United States Department of Labor
Employees' Compensation Appeals Board

L.J., Appellant	)	
and	)	**Docket No. 17-0807**
	)	**Issued: January 23, 2018**
DEPARTMENT OF HOMELAND SECURITY, CUSTOMS & BORDER PROTECTION, Marfa, TX, 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 March 1, 2017 appellant filed a timely appeal from a January 5, 2017 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 has established an injury on June 22, 2015 in the performance of duty.

FACTUAL HISTORY

On June 23, 2015 appellant, then a 46-year-old special operations supervisor, filed a traumatic injury claim (Form CA-1) alleging that on June 22, 2015 he twisted his left ankle in the performance of duty. He related that he was stepping onto a curb in front of a convenience store when he slipped and fell. Appellant worked from 7:00 a.m. to 3:00 p.m. and the incident occurred at noon. The employing establishment did not controvert the claim.

Appellant stopped work on June 23, 2015, returned to limited-duty work from July 9 to September 7, 2015, and resumed to his usual employment on September 8, 2015.

By letter dated December 16, 2015, OWCP informed appellant that it had initially paid a limited amount of medical expenses as his injury seemed minor and did not result in significant time lost from work. It advised that it was now adjudicating the merits of his claim as his medical bills had exceeded $1,500.00. OWCP requested that appellant submit additional factual and medical information, including information regarding whether he was on the premises of the employing establishment at the time of his injury and whether he was performing work duties.

Appellant, in a December 21, 2015 response, indicated that he was not on the premises of the employing establishment at the time of the incident. He related:

> "I was performing my regularly assigned duties for the date (On Duty -- In Uniform) when I left the premises to go to the Stripes Convenience store in order to purchase a sandwich for lunch at the Subway station inside the building. My intentions were to buy the sandwich and return to my office, unfortunately that didn't happen as I slipped on the curb and twisted my left ankle."

Appellant advised that the convenience store was located a mile and a half from his office. He asserted that as a law enforcement officer he was "always officially on duty" during his assigned work hours of 7:00 a.m. to 3:00 p.m.

In a January 11, 2016 e-mail, OWCP requested that the employing establishment indicate whether appellant had a fixed place of employment. In a January 21, 2016 response, the employing establishment related that he did not have a scheduled lunch period, but had a fixed place of employment.

By decision dated January 22, 2016, OWCP denied appellant's traumatic injury claim finding that he was not in the performance of duty at the time of the June 22, 2015 incident. It found that as he left the premises of the employing establishment to buy lunch he was outside of the coverage of FECA.

On February 22, 2016 appellant, through counsel, requested a telephone hearing before an OWCP hearing representative. At the telephone hearing, held on October 13, 2016, he related

that he did not have a set break for lunch but instead time for lunch break but instead got something when he got a chance and brought it back to the office to eat. The convenience store was a mile and a half away and off the premises of the employing establishment. Appellant drove to the store in his government vehicle and noted that if an emergency had occurred he would have been dispatched to the situation regardless of whether he was going to get something to eat. He advised that his building did not have a cafeteria and that he did not have an assigned place to get lunch. Appellant used continuation of pay after the injury.

Counsel, on October 13, 2016, noted that appellant was on a paid lunch break, in uniform, and available to respond to any emergency at the time of injury. He maintained that the Board cases of *J.C.*[3] and *B.H.*,[4] supported that he remained in the course of employment while leaving the premises to obtain food, noting that there was no cafeteria on the premises of the employing establishment.

By decision dated January 5, 2017, OWCP's hearing representative affirmed the January 22, 2016 decision. She found that, under the premises doctrine, injuries that occurred while going or coming during a lunch period were not compensable for employees having fixed hours or places of work.

LEGAL PRECEDENT

FECA provides for the payment of compensation for the disability or death of an employee resulting from personal injury sustained while in the performance of duty.[5] The phrase sustained while in the performance of duty under FECA is regarded as the equivalent of the commonly found requisite in workers' compensation law of arising out of and in the course of employment.[6]

To arise in the course of employment, an injury must occur at a time when the employee may reasonably be said to be engaged in the master's business, at a place where he may reasonably be expected to be in connection with the employment, and while he was reasonably fulfilling the duties of his employment or engaged in doing something incidental thereto.[7]

The Board has recognized as a general rule that off-premises injuries sustained by employees having fixed hours and places of work while going to or coming from work or during

[3] Docket No. 12-1430 (issued January 9, 2013). In *J.C.*, the Board remanded the case for OWCP to determine whether the claimant was on temporary duty and whether he performed most of his work duties at sites off the premises of the employing establishment.

[4] Docket No. 14-0829 (issued July 8, 2015). In *B.H.*, the claimant sustained an injury when he fell outside the premises of the employing establishment while on a paid break. The Board found that the case was not in posture for decision regarding whether the employing establishment approved or prohibited retrieving food off the premises as a form of personal comfort and ministration.

[5] 5 U.S.C. § 8102(a).

[6] *See Valerie C. Boward*, 50 ECAB 126 (1998).

