United States Department of Labor
Employees' Compensation Appeals Board

J.R., Appellant	)	
and	)	**Docket No. 16-1005**
	)	**Issued: September 23, 2016**
DEPARTMENT OF THE NAVY, MARINE CORP AIR STATION MIRAMAR, San Diego, CA, Employer	)	

Appearances:
Michael Jacobson, 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
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On March 10, 2016 appellant, through his representative, filed a timely appeal of a September 16, 2015 merit decision of the Office of Workers' Compensation Programs (OWCP).[2]

[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] Under the Board's *Rules of Procedure*, an appeal must be filed within 180 days from the date of issuance of an OWCP decision. An appeal is considered filed upon receipt by the Clerk of the Appellate Boards. *See* 20 C.F.R. § 501.3(e)-(f). One hundred and eighty days from September 16, 2015, the date of OWCP's last decision was March 14, 2016. Since using March 22, 2016, the date the appeal was received by the Clerk of the Appellate Boards, would result in the loss of appeal rights, the date of the postmark is considered the date of filing. The date of the U.S. Postal Service postmark is March 10, 2016, rendering the appeal timely filed. *See* 20 C.F.R. § 501.3(f)(1).

Pursuant to the Federal Employees' Compensation Act[3] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to consider the merits of the case.[4]

ISSUE

The issue is whether appellant has met his burden of proof to establish a traumatic injury in the performance of duty.

FACTUAL HISTORY

On June 11, 2015 appellant, then a 55-year-old maintenance mechanic, filed a traumatic injury claim (Form CA-1) alleging that on that date he stepped in a hole at 9:40 a.m. The hole was approximately 18 inches deep and 12 inches wide near the children's pool area at the Officers' Club swimming pool. Appellant alleged that he lost his balance when he stepped in a hole and fell twisting his body and resulting in a lumbar sprain. On the reverse of the form, appellant's supervisor indicated that appellant's regular work schedule was from 6:30 a.m. to 3:30 p.m. He further indicated that appellant was injured in the performance of duty.

In statements from witnesses dated June 16, 2015, appellant's three coworkers noted that they and appellant were working on the Officer's Club wading pool on June 11, 2015. Appellant's coworkers indicated that at about 9:00 or 9:15 a.m. the group was finishing the morning break at the picnic table on the south side of the pool under the trees. One of appellant's coworkers noted a hawk or an eagle in a tree carrying a rabbit while other birds fought over it. Appellant and his coworkers left the picnic table and began to move toward the south fence. Near the fence are three holes approximately 18 inches wide and 16 inches deep with irrigation risers in them. As appellant's coworkers reached the south fence they heard appellant scream out in pain. The witnesses saw appellant with one leg in the center hole. He was struggling to get up from the ground. A coworker went to his aid, but appellant was obviously in pain.

Appellant submitted a report dated June 11, 2015 from Dr. Stephen Leibham, a Board-certified internist, describing appellant's history of stepping in a hole which caused him to twist and fall injuring his lower back. He stepped in the hole while he was trying to watch an eagle which had picked up a rabbit. Appellant reported a prior back injury in 2010 which occurred while lifting metal lockers at work. Dr. Leibham diagnosed lumbar sprain/strain. He referred appellant for chiropractic therapy due to his back injury.

In a letter dated August 11, 2015, OWCP requested additional factual and medical evidence in support of appellant's claim. It informed him that the evidence was insufficient to support that he was injured while in the performance of duty. OWCP requested that appellant provide a detailed account of the circumstances of his injury.

[3] 5 U.S.C. § 8101 *et seq.*

[4] The Board notes that appellant submitted additional evidence after OWCP rendered its September 16, 2015 decision. The Board's jurisdiction is limited to reviewing the evidence that was before OWCP at the time of its final decision. Therefore the Board lacks jurisdiction to review this additional evidence on appeal. 20 C.F.R. § 501.2(c)(1).

Appellant completed OWCP's questionnaire on August 24, 2015. He described his work on June 11, 2015 as rehabilitation of the children's wading pool area at the Officers' Club. Appellant indicated that he and his coworkers stopped for a scheduled break at 9:30 a.m. One of his coworkers "witnessed a natural phenomenon" and all stood for a better view. Appellant asserted that he took approximately four steps forward and stepped in a hole left by previous landscapers. The hole was approximately 18 inches in diameter and 15 inches in depth. Appellant's right foot entered the hole and his upper torso twisted to the left. He fell and landed in a sitting position with his left leg bent against his chest. Appellant experienced a tearing and burning sensation in his left lower back. He asserted that the entire area, including the hole was considered the work site. Appellant's tasks were grinding uneven cracks in concrete, ripping out tree roots, laying forms, pouring new concrete, and carrying bricks and equipment.

Dr. Trisha Sharma, an internist, completed a note on August 26, 2015 and noted that appellant had a history of back pain, but on March 18, 2015 appellant had no significant limitation of physical activity on his physical examination. She reported that on June 23, 2015 she examined appellant for severe lower back pain which appellant reported began after a fall at work.

