

ISSUE

The issue is whether appellant met his burden of proof to establish an injury in the performance of duty on June 30, 2014, as alleged.

FACTUAL HISTORY

This case has previously been before the Board.⁴ The facts as presented in the Board's prior decision are incorporated herein by reference. The relevant facts are as follows.

On July 3, 2014 appellant, then a 40-year-old security specialist, filed a traumatic injury claim (Form CA-1) alleging that, at 1:00 p.m. on Monday, June 30, 2014, he sustained injuries to his neck, shoulder, and right leg due to a fall at his home in San Antonio, TX.⁵ He attached a statement in which he explained that, on the date of injury, he was relocating his telework items from his home to the Commissary at Fort Sam Houston, TX, at the direction of his supervisor. Appellant indicated that, as he was carrying a box of reference materials and supplies down the stairs in his home, his right leg gave out and he tumbled down the last six steps. He advised that he hit his head on the wall at the bottom of the stairs.

On the reverse side of the Form CA-1, appellant's immediate supervisor indicated that appellant's duty station was at Fort Sam Houston and that his regular work hours were 7:30 a.m. to 4:00 p.m., Monday through Friday. In a July 9, 2014 statement attached to the Form CA-1, he contended that appellant had not sustained an injury in the performance of duty on June 30, 2014 because his alleged injury occurred at home despite the fact that he had directed appellant on three occasions prior to June 30, 2014 to report to the Fort Sam Houston Commissary at 7:00 a.m. on June 30, 2014.⁶ The supervisor noted that he knew nothing about appellant making trips back and forth from his home to the Fort Sam Houston Commissary to haul office supplies. He indicated that appellant never asked him for permission to carry out this task and he did not approve it. The supervisor noted that appellant's duty station on June 30, 2014 was the Fort Sam Houston Commissary. He indicated that, he had advised appellant on June 26, 2014 that he was taking him off his telework schedule of five days per week and that appellant instead had to work at the Fort Sam Houston Commissary.

In a June 27, 2014 statement, a store director for the employing establishment indicated that he was present on June 26, 2014 when appellant's immediate supervisor advised appellant that he was taking him off his telework schedule of five days per week. He noted that appellant's immediate supervisor told appellant to pack up his things and bring them with him on Monday, June 30, 2014, to his workplace at the Fort Sam Houston Commissary.

In a July 22, 2014 e-mail to an injury compensation specialist for the employing establishment, appellant's immediate supervisor indicated that his comment to appellant to "bring

⁴ Docket No. 16-0927 (issued February 13, 2017).

⁵ Appellant stopped work on June 30, 2014.

⁶ The record contains a June 13, 2014 e-mail in which appellant's supervisor directed him to report to the Fort Sam Houston Commissary for work on June 30, 2014.

his work things” with him when he reported to the Fort Sam Houston Commissary on June 30, 2014 was not meant to imply that he had approved trips to and from his residence.

Appellant submitted July 7 and 17, 2014 reports in which an attending physician listed a date of injury as June 30, 2014 and a diagnosis of “right leg/head.” The physician indicated that appellant was totally disabled from work.

In a July 24, 2014 letter, OWCP requested that appellant submit additional factual and medical evidence in support of his claim.

Appellant submitted an August 21, 2014 report in which an attending physician again listed a date of injury as June 30, 2014 and a diagnosis of “right leg/head” and indicated that appellant was totally disabled.

By decision dated August 26, 2014, OWCP denied appellant’s claim for a June 30, 2014 work injury. It found that he had established that a work incident occurred on June 30, 2014 as alleged, but that he had not submitted medical evidence establishing that a specific medical condition was sustained due to the work incident.

On October 28, 2014 appellant requested reconsideration of OWCP’s August 26, 2014 decision. He submitted a statement in which he indicated that he felt that the multiple trips he took to and from his home were necessary to move his many files, reference materials, office supplies, and other work items. Appellant also submitted a letter to his congressman in which he asserted that he was following his supervisor’s order to move his work belongings from his home to the Fort Sam Houston Commissary. He also submitted additional medical reports from June and July 2014.

