United States Department of Labor
Employees' Compensation Appeals Board

S.M., claiming as son of J.M., Appellant	)	
and	)	**Docket No. 18-0615**
	)	**Issued: November 5, 2018**
U.S. POSTAL SERVICE, BULK MAIL CENTER, Jersey City, NJ, Employer	)	

Appearances:
James D. Muirhead, 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
PATRICIA H. FITZGERALD, Deputy Chief Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On January 30, 2018 appellant, through counsel, filed a timely appeal from an August 23, 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 the 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 met his burden of proof to establish that the employee's death on December 27, 2010 occurred in the performance of duty.

FACTUAL HISTORY

This case has previously been before the Board.[3] The facts and circumstances of the case as set forth in the Board's prior decision are incorporated herein by reference. The relevant facts are as follows.

On March 4, 2011 appellant completed a claim for death benefits (Form CA-5) alleging that the death of his father, the employee who was employed as a postal clerk, was related to "exposure" at work that caused a heart attack. A supervisor's report of employee's death (Form CA-6) dated June 5, 2012 indicated that on December 26, 2010 the employee "punched out of work" at 7:00 p.m. The supervisor reported that there was a snowstorm, the employee was seen at 4:00 a.m. on December 27, 2010 in the employing establishment cafeteria, and the employee's son had arranged to pick the employee up from work.

In a December 28, 2010 memorandum, an employing establishment supervisor reported that the employee was a clerk and on December 26, 2010 had asked to leave work early due to a snowstorm that occurred earlier in the day. According to the supervisor, the police reported that the employee had called his son at approximately 5:00 a.m. on December 27, 2010 from the employing establishment cafeteria. The son was supposed to pick up the employee at the intersection of McDermott Drive and County Road, but had not picked up his father. The supervisor reported that the employee's body was found in "Veterans Plaza at the entrance to McDermott Drive."

Appellant submitted an autopsy report dated December 30, 2010. The medical examiner reported that the cause of the employee's death was arteriosclerotic cardiovascular disease and diabetes mellitus, with "exposure to cold" as a contributory cause.

By decision dated August 27, 2013, OWCP denied appellant's claim for compensation based on the factual component of fact of injury. It found that the death did not occur until after the employee had left the employing establishment.

On May 30, 2014 appellant, through counsel, requested reconsideration and submitted a May 23, 2014 report from Dr. Malcolm Hermele, an internist. Dr. Hermele provided a history that it appeared the employee was waiting on the employing establishment premises for a ride from his son, at an area called Memorial Park, and "essentially froze to death." He wrote that it was his understanding that the employee had a massive heart attack and was caught in a blizzard. Dr. Hermele indicated that he had reviewed incident reports and witness statements. He opined that "the cold weather contributed to and was the proximal cause of a fatal arrhythmia and myocardial infarction in [the employee's] already compromised cardiovascular system. This event

[3] Docket No. 16-1725 (issued May 11, 2017).

occurred while he was on the [employing establishment] premises on or about [December 27 to 28, 2010]."

On March 25, 2015 additional evidence was submitted in support of reconsideration. An incident report dated December 28, 2010 from the "inspection postal police force" indicated that the employee's son reported that he talked with his father by cellphone at 5:00 a.m. on December 27, 2010. The employee was at the employing establishment and requested to be picked up. When appellant could not locate the employee at the agreed upon destination, the Military Park section of the employing establishment facility was searched and the employee's body was discovered. A "preliminary serious accident report" indicated that the body was found approximately 50 feet from the McDermott Drive employee entrance.

Three witness statements were submitted to the record. In a December 29, 2010 statement, a coworker reported that on December 27, 2010 the employee left the employing establishment cafeteria and at about 7:00 a.m. she saw him outside in a crosswalk in front of a stopped truck. The coworker indicated that the employee was "making backward strides" toward the facility entrance. A second coworker submitted an undated statement that at 10:00 p.m. on December 26, 2010 the employee was in the cafeteria trying to contact someone by telephone. The witness indicated that at 6:00 a.m. the employee was walking outside to the "guard shack" when he fell. According to the witness, he asked the employee if he was okay, the employee responded yes, and asked him to close the guard shack door. In addition, the witness asked the employee if he wanted a ride home, and was told no. A third witness submitted an undated statement, writing that the employee received a call at approximately 3:00 a.m. on the morning of December 27, 2010. The witness wrote that at 6:00 a.m. when "we were going home" the employee fell in snow, was asked if he needed a ride, but he responded that he did not.

By decision dated September 23, 2015, OWCP denied modification of its August 27, 2013 decision. It found that the employee was not on the clock, and the evidence did not establish that his work, or presence in the parking lot, contributed to his death. OWCP noted that the death did not occur within a reasonable time frame after he stopped work, and weather events did not constitute a special hazard.

