United States Department of Labor
Employees' Compensation Appeals Board

S.M., Appellant	)	
and	)	**Docket No. 15-1491**
	)	**Issued: February 10, 2016**
U.S. POSTAL SERVICE, POST OFFICE, Fort Worth, TX, Employer	)	

Appearances:
Belen Rodriguez, for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
PATRICIA H. FITZGERALD, Deputy Chief Judge
COLLEEN DUFFY KIKO, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On June 30, 2015 appellant, through his representative, filed a timely appeal from an April 8, 2015 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 an injury in the performance of duty on August 29, 2012.

FACTUAL HISTORY

On May 17, 2013 appellant, then a 64-year-old mail carrier, filed a traumatic injury claim (Form CA-1) alleging that on August 29, 2012, he sustained a collapsed lung, broken ribs, and a

[1] 5 U.S.C. § 8101 *et seq.*

fractured left foot which resulted in amputation of all left toes.[2] He explained that on his assigned day off, he was called in at 6:20 a.m. to report to work for a shift which was to begin at 7:00 a.m. While on his way to work, at approximately 6:51 a.m., a sport utility vehicle ran a stop sign, coming into his lane, which forced appellant to swerve and take his motorcycle out of his lane. The sport utility vehicle bumped his rear and forced him to lay down the motorcycle. Appellant asserted that his claimed injuries were the result of being called in on his day off with 30 to 40 minutes' notice, and that he would not have been traveling that route but for the request of the employing establishment. He stated that once he received the call to report to work, the employing establishment benefited from not having to call in another carrier for that assignment. Appellant noted that he called his supervisor to report the incident, but was told that it was not work related.

The employing establishment controverted appellant's claim by letter dated May 17, 2013. It stated that he was involved in an "off the clock" vehicular incident on the morning of August 29, 2012. The employing establishment noted that appellant suffered extreme injuries from the incident and had not been able to return to work. Appellant had requested 240 hours (30 days) of advanced sick leave, which was granted, and requested reasonable accommodations. The employing establishment asserted that he was not in the performance of his duties on the date of injury, noting that his tour of duty began at 7:00 a.m., but that appellant never clocked in on August 29, 2012. It also controverted continuation of pay, noting that appellant did not file his claim until May 14, 2013, almost nine months after the incident. Lastly, the employing establishment noted that he had not provided medical documentation to support his claim.

In an undated statement, appellant's representative noted that appellant was still unable to return to work because the employing establishment refused to allow him to return to a four-hour workday as directed by his physician.

On March 29, 2013 the employing establishment responded to senatorial correspondence regarding appellant's claimed injury. It noted that appellant was involved in a nonjob-related vehicular incident on August 29, 2012, and was granted 240 hours of advanced sick leave. The employing establishment stated that he submitted a physician's note dated January 7, 2013, which included the phrase "nonweight-bearing." On February 27, 2013 it received a report stating that appellant could return to work the next day with restrictions of working no more than four hours per day and wearing an ankle brace.

By letter dated May 28, 2013, OWCP advised appellant of the factual and medical evidence needed to establish his claim. It requested that he provide this evidence, within 30 days. On the same date, OWCP also requested that the employing establishment provide details regarding appellant's duties and its knowledge of the incident.

On May 31, 2013 the employing establishment responded. It stated that appellant's injury occurred at 6:51 a.m. and that it was unknown to where he was traveling when it occurred. The employing establishment noted that appellant was called into work to report to his shift on

[2] Appellant had previously completed a Form CA-1 on this claim dated March 22, 2013. However, the form was not signed by a supervisor.

the date of injury, and that he last performed his official duties on August 28, 2012. The distance between appellant's place of work and the location of the vehicular incident was approximately two miles. Appellant's regular reporting time was 7:00 a.m. The employing establishment asserted that appellant was not in a government-owned vehicle at the time of the incident and noted that he was not covered under a "portal to portal."

In an undated statement, appellant responded to OWCP's questionnaire. He stated that at the time of injury, he was at an intersection driving his motorcycle to work after his supervisor called him to come in on his day off. At approximately 6:51 a.m. another vehicle pulled out from a stop sign in front of appellant. He swerved to avoid hitting the vehicle head-on and the vehicle hit the rear of his motorcycle. The motorcycle hit the pavement falling on appellant's left foot, while he slid across the pavement for several feet. He noted that he had waited to file his claim because originally he was told his claim was not work related. Appellant received medical attention immediately after the injury of August 29, 2012. He reported that he had a severely fractured left foot, a collapsed lung, broken ribs, and severe road rash. Appellant's toes were severely fractured and unable to heal, and eventually developed gangrene, resulting in amputation of his left toes. He was nonweight-bearing until approximately February 10, 2013 and was confined to a wheelchair until he received prosthetics.