[7] *See R.A.*, 59 ECAB 581 (2008); *Mary Keszler*, 38 ECAB 735 (1987).

a lunch period, are not compensable, as they do not arise out of and in the course of employment. Rather, such injuries are merely the ordinary, nonemployment hazards of the journey itself, which are shared by all travelers.[8] Due primarily to the myriad of factual situations presented by individual cases over the years, certain exceptions to the general rule have developed where the hazards of travel may fairly be considered a hazard of employment. Exceptions to the general coming and going rule have been recognized, which are dependent upon the relative facts to each claim: (1) where the employment requires the employee to travel; (2) where the employer contracts for and furnishes transportation to and from work; (3) where the employee is subject to emergency duty, as in the case of firefighters; (4) where the employee uses the highway or public transportation to do something incidental to his or her employment with the knowledge and approval of the employer; and (5) where the employee is required to travel during a curfew established by local, municipal, county or state authorities because of civil disturbances or other reasons.[9]

OWCP's procedures provide, "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 POD [performance of duty] issues such as premises, temporary duty travel, or recreational injuries), a statement from the employing [establishment] is imperative to properly develop and adjudicate the claim."[10]

ANALYSIS

Appellant alleged that he twisted his left ankle on June 22, 2015 at 12:00 p.m. when he slipped as he stepped onto a curb in front of a convenience store. He had driven to the convenience store from his work location in his government vehicle to pick up a sandwich for lunch. The convenience store was located about a mile and a half from his office. The employing establishment did not controvert the claim. OWCP requested that appellant provide a detailed description of the circumstances surrounding the June 22, 2015 incident and whether he was on the premises of the employing establishment. It did not request detailed factual information in writing from the employing establishment. Instead, in a January 11, 2016 e-mail, OWCP asked if appellant had a fixed place of employment. The employing establishment advised on January 21, 2016 that he had a fixed work location.

Appellant was not injured on the premises of the employing establishment and he had a fixed work location. As noted, when an employee leaves the work premises for lunch, he is generally not considered within the performance of duty. Appellant asserted that he was in uniform and available for emergency calls at the time of the incident. As a law enforcement officer, he must respond to law enforcement situations that arise at any given time, and if he had been responding to a law enforcement situation he would be covered. In this case, however, there is no evidence that he left the premises in response to a law enforcement situation. Thus,

[8] *See John M. Byrd*, 53 ECAB 684 (2002); *see also Gabe Brooks*, 51 ECAB 184 (1999).

[9] *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Performance of Duty*, Chapter 2.804.6(a) (August 1992); *see also Melvin Silver*, 45 ECAB 677 (1994).

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

under the general rule with respect to leaving work for lunch, appellant was not in the performance of duty.[11]

For the June 22, 2015 incident to be under the coverage of FECA, there must be an applicable exception to the general rule. The Board has recognized exceptions to the general rule that off-premises injuries while going to or coming from work are not compensable.[12] If the employer provides the employee with an automobile under the employee's control for coming to and going from work, the journey is held to be in the course of employment.[13]

In *S.A.*,[14] the claimant, a special agent, was injured in a motor vehicle accident while driving a government vehicle on his lunch break. The employing establishment provided a statement relating that the claimant was on call round the clock to respond to law enforcement situations and that it provided a vehicle for him to use driving from home to work and on the job. The Board determined that, if the claimant had been driving to work or coming home from work, he would be in the course of employment as the journey would have been part of his compensated employment. The Board found, however, that there was no evidence demonstrating that the employing establishment intended for the claimant to use the vehicle for lunch or other personal use, and thus determined that his injury was not compensable as it resulted from the ordinary, nonemployment hazards of a journey shared by all travelers.

The Board finds that OWCP did not sufficiently develop the evidence regarding whether appellant was in the performance of duty at the time of the alleged June 22, 2015 slip and fall. As noted, OWCP did not request detailed information from the employer. Its procedures provide that a statement from the employing establishment is essential in developing a performance of duty claim.[15] The only evidence from the employing establishment is an e-mail indicating that appellant had a fixed place of work. The employing establishment provided appellant with a government-owned vehicle. It is unclear, however, whether his use of the vehicle to obtain lunch off premises constituted part of his compensated employment.

The Board, consequently, finds that the case is not in posture for decision as to whether appellant was in the performance of duty at the time of the alleged June 22, 2015 work incident. Proceedings under FECA are not adversarial in nature and OWCP is not a disinterested arbiter. While appellant has the burden 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.[16] On remand OWCP should obtain a statement from the employing establishment fully addressing appellant's work duties, including his use of a government vehicle and the responsibility to

[11] *See S.A.*, Docket No. 09-0169 (issued July 21, 2009).

[12] *See Melvin Silver*, 45 ECAB 677 (1994).

[13] A. Larson, *The Law of Workers' Compensation* § 14.07 (2003).

[14] *Supra* note 11.

[15] *See supra* note 10; *see also P.S.*, Docket No. 15-1672 (issued December 7, 2015).

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

respond to emergency situations and its policy regarding the scope of his employment as a law enforcement officer. Following such further development as deemed necessary, it should then determine whether appellant was in the performance of duty when he twisted his ankle on June 22, 2015 and issue a *de novo* decision.

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the January 5, 2017 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this opinion of the Board.[17]

Issued: January 23, 2018
Washington, DC

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

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

[17] Colleen Duffy Kiko, Judge, participated in the preparation of this decision, but was no longer a member of the Board effective December 11, 2017.