In a November 18, 2014 letter, an injury compensation specialist for the employing establishment contended that appellant was not in the performance of duty when his accident occurred on June 30, 2014. She advised that he was not authorized to be at his residence at the time of injury. The specialist noted that reference should be made to the July 9, 2014 statement of appellant’s immediate supervisor and a July 22, 2014 e-mail the immediate supervisor sent to appellant which indicated that he did not have permission to go back and forth to his residence on June 30, 2014. She indicated that appellant was expected to be at his duty station.

By decision dated March 9, 2015, OWCP denied appellant’s claim for a work-related injury on June 30, 2014. It noted that it was modifying the basis for the denial because he had not shown that he fell while in the performance of duty on June 30, 2014 as alleged. OWCP discussed the statements indicating that appellant was not authorized to travel back and forth between his home and the Fort Sam Houston Commissary on June 30, 2014 and indicated, “The evidence is sufficient to modify the decision dated August 26, 2014 from a denial based on one of the five basic elements for FECA coverage (fact of injury, medical) to a denial based on another basic element (performance of duty). Your case remains denied as you have not met the performance of duty element of your claim.”

In a December 8, 2015 letter received on that date, appellant, through counsel, requested reconsideration of OWCP’s March 9, 2015 decision. Counsel argued that appellant was responding to a direct order from his supervisor to pack up and move his things from his home to

the Fort Sam Houston Commissary when he was injured on June 30, 2014. He noted that appellant's supervisor "did not direct [appellant] to pack up his things on a day prior to Monday June 30, 2014, he specifically told [appellant] to pack them up on June 30, 2014, and bring them with him."

In a February 16, 2016 letter to OWCP, an injury compensation specialist for the employing establishment contended that appellant was directed to be at his designated duty station at 7:00 a.m. on June 30, 2014.

In a February 29, 2016 decision, OWCP denied modification of its March 9, 2015 decision. It again found that appellant did not sustain an injury in the performance of duty on June 30, 2014.

On April 1, 2016 appellant appealed his claim to the Board. In a February 13, 2017 decision,⁷ the Board affirmed OWCP's February 29, 2016 decision, finding that he had not shown that his claimed June 30, 2014 injury occurred in the performance of duty. The Board found that appellant was not at a place where he may have reasonably been expected to be in connection with the employment when he fell at his home on June 30, 2014 because his duty station on that date was the Fort Sam Houston Commissary and his supervisor directed him to report there at 7:00 a.m. on that date. The Board noted that appellant's supervisor indicated that he had not authorized appellant to travel back and forth between his home and the Fort Sam Houston Commissary on June 30, 2014. Although the supervisor told appellant to "bring his work things" with him when he reported to the Fort Sam Houston Commissary on June 30, 2014, this comment could not be reasonably interpreted as approval for appellant to leave his workplace and travel back and forth between his home and his duty station during the workday without prior approval. The Board noted that appellant was expected to report to his duty station at the Fort Sam Houston Commissary and perform his usual duties at the time of his fall on June 30, 2014. Therefore, appellant was not reasonably fulfilling the duties of his employment or engaged in doing something incidental thereto at the time of his June 30, 2014 fall.

On May 2, 2017 OWCP received a May 1, 2017 letter in which counsel requested reconsideration on behalf of appellant. In this letter counsel asserted that appellant's claim for a June 30, 2014 work injury was supported by a June 27, 2014 letter in which a store director for the employing establishment noted that appellant's immediate supervisor told appellant that he should go ahead and pack up his things and bring them with him on Monday, June 30, 2014. He asserted that appellant had to make several trips in order to comply with what his supervisor told him and posited that appellant would not have been able to work if he only made one trip into work and brought half of the files without his computer and printer. Counsel indicated that appellant reported that his supervisor gave him permission orally to ferry his files from his home to the office and asserted that his supervisor knew that appellant was hired under a special program and frequently misunderstood directions due to his dyslexia and significant academic and cognitive difficulties. He also indicated that appellant's claim for a June 30, 2014 work injury was supported by a July 23, 2015 document showing that appellant's supervisor was being investigated for standards of ethical conduct (conduct unbecoming a federal employee) and that he was found to be guilty of improper conduct.

