

**United States Department of Labor
Employees' Compensation Appeals Board**

J.K., Appellant

and

**DEPARTMENT OF THE TREASURY,
INTERNAL REVENUE SERVICE,
Richmond, VA, Employer**

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**Docket No. 15-198
Issued: March 10, 2015**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

CHRISTOPHER J. GODFREY, Chief Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On November 5, 2014 appellant filed a timely appeal from an October 28, 2014 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3,² the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant met his burden of proof to establish an employment-related injury in the performance of duty on September 13, 2013.

¹ 5 U.S.C. §§ 8101-8193.

² The Board notes that appellant submitted evidence with his appeal to the Board. The Board cannot consider this evidence as its review of the case is limited to the evidence that was before OWCP at the time of its final decision. 20 C.F.R. § 501.2(c)(1); *P.W.*, Docket No. 12-1262 (issued December 5, 2012).

On appeal appellant asserts that the injury is compensable because the claimed motor vehicle accident occurred during lunch when he left his duty station, his home office, to drive to a park to take a walk and clear his head.

FACTUAL HISTORY

On September 30, 2013 appellant, then a 60-year-old internal revenue agent, filed a traumatic injury claim alleging that at 11:30 a.m. on September 13, 2013 he injured his lower back, left shoulder, left wrist, and thumb when his car was hit from behind while he was waiting for a light to change. The employing establishment responded that he was not in the performance of duty because he was injured at lunch time and that no medical evidence had been received. Appellant's duty hours were listed as 7:30 a.m. to 4:15 p.m., Monday through Friday.

By letter dated October 2, 2013, OWCP informed appellant of the type of evidence needed to support his claim. This was to include answers to an attached questionnaire which asked him to describe the claimed motor vehicle accident, provide witness statements and documentation regarding the accident, and asked him to explain how he could be considered to be in the performance of duty since the accident occurred at lunchtime. Appellant was also to provide a physician's opinion as to how the injury resulted in a diagnosed condition. He was given 30 days to respond.

Medical evidence was obtained by OWCP. A September 19, 2013 computerized tomography (CT) scan of the head was within normal limits. In a September 24, 2013 treatment note, Dr. Patricia N. Barnwell, Board-certified in family medicine, noted that appellant reported that his vehicle had been rear-ended on September 13, 2013. She indicated that appellant had a past history of stroke in 2008 and stated that he did not immediately seek medical attention but was now complaining of a headache and difficulty focusing. Physical examination demonstrated painful neck and back range of motion. Dr. Barnwell diagnosed headache, back and neck pain, and prescribed medication.

On November 7, 2013 OWCP found that fact of injury had not been met and denied the claim. It noted that appellant had not provided any factual evidence regarding the accident as requested and that the medical evidence submitted did not support that the injury occurred as described.

Appellant timely requested a review of the written record. He attached a November 19, 2013 report from Dr. Patricia N. McClendon,³ who stated that appellant was under her care and was seen on September 19, 2013 for what he described as a worsening headache as a result of a September 13, 2013 motor vehicle accident. Dr. McClendon noted the negative CT scan results and appellant's additional complaints of neck, back, and left thumb pain. She described painful neck and back range of motion, spasm, and stiffness. Dr. McClendon stated that appellant had been referred to physical therapy and on November 1, 2013 his condition had improved. Appellant also attached information regarding physical therapy appointments and an unidentified treatment note.

³ Dr. McClendon and Dr. Barnwell are apparently the same person.

By decision dated March 18, 2014, an OWCP hearing representative found that the record did not establish that an injury occurred at the time, place, or in the manner alleged and affirmed the November 7, 2013 decision. He noted that appellant had failed to provide documentation regarding the accident and did not seek medical care until September 19, 2013.

On July 9, 2014 appellant requested reconsideration. In a March 24, 2014 statement, he maintained that he was in pain from the moment of the accident and could hardly fill out all required police accident forms. Appellant stated that he declined medical care at that time and instead took his car to a body shop. He stated that his duty hours were 7:30 a.m. to 4:15 p.m. with a 45-minute lunch period, typically from 11:30 a.m. to 12:15 p.m. Appellant stated that after the accident he had increasing back, neck, arm, and wrist pains as well as slurring of speech and had two months of physical therapy and pain medication. He submitted evidence previously of record and a list of physical therapy appointments and leave taken. Correspondence dated February 10, 2014 from Government Employees Health Association, Inc. (GEHA) reflected a September 13, 2013 loss and provided information regarding subrogation.

