

**United States Department of Labor
Employees' Compensation Appeals Board**

C.F., Appellant)

and)

DEPARTMENT OF VETERANS AFFAIRS,)
PORTLAND VETERANS AFFAIRS MEDICAL)
CENTER, Portland, OR, Employer)

Docket No. 17-1204
Issued: August 22, 2017

Appearances:
Appellant, pro se
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
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On May 11, 2017 appellant filed a timely appeal from a March 30, 2017 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (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 her burden of proof to establish an injury in the performance of duty on January 9, 2017.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On February 13, 2017 appellant, then a 24-year-old human resources assistant, filed a traumatic injury claim (Form CA-1) alleging that at 7:40 a.m. on Monday, January 9, 2017, she sustained right ankle and tibia fractures, and ligament dislocation due to a fall. She indicated that, while traveling to a work-related training session at another Veterans Affairs campus, she exited the C-Tran bus at the bus stop and slipped on black ice directly underneath the bus door. Appellant noted that the bus stop was located at the intersection of East 13th Street and Broadway Street in Vancouver, Washington. She stopped work on January 9, 2017 and returned to modified work on February 3, 2017.²

On the claim form appellant's immediate supervisor indicated that appellant's duty station was the Portland Veterans Affairs Medical Center at 3710 S.W. U.S. Veterans Hospital Road in Portland, Oregon, and her regular work hours were 8:00 a.m. to 4:30 p.m., Monday through Friday. The supervisor noted that the employing establishment was controverting appellant's request for continuation of pay because the claimed injury occurred off of the employing establishment's premises, and appellant was not involved in official "off premises" duties. He checked a box marked "No" in response to a question asking whether appellant was injured in the performance of duty, but added the notation, "Unknown, employee claimed that she was getting off the public transportation bus."

Appellant submitted medical evidence in support of her claim. In a January 9, 2017 report, Dr. Brett T. Jensen, an attending Board-certified emergency medicine physician, indicated that appellant reported she slipped and fell on ice on January 9, 2017 after stepping off a bus, and that she landed on her posterior. He discussed the findings of right ankle x-rays obtained on that date and diagnosed fractures of the right fibula and tibia. In a January 9, 2017 report, Dr. Kevin M. Kahn, an attending Board-certified orthopedic surgeon, detailed an open reduction internal fixation (ORIF) of trimalleolar right ankle fracture without fixation of posterior lip and ORIF of right syndesmosis ligament injury, with excisional irrigation/debridement down to subcutaneous tissue and delayed primary closure of irregular traumatic wound.³ Appellant submitted other medical reports, dated between January 9 and February 20, 2017, regarding the initial treatment of her right ankle condition and her postsurgery recovery.⁴

On an employing establishment "Incident Report" form completed on February 13, 2017, appellant's immediate supervisor noted, "On or about [January] 9, 2017 the employee claimed that while she was stepping off the bus [she] slipped on ice not on [Veterans Affairs] property. He indicated that appellant was treated in a nonemploying establishment emergency room and was hospitalized as an in-patient.

² On the Form CA-1 appellant requested continuation of pay.

³ The surgical procedure was not authorized by OWCP.

⁴ The record contains a duty status report (Form CA-17) in which an attending physician indicated that appellant could work eight hours per day with work restrictions

In a February 14, 2017 form letter, an employing establishment human resources assistant indicated that the employing establishment was controverting appellant's claim for continuation of pay and identified the reason for the controversion by placing a check next to a sentence on the form letter which reads, "The injury occurred off the agency's premises, and the employee was not engaged in official 'off-premises' duties."

On February 22, 2017 the employing establishment offered appellant a full-time transitional-duty assignment which involved performing her regular duties while using a wheelchair, except for those duties outside her work restrictions of no standing, walking, bending, stooping, twisting, pushing, or pulling.

In a February 24, 2017 letter, OWCP requested that appellant submit additional factual and medical evidence in support of her claim, including completion of a development questionnaire. If the injury occurred off the employing establishment premises, appellant was to identify the location where the injury occurred in relation to her "workplace/training location."

