United States Department of Labor
Employees' Compensation Appeals Board

J.D., Appellant	)	
and	)	**Docket No. 16-0104**
	)	**Issued: April 5, 2016**
DEPARTMENT OF HOMELAND SECURITY, TRANSPORTATION SECURITY ADMINISTRATION, Boise, ID, Employer	)	

Appearances:
Alan J. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On October 23, 2015 appellant, through counsel, filed a timely appeal from September 29 and October 1, 2015 merit decisions 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.

ISSUES

The issues are: (1) whether appellant met his burden of proof to establish that he sustained an injury in the performance of duty on January 9, 2014; and (2) whether appellant is entitled to continuation of pay.

[1] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On December 4, 2014 appellant, then a 75-year-old transportation security screener, filed a traumatic injury claim (Form CA-1) alleging that on January 9, 2014 at 11:30 a.m., he had sustained injuries to multiple muscle groups, tendons, hamstrings, and ligaments in his legs due to a fall on a sidewalk covered in ice and snow. He noted that the injury occurred at his place of employment and claimed continuation of pay. Appellant's regular work hours were listed as from 12:30 p.m. through 9:00 p.m. on Wednesdays through Saturdays. A supervisor checked a box indicating that appellant had not been injured in the performance of duty, noting that appellant had not yet arrived to work and fell down in a parking lot prior to arriving for his scheduled shift. The supervisor also noted that the event had occurred 11 months prior and that the employing establishment controverted continuation of pay because the injury occurred off-premises.

By letter dated December 15, 2014, OWCP requested that appellant submit additional factual and medical evidence in support of his claim. It included a questionnaire regarding the circumstances of his injury. On the same date, OWCP sent a letter to the employing establishment requesting information regarding the exact time of appellant's alleged injury and the beginning of his shift, whether he was on the premises of the employing establishment at the time of the injury, and whether he was performing duties of his employment at the time of injury.

By decision dated December 15, 2014, OWCP determined that appellant was not entitled to continuation of pay during the period of absence from work from January 10 through February 23, 2014. It found that he did not report his claimed injury on a form approved by OWCP within 30 days following the injury.

By letter dated December 18, 2014, the employing establishment challenged appellant's entire claim asserting that he was not within the performance of duty at the time of the fall. It stated that on January 9, 2014 appellant was walking on the airport parking lot prior to the start of his shift and fell. The incident occurred on a covered sidewalk at the Gowen Field Airport. The employing establishment maintained that this area was off-premises because it was not managed, controlled, or supervised by it. It further noted that it did not provide parking for employees wherein they were free to park wherever they chose. The employing establishment submitted and summarized medical evidence submitted by appellant.

Appellant submitted several notes signed by physician assistants. In addition he submitted a note dated June 29, 2014 from Dr. Wajeeh Nasser, Board-certified in family medicine, who diagnosed appellant with left hip and knee pain.

On January 14, 2015 appellant, through counsel, requested a telephonic hearing before an OWCP hearing representative to review the continuation of pay decision dated December 15, 2014.

By decision dated January 16, 2015, OWCP denied appellant's claim for compensation, finding that appellant had not submitted any medical evidence containing a medical diagnosis from a qualified physician in connection with the incident of January 9, 2014.

On January 27, 2015 appellant, through counsel, requested a telephonic hearing before an OWCP hearing representative to review the decision of January 16, 2015.

In a report dated February 2, 2015, Dr. Michael V. Hajjar, a Board-certified neurosurgeon, examined appellant and reported his findings. He stated that appellant "suffered a slip and fall a couple of weeks ago [when] he fell on ice and essentially did a split." Dr. Hajjar reviewed appellant's radiographic studies, noting moderately severe stenosis at L4-5, a slight antherolisthesis with a small synovial cyst, and moderate stenosis with the remainder of the spine essentially normal. Dr. Hajjar reiterated that appellant had fallen a "couple of weeks ago" and noted that an x-ray of his left hip demonstrated some degenerative pathology, but no major traumatic findings.

