United States Department of Labor
Employees' Compensation Appeals Board

J.O., Appellant	)	
and	)	**Docket No. 16-0636**
	)	**Issued: October 18, 2016**
OFFICE OF PERSONNEL MANAGEMENT, BOYERS HR SERVICES TEAM, Boyers, PA, Employer	)	

Appearances:
Alan J. Shapiro, Esq., for the appellant[1]
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On February 18, 2016 appellant, through counsel, filed a timely appeal from a January 4, 2016 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[2] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

[1] In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; *see also* 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

[2] 5 U.S.C. § 8101 *et seq.*

ISSUE

The issue is whether appellant sustained an injury on November 20, 2014 while in the performance of duty.

FACTUAL HISTORY

On November 26, 2014 appellant, then a 50-year-old legal administrative specialist filed a claim for traumatic injury (Form CA-1) alleging that on November 20, 2014, while he was in the nurse's office, he fell over a chair while putting on his left boot. He indicated that his elbow, neck, and shoulder hit the wall and his left leg, back, and left knee hit the floor. Appellant's normal duty hours were from 9:00 a.m. to 5:30 p.m. He stopped work on November 20, 2014 at approximately 11:00 a.m. and returned to work on November 26, 2014.

The employing establishment controverted the claim. Martha J. Hughes, appellant's supervisor, advised that appellant had not informed her or any other employee of his visit to the nurse nor did he sign out. Employees were required to notify someone when they visited the nurse, for whatever reason, and to also sign in and out for safety and security reasons. Ms. Hughes also noted that appellant was visiting the nurse for a condition unrelated to his back and had requested to rest for a bit. Under claim number xxxxxx580, OWCP had denied his traumatic injury claim for an April 25, 2014 lifting incident in which he felt extreme pain in his back and legs. The supervisor indicated that, in the week prior to the November 20, 2014 incident, appellant had unscheduled absences and on November 19, 2014 he was presented with a leave restriction letter due to his excessive absences.

In a February 12, 2015 letter, OWCP advised appellant of the factual and medical evidence necessary to establish his claim. A questionnaire was provided for his completion. Appellant was asked to describe in detail how his injury occurred.

In a November 20, 2014 treatment note, Susan Burdick, registered nurse, indicated that at 10:15 a.m., appellant visited the nurse's office complaining of a sore, swollen throat and low back and leg pain. She noted that he had a history of chronic low back pain and had a morphine pump. Appellant requested bed rest. At approximately 11:05 a.m., he called Nurse Burdick into the bed rest room, where she found him in a semi-sitting position on the floor with a chair on its side at his foot. Appellant reported that his leg gave out. Nurse Burdick assisted him back onto the bed. Appellant requested to go home and she drove him to his vehicle in the parking lot and gave him a cane for walking assistance. He drove home at 11:20 a.m.

In a December 4, 2013 report, Dr. Mark R. LoDico, a Board-certified anesthesiologist, diagnosed appellant with lumbar spinal pain, lower extremity radiculopathy, and cervical spine pain. He noted that appellant had a history of back surgeries in 1990 and 2004 and had an intrathecal morphine pump implanted in 2004. The x-rays of the back and hip did not show any fractures. Dr. LoDico noted that appellant had requested a month off work, but was only approved for 10 days from the employing establishment. He later kept appellant off work. In a February 17, 2015 report, Dr. LoDico indicated that the February 5, 2015 magnetic resonance imaging (MRI) scan was similar to the prior MRI scan of February 3, 2014.

In a March 10, 2015 report, Dr. David M. Sack, a Board-certified internist and gastroenterologist, an employing establishment physician, reviewed appellant's claim. He indicated that the fall appeared to have occurred as a result of a personal medical issue and should be considered as incidental to his employment. Dr. Sack noted that appellant had a long-standing and severe lumbar condition that had required an indwelling morphine pump for 10 years and that there were no changes on the most recent MRI scan when compared to one done a year ago. Thus, he concluded that there was no aggravation or exacerbation. Appellant's disability claim appeared to be based primarily on pain.

By decision dated March 27, 2015, OWCP denied the claim because appellant had not responded to OWCP's questionnaire regarding the circumstances of the injury.