In an emergency department report dated August 29, 2012, Dr. Christopher Thompson, Board-certified in emergency medicine, diagnosed a traumatic closed pneumothorax, a closed foot fracture, and three rib fractures, as a result of a motor vehicle incident.

In a report dated September 10, 2012, Dr. Zak Weis[3] noted that appellant had a comminuted open fracture of multiple metatarsals in his left foot, which developed gangrene and required digit amputation. Appellant also submitted diagnostic and medical records detailing his course of treatment in 2013.

In a Family Medical Leave Act certification of health care provider for employee's serious health condition form dated September 6, 2012, Dr. Weis stated that appellant was nonweight-bearing at that time and unable to perform any duties of his employment. Appellant also provided further medical notes from Dr. Weis and nurses excusing him from work through May 2013.

By decision dated October 18, 2013, OWCP denied appellant's claim, finding that, though the incident occurred as alleged, the evidence of record failed to establish that it had occurred in the performance of duty. It found that employees do not generally have the protection of FECA while traveling to and from work unless one of these five exceptions are met. As appellant did not fall into one of the exceptions, he was found to be outside the performance of duty.

On October 9, 2014 appellant, through his representative, submitted a request for reconsideration. With his request, appellant's representative supplied a lengthy legal analysis with citations to Board precedent involving cases in which federal employees had been found to

[3] Dr. Weis' certification in a medical specialty could not be confirmed with the American Board of Medical Specialties or the American Osteopathic Association.

be in the performance of duty while coming to or going from work. He contended that OWCP had misinterpreted Board precedent in denying appellant's claim.

By decision dated April 8, 2015, OWCP reviewed the merits of appellant's claim and affirmed its prior decision of October 18, 2013.

LEGAL PRECEDENT

An employee seeking benefits under FECA[4] has the burden of proof to establish 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 filed within the applicable time limitation; that an injury was sustained while in the performance of duty as alleged and that any disability and/or specific condition for which compensation is claimed are causally related to the employment injury.[5] These are the essential elements of each and every compensation claim regardless of whether the claim is predicated on a traumatic injury or an occupational disease.[6]

To determine whether a federal employee has sustained a traumatic injury in the performance of duty it must first be determined whether a fact of injury has been established.[7] First, the employee must submit sufficient evidence to establish that he actually experienced the employment incident at the time, place, and in the manner alleged.[8] Second, the employee must submit sufficient evidence, generally only in the form of medical evidence, to establish that the employment incident caused a personal injury.[9]

FECA provides for the payment of compensation benefits for disability or death of an employee resulting from personal injury sustained while in the performance of duty. The phrase "while in the performance of duty" in FECA 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."[10]

In addressing this issue, the Board has generally held that, in the compensation field, to occur in the course of employment, an injury must occur at a time when the employee may reasonably be said to be engaged in his or her master's business, at a place where he or she may reasonably be expected to be in connection with the employment, and while he or she was

[4] 5 U.S.C. § 8101 *et seq*.

[5] *C.S.*, Docket No. 08-1585 (issued March 3, 2009); *Bonnie A. Contreras*, 57 ECAB 364, 366 (2006).

[6] *S.P.*, 59 ECAB 184, 188 (2007); *Joe D. Cameron*, 41 ECAB 153, 157 (1989).

[7] *B.F.*, Docket No. 09-60 (issued March 17, 2009); *Bonnie A. Contreras*, *supra* note 5.

[8] *D.B.*, 58 ECAB 464, 466 (2007); *David Apgar*, 57 ECAB 137, 140 (2005).

[9] *C.B.*, Docket No. 08-1583 (issued December 9, 2008); *D.G.*, 59 ECAB 734, 737 (2008); *Bonnie A. Contreras*, *supra* note 5.