⁷ See *supra* note 4.

Counsel further argued that appellant's supervisor had the responsibility to make sure that appellant fully understood his instructions. On June 30, 2014 appellant was following the instructions given to him: "pack up all his things and bring them with him on Monday." Counsel asserted that appellant reported to work Monday morning, June 30, 2014, as instructed with his first load and at no time did it ever occur to appellant that his supervisor did not want him to return back to his residence to pick up the remainder of the office equipment, files, and supplies that he was told he had to bring to the office on June 30, 2014. He argued that a person with cognitive difficulties such as appellant did not process information the same way as everyone else. Counsel asserted that appellant's supervisor failed to ask appellant how much office equipment and supplies he had to bring with him to the office on June 30, 2014 and failed to advise him, that, if he had more office equipment, files, and supplies than he could bring in one trip, he could bring the remainder of the office equipment, files, and supplies to work with him on July 1, 2014.

Counsel submitted an additional copy of the store manager's June 27, 2014 statement which had previously been submitted to OWCP. He also submitted a two-page excerpt from a report that described appellant's cognitive functioning testing⁸ and six pages of a July 23, 2015 investigative report produced by a lead investigator for the Defense Contract Management Agency. In the synopsis portion of the report, the lead investigator indicated that the evidence supported that appellant's supervisor engaged in misconduct, including an instance when he failed to report possible crimes by senior officials of the employing establishment.⁹

In a May 23, 2017 letter, an injury compensation specialist indicated that appellant was not in the performance of duty on June 30, 2014, despite his assertion that he was given permission to travel back and forth to his home to retrieve his working materials. She noted that the record contained statements from appellant's immediate supervisor and the store manager for the employing establishment advising appellant of his instructions/requirements. The specialist indicated that appellant's previous reconsideration requests never mentioned that he had any mental conditions. Prior to the alleged June 30, 2014 incident, appellant teleworked 100 percent of his work schedule, which required him to work independently without constant supervisory oversight and/or directions. The specialist indicated that he reported that he was going to comply with his supervisor's instructions and, therefore, he understood these instructions.¹⁰

In a June 14, 2017 decision, OWCP denied modification.¹¹ It noted that appellant's supervisor advised that appellant did not have permission to move items back and forth from his home on June 30, 2014 and, therefore, he was not in the performance of duty when he fell at home

⁸ The pages are undated and unsigned.

⁹ The record does not contain a complete copy of the July 23, 2015 investigative report.

¹⁰ The employing establishment also submitted a copy of appellant's position description.

¹¹ The decision noted that it denied modification of the Board's February 13, 2017 decision. OWCP is not authorized to review Board decisions. Although the February 13, 2017 Board decision was the last merit decision, the February 29, 2016 OWCP decision is the appropriate subject of possible modification by OWCP. *See* 20 C.F.R. § 501.6(d).

that day. OWCP indicated that the new evidence submitted by appellant did not alter its previous determinations regarding his claim for a June 30, 2014 work injury.

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.”¹² The phrase “sustained while in the performance of duty” has been interpreted by the Board to be the equivalent of the commonly found prerequisite in workers’ compensation law of “arising out of and in the course of employment.”¹³ The phrase “in the course of employment” is recognized as relating to the work situation, and more particularly, relating to elements of time, place, and circumstance. To arise in the course of employment, an injury must occur at a time when the employee may reasonably be stated to be engaged in the master’s business, at a place where [appellant] 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.”¹⁴ This alone is insufficient 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.¹⁵

As a general rule, off-premises injuries sustained by employees having fixed hours and place of work, while going to or coming home from work or during a lunch period, are not compensable as they do not arise out of and in the course of employment, but are merely the ordinary, nonemployment hazards of the journey itself, which are shared by all travelers.¹⁶ When an employee has a definite place and time for work and the time for work does not include the lunch period, the trip away from, and back to the premises for the purposes of getting lunch is indistinguishable in principle from the trip at the beginning and end of the workday and is governed by the same rules and exceptions.¹⁷ Exceptions to the general rule have been made in order to protect activities that

¹² 5 U.S.C. § 8102(a).