In a merit decision dated October 28, 2014, OWCP noted that it had not received any evidence to support that the claimed injury occurred while appellant was performing duties of employment at the time and place described and denied modification of the prior decisions.

LEGAL PRECEDENT

Congress, in providing for a compensation program for federal employees, did not contemplate an insurance program against any and every injury, illness or mishap that might befall an employee contemporaneous or coincidental with his or her employment. Liability does not attach merely upon the existence of an employee/employer relation. Instead, Congress provided for the payment of compensation for “the disability or death of an employee resulting from personal injury sustained while in the performance of his duty.”⁴ The phrase “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.” In addressing this issue, the Board has stated: “In the compensation field, to occur in the course of employment, in general, an injury must occur: (1) at a time when the employee may reasonably be said to be engaged in his or her master’s business; (2) at a place where he or she may reasonably be expected to be in connection with the employment; and (3) while he or she was reasonably fulfilling the duties of his or her employment or engaged in doing something incidental thereto.”⁵ In deciding whether an injury is covered by FECA, the test is whether, under all the circumstances, a causal relationship exists between the employment itself, or the conditions under which it is required to be performed, and the resultant injury.⁶

The Board has recognized, as a general rule, that off-premises injuries sustained by employees having fixed hours and places of work while going to or coming from work or lunch,

⁴ 5 U.S.C. § 8102(a); *Angel R. Garcia*, 52 ECAB 137 (2000).

⁵ *George E. Franks*, 52 ECAB 474 (2001).

⁶ *Mark Love*, 52 ECAB 490 (2001).

are not compensable as they do not arise out of and in the course of employment. Such injuries are merely the ordinary, nonemployment hazards of the journey itself which are shared by all travelers.⁷ There are recognized exceptions which are dependent upon the particular facts relative to each claim: (1) where the employment requires the employee to travel on the highways; (2) where the employer contracts to and does furnish transportation to and from work; (3) where the employee is subject to emergency calls, as in the case of firefighters; and (4) where the employee uses the highway to do something incidental to his employment with the knowledge and approval of the employer.⁸

ANALYSIS

The Board finds that appellant has not established an employment-related injury in the performance of duty on September 13, 2013. The evidence does not establish that the claimed injury occurred at a time when he was reasonably said to be engaged in his master's business, at a place where he was reasonably 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.⁹

Appellant claimed that he was in a motor vehicle accident at 11:30 a.m. on September 13, 2013, stating that he was on a lunch break, leaving his duty station in his home office, to drive to a park and take a walk to clear his head. He did not respond to OWCP's request on October 2, 2013 to explain how he could have been in the performance of duty at that time.

As noted above, as a general rule, when off premises during a lunch break, injuries are not compensable.¹⁰ While there are exceptions to this rule,¹¹ these exceptions are not applicable in this case. There is no evidence to support that appellant was injured while on an emergency call, that he was travelling on the road as part of his employment, or that he was subjected to a special inconvenience, hazard, or urgency of travel that would bring the claimed injury within coverage of FECA.¹² Appellant's stated reason for leaving his claimed telework office at home was to take a lunch break and go for a walk to clear his head, an excursion that was purely personal in nature. His claimed injury occurred away from his place of employment while he was engaged in nonemployment activities and represented a nonemployment hazard which was shared by the general public.¹³

⁷ *Cheryl Bowman*, 51 ECAB 519 (2000).

⁸ *J.E.*, 59 ECAB 119 (2007).

⁹ *Supra* note 5.

¹⁰ *Supra* note 7.

¹¹ *Supra* note 8.

¹² *See E.B.*, Docket No. 06-2178 (issued February 27, 2007).

¹³ *Id.*

Finally, if an employee has fixed hours of work, as appellant did, his departure from the telework space would remove him from compensability, under the rules stated above.¹⁴

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 establish that he sustained an employment-related injury in the performance of duty on September 13, 2013.

ORDER

IT IS HEREBY ORDERED THAT the October 28, 2014 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 10, 2015
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board

¹⁴ See *S.F.*, Docket No. 09-2172 (issued August 23, 2010). For cases involving claimed telework injuries, see *Mona M. Tates*, 55 ECAB 128 (2003); *John B. Shutack*, 54 ECAB 336 (2003); *Julietta M. Reynolds*, 50 ECAB 529 (1999).