By letter dated May 12, 2015, Dr. Nasser addressed OWCP and remarked,

> "This letter is written in regards to [appellant's] workplace injury. In the parking lot of the airport on his way to work there, [appellant] slipped on the ice and fell. Upon falling, he experienced 10/10 pain in his left leg and 8/10 pain in his right leg. On physical examination [appellant] was found to have bruising and swelling of mainly his left leg from his proximal thigh all the way down to his ankle. This whole area was also tender to palpation. X-rays of the hip and knee were unremarkable. [Appellant's] diagnosis was a traumatic and significant soft tissue injury/tear to his left thigh muscle/tendon complex with incumbent swelling and bruising of his whole left leg. His left leg injury was absolutely and without question caused by his fall while walking to work within the airport."

By letter dated February 18, 2015, Dr. Hajjar noted that a new magnetic resonance imaging (MRI) scan of appellant's left hip revealed significant pathology. The January 29, 2015 report of the scan from Dr. Jason Salber, Board-certified in diagnostic radiology, found a chronic high-grade partial tear of the left common hamstring tendon, a subacute high-grade partial detachment of the right common hamstring tendon, and a moderate-sized indirect left inguinal hernia containing a portion of the sigmoid.

A hearing was held on July 17, 2015 before an OWCP hearing representative on the issue of denial of continuation of pay. Counsel explained that appellant's claim was not filed within 30 days following the date of injury because appellant had been told by the human resources department that he could not file a claim for compensation because the incident did not occur when he was logged into the employing establishment's time recording system. He argued that this advice was erroneous and incorrect, and as such his untimely claim for continuation of pay was attributable to the employing establishment. Appellant stated that he had worked light duty after taking about a week off of work following the incident.

On August 11, 2015 the employing establishment submitted a response to the July 17, 2015 hearing. It stated that it continued to challenge the entirety of appellant's claim. The employing establishment noted that he submitted a claim after receiving a notice of proposed removal from federal service as not medically qualified, and stated that he was offered the opportunity to seek a possible reassignment to a vacant position at the same or a lower pay band for which he qualified. It indicated that appellant had declined that opportunity and stated that

he mentioned that he planned to pursue disability retirement benefits. The employing establishment included a memorandum from a meeting with a human resources official, in which the official noted that she had told appellant that "he could file a new claim if he wanted to," after explaining that the January 9, 2014 employment incident was separate from an earlier workers' compensation claim, numbered xxxxxx617. It also provided a correction to its earlier letter challenging the claim, noting that the incident occurred on an "ice/snow covered sidewalk," rather than a "covered sidewalk."

A hearing was held on August 5, 2015 on the issue of whether appellant met his burden of proof to establish an injury in the performance of duty on January 9, 2014. The hearing representative stated that the claim was challenged because appellant fell on a covered sidewalk and it was not clear why there was ice. Appellant explained that the sidewalk on which he fell was not a covered sidewalk. He recounted that the sidewalk ran between a fee-based parking lot and the lower level of an airport terminal, and that it was covered in a light layer of snow. Appellant slipped on the snow and fell into a "split" position. He continued on to report to work, but shortly thereafter became lightheaded. The employing establishment called paramedics, but appellant declined to be transported, and eventually drove himself to a clinic. Appellant returned to work after seven days. In response to a question from the hearing representative, appellant acknowledged that he had arrived at work an hour early, explaining that it was within his work ethic. He stated that he regularly arrived at work early, but that there was no written documentation of whether his supervisors were aware of it. On arriving at work early, appellant would go to his locker and remove his cold weather attire, retrieve his work radio, and checked e-mails in the break room. He noted that the parking lot where he had parked on the date of the incident, Lot 30, was the only lot employees of the employing establishment had access to without paying for parking at the airline passengers' parking rate. Appellant stated that he was issued a paddle, which employees would use to enter the parking lot, and that this parking lot was the only one the employees of the employing establishment had access to. He noted that he paid a fee to park in Lot 30, and that the employing establishment did not direct him to park there.

By letter dated August 28, 2015, the employing establishment requested to clarify that appellant's claim was not challenged on the basis that he claimed to have fallen on a covered sidewalk, as this statement was inaccurate. It added that he was not in the performance "of any official duty" at the time of the claimed injury and that he was not "within the purview of the promised rule."

