United States Department of Labor
Employees' Compensation Appeals Board

R.H., Appellant	)	
and	)	**Docket No. 15-1339**
	)	**Issued: June 13, 2016**
DEPARTMENT OF VETERANS AFFAIRS, VETERANS BENEFITS ADMINISTRATION, Saint Petersburg, FL, 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
PATRICIA H. FITZGERALD, Deputy Chief Judge
COLLEEN DUFFY KIKO, Judge

JURISDICTION

On May 28, 2015 appellant, through counsel, filed a timely appeal from a December 3, 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 an injury in the performance of duty on May 3, 2013.

On appeal counsel contends that OWCP's decision is contrary to fact and law.

[1] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On May 10, 2013 appellant, then a 59-year-old claims examiner, filed a traumatic injury claim (Form CA-1) alleging that he pulled/strained his back on May 3, 2013 at 1:30 p.m. while lifting two large trunks of case files filled with c-files, provided by the employing establishment, into the trunk of his car.[2] The claimed injury occurred on the third floor of a parking garage. Appellant's supervisor checked a box on the claim form to indicate that appellant was in the performance of duty. She also checked a box to indicate that her knowledge of the incident agreed with appellant's statements. Appellant stopped work on May 8, 2013.

An OWCP Form CA-16, authorization for examination, was issued by the employing establishment on May 15, 2013. Appellant was authorized to visit the Rehabilitation Medical Group in Orlando, Florida.

In a May 29, 2013 letter, OWCP indicated that when appellant's claim was received it appeared to be a minor injury that resulted in minimal or no lost time from work and, based on these criteria and because the employing establishment did not controvert continuation of pay (COP) or challenge the case, payment of a limited amount of medical expenses was administratively approved. It stated that it had reopened the claim for consideration because the medical bills had exceeded $1,500.00. OWCP requested additional evidence and afforded appellant 30 days to respond to its inquiries.

Appellant submitted a May 28, 2013 prescription from Dr. Michael Creamer, a Board-certified physiatrist with the Rehabilitation Medical Group, for four to six weeks of physical therapy.

In a June 27, 2013 letter, the employing establishment stated that appellant worked from home four days per week and went into the office one day per week. It indicated that appellant went into the office "on May 3, 2013, to work and take a new set of files home to work from home."[3] Appellant's tour of duty was from 7:30 a.m. to 4:00 p.m., but he put in a sick leave request and left work early at 1:00 p.m. He physically left the office for lunch at 12:30 p.m. and began his leave following his lunch period.

By decision dated July 12, 2013, OWCP denied appellant's claim finding that he had failed to establish that the May 3, 2013 incident occurred as alleged.

On July 24, 2013 appellant, through counsel, requested an oral hearing before an OWCP hearing representative and submitted a narrative statement dated October 14, 2013 indicating that the two containers he transported on May 3, 2013 weighed approximately 11 pounds when empty and approximately 65 to 90 pounds each when filled, based on the number of files transported. He explained that, while loading the boxes into his car, he felt his back pull and pop. This occurred before appellant left to return the cart he had used to ferry the file containers to his car from the employing establishment's office. He did not think anything of it at the time, as he had felt back pain and discomfort on numerous occasions while moving these containers of

[2] Appellant also submitted wage-loss compensation claims for intermittent periods beginning June 30, 2013.

[3] Appellant was scheduled to work overtime on May 4, 2013.

files in and out of his vehicle on Fridays, noting that the pain usually subsided with rest when he got home. However, as a precaution, appellant requested assistance to remove the cases from his car on May 3, 2013 as he did not want to exacerbate his pain upon arrival at his residence. He stated that his duty did not end until files were removed from his vehicle and placed in the locking filing cabinet provided by the employing establishment, for the security of files, at his residence. Appellant argued that loading and unloading of the containers was his direct duty and responsibility and therefore the injury he sustained while lifting or unloading files from his vehicle was in the performance of duty.

Appellant also submitted photographs of the bins of files assigned to him for telework by the employing establishment and a time log of his entry into the parking garage where the May 3, 2013 employment incident occurred. The time log indicated that he clocked into the north garage entrance on May 3, 2013 at 7:47:56 a.m. and clocked out of the south service corridor at 1:37:10 p.m.