By decision dated September 16, 2015, OWCP denied appellant's claim for a traumatic injury on June 11, 2015 as his injury did not occur in the performance of duty. It found that he was not engaged in his master's business at the time of his injury. OWCP concluded that appellant had removed himself from the performance of duty when he left his break area to go birdwatching.

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 her employment. Liability does not attach merely upon the existence of any employee/employer relation.[5] FECA provides for the payment of compensation for disability or death of an employee resulting from personal injury sustained while in the performance of duty.[6] The term "in the performance of duty" has been interpreted to be the equivalent of the commonly found prerequisite in workers' compensation law, "arising out of and in the course of employment."[7] "In the course of employment" deals with the work setting, the locale, and time of injury.[8] 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 master's business; (2) at a place where he may reasonably be

[5] *Minnie N. Heubner (Robert A. Heubner)*, 2 ECAB 20, 24 (1948); *Christine Lawrence*, 36 ECAB 422, 423-24 (1985).

[6] *See supra* note 3.

[7] *James E. Chadden, Sr.*, 40 ECAB 312, 314 (1988).

[8] *Denis F. Rafferty*, 16 ECAB 413, 414 (1965).

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."[9]

This alone is not sufficient to establish entitlement to benefits for compensability. The concomitant requirement of an injury "arising out of the employment" must be shown, and this encompasses not only the work setting but also a causal concept, the requirement being that the employment caused the injury in order for an injury to be considered as arising out of the employment, the facts of the case must show some substantial employer benefit is derived or an employment requirement gave rise to the injury.[10]

ANALYSIS

The Board finds that appellant's June 11, 2015 injury occurred in the performance of duty.

At the time of his injury, the record reflects that appellant was on or ending a scheduled break, a time when he may reasonably be said to be engaged in his master's business. He was at a place where he may reasonably be expected to be in connection with the employment, on the employing establishment premises at his assigned job site in the outdoors. Appellant was also reasonably fulfilling the duties of his employment or engaged in doing something incidental thereto. The record reflects that appellant was momentarily diverted from his specific employment duties due to a coworker's observations of "a natural phenomenon." Appellant and his coworkers saw a bird of prey with a rabbit and walked a few steps on the premises from the site of their break to observe the bird. Appellant indicated that he took four steps from the picnic table where he was taking his break to the hole where he fell.

OWCP's procedures provide that injuries arising on the premises may be approved if the employee was engaged in activity reasonably incidental to employment, such as personal acts for the employee's comfort, convenience and relaxation.[11] In *T.I.*, the Board found that a claimant who was injured on the employing establishment premises during her regular lunch hour was in the performance of duty.[12] The Board noted that the fact that the claimant used a portion of her lunch hour to walk to her personal vehicle, which was also located on government property to retrieve her ATM card did not take her outside the performance of duty.

[9] *Carmen B. Gutierrez*, 7 ECAB 58, 59 (1954).

[10] *See Eugene G. Chin*, 39 ECAB 598, 602 (1988).

[11] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Performance of Duty*, Chapter 2.804.4(a) (August 1992).

[12] 59 ECAB 537 (2008).

In *J.O.*,[13] the employee was injured on the premises while cleaning snow from her car, also on the employing establishment premises, during her lunch hour. The Board also found that this was an act reasonably incidental to personal comfort.

The Board finds that this situation is factually similar to these cases. Appellant was on the premises during his regular duty hours, on a scheduled break and was momentarily diverted by the sights of his surroundings while remaining on government property. His actions were only of momentary duration, were of the type that would be expected given employees' outside worksite and were so insubstantial that his actions cannot be considered an abandonment of appellant's employment.[14]

The Board reached contrary results in *Peter Belkind*,[15] when an employee in the time and place he should be, stepped outside his work activities by freeing a trapped bird and sustaining an injury. In *Belkind*, the employee went beyond a momentary visual distraction to engaging in interactions with wildlife which resulted in his injury and took him out of the performance of duty. The Board found that appellant ceased to be under the protection of FECA when he attempted to free the bird and that his injury during his deviation was not compensable.

The Board finds that appellant's momentary distraction from his duties while on his break occurred in the performance of duty. As appellant has met his burden of proof to establish that he was in the performance of duty on June 11, 2015 at the time of the accepted incident, the case is remanded to OWCP for development of the medical evidence to determine the extent of any injury caused by the employment incident. OWCP shall issue a *de novo* decision.

CONCLUSION

Appellant was in the performance of duty at the time of his June 11, 2015 incident.

[13] Docket No. 09-1432 (issued February 2, 2010). *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] *Barry Himmelstein*, 42 ECAB 423 (1991).

[15] 56 ECAB 580 (2005).

ORDER

IT IS HEREBY ORDERED THAT the September 16, 2015 decision of the Office of Workers' Compensation Programs is reversed and remanded for further development in accordance with this decision of the Board.

Issued: September 23, 2016
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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