United States Department of Labor
Employees' Compensation Appeals Board

D.D., Appellant	)	
and	)	**Docket No. 15-0837**
	)	**Issued: July 10, 2015**
U.S. POSTAL SERVICE, POST OFFICE, Colfax, WI, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On March 2, 2015 appellant filed a timely appeal from a November 20, 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 sustained an injury on January 7, 2014 in the performance of duty.

FACTUAL HISTORY

On January 9, 2014 appellant, then a 56-year-old postmaster, filed a traumatic injury claim alleging that at 12:20 p.m. on January 7, 2014 he injured his left shoulder when he fell on

[1] 5 U.S.C. § 8101 *et seq.*

ice in a parking lot. He did not stop work and the employing establishment did not controvert his claim. Appellant's regular-duty hours were from 8:30 a.m. until 5:00 p.m.

Appellant submitted reports from a physician assistant, Reid C. Berger, who noted a history of a traumatic injury to the shoulder sustained on January 7, 2014. He recommended light duty, including no lifting.

Appellant also submitted a report dated February 13, 2014 from Dr. Mark Romzek, an osteopath, who evaluated appellant for pain in his left shoulder after he slipped and fell on ice in a parking lot. Dr. Romzek diagnosed tendinitis, bursitis, and a partial rotator cuff tear of the left shoulder.

By letter dated October 17, 2014, OWCP advised appellant that it had initially paid a limited amount of medical expenses as his claim appeared minor and was uncontroverted, but was now formally adjudicating his claim. It requested that he submit additional factual and medical information, including a detailed description of how his injury occurred and whether he was on the premises of the employing establishment at the time of the incident. OWCP requested that appellant explain whether the employing establishment owned or managed the parking lot. It further advised him that a physician assistant was not considered a physician under FECA and asked that he submit a comprehensive report from a physician addressing the causal relationship between any diagnosed condition and work factors. Appellant did not respond within the allotted time.

In a decision dated November 20, 2014, OWCP denied appellant's traumatic injury claim after finding that he had not established that he was injured in the performance of duty. It determined that he had not demonstrated that he was in the scope of employment at the time of his injury. OWCP noted that neither appellant nor the employing establishment submitted evidence regarding "the facts surrounding the parking lot" necessary to show whether he was in the performance of duty at the time of the incident. It further found that the medical evidence was also insufficient to show that he sustained a diagnosed condition as a result of the January 7, 2014 incident.

LEGAL PRECEDENT

FECA[2] provides for the payment of compensation for disability or death of an employee resulting from personal injury sustained while in the performance of duty.[3] 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.[4] In the course of employment relates to the elements of time, place, and work activity.[5] To arise in the course of employment, an injury must occur at a time when the

[2] *Id*.

[3] *Id.* at § 8102(a).

[4] 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).

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

employee may reasonably be said 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.

OWCP's procedures provide:

> "If the employee has a fixed place of work, the CE [claims examiner] must ascertain whether the employee was on the premises when the injury occurred. The answers to the appropriate sections of Forms CA-1, CA-2 and CA-6 contain information on this point. If clarification is needed, it should be secured from the official superior in the form of a statement which describes the boundaries of the premises and shows whether the employee was within those boundaries when the injury occurred. Where indicated, the clarification should include a diagram showing the boundaries of the industrial premises and the location of the injury site in relation to the premises."[6]

Regarding parking facilities, OWCP's procedures provide:

> "The industrial premises include the parking facilities owned, controlled, or managed by the employer. An employee is in the performance of duty when injured while on such parking facilities unless engaged in an activity sufficient for removal from the scope of employment. In such cases the official superior should be requested to state whether the parking facilities are owned, controlled, or managed by the employer, and whether the injury did in fact occur in the parking area. The CE may approve the case when the official superior's response is affirmative and consistent with the other evidence."[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]

ANALYSIS

Appellant alleged that he injured his left shoulder on January 7, 2014 when he slipped and fell on ice in a parking lot. The employing establishment did not controvert the claim.

[6] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Performance of Duty*, Chapter 2.804.4(b) (August 1992).

[7] *Id*. at Chapter 2.804.4(f) (August 1992).

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

OWCP requested that appellant submit supporting factual evidence, including a detailed description of the circumstances surrounding his fall on January 7, 2014 and whether the employing establishment controlled the parking lot where the alleged incident occurred. OWCP did not request information from the employing establishment regarding whether the parking lot was part of its premises.

The Board finds that the case is not in posture for decision, as the evidence of record is insufficient to determine whether appellant was on the premises of the employing establishment at the time of the alleged January 7, 2014 work incident. OWCP's procedures provide that it should obtain relevant information from an official superior if it requires clarification before determining whether or not the employee was on the premises.[9] Its procedures further provide that it should ask that an official superior relate whether the parking facilities are owned, controlled, or managed by the employing establishment.[10] However, there is no evidence that OWCP obtained a statement from the employing establishment in accordance with its procedures prior to finding that appellant had not shown that he was on the premises of the employing establishment when injured.

Proceedings under FECA are not adversarial in nature, nor is OWCP a disinterested arbiter. While appellant has the burden to establish entitlement to compensation, OWCP shares the responsibility in the development of the evidence, particularly when such evidence is of the character normally obtained from the employing establishment or other governmental source.[11] The Board finds that OWCP did not sufficiently develop the evidence regarding whether the parking lot where the alleged incident occurred was on the premises of the employing establishment.[12] OWCP may not simply conclude, based on the failure of appellant and the employer to respond, that appellant has not met his burden.[13]

On remand, OWCP should obtain information from the employing establishment and determine whether the parking lot was owned, managed, or controlled by the employing establishment and thus part of the premises.[14] It should then determine whether appellant was in the performance of duty at the time of the incident and, if so, adjudicate whether the factual and medical evidence establishes that he sustained an injury as alleged. Following such further development as deemed necessary, OWCP should issue a *de novo* decision.

[9] *See supra* note 6.

[10] *See supra* note 7.

[11] *See L.L.*, Docket No. 12-194 (issued June 5, 2012); *N.S.*, 59 ECAB 422 (2008); *Mary A. Geary*, 43 ECAB 300 (1991).

[12] *See Rosie P. Colmer*, Docket No. 03-116 (issued May 2, 2003).

[13] *See Londa Lee*, Docket No. 01-1183 (issued January 22, 2002)

[14] Off-premises injuries sustained by employees having fixed hours and place of work, while going to or coming home from work or during a lunch period, are not compensable as they do not arise out of and in the course of employment but are merely the ordinary, nonemployment hazards of the journey itself, which are shared by all travelers. *Anne R. Rebeck*, 32 ECAB 315 (1980).

CONCLUSION

The Board finds that the case is not in posture for decision.

ORDER

IT IS HEREBY ORDERED THAT the November 20, 2014 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: July 10, 2015
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

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