On April 2, 2015 appellant, through counsel, requested a telephonic hearing before an OWCP hearing representative, which was held on October 21, 2015. He testified that he went to the nurse's office because he was having pain in his leg. Appellant related that he had informed his supervisor that he was going to visit the nurse, but that he did not sign out. He rested in a dark room for approximately 45 minutes. While appellant was putting on his boots in the dark, he fell over a chair. He indicated that he returned to work in July 2015, but had missed work intermittently due to flare ups. Appellant indicated that he had underlying conditions of herniated discs and radiculopathy.

Counsel for appellant argued that his injury was compensable under the personal comfort doctrine because it occurred on the employing establishment's premises.

In an October 1, 2015 report, Dr. Richard Plowey, a Board-certified neurologist and pain specialist, diagnosed low back pain and radiculopathy due to tripping over a chair in the nurse's office.

In a November 20, 2015 statement, the employing establishment asserted that Dr. Plowey's report failed to explain how appellant's medical condition changed/worsened due to the alleged work injury on November 20, 2014.

By decision dated January 4, 2016, an OWCP hearing representative modified the denial of claim to find that appellant had established that the incident occurred on November 20, 2015, but that he was not in the performance of duty at the time of the incident.

LEGAL PRECEDENT

FECA provides for 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

[3] 5 U.S.C. § 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).

activity. To arise in the course of employment, an injury must occur at a time when the employee may reasonably be stated to be engaged in his master's business, at a place when he may reasonably be expected to be in connection with his employment, and while he was reasonably fulfilling the duties of his employment or engaged in doing something incidental thereto.

As to the phrase in the course of employment, the Board has accepted the general rule of workers' compensation law that, as to employees having fixed hours and places of work, injuries occurring on the premises of the employing establishment, while the employees are going to or from work, before or after working hours, at lunch time, or on authorized break are compensable.[5]

It is well settled that an employee who within the time and space limits of employment engages in an act that ministers to personal comfort, health, or necessity does not leave the course of employment. An injury sustained on the employee's way to, from, or during a period of ministering to such needs is compensable as arising out of and in the course of employment, unless there is a departure so great that an intent to abandon the job temporarily may be inferred, or unless the conduct cannot be considered an incident of the employment.[6]

Even if the activity cannot be stated in any sense to advance the employer's interest, it may still be in the course of employment if, in view of the nature of the employment environment, the characteristics of human nature and the customs or practices of the particular employment, the activity is in fact an inherent part of the conditions of that employment.[7]

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.[8]

ANALYSIS

Appellant filed a claim alleging that he sustained a traumatic injury on November 20, 2014 while he was in the employing establishment's nursing station. By decision dated January 4, 2016, OWCP determined that his injury did not arise in the performance of duty.

[5] *Narbik A. Karamian*, 40 ECAB 617, 618 (1989). The Board has also applied this general rule of workers' compensation law in circumstances where the employee was on an authorized break. *See Eileen R. Gibbons*, 52 ECAB 209 (2001).

[6] A. Larson, *The Law of Workers' Compensation* § 21 (2007); *see, e.g., Dorothy F. Huber*, 19 ECAB 147 (1967) (the Board found that a mail carrier who was injured in an automobile accident while driving home to change her wet uniform before resuming duties at the employing establishment was in the performance of duty at the time of injury because the purpose of her travel home was not purely personal in nature, but inured to the benefit of the employing establishment).

[7] *Conrad R. Debski*, 44 ECAB 381 (1993).

[8] *See L.K.*, Docket No. 08-849 (issued June 23, 2009); *see also Bradford N. Reed*, 56 ECAB 428 (2005).

Appellant testified that he fell over a chair while putting on his boots in a darkened room at the nurse's office. The nurse observed him on the floor shortly after the injury and noted that he reported that his leg gave out. Appellant's statement that an injury occurred at a given time and in a given manner is of great probative value and will stand as it is not refuted by strong or persuasive evidence.[9] Thus, it is accepted that appellant fell over a chair in the nurse's office on November 20, 2014.