¹³ *Charles Crawford*, 40 ECAB 474, 476-77 (1989).

¹⁴ *Mary Keszler*, 38 ECAB 735, 739 (1987).

¹⁵ *Eugene G. Chin*, 39 ECAB 598, 602 (1988).

¹⁶ *Supra* note 13.

¹⁷ *Donna K. Schuler*, 38 ECAB 273-74 (1986).

are so closely related to the employment itself as to be incidental thereto,¹⁸ or which are in the nature of necessary personal comfort or ministrations.¹⁹

OWCP's procedures address off-premises injuries sustained by workers who perform service at home:

“Ordinarily, the protection of [FECA] does not extend to the employee's home, but there is an exception when the injury is sustained while the employee is performing official duties. In situations of this sort, the critical problem is to ascertain whether at the time of injury the employee was in fact doing something for the [establishment employer]. The official superior should be requested to submit a statement showing --

‘(a) What directives were given to or what arrangements had been made with the employee for performing work at home or outside usual working hours;

‘(b) The particular work the employee was performing when injured; and

‘(c) Whether the official superior is of the opinion the employee was performing official duties at the time of the injury, with appropriate explanation for such opinion.’”²⁰

ANALYSIS

The Board finds that appellant has not met his burden of proof to establish a June 30, 2014 work injury because he was not in the course of his employment at the time of his claimed injury on June 30, 2014 and, therefore, was not in the performance of duty.

Appellant's supervisor indicated that appellant had not sustained an injury in the performance of duty on June 30, 2014 because appellant's claimed injury occurred at home at 1:00 p.m. on that date despite the fact that he had directed appellant on three occasions prior to June 30, 2014 to report to the Fort Sam Houston Commissary at 7:00 a.m. on June 30, 2014. He noted that he knew nothing about appellant making trips back and forth from his home to the Fort Sam Houston Commissary to haul office supplies. The supervisor stated that he was never asked

¹⁸ The Board has stated that these exceptions have developed where the hazards of the travel may fairly be considered a hazard of the employment and that they are dependent upon the particular facts and related situations: “(1) where the employment requires the employee to travel on the highways; (2) where the [employing establishment] contracts to and does furnish transportation to and from work; (3) where the employee is subject to emergency calls as in the case of firemen; and (4) where the employee uses the highway to do something incidental to his employment, with the knowledge and approval of the employer.” *Betty R. Rutherford*, 40 ECAB 496, 498-99; *Lillie J. Wiley*, 6 ECAB 500, 502 (1954).

¹⁹ See, e.g., *Harris Cohen*, 8 ECAB 457, 457-58 (1954) (accident occurred while the employee was obtaining coffee); *Abraham Katz*, 6 ECAB 218, 218-19 (1953) (accident occurring while the employee was on the way to the lavatory).

²⁰ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Performance of Duty*, Chapter 2.804.5(f)(1) (August 1992); see also *S.F.*, Docket No. 09-2172 (issued August 23, 2010).

permission to carry out this task and had not approved it.²¹ He noted that appellant's duty station on June 30, 2014 was the Fort Sam Houston Commissary.

Appellant has not shown that his claimed June 30, 2014 injury occurred at a time when he may reasonably be expected to have been engaged in the master's business, at a place where he may have reasonably been 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.²² He has not met these important indicia of being in the performance of duty at the time of his June 30, 2014 fall. Appellant was not at a place where he may have reasonably been expected to be in connection with the employment when he fell at home on June 30, 2014 because his duty station on that date was the Fort Sam Houston Commissary and his supervisor directed him to report there at 7:00 a.m. on that date.

