

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

A.S., Appellant)	
)	
and)	Docket No. 17-1880
)	Issued: December 12, 2018
U.S. POSTAL SERVICE, POST OFFICE,)	
Norcross, GA, Employer)	
)	

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
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On September 5, 2017 appellant filed a timely appeal from a May 12, 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.²

ISSUE

The issue is whether appellant has met his burden of proof to establish an injury in the performance of duty on March 27, 2017, as alleged.

¹ 5 U.S.C. § 8101 *et seq.*

² The Board notes that following the May 12, 2017 decision, OWCP received additional evidence. However, the Board's *Rules of Procedure* provides: "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 not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

FACTUAL HISTORY

On March 27, 2017 appellant, then a 47-year-old mail carrier, filed a traumatic injury claim (Form CA-1), alleging that he was in a motor vehicle accident that day while in the performance of duty. He noted that his vehicle was hit from behind and sustained back pain. Appellant stopped work the next day, March 28, 2017. On the reverse side of the claim form, the employing establishment indicated that the injury was caused by a third party.

In support of his claim, appellant submitted a position description.

On March 28, 2017 Dr. Francine Fields, a Board-certified family practitioner, diagnosed strain of neck muscle and asserted that appellant had been rear-ended by a small car at work. She indicated that appellant was wearing his seatbelt and the truck was stationary. The small car was totaled. Dr. Fields noted that no emergency services were needed.

In a separate March 28, 2017 report, Dr. Fields referred appellant to physical therapy for strain of muscle, fascia and tendon at neck level.

In another March 28, 2017 report, Dr. Fields released appellant to work that day with the following restrictions: lifting up to 10 pounds occasionally for three hours per day; pushing/pulling up to 10 pounds occasionally for three hours per day; and no driving due to functional limitations.

On March 28, 2017 Neal Barot, a physical therapist, diagnosed cervical strain and asserted that appellant was involved in a motor vehicle accident on March 27, 2017 in which he was rear-ended.

In an April 7, 2017 development letter, OWCP notified appellant of the deficiencies of his claim and attached a questionnaire for completion by appellant and requested a complete copy of any investigation made by the State Highway Patrol, by other law enforcement officers, or by the employing establishment. It afforded him 30 days to submit additional evidence and respond to its inquiries.

In response, appellant submitted physical therapy reports dated March 29 and 31, 2017.

In two reports dated March 31, 2017, Dr. Rhonda King, an occupational medicine specialist, diagnosed strain of muscle, fascia and tendon at neck level and thoracic myofascial strain. She asserted that appellant had been seen for a recheck of injuries. Appellant stated that he was tolerating modified duty and believed that he could perform his regular duties. He also noted his belief that physical therapy worsened his condition. Dr. King released appellant to regular duty on March 31, 2017.

In two reports dated April 6, 2017, Barry Parker, a physician assistant, diagnosed strain of muscle, fascia and tendon at neck level and thoracic myofascial strain. He stated that appellant had presented with a self-reported strain of neck. Mr. Parker released appellant to regular duty that day.

By decision dated May 12, 2017, OWCP denied appellant's claim, finding that the evidence of record was insufficient to establish that the claimed injury occurred on March 27, 2017, as alleged. It noted that appellant failed to respond to its development questionnaire and failed to provide copies of any accident reports made by law enforcement or the employing establishment to support that he was injured in the performance of duty.

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.³ 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. 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.⁴

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 or her master's business; (2) at a place where the employee may reasonably be expected to be in connection with the employment; and (3) while the employee was reasonably fulfilling the duties of his or her employment or engaged in doing something incidental thereto.⁵

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.⁶

Once an employee establishes that he or she sustained an injury in the performance of duty, he or she has the burden of proof to establish that any subsequent medical condition or disability for work, for which he or she claims compensation, is causally related to the accepted injury.⁷

ANALYSIS

The Board finds that appellant has not established that the motor vehicle accident on March 27, 2017 occurred while he was in the performance of his federal employment.

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

⁴ *A.K.*, Docket No. 09-2032 (issued August 3, 2010); *C.O.*, Docket No. 09-0217 (issued October 21, 2009).

⁵ *T.F.*, Docket No. 08-1256 (issued November 12, 2008). *See also Roma A. Mortenson-Kindschi*, 57 ECAB 418 (2006).

⁶ *See T.C.*, Docket No. 16-1070 (January 24, 2017).

⁷ *Michael E. Smith*, 50 ECAB 313 (1999).

It is the employee's burden of proof to submit sufficient evidence necessary for OWCP to make a determination as to whether he was in the course of federal employment at the time of the incident.⁸ As an off-premises employee, a mail carrier performs service away from the employer's premises.⁹ The evidence of record must, therefore, establish that the injury occurred at a place the employee was expected to be during the time of injury.

Appellant was provided opportunity to establish that his alleged injury occurred in the performance of duty. In its April 7, 2017 letter, OWCP advised appellant to provide details which would clarify whether the March 27, 2017 accident occurred in the performance of duty. It afforded him 30 days to complete a questionnaire, which provided a series of questions regarding the factual circumstances of the alleged incident, and submit a copy of any investigations made by the police or the employing establishment.

The Board finds, however, that appellant did not complete the questionnaire or submit copies of any investigations regarding the motor vehicle accident as requested. Moreover, there are no witness statements in the evidence of record to corroborate appellant's claim that he was in the performance of duty when he was injured. Other than noting that he had sustained injuries due to being involved in a motor vehicle accident on March 27, 2017 in his Form CA-1, appellant failed to provide any specific details of where and how the injury occurred so that it could be determined whether his injury occurred in the performance of duty. Accordingly, the Board finds that appellant failed to provide sufficient evidence to establish that he sustained an injury on March 27, 2017 while in the performance of duty.¹⁰

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

CONCLUSION

The Board finds that appellant has not met his burden of proof to establish an injury in the performance of duty on March 27, 2017, as alleged.

⁸ T.S., Docket No. 09-2184 (issued June 9, 2010). See also *Ricky A. Paylor*, 57 ECAB 568 (2006).

⁹ See *C.R.*, Docket No. 17-0065 (issued March 28, 2017); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Performance of Duty*, Chapter 2.804.5(a) (August 1992).

¹⁰ As appellant has failed to establish that the injury occurred in the performance of duty, the Board need not address the medical evidence of record. *Marlon Vera*, 54 ECAB 834 (2003).

ORDER

IT IS HEREBY ORDERED THAT the May 12, 2017 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: December 12, 2018
Washington, DC

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

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

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