On September 14, 2015 appellant responded to the employing establishment's August 10, 2015 letter challenging his claim. He stated that he was proceeding to his duty station after parking in an airport parking lot on January 9, 2014. Appellant noted that the issues surrounding his notice of proposed removal and his claim for workers' compensation were totally separate. He stated that the memorandum of a meeting with a human resources specialist included in the challenge did not meet his recollection, and that the conversation did not take place.

By decision dated September 29, 2015, the hearing representative modified and affirmed OWCP's decision of January 16, 2015, finding that appellant's claimed injury did not occur within the performance of duty. He found that the incident occurred on the premises of the employing establishment, as the walkway between the parking lot and appellant's duty station

was a necessary point of ingress/egress. The hearing representative further found that because the incident occurred outside of appellant's scheduled working hours and there was no evidence that appellant's supervisors knew that he regularly came to work early or was authorized to do so, his presence at the employing establishment was not incidental to his employment, and therefore not in the performance of duty.

By decision dated October 1, 2015, the hearing representative affirmed OWCP's decision of December 15, 2014, finding that appellant was not entitled to continuation of pay because he had not submitted his claim within 30 days of the date of injury.

LEGAL PRECEDENT -- ISSUE 1

In providing for a compensation program for federal employees, Congress 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 relationship. Instead, Congress provided for the payment of compensation for disability or death of an employee resulting from personal injury sustained while in the performance of duty.[2] 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." The phrase "course of employment" is recognized as relating to the work situation and more particularly, relating to elements of time, place, and circumstance.[3]

In a workers' compensation claim, 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 employer's business; (2) at a place where he may reasonably be expected to be in connection with the employment; and (3) while he was reasonably fulfilling the duties of his employment or engaged in doing something incidental thereto.[4]

The Board has accepted the general rule of workers' compensation law that, as to employees having fixed hours of work, injuries occurring on the premises of the employing establishment, while the employee is going to or from work, before or after working hours or at lunch time, are compensable.[5] Given this rule, the Board has noted that the course of employment for employees having a fixed time and place of work includes a reasonable time while the employee is on the premises engaged in preparatory or incidental acts. However, 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

[2] *See id*. at § 8102(a).

[3] *See Annie L. Ivey*, 55 ECAB 480 (2004). *See also Alan G. Williams*, 52 ECAB 180 (2000).

[4] *Id.*

[5] *See James P. Schilling*, 54 ECAB 641 (2000). *See also Narbik A. Karamian*, 40 ECAB 617 (1989).

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.[6]

In determining whether an injury occurs in a place where the employee may reasonably be or constitutes a deviation from the course of employment, the Board will focus on the nature of the activity in which the employee was engaged and whether it is reasonably incidental to the employee's work assignment or represented such a departure from the work assignment that the employee becomes engaged in personal activities, unrelated to his or her employment. The Board has noted that the standard to be used in determining that an employee has deviated from his or her employment requires a showing that the deviation was aimed at reaching some specific personal objective.[7]

The Board has permitted relief for employees on employer premises when the claimed injury occurred during a reasonable time before or after work or, in the case of injuries occurring far outside regular work hours, when the employee was acting in service of the employer.[8] In *John F. Castro*,[9] an employee was injured in an automobile accident at a naval station five minutes after the end of his shift.[10] It found that such a short time period fell within the scope of a reasonable interval before going to or leaving from work. In *Catherine Callen*,[11] the employee was found to be in the performance of duty under FECA for an injury sustained on the employer premises six hours after the end of her regular shift, primarily because she remained on the premises to complete a project at the request of her employer.[12] In *Nona J. Noel*,[13] the employee arrived one and one-half hours prior to the start of her workday to avoid heavy traffic and to eat breakfast at the Noncommissioned Officer's (NCO) Club where she sustained an injury. The Board found that the act of having breakfast, coupled with the length of time appellant arrived at her employer's premises prior to her official starting time to avoid heavy traffic, placed her activity outside the scope of the employment. In *T.F.*,[14] the employee sustained an injury when she tripped on a loose floor tile 25 minutes before her work shift began at 6:00 a.m. She was on the premises of her employer in the vicinity of her work cubicle. The Board affirmed the denial

[6] *See Eileen R. Gibbons*, 52 ECAB 209 (2001). *See also Cheryl Bowman*, 51 ECAB 519 (2000); *Shirlean Sanders*, 50 ECAB 299 (1999); *Charles Crawford*, 40 ECAB 474 (1989).