[10] *Bernard D. Blum*, 1 ECAB 1 (1947).

reasonably fulfilling the duties of his or her employment or engaged in doing something incidental thereto.[11]

The Board has stated, as a general rule, that off-premises injuries sustained by employees having fixed hours and place of work, while going to or coming from work, 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.[12] Due primarily to the myriad factual situations presented by individual cases over the years, certain exceptions to the general rule have developed where the hazards of the travel may fairly be considered a hazard of the employment. These recognized exceptions are dependent upon the particular facts and related to situations: (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 firemen; and (4) where the employee uses the highway to do something incidental to her employment with the knowledge and approval of the employer.[13]

The Board has also recognized the special errand exception to the going to and coming from work rule. When the employee is to perform a special errand, the employer is deemed to have agreed, expressly or impliedly, that the employment service should begin when the employee leaves home to perform the errand. Ordinarily, cases falling within this exception involve travel which differs in time or route or because of an intermediate stop, from the trip which is normally taken between home and work. In such a case, the hazard encountered in the trip may differ somewhat from that involved in normally going to and returning from work. However, the essence of the exception is not found in the fact that a greater or different hazard is encountered but in the agreement to undertake a special task. For this reason, coverage is afforded from the time the employee leaves home, even though in time and route the journey may be, in part, identical to that normally followed in going to work.[14]

ANALYSIS

OWCP determined that appellant did not sustain an injury in the performance of duty on August 29, 2012. The Board finds that this case is not in posture for decision.

The evidence of record establishes that appellant's injury occurred outside of his normal work hours and outside of the employing establishment's premises. As noted, the general coming and going rule would preclude coverage under FECA for this off-premises injury, unless appellant can establish an applicable exception.[15]

[11] *James E. Chadden, Sr.*, 40 ECAB 312 (1988).

[12] *Gabe Brooks*, 51 ECAB 184 (1999); *Robert F. Hart*, 36 ECAB 186, 191 (1984).

[13] *Joan K. Phillips*, 54 ECAB 172 (2002); *see also Janet Rorrer*, 47 ECAB 764, 768 (1996).

[14] *Elmer L. Cooke*, 16 ECAB 163 (1964); *J.H.*, Docket No. 10-185 (issued July 19, 2010).

[15] *Id*.

Appellant's representative argues that this claim falls within the special errand exception, contending that appellant's supervisor sanctioned his coming into work on a day that he was not scheduled to work. As noted, when the employee is to perform a special errand, the employer is deemed to have agreed, expressly or impliedly, that an employee is engaged in an employment service while performing the errand. The Board finds that the evidence in this case is insufficient to determine the circumstances of appellant's supervisor asking him to come into work on his day off. While appellant has submitted statements regarding the route he took to work and the reason that he was called into work on the date of incident, the employing establishment has merely indicated that appellant was asked to report to work on that date, without further elaboration. The Board is unable to make a determination of whether appellant's alleged work-related injury falls under an exception to the general coming and going rule, as a special errand, without further elaboration of the circumstances surrounding the employing establishment's calling appellant into work.[16]

Proceedings under FECA are not adversarial in nature and OWCP is not a disinterested arbiter. While the claimant has the burden to establish entitlement to compensation, OWCP shares responsibility in the development of the evidence to see that justice is done.[17] The Board notes that the claims examiners did not develop the factual evidence or attempt to ascertain from the employing establishment the circumstances surrounding the employing establishment's request for appellant to come to work that day.

Following this and such further development as is deemed necessary, OWCP shall issue a *de novo* decision.

CONCLUSION

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

[16] *See D.T.*, Docket No. 11-751 (issued March 12, 2012) (appellant alleged an exception to the general coming and going rule by contending he was on a special errand, to take a snow plow to the repair shop, when injured. The Board found insufficient evidence to establish whether the employing establishment agreed, expressly or impliedly, to permit appellant to take the postal vehicle off premises for the purpose of having the vehicle repaired. The Board remanded for further development and a *de novo* decision on the issue).

[17] *See L.L.*, Docket No. 10-16 (issued October 1, 2010); *Phillip L. Barnes*, 55 ECAB 426 (2004); *Horace L. Fuller*, 53 ECAB 775, 777 (2002); *James P. Bailey*, 53 ECAB 484, 496 (2002); *William J. Cantrell*, 34 ECAB 1223 (1983).

ORDER

IT IS HEREBY ORDERED THAT the April 8, 2015 decision of the Office of Workers' Compensation Programs is set aside and the case remanded for further action consistent with this opinion.

Issued: February 10, 2016
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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