The Board further finds that the weight of the probative evidence of record establishes that the November 20, 2014 fall occurred in the performance of duty under the personal comfort doctrine.[10]

At the time of his fall, appellant was ministering to his personal comfort by engaging in bed rest at the nursing station on the employing establishment's premises. He had a history of chronic low back pain and had a morphine pump and had requested bed rest at the nurse's office complaining of a sore, swollen throat, low back, and leg pain. The injury occurred after appellant had been at the nurse's office engaged in bed rest for approximately 45 minutes.[11]

OWCP's procedure manual acknowledges that injuries sometimes occur while the employee is allegedly engaged in a personal act for the employee's comfort, health, convenience, or relaxation. In these cases, it is particularly essential to determine whether the act was one which is regarded as a normal incident of the work experience, or was one which is foreign or extraneous to the work experience, and the extent to which the employee diverted from duty to perform the act. Factors to be considered in determining whether the personal act can be regarded as a normal incident of the work experience included:

> (a) The precise location of the scene of the accident in relation to the industrial premises, and the place where the employee regularly performed assigned duties;
>
> (b) Whether the employee was performing assigned duties immediately preceding the personal act …;
>
> (c) A description of the personal act in which the employee was engaged;
>
> (d) Whether for this purpose the employee was using the nearest available facilities or those intended for such use; and
>
> (e) The extent of the employee's diversion from duty in terms of time and distance.[12]

[9] *Michelle Kunzwiler*, 51 ECAB 334 (2000); *Edward W. Malaniak*, 51 ECAB 279 (2000).

[10] Given the Board's disposition of this issue, counsel's arguments on appeal will not be addressed.

[11] Regarding the issue of a compensable time period for a rest or sleep break, Larson, *supra* note 6 at § 21.71 relates that the controlling guide should be found in the practice of the employing establishment, coupled with the employee's needs and condition at the time of injury.

[12] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Performance of Duty*, Chapter 2.804.7(b) (August 1992).

The Board finds that appellant's action of going to the nurse's office to rest, even absent authorization by his supervisor, is within the ambit of what is deemed reasonable, and a normal incident of work.[13] Appellant, at the time of the accepted incident, was ministering to his personal comfort by engaging in bed rest at the nurses' station on the employing establishment's premises. The record reflects that appellant began his tour of duty at 9:00 a.m., and then went to the nursing station at 10:15 a.m. for symptoms of a sore throat, as well as low back and leg pain.

Unlike cases wherein the employee sought personal comfort during a break off premises, appellant's alleged injury occurred on premises.[14] The Board notes that the personal comfort doctrine is intended to provide coverage to employees while injured on the employing establishment premises when ministering to their personal comfort.[15] Appellant's alleged injury occurred on premises, during work hours when he visited the nurse's office

On remand, OWCP should address the issue of causal relationship between the accepted November 20, 2014 employment incident and appellant's alleged medical conditions. After such further development as necessary, OWCP shall issue a *de novo* decision.

CONCLUSION

The Board finds that appellant has established that an employment incident occurred on November 20, 2014 while in the performance of duty. The case is not in posture for decision regarding the nature and extent of any injury or disability that resulted from the November 20, 2014 employment incident.

[13] *See J.O.*, Docket No. 09-1432 (issued February 3, 2010) (where the Board held that appellant's action of walking to her personal vehicle to clean off snow, while on lunch, is within the ambit of what is deemed reasonable, even absent authorization by her supervisor). *See also Annette Stonework*, 35 ECAB 306 (1983) (where the Board held that appellant's use of a portion of her lunch hour to purchase stamps for her personal use from a postal facility on the premises of the employing establishment did not take her injury outside the performance of duty); *see also C.S.*, Docket No. 06-1121 (issued August 22, 2006) (where appellant was injured on the employing establishment premises on her way to a credit union while on her break, the Board found that this personal convenience was reasonably incidental to her employment and, therefore, compensable).

[14] *See L.K.*, Docket No. 08-0849 (issued June 23, 2009).

[15] *See V.O.*, 59 ECAB 500 (2008); *Sari A. Shapiroholland*, 47 ECAB 682 (1996).

ORDER

IT IS HEREBY ORDERED THAT the January 4, 2016 decision of the Office of Workers' Compensation Programs is set aside and the case remanded to OWCP for proceedings consistent with this opinion of the Board.

Issued: October 18, 2016
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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