[7] *See Rebecca LeMaster*, 50 ECAB 254 (1999).

[8] *See William W. Knispel*, 56 ECAB 639 (2005).

[9] Docket No. 03-1653 (issued May 14, 2004).

[10] *Id.*

[11] 47 ECAB 192 (1995).

[12] The Board found that, although the employee had been cautioned about unauthorized overtime and did not request it on the date of injury, there was not an express prohibition concerning her overtime work. Rather, the support staff was routinely requested by attorneys to work overtime and management was generally aware that they were on the premises after regular duty tour hours. *See id.*

[13] 36 ECAB 329 (1984).

[14] Docket No. 09-154 (issued July 16, 2009).

of compensability under FECA, noting that finding a good parking place, drinking coffee, having breakfast and putting her lunch away were personal activities and not reasonably incidental to the work of her employer. The Board found that her presence at the premises some 25 minutes prior to the commencement of her work shift did not constitute a reasonable interval under the circumstances.

ANALYSIS -- ISSUE 1

The Board finds that appellant's claimed injury was not sustained in the performance of duty.

OWCP's hearing decision of September 29, 2015 held that the incident of January 9, 2014 occurred on the employing establishment's premises, as the sidewalk upon which the injury occurred was the sole means of ingress to the employing establishment, from the employing establishment parking lot.[15] It also held that the incident did not occur during appellant's regular work shift or during a lunch or recreation period as a regular incident of his employment. In order for an injury to be considered as arising out of employment in these circumstances, the facts of the case must show some substantial employer benefit or requirement which gave rise to the injury.[16] It is incumbent upon appellant to establish that it arose out of her employment. In other words, some contributing or causal employment factor must be established.

Appellant has not shown that his presence at the employing establishment on January 9, 2014 at 11:30 a.m. was a reasonable interval before work. His usual work shift began at 12:30 p.m. Appellant's presence on the employer's premises alone is insufficient to establish compensability. He arrived to work one hour before the start of his shift. The Board has held that what constitutes a reasonable interval before a work shift begins depends not only on the length of time involved but also on the circumstances for the time interval and nature of the employment activity.[17] There is no evidence of record establishing that the employing establishment expressly or impliedly required appellant's presence on the premises prior to his regular work hours. There is no evidence that appellant sought approval from his supervisor to be on the premises prior to his regular-duty hours in order to sign in or prepare for his daily activities. Appellant stated that there was no documentation establishing that his supervisors were aware that he regularly came into work early. The Board finds that there is insufficient

[15] A. Larson, *The Law of Workers' Compensation*, Chapter 13.01(3) (December 2013) explains that the most common ground of extension of the premises doctrine 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 employing establishment, and that therefore the special hazards of that route become the hazards of the employment. Larson has also explained in § 13.02(2) (December 2013) that the zone of danger concept has been extended for slips and falls on ice which occur to public sidewalks immediately in front of the employer's place of business.

[16] *See Dwight D. Henderson*, 46 ECAB 441 (1995).

[17] *See Maryann Battista*, 50 ECAB 343 (1999). *See also Narbik A. Karamian* at 618 *supra* note 5; (citing *Clayton Varner*, 37 ECAB 248 (1985)).

evidence to establish that his presence on the premises for one hour prior to his work shift was reasonable.[18]

Appellant's arrival at the employing establishment prior to his official starting time does not automatically place his activities outside the scope of employment.[19] He noted that on arriving at work early, he would go to his locker and remove his cold weather attire, retrieve his work radio, and check e-mails in the break room. There is no evidence of record that the employer expressly or impliedly required appellant's presence on the premises outside of his regular-duty hours. There is no evidence that his supervisors were ever made aware that he would be present on the premises before his regular-duty hours.[20] Appellant did not submit sufficient evidence to establish that the employing establishment condoned or encouraged employees to come into work early. Without evidence of such an express or implied direction from the employing establishment, the Board finds that his arrival one hour prior to the start of his regularly-scheduled shift on January 9, 2014 was a matter of personal convenience, and not a matter from which the employer derived substantial benefit. Hence, the act of arriving at work one hour early, without direction or authorization from a supervisor, places appellant's injury outside the scope of employment.

