

ISSUE

The issue is whether appellant sustained an injury on August 29, 2014 in the performance of duty.

FACTUAL HISTORY

On September 18, 2014 appellant, a 53-year-old physical security specialist, filed a traumatic injury claim (Form CA-1) alleging that on August 29, 2014, while on travel in Beijing, China, appellant fractured his right elbow, sprained his right wrist, and bruised his right shin and knee in the performance of duty. He indicated that he had tripped and fallen on a low cross bar in the roadway while crossing Xiao Yun Road while walking from the U.S. Embassy to his hotel to await transportation to the airport. The employing establishment marked the box “yes” to indicate that appellant was in the performance of duty when the injury occurred.

By letter dated March 16, 2015, OWCP advised appellant of the type of evidence needed to establish his claim. Appellant was asked to complete and return a questionnaire to establish the factual element of his claim. OWCP informed him that he had 30 days to submit responsive evidence. No response was received.

By decision dated April 20, 2015, OWCP denied appellant’s claim because the evidence of record was insufficient to establish that a medical condition was diagnosed in connection with the claimed event.

On May 20, 2015 appellant requested review of the written record by an OWCP hearing representative. He advised that the orthopedic clinic where he was treated advised him that it would send the necessary records, but it had failed to do so.

In an August 29, 2014 report, Dr. Kristie Harris, a radiologist, advised that a right elbow x-ray revealed an impacted fracture of the radial head.

In a September 2, 2014 report, Dr. Daniel Hampton, a Board-certified orthopedic surgeon, advised that appellant complained of right elbow pain. He noted that appellant had injured his right elbow when he tripped and fell while abroad. Dr. Hampton indicated that appellant’s flight was a few hours following the fall, so he sought medical treatment once he arrived back home. Examination of the elbow revealed soft tissue swelling, tenderness over the radial head, pain with attempted range of motion, and no gross instability. Dr. Hampton noted that an outside x-ray report revealed a radial head fracture with some comminution and displacement. He diagnosed radial head fracture and recommended surgery. In a September 3, 2014 report, Dr. Hampton advised that appellant underwent a radial head arthroplasty. Several progress reports from Dr. Hampton were submitted.

Appellant also provided an April 7, 2015 statement from R.P., a coworker, who advised that he witnessed appellant injure his right elbow when he tripped on a road divider while returning to the hotel around 1500 hours.

Also received was a July 1, 2014 travel authorization form. It indicated that appellant was authorized to travel from Washington, DC to China from August 18 until 29, 2014.

By decision dated October 27, 2015, an OWCP hearing representative modified the prior decision to find that appellant's claim was denied because he failed to establish that his August 29, 2014 fall occurred in the performance of his federal duties. She noted that appellant had failed to return the questionnaire accompanying OWCP's March 16, 2015 letter. The hearing representative noted that the responses to the questionnaire were necessary to determine whether he was involved in an activity connected to his federal employment prior to the fall.

On appeal appellant provided additional facts surrounding 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 Arising in the course of employment relates to the elements of time, place, and work activity.⁵ An injury is stated to arise in the course of employment when it takes place within the period of the employment, at a place where the employee reasonably may be and while they are fulfilling their duties or are engaged in doing something incidental thereto.⁶ Arising out of employment relates to the causal connection between the employment and the injury claimed.⁷

Under FECA, an employee on travel status or a temporary-duty assignment or special mission for his or her employer is in the performance of duty and therefore under the protection of FECA 24 hours a day with respect to any injury that results from activities essential or incidental to his or her special duties.⁸ Examples of such activities are eating,⁹ returning to a hotel after eating dinner, and engaging in reasonable activities within a short distance of the hotel where the employee is staying.¹⁰ However, when a claimant voluntarily deviates from such activities and engages in matters, personal or otherwise, which are not incidental to the duties of his or her temporary assignment, they cease to be under the protection of FECA. Any injury

³ 5 U.S.C. § 8102(a).

⁴ *R.A.*, Docket No. 07-814 (issued June 19, 2008); *Bernard D. Blum*, 1 ECAB 1 (1947).

⁵ *V.O.*, 59 ECAB 500 (2008); *R.S.*, 58 ECAB 660 (2007).

⁶ *L.K.*, 59 ECAB 465 (2008); *D.L.*, 58 ECAB 667 (2007).

⁷ See *Charles Crawford*, 40 ECAB 474 (1989) (the phrase arising out of and in the course of employment encompasses not only the concept that the injury occurred in the work setting, but also the causal concept that the employment caused the injury); see also *Robert J. Eglinton*, 40 ECAB 195 (1988); *Clayton Varner*, 37 ECAB 248 (1985); *Thelma B. Barenkamp (Joseph L. Barenkamp)*, 5 ECAB 228 (1952).

⁸ *Ann P. Drennan*, 47 ECAB 750 (1996); *Janet Kidd (James Kidd)*, 47 ECAB 670 (1996); *William K. O Connor*, 4 ECAB 21 (1950).