Appellant's supervisor indicated that he had not authorized appellant to travel back and forth between his home and the Fort Sam Houston Commissary on June 30, 2014. Although he told appellant to "bring his work things" with him when he reported to the Fort Sam Houston Commissary on June 30, 2014, this comment could not be reasonably interpreted as approval for appellant to leave his workplace and travel back and forth between his home and his duty station during the workday without prior approval. Appellant was expected to report to his duty station at the Fort Sam Houston Commissary and perform his usual duties at the time of his fall on June 30, 2014. Therefore, he was not reasonably fulfilling the duties of his employment or engaged in doing something incidental thereto at the time of his June 30, 2014 fall.

OWCP's procedures provide that, ordinarily, the protection of FECA does not extend to the employee's home, but there is an exception when the injury is sustained while the employee is performing official duties. In situations as such, the critical problem is to ascertain whether at the time of injury the employee was in fact doing something for the employing establishment.²³ In such circumstances, the official superior is to be asked if the employee was performing official duties at the time of the injury.²⁴ In this case, appellant's supervisor provided a clear opinion that appellant was not performing official duties at the time of the injury.

The aforementioned evidence was considered by the Board in connection with its February 13, 2017 decision affirming OWCP's February 29, 2016 denial of modification. The Board found that the evidence of record did not show that appellant was in the performance of duty at the time of his claimed injury on June 30, 2014.

²¹ Appellant's supervisor indicated that his comment to appellant to "bring his work things" with him when he reported to the Fort Sam Houston Commissary on June 30, 2014 was not meant to imply that he had approved trips to and from his residence.

²² See *supra* note 13.

²³ See *supra* note 19.

²⁴ *Id.*

After the Board issued its February 13, 2017 decision, appellant submitted additional evidence and argument in support of his claim for a June 30, 2014 work injury. The Board finds, however, that this additional evidence does not establish his claim for a June 30, 2014 work injury.

Counsel submitted an additional copy of a June 27, 2014 letter of a store director for the employing establishment and argued that the letter shows that appellant was authorized to make multiple trips on June 30, 2014 between his home and the Fort Sam Houston Commissary. However, the June 27, 2014 letter was previously of record and the Board already determined in its February 13, 2017 decision that the statement did not serve to establish appellant's claim.²⁵

Counsel also asserts on appeal that appellant believed that his supervisor gave him permission orally to ferry his files from his home to the office. He asserted that appellant's supervisor knew that appellant was hired under a special program and frequently misunderstood directions due to his dyslexia and significant academic and cognitive difficulties. Counsel alleges that appellant's supervisor failed in his responsibility to ensure that appellant fully understood his instructions. The Board notes that appellant did not submit probative evidence that he had cognitive deficits of such a degree that he was unable to understand his supervisor's instructions regarding the expectations of his work activities on June 30, 2014.²⁶

For these reasons, the Board finds that appellant has not established an injury in the performance of duty on June 30, 2014, as alleged.

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 June 30, 2014, as alleged.

²⁵ Counsel submitted six pages of a July 23, 2015 investigative report produced by a lead investigator for the Defense Contract Management Agency and, on appeal, he suggests that this report supports appellant's claim for a June 30, 2014 work injury. In the synopsis portion of the report, the lead investigator indicated that the evidence supported that appellant's supervisor engaged in misconduct, including an instance when he failed to report possible crimes by senior officials of the employing establishment. The Board notes that the copy of the July 23, 2015 report in the case record is incomplete and does not contain a findings section. The portion of the July 23, 2015 report in the case record does not contain any reference to appellant and counsel has not adequately explained how this document supports appellant's claim for a June 30, 2014 work injury.

²⁶ Counsel submitted two pages excerpted from a report which describes cognitive functioning testing of appellant. The pages are undated and unsigned and it is unclear who prepared the report or for what purpose it was produced.

ORDER

IT IS HEREBY ORDERED THAT the June 14, 2017 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: May 15, 2018
Washington, DC

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

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

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