On March 28, 2017 OWCP received appellant's response to the February 24, 2017 development letter and questionnaire. Appellant indicated, "No" in response to the questions regarding whether she was injured on the employing establishment premises and whether she was injured on property owned, controlled, or managed by the employing establishment. In response to the request to identify the location where the injury occurred in relation to her "workplace/training location," appellant indicated, "Broadway and 13th bus stop (see map)."⁵ Appellant signed the questionnaire on March 28, 2017 and provided additional comments below her signature. She indicated that on January 9, 2017 she was on travel duty for training outside her regular duty station and noted that she would have been eligible for "comp-time" for travel because the travel was outside her regular tour hours. Appellant made reference to the attached maps outlining her trip to Vancouver, Washington, and estimated that she would have claimed 45 minutes of "comp-time" beyond her regular commuting time. She asserted that, according to an attached Office of Personnel Management (OPM) fact sheet, she would have been on "compensated hours" if she had traveled under arduous weather-related conditions.⁶ Appellant noted that on January 9, 2017 there was an ice storm and roads were treacherous.

Appellant also submitted medical reports from March 2017 and copies of previously submitted medical reports.

⁵ Appellant submitted copies of online searches she had conducted with Google Maps, including the trip by public transport between her residence at 1221 N.W. 11th Avenue in Portland, Oregon, and the Vancouver Campus of the Portland Veterans Affairs Medical Center at 1601 East 4th Plain Boulevard in Vancouver, Washington (a distance of approximately 9.3 miles), and the trip by public transport between the intersection of East 13th Street and Broadway Street in Vancouver, Washington, and the Vancouver Campus of the Portland Veterans Affairs Medical Center (a distance of approximately 1.3 miles)

⁶ Appellant submitted a portion of an OPM document containing the heading "Fact Sheet: Hours of Work for Travel."

In a March 30, 2017 decision, OWCP denied appellant's claim for a January 9, 2017 work injury. It found that appellant established that she was a federal employee who filed a timely claim, that the injury, accident, or employment factor occurred, and that a medical condition had been diagnosed in connection with the injury or event. OWCP further found that appellant failed to establish the element of performance of duty and noted that her case was denied because the evidence of record was insufficient to establish that the claimed injury and/or medical condition arose during the course of employment and within the scope of compensable work factors. It noted, "The reason for this finding is that you were injured off the premises of your employing agency and not engaged in a work activity or any off-premises duty for your employer."

LEGAL PRECEDENT

FECA provides for the payment of compensation for the disability or death of an employee resulting from a personal injury sustained while in the performance of duty.⁷ The phrase sustained while in the performance of duty has been interpreted by the Board to be the equivalent of the commonly found requisite in workers' compensation law of arising out of and in the course of employment.⁸ In the course of employment deals with the work setting, locale, and time of injury, whereas arising out of the employment encompasses not only the work setting, but also the requirement that an employment factor caused the injury.⁹

To occur in the course of employment, in general, an injury must occur: (1) at a time when the employee may reasonably be stated to be engaged in his or her master's business; (2) at a place where he or she may reasonably be expected to be in connection with the employment; and (3) while he or she was reasonably fulfilling the duties of his or her employment or engaged in doing something incidental thereto.¹⁰

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.¹¹

OWCP's procedure manual provides that the employing establishment is required to complete the reports and statements needed and then submit the evidence to OWCP. In several types of claims (*e.g.*, stress claims, claims with performance of duty issues such as premises, temporary duty travel, or recreational injuries), a statement from the employing establishment is

⁷ 5 U.S.C. § 8102(a). *See also P.S.*, Docket No. 08-2216 (issued September 25, 2009).

⁸ *A.K.*, Docket No. 09-2032 (issued August 3, 2010); *C.O.*, Docket No. 09-0217 (issued October 21, 2009).

⁹ *Id.*

¹⁰ *T.F.*, Docket No. 08-1256 (issued November 12, 2008); *Roma A. Mortenson-Kindschi*, 57 ECAB 418 (2006).