In an October 14, 2013 witness statement, appellant's spouse testified that appellant pulled something in his upper back when lifting his cases from work into the trunk of his car. He told her that he would have to leave the cases locked in his trunk until she returned home from work to assist him in removing the cases. When appellant's wife arrived home, she assisted appellant by helping him lift the cases from the trunk of his car, as he stated he was unable to lift them himself. The cases were rolled into his the home office and appellant secured the claim files in the employing establishment-provided filing cabinet.

In a May 28, 2013 report, Dr. Creamer diagnosed thoracic pain, lumbar pain, lumbar degenerative disc disease, muscle spasm, and thoracic strain/sprain. Appellant reported that he was lifting boxed files for transport from his job to home and when he lifted the boxes up to his waist he noted a "pain/pop/pull" in the mid-thoracic region. On August 1, 2013 Dr. Creamer diagnosed left shoulder pain and thoracic facet arthropathy. He ordered a magnetic resonance imaging (MRI) scan of the thoracic spine and excused appellant from work for the next 30 days.

In two reports dated September 3, 2013, Dr. William Mills, a family practitioner, noted that appellant suffered a traumatic back injury while lifting trunk-type cases into his car on May 3, 2013 at his place of employment. He diagnosed thoracic strain with inter-scapular spasm as a result of pulling, lifting, or otherwise carrying or moving files, in large containers, from or to his vehicle as described. Dr. Mills indicated that appellant's description of the injury was consistent with his medical examination findings and noted that back injuries involving muscles, tendons, ligaments, and often vertebra "can, and often do, include disc herniation and/or bulging." He opined that appellant's injury was "likely caused by handling or moving motions involving weighted items, which [was] consistent with [appellant's] statement."

In an August 2, 2013 letter, an employing establishment human resources specialist provided a copy of the employer's side of the Form CA-1 in which the supervisor checked a box marked "no" to indicate that her knowledge of the claimed injury did not agree with appellant's statements. She stated that appellant was on leave from 1:00 p.m. to 4:00 p.m. and that the injury occurred at his residence.

By decision dated December 9, 2013, an OWCP hearing representative vacated the prior decision and remanded the case for further development regarding the location where the injury occurred and whether it was on the premises of the employing establishment.

In a December 24, 2013 letter, OWCP requested factual evidence from appellant, including a statement explaining his actions and whereabouts between 12:30 p.m. and 1:30 p.m. on May 3, 2013.

In a letter dated December 30, 2013, the employing establishment stated that appellant's injury occurred on the third floor of the parking garage, which was not owned or operated by the Federal Government. It indicated that the employing establishment "only leases office space on the 15th floor of the building attached to the parking garage where [appellant] stated the injury happened." The employing establishment further indicated that appellant left the office at 12:30 p.m. on May 3, 2013 and was on sick leave for the remainder of the workday. The injury occurred at 1:30 p.m., one hour after he left work. The employing establishment indicated that all employees working from home were responsible for transporting their work to and from the office. Telework was at the employee's request and in appellant's case it was part of a reasonable accommodation request.

In a narrative statement dated January 6, 2014, appellant stated that he was a telework employee who transported files to and from his home. He indicated that he logged into and out of the parking garage between 1:26:32 p.m. and 1:37:10 p.m. on May 3, 2013. Appellant further indicated that this was the time period when he was transporting cases to and from his car, as required to work from home. During the time period 12:30 p.m. to 1:30 p.m. he stated that he was still in the office, completing last minute work and locating files to take home. Appellant left approximately an hour later than scheduled based on the fact that he was running late. He was on authorized leave from 1:30 p.m. to 4:30 p.m.

By decision dated January 23, 2014, OWCP denied the claim finding appellant's injury on May 3, 2013 did not arise in the performance of duty. It found that the evidence of record was insufficient to establish that the injury occurred on premises owned, maintained, or controlled by the employing establishment.

On February 3, 2014 appellant, through counsel, requested an oral hearing before an OWCP hearing representative.

A real property lease dated March 1, 2005 was provided to OWCP. The lease stated that a total of 17,273 rentable square feet of office and related space on the 15th floor of Gateway Center at 1000 Legion Place, Orlando, Florida, was rented to the employing establishment. The lease further indicated that parking was provided. An occupancy agreement dated March 19, 2010 stated that the employing establishment was provided with 64 surface parking spaces.