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.

LEGAL PRECEDENT -- ISSUE 2

Section 8118(a) of FECA authorizes continuation of pay, not to exceed 45 days, of an employee who has filed a claim for a period of wage loss due to a traumatic injury with his or her immediate superior on a form approved by the Secretary of Labor within the time specified in section 8122(a)(2) of this title.[21] The latter section provides that written notice of injury shall be given within 30 days. The context of section 8122 makes clear that this means within 30 days of the injury.[22]

[18] *See Howard M. Faverman*, 57 ECAB 151 (2005). *Cf. Cemeish E. Williams*, 57 ECAB 509 (2006) (finding that where claimant arrived for duty 15 or 30 minutes prior to her scheduled shift and was adjusting her uniform tie and reaching for her bag when the injury occurred on the escalator on the way to sign in for her afternoon shift, appellant was on the premises for a reasonable time before her specific working hours in preparation for her shift, thereby providing the employing establishment some substantial benefit from the activity involved.)

[19] *See James E. Chadden*, 40 ECAB 312, 315 (1988) (stating that claimant's arrival at the employing establishment a half hour prior to his official starting time was not so early as to place claimant's activity outside the scope of employment).

[20] *See supra* note 12. *See also S.D.*, Docket No. 10-1391 (issued August 24, 2011) (finding that the employee was not in the performance of duty when she was injured in the lobby while assisting a coworker to gain entry through the handicap door before her work shift began. Appellant arrived early in order to secure a desired parking space close to her employment.)

[21] 5 U.S.C. § 8118(a).

[22] *George A. Harrell*, 29 ECAB 338, 340 (1978).

The Board has held that section 8122(d)(3) of FECA,[23] which allows OWCP to excuse failure to comply with the time limitation provision for filing a claim for compensation because of exceptional circumstances, is not applicable to section 8118(a), which sets forth the filing requirements for continuation of pay. Thus, there is no provision in the law for excusing an employee's failure to file a claim within 30 days of the employment injury.[24]

ANALYSIS -- ISSUE 2

For employees who sustain a traumatic injury, FECA provides that the employing establishment must continue the employee's regular pay during any period of resulting disability, up to a maximum of 45 calendar days. This is called continuation of pay (COP). The employing establishment, not OWCP, pays continuation of pay.[25]

One purpose of continuation of pay is to eliminate the interruption to the injured employee's salary due to delay between the notice of injury and payment of compensation benefits.[26] The late filing of a claim for a period of wage loss defeats that purpose.

Appellant's claimed employment-related injury occurred on January 9, 2014. He did not officially file a written claim related to this incident within 30 days. As there is no provision in FECA for excusing a late filing, appellant is not entitled to continuation of pay. This is so regardless of any failure or alleged failure on the part of the employer[27] or local FECA representative. As such, the Board finds that appellant is not entitled to continuation of pay.

CONCLUSION

The Board finds that appellant has not established that he sustained an injury on January 9, 2014 while in the performance of duty. The Board further finds that he is not entitled to continuation of pay.

[23] 5 U.S.C. § 8122(d)(3).

[24] *William E. Ostertag*, 33 ECAB 1925, 1932 (1982).

[25] 20 C.F.R. § 10.200(a).

[26] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Continuation of Pay and Initial Claims for Compensation*, Chapter 2.807.2 (June 2012).

[27] *See* 20 C.F.R. §§ 10.210-211 (detailing the employee's and employer's responsibilities in COP cases).

ORDER

IT IS HEREBY ORDERED THAT the October 1 and September 29, 2015 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: April 5, 2016
Washington, DC

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

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

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board