On October 15, 2015 appellant, through counsel, requested reconsideration. The evidence submitted in support thereof included a statement from appellant, who asserted that his father called him at 2:00 a.m. on December 27, 2010 and reported that the employing establishment parking lot was not plowed and he could not leave because of the snow. Appellant indicated that the employee stated that his car was stuck in the parking lot, and appellant told his father that he could pick him up at 7:00 a.m. because the roads were not clear. According to appellant, he tried to call his father at 5:30 a.m. to tell him that the roads still were not clear, but the employee could not be located and did not have a cellphone. He wrote that the parking lot was not cleared until 4:00 p.m. on December 27, 2010 and he felt that the employee's death was the result of his having to remain at the employing establishment due to the snowstorm.

By decision dated March 10, 2016, OWCP denied modification of its September 23, 2015 decision. It found that the employee's death did not arise out of his work duties and he was not in the performance of duty. OWCP found that "although the [employee] was witnessed as being on the premises, the [employee] did not pass away on the premises of the [employing establishment,]

but rather the day after his shift ended and in Veteran's Plaza which is not owned by the [employing establishment]. Accordingly, he was not performing any duties or assigned work at the time of his death."

On August 15, 2016 appellant, through counsel, appealed to the Board. By decision dated May 11, 2017, the Board set aside the March 10, 2016 OWCP decision and remanded the case for further findings. The Board found that OWCP had not sufficiently developed the record as to whether the employee was found on the employing establishment's premises. The Board also found that OWCP failed to make adequate findings as to the circumstances related to the snowstorm and whether the employee was expressly or impliedly required to remain at work.[4]

Following a June 23, 2017 development letter, OWCP received an August 15, 2017 response from the employing establishment. The employing establishment indicated that the employee was found in the Military Park which was located within its premises. The employee apparently walked from the guard shack, which is adjacent to the employee's entrance, and walked the road 3/10th of a mile from the guard shack, crossing Military Park approximately 50 feet off McDermott Drive, where he was found. This area was to the right at the entrance to the parking lot, which it owned and operated. The employing establishment indicated that the parking lot was maintained by plowing and shoveling that night. It stated that it was not aware that the employee had remained at work. The employing establishment also stated that it did not require that the employee remain on the premises that day, nor did it require that any employee leave the premises.

By decision dated August 23, 2017, OWCP denied appellant's claim, finding that the employee was not in the performance of duty on December 27, 2010 even though he had remained on the premises. Specifically, it found that the employee was not engaged in the performance of his employment duties or doing something incidental thereto. Additionally, the employee had remained an unreasonable amount of time after he ended his shift early and was found in an unreasonable location due to the surrounding circumstances, namely a severe blizzard.

LEGAL PRECEDENT

The United States shall pay compensation for the disability or death of an employee resulting from personal injury sustained while in the performance of duty.[5] An award of compensation in a survivor's claim may not be based on surmise, conjecture, or speculation or an appellant's belief that the employee's death was caused, precipitated, or aggravated by the employment.[6]

It is appellant's burden of proof to submit sufficient evidence necessary for OWCP to make a determination as to whether an employment incident occurred as alleged. The evidence must be sufficient to establish whether the employee was in the course of federal employment at the time

[4] *Id.*

[5] 5 U.S.C. § 8133 (compensation in case of death).

[6] *See Sharon Yonak (Nicholas Yonak)*, 49 ECAB 250 (1997).

of the incident, so that a proper determination may be made as to whether an injury occurred while in the performance of duty.[7]

An injury is determined 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 the employee is fulfilling employment duties or is engaged in doing something incidental thereto. Arising out of employment relates to the causal connection between the employment and the injury claimed.[8]

Injuries arising on the premises may be approved if the employee was engaged in activity reasonably incidental to the employment, such as preparatory or incidental acts associated with leaving work.[9]

ANALYSIS

The Board finds that appellant has not met his burden of proof to establish that the employee's death on December 27, 2010 occurred in the performance of duty.

Appellant alleged that the employee's death on December 27, 2010 was causally related to "exposure" at work. The record indicates that the employee's scheduled work hours were from 1:00 p.m. to 9:50 p.m. On December 26, 2010 he worked until 7:00 p.m. then he spent time in the employing establishment's cafeteria. Appellant asserted that the employee had his car in the parking, lot, but was unable to leave due to a snowstorm. The employing establishment however reported that the parking lot had been plowed during the night. On December 27, 2010 the employee was outside at times during the morning hours, going to the "guard shack" and then at 7:00 a.m. was walking to meet his son for a ride home when he collapsed.

The employing establishment indicated that the employee's body was found in the Military Park which was part of its premises. As the employee's death occurred on the premises of the employing establishment, the issue is whether the incident occurred within a reasonable interval after official working hours while the employee was engaged in preparatory or incidental acts associated with leaving work.

The Board finds that, despite occurring on the premises, the employee's death on December 27, 2010 did not occur in the performance of duty. The occurrence of an incident on the employing establishment premises which leads to an injury is insufficient, in itself, to give rise to coverage under FECA as the employee must show not only that the injury encompasses the work setting, but also that the injury occurred a reasonable interval before or after official working hours while he was on the premises engaged in preparatory or incidental acts. What constitutes a

[7] *T.S.*, Docket No. 09-2184 (issued June 9, 2010).

[8] *B.C.*, Docket No. 09-0653 (issued December 24, 2009).

[9] *See A.B.*, Docket No. 15-0288 (issued May 21, 2015) (finding that a claimant had established that the incident occurred a reasonable interval after clocking out of work when he was assaulted a few minutes after clocking out at 4:50 p.m.).

reasonable interval before work depends on both the length of time involved and the circumstances occasioning the interval and the nature of the employee's activity.[10]

The evidence of record does not establish that the employee was in the performance of his regular or specially assigned work duties or engaged in other preparatory or incidents at the time of his December 27, 2010 fatal heart attack. The employee had signed out of work early at 7:00 p.m. on December 26, 2010. He remained on the premises for approximately 11 hours and was last seen by a witness at 6:00 a.m. walking towards the guard shack and at approximately 7:00 a.m. in the crosswalk in front of a stopped truck. The employee was believed to be waiting for a ride from his son, who was on his way to pick him up at the intersection of McDermott Drive and County Road. In *Catherine Callen*,[11] the employee was found to be in the performance of duty under FECA for an injury sustained on the employing establishment premises six hours after the end of her regular shift, primarily because she remained on the premises to complete a project at the request of her employing establishment. There is no evidence that the employing establishment in this case expressly or impliedly required the employee's presence on the premises after his regular work hours on December 26, 2010. There is no evidence that the employee sought approval from his supervisor to remain on the premises, and the employing establishment has related that it was unaware that the employee in fact remained on premises through the early morning hours of December 27, 2010. Accordingly, the Board finds that the employee's presence on the employing establishment premises the morning of his death was not reasonable.[12]

The facts and circumstances of this case indicate that the employee had not left the employing establishment premises due to a snowstorm on December 26 and 27, 2010. Accordingly, the issue becomes whether the employee's death would not have occurred, but for the fact that the conditions and obligations of his employment put him in the position where he was injured.

In *Doyle W. Rickett*,[13] the Board noted that *The Law of Workers' Compensation*, identifies three types of risks: risks distinctly associated with the employment; risks personal to the claimant; and "neutral risks," *i.e.*, risks having no particular employment or personal character. It further indicates that harms from the first risk are universally compensable and those from the second are universally noncompensable; harms from the third risk are the subject of controversy in modern compensation law, but there is increased acceptance for finding an injury arose in the performance of duty when a condition of employment put the claimant in a position to be injured by the neutral

[10] *See P.S.*, Docket No. 13-370 (issued November 12, 2013); *William W. Knispel*, 56 ECAB 639 (2005); *Venicee Howell*, 48 ECAB 414 (1997); *Dwight D. Henderson*, 46 ECAB 441 (1995); *Arthur A. Reid*, 44 ECAB 979 (1993); *Nona J. Noel*, 36 ECAB 329 (1984). *Compare John F. Castro*, Docket No. 03-1653 (issued May 14, 2004) with *George E. Franks*, 52 ECAB 474 (2001). In cases concerning what constitutes a reasonable interval before or after work, the Board has been influenced by the activities engaged in by the employees before or after work. In *Howell*, the Board found coverage when the employee was injured five minutes after work while performing the incidental task of submitting a job bid. However, in *Noel*, the Board denied coverage when the employee was injured 90 minutes before work while engaging in the personal activity of eating breakfast.

[11] 47 ECAB 192 (1995).

[12] *See B.R.*, Docket No. 11-153 (issued September 30, 2011).

[13] Docket No. 95-0435 (issued November 6, 1996).

risk.[14] The Board also noted in *Doyle W. Ricketts* that it has applied the positional risk doctrine and has held that an injury arising in the course of employment from a neutral risk is compensable.

The Board finds that the above-described coverage under the "neutral risk" theory is not applicable to the circumstances of the employee's case, wherein his death allegedly occurred due to exposure to weather conditions. Coverage under this theory is dependent on a reasonably clear linkage between the neutral risk and the employment. There is no such indication in the employee's case that the harm he encountered, