part of the employing establishment's premises, noting that the crosswalk where the incident occurred was open to the general public and was not owned or maintained by the employing establishment. The Board further found the risk of being struck by a shuttle bus was a risk faced by all travelers to the airport, not a special hazard faced by employees.

In the present case, unlike in *J.B.,* or *T.M.*, OWCP did not adequately develop issue of whether appellant was injured in the performance of duty at the time of its March 26, 2014 decision. The employing establishment controverted appellant's claim stating that he was not in an employing establishment-occupied space when injured. OWCP requested information from the employing establishment and appellant, but did not receive a response.

The Board finds that the factual evidence of record was not sufficiently developed by OWCP to permit a fully informed adjudication of the issue to determine whether appellant was fulfilling duties incidental to his employment at the time of the injury. The questions of whether the incident occurred on the premises of the employment establishment or during the fulfillment of duties incidental to his employment remain unresolved.[18] OWCP began factual development

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

[18] *See L.Y.*, Docket No. 13-761 (issued July 18, 2013).

concerning performance of duty, but did not adequately ascertain whether appellant was in the performance of duty at the time of the alleged injury before denying his claim on the basis of insufficient medical evidence to establish a causal relationship. As noted above, for the purposes of determining entitlement to compensation under FECA, arising in the course of employment (*i.e.*, performance of duty) must be established before arising out of the employment (*i.e.*, causal relation) can be addressed.[19] The case will be remanded for OWCP to undertake further development on the issue of performance of duty.[20]

For these reasons, additional development by OWCP is required with respect to the question of whether the January 18, 2014 incident occurred on the premises of the employing establishment or in the fulfillment of duties incidental to appellant's employment. The information regarding employing establishment premises is the type of information usually obtained from the employing establishment.[21] After such development as it deems necessary, OWCP shall issue a *de novo* decision regarding whether appellant sustained an injury in the performance of duty on January 18, 2014.

CONCLUSION

The Board finds that this case is not in posture for decision, as further development of the evidence is warranted.

[19] *Supra* note 9.

[20] *See D.M.*, Docket No. 13-1821 (issued March 26, 2014) (finding that OWCP did not fully develop the issue of whether appellant was in the performance of duty at the time of his alleged injury and remanding the case for further factual development).

[21] *Willie A. Dean*, 40 ECAB 1208, 1212 (1989); *Willie James Clark*, 39 ECAB 1311, 1318-19 (1988).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated March 26, 2014 is set aside and the case remanded for further development consistent with the above opinion.

Issued: November 24, 2014
Washington, DC

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board

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