A telephone hearing was held before an OWCP hearing representative on September 15, 2014. Appellant testified that he anticipated leaving work at 12:30 p.m. on May 3, 2013, and that was the time he told his supervisor he was leaving, but as it often happened in his position, he was stopped and asked questions, so his departure was delayed. He did not leave work until 1:26 p.m. and testified that he did not believe his supervisor was aware that he was still in the office after 12:30 p.m. Appellant further testified that he worked on the

15th floor of the building and was not assigned a parking space, but had access to 64 parking spaces in a garage facility attached to the building.

By decision dated December 3, 2014, the OWCP hearing representative affirmed the January 23, 2014 decision.

LEGAL PRECEDENT

OWCP regulations, at 20 C.F.R. § 10.5(ee) define a traumatic injury as a condition of the body caused by a specific event or incident or series of events or incidents within a single workday or shift.[4] 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. 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. 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.[5]

In the compensation field, to occur in the course of employment, an injury must occur: (1) at a time when the employee may be reasonably said to be engaged in the master'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 the employment or engaged in doing something incidental thereto.[6]

Regarding employees having fixed hours and a fixed place of work, the Board has accepted the general rule of workers' compensation law that injuries occurring on the premises of the employing establishment, while the employees are going to and from work before or after working hours or at lunchtime are compensable.[7] The course of employment for such employees includes acts which minister to their personal comfort within the time and space limits of their employment.[8] On the other hand, when a claimant departs from his workstation without authorization to retrieve personal items, such activity is not considered an activity necessary for personal comfort or ministration or incidental to her employment.[9] In defining what constitutes the premises of an employing establishment, the Board has stated that the premises of the employer, as the term is used in workmen's compensation law, are not necessarily coterminous with the property owned by the employer; they may be broader or narrower and are dependent

[4] 20 C.F.R. § 10.5(ee); *Ellen L. Noble*, 55 ECAB 530 (2004).

[5] *See Gloria J. McPherson*, 51 ECAB 441 (2000).

[6] *See R.A.*, 59 ECAB 581 (2008).

[7] *See F.S.*, Docket No. 09-1573 (issued April 6, 2010).

[8] *See R.H.*, Docket No. 09-13 (issued March 6, 2009); A. Larson, *The Law of Workers' Compensation* § 21 (2007).

[9] *See A.K.*, Docket No. 09-2032 (issued August 3, 2010).

more on the relationship of the property to the employment than on the status or extent of the legal title.[10]

The Board has noted that factors which determine whether a parking area used by employees may be considered a part of the employing establishment's premises include whether the employing establishment contracted for the exclusive use by its employees of the parking area, whether parking spaces on the lot were assigned by the employer to its employees, whether the parking areas were checked to see that no unauthorized cars were parked in the lot, whether parking was provided without cost to the employees, whether the public was permitted to use the lot, and whether other parking was available to the employees. Mere use of a parking facility, alone, is not sufficient to bring the parking lot within the premises of the employing establishment. The premises doctrine is applied to those cases where it is affirmatively demonstrated that the employing establishment owned, maintained, or controlled the parking facility, used the facility with the owner's special permission, or provided parking for its employees.[11]

ANALYSIS

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

The Board notes that the claimed work incident occurred off the premises of the employing establishment. Appellant alleged that he sustained a back injury on May 3, 2013 at 1:26 p.m. while lifting two large trunks of case files into the trunk of his car. He testified that he worked on the 15th floor of the building and the employees were not assigned a parking space, but had access to 64 parking spaces in a garage facility attached to the building. A real property lease dated March 1, 2005 stated that a total of 17,273 rentable square feet of office and related space on the 15th floor of the office building was rented to the employing establishment. The lease further indicated that parking would be provided and an occupancy agreement dated March 19, 2010 stated that the employing establishment would be provided with 64 surface parking spaces. There is no indication that parking was for the exclusive use of the employing establishment. Mere use of a parking facility, alone, is insufficient to bring the parking lot within the "premises" of the employing establishment.[12] Under the circumstances of this case, the Board finds that the parking garage was not part of the actual premises of the employing establishment. Rather it was being leased from a private company and was not owned, operated, or controlled by the employing establishment. There is no evidence that the parking lot where the claimed injury occurred was part of the employing establishment premises or that the

[10] *See also Idalaine L. Hollins-Williamson*, 55 ECAB 655 (2004) (where the employee fell and injured her left side while walking from a parking lot to the employing establishment building on a snow-covered public sidewalk, the Board found that the employee did not establish that the sidewalk on which she fell was used exclusively or principally by employees of the employing establishment for the convenience of the employing establishment. The evidence of record supported that the sidewalk where the incident occurred was not owned, operated, or maintained by the employing establishment and was open to the public. The employee's injury was found not to be in the performance of duty.)