⁹ *Michael J. Koll, Jr.*, 37 ECAB 340 (1986); *Carmen Sharp*, 5 ECAB 13 (1952).

¹⁰ *Ann P. Drennan*; *Janet Kidd (James Kidd)*, *supra* note 8; *Theresa B.L. Grissom*, 18 ECAB 193 (1966).

occurring during these deviations is not compensable.¹¹ Examples of such deviations are visits to relatives or friends while in official travel status,¹² visiting nightclubs and bars,¹³ skiing at a location 60 miles from where an employee is undergoing training,¹⁴ and taking a boat trip during nonworking hours to view a private construction site.¹⁵

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.¹⁶

An employee seeking benefits under FECA¹⁷ 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.¹⁸ 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.¹⁹

ANALYSIS

OWCP accepted that appellant fell while on travel status in Beijing, China. However, it denied appellant's claim because it found the evidence of record insufficient to establish that the injury occurred in the performance of duty. It noted that appellant had failed to return a questionnaire sent by OWCP to explain the circumstances surrounding the fall. Appellant's claim was that he fractured his right elbow, sprained his right wrist, and bruised his right shin and knee while on travel overseas. OWCP accepted the claim without formal review for a limited time and medical expense. As the claim went over the informal acceptance limits, OWCP determined to evaluate the merits of the claim.

¹¹ *Karl Kuykendall*, 31 ECAB 163 (1979).

¹² *Ethyl L. Evans*, 17 ECAB 346 (1966) (travelling to a friend's house to spend the night was a deviation from the course of employment); *Miss Leo Ingram*, 9 ECAB 796 (1958) (driving 200 miles to visit relatives was a deviation).

¹³ *Conchita A. Elefano*, 15 ECAB 373 (1964).

¹⁴ *Supra* note 11.

¹⁵ *Mattie A. Watson*, 31 ECAB 183 (1979).

¹⁶ *Phyllis A. Sjoberg*, 57 ECAB 409 (2006).

¹⁷ *Supra* note 2.

¹⁸ *C.S.*, Docket No. 08-1585 (issued March 3, 2009); *Bonnie A. Contreras*, 57 ECAB 364 (2006).

¹⁹ *Supra* note 2.

Appellant has been provided three opportunities to provide the details of the alleged incident relating to his injuries.

First was a Form CA-1 filed on September 18, 2014. His description as to the cause of the injury was: “Walking from U.S. Embassy to Hotel to await transportation to airport. [T]ripped on low cross bar in roadway, smacking shin on both legs and worker fell forward onto right knee, right elbow, and right wrist.” The place where the injury occurred was “Crossing road between Xiao Yun Road U.S. Embassy and Beijing Marriott Hotel Tianze Road, Beijing.” In an April 7, 2015 statement, appellant’s coworker advised that he and appellant were returning to the hotel at approximately 1500 hours when appellant tripped over a road divider.

Second, OWCP provided appellant an opportunity to further elaborate through the March 16, 2015 development letter. It requested answers to the following questions: “When and where did you last perform your official duties? What was the approximate distance between the place of the accident and the place where your last official duty was performed? When and where were you expected to perform your next official duty? When the accident occurred, were you on the most direct route between the point of last official duty and next expected official duty? If not, explain where you were in relation to the most direct or usually-traveled route and why you were at such point.” Appellant was also asked to provide a copy of his travel orders. No response was received to the questionnaire. By decision dated April 20, 2015 OWCP denied the claim finding that there had been no evidence to support that appellant was injured in the performance of duty.

The third opportunity was when appellant filed a request for a review of the written record before an OWCP hearing representative following the April 20, 2015 OWCP decision. Appellant did provide medical evidence reflecting a fractured right elbow and other injuries, a copy of his travel records, and a witness statement. However, he failed to provide the details surrounding the injury. The hearing representative, in her decision dated October 27, 2015, denied the claim for failing to establish that his fall occurred while in the performance of duty. She noted that appellant had not responded to the questions and that his responses were critical to the determination of whether the injury occurred in the performance of duty.

On appeal appellant provided details surrounding the incident. However, the Board’s review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence will not be considered for the first time on appeal.²⁰

It is appellant’s burden of proof to establish his claim. This burden includes the submission of a detailed description of the employment factors or conditions which he believes caused or adversely affected a condition for which compensation is claimed and a rationalized medical opinion relating the claimed condition to compensable employment factors.²¹ The Board finds that appellant has failed to meet that burden.

²⁰ 20 C.F.R. § 501.2(c)(1) (2008).

²¹ See *Effie O. Morris*, 44 ECAB 470, 473-74 (1993).

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision.²²

CONCLUSION

The Board finds that appellant has failed to meet his burden of proof to establish an injury in the performance of duty on August 29, 2014.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated October 27, 2015 is affirmed.

Issued: January 24, 2017
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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

²² See 5 U.S.C. § 8128(a); 20 C.F.R. §§ 10.605-10.607.