¹¹ *G.R.*, Docket No. 16-0544 (issued June 15, 2017); *M.T.*, Docket No. 16-0927 (issued February 13, 2017).

imperative to properly develop and adjudicate the claim.¹² OWCP's procedure manual further provides that the protection of the FECA is not limited to injuries which occur on the industrial premises, and it contains provisions regarding the necessary information to be obtained when an employee has claimed that an injury occurred while on travel status.¹³

ANALYSIS

Appellant filed a Form CA-1 alleging that at 7:40 a.m. on Monday, January 9, 2017, she sustained injury to her right ankle/leg due to a fall on ice that occurred when exiting a bus in Vancouver, Washington. In a March 24, 2017 decision, OWCP denied appellant's claim finding that she had not established that her claimed injury occurred in the performance of duty.

The Board finds that the case is not in posture for decision regarding whether appellant sustained an injury in the performance of duty on January 9, 2017.

The Board notes that proceedings under FECA are not adversarial in nature and OWCP is not a disinterested arbiter.¹⁴ While appellant has the burden of proof to establish entitlement to compensation, OWCP shares the responsibility in the development of the evidence, particularly when such evidence is of the character normally obtained from the employing establishment or other governmental source.¹⁵ The employing establishment, in a February 14, 2017 letter, controverted appellant's claim for a January 9, 2017 work injury by generally asserting that the injury occurred off the employing establishment premises, and that appellant was not engaged in official "off-premises" duties at the time of her fall on January 9, 2017.¹⁶ However, appellant claimed that, at the time of her January 9, 2017 fall, she was on official travel status for the purpose of attending a training session at another location of the employing establishment in Vancouver, Washington. OWCP has not adequately developed this aspect of appellant's claim. The employing establishment generally denied that appellant was engaged in work-related duties

¹² Federal (FECA) Procedure Manual, Part 2 -- Claims, *Initial Development of Claims*, Chapter 2.800.7a(2) (June 2011).

¹³ *Id.* at -- Claims, *Performance of Duty*, Chapter 2.804.5 (August 1992). For injuries sustained in a travel status the record must contain evidence showing when and where the employee last performed official duty, the distance between the place of injury and the place where official duty was last performed, between what points the employee was traveling when injured, the purpose of the trip, when and where the employee was next expected to perform official duty, whether at the time of the injury the employee was riding in or driving a government-owned vehicle, and whether the employee's travel expenses were reimbursable. The record must also contain evidence regarding whether the injury occurred on the direct or most usually traveled route between the place of last official duty and the place where the employee was expected to next perform official duty and, if not, the nature and extent of the deviation should be given with a full explanation of the reason for such deviation. *Id.* at Chapter 2.804.5d.

¹⁴ *See L.L.*, Docket No. 12-0194 (issued June 5, 2012); *N.S.*, 59 ECAB 422 (2008).

¹⁵ *Id.* *See also M.B.*, Docket No. 17-0536 (issued June 22, 2017).

¹⁶ Appellant's duty station was the Portland Veterans Affairs Medical Center at 3710 S.W. U.S. Veterans Hospital Road in Portland, Oregon, and her regular work hours were 8:00 a.m. to 4:30 p.m., Monday through Friday.

on January 9, 2017, but it was not asked to specifically respond to appellant's claim of being on official travel status to attend work-related training on January 9, 2017.¹⁷

On remand OWCP should further development the question of whether appellant was on travel status on January 9, 2017 or otherwise was on official duty status to attend work-related training in Vancouver, Washington. After such further development as deemed necessary, it should issue a *de novo* decision regarding appellant's claim for a January 9, 2017 work injury.

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the March 30, 2017 decision of the Office of Workers' Compensation Programs is set aside, and the case is remanded to OWCP for further action consistent with this decision.

Issued: August 22, 2017
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

¹⁷ In a February 24, 2017 letter, OWCP requested that appellant submit additional factual and medical evidence in support of her claim. It asked her to complete a questionnaire posing various questions regarding the factual circumstances of her January 9, 2017 fall. OWCP did not send a development letter to the employing establishment asking it to provide further specific information about the factual aspects of appellant's claim, including her claim of being on official travel status on January 9, 2017.