[11] *See Diane Bensmiller*, 48 ECAB 675 (1997); *Rosa M. Thomas-Hunter*, 42 ECAB 500 (1991); *Edythe Erdman*, 36 ECAB 597 (1985); *Karen A. Patton*, 33 ECAB 487 (1982); *R.M.*, Docket No. 07-1066 (issued February 6, 2009).

[12] *Roma A. Mortenson-Kindschi*, 57 ECAB 418 (2006).

premises extended to the parking lot under the proximity rule.[13] However, the Board finds that OWCP improperly ended its analysis after finding that the injury was off-premises.

The Board has held that exceptions to the general premises rule have been made to protect activities that are so closely related to the employment itself as to be incidental thereto.[14] In *I.F.*,[15] a former wildlife inspector, who indicated that she regularly took work home with her, claimed to have injured her neck and back while loading the trunk of her car with work materials which she planned to review over the weekend. First, the Board found that injury occurred within a reasonable interval after the end of her work shift while she was engaged in activities incidental to her employment. Second, the Board found that while taking work home was not specifically mandated by the employing establishment, the claimant did this routinely, it assisted her in her day-to-day job duties and responsibilities, and there was no evidence that her employing establishment expressly prohibited her from removing such materials from her office and taking them home for further review. Thus, the Board held that the employing establishment would derive a substantial benefit from the employee's efforts to distill and organize her work-related notes and materials and her injury occurred in the performance of duty.

Furthermore, OWCP procedures provide coverage under FECA for off-premises workers who perform services from home for their employing establishment.[16] In these cases, the procedures direct OWCP to determine if the employee was performing assigned duties, was engaged in an activity reasonably incidental to the assignment, or had deviated from the assignment and was engaged in a personal activity.[17]

In this case, the Board finds that OWCP failed to properly adjudicate whether appellant's off-premises activity was incidental to his employment duties at the time of the claimed injury on May 3, 2013. As noted, OWCP procedures provide that the official superior should provide a statement regarding the details of the matter and, if such statements are not sufficiently detailed, additional statements should be obtained from others in a position to know the circumstances.

It is well established that proceedings under FECA are not adversarial in nature and while the claimant has the burden of establishing entitlement to compensation, OWCP shares responsibility in the development of the evidence to see that justice is done.[18] Accordingly, the

[13] 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 (1980).

[14] *See A.B.*, Docket 15-288 (issued May 21, 2015) (where a letter carrier was assaulted by a coworker in an off-premises parking lot, the Board determined that the claimant was not in the performance of duty because he was "merely leaving work after clocking out for the day and walking to his car" and was not engaged in any incidental employment activities at the time of the assault).

[15] Docket No. 12-192 (issued September 26, 2013).

[16] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Performance of Duty*, Chapter 2.804.5(a)(4) (August 1992).

[17] *Id*. at 2.804.5(b).

[18] *See Phillip L. Barnes*, 55 ECAB 426 (2004); *Virginia Richard (Lionel F. Richard)*, 53 ECAB 430 (2002).

Board will remand the case for OWCP to analyze whether appellant was reasonably fulfilling the duties of his federal employment or engaged in activities incidental thereto on May 3, 2013. After such further development as it deems necessary, OWCP shall issue a *de novo* decision.

The Board also notes that the employing establishment issued appellant a Form CA-16 on May 15, 2013 authorizing medical treatment. The Board has held that where an employing establishment properly executes a Form CA-16, which authorizes medical treatment as a result of an employee's claim for an employment-related injury, it creates a contractual obligation, which does not involve the employee directly, to pay the cost of the examination or treatment regardless of the action taken on the claim.[19] Although OWCP denied appellant's claim for an injury, it did not address whether he is entitled to reimbursement of medical expenses pursuant to the Form CA-16.

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the December 3, 2014 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further development consistent with this decision of the Board.

Issued: June 13, 2016
Washington, DC

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

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

[19] *See D.M.*, Docket No. 13-535 (issued June 6, 2013). *See also* 20 C.F.R. §§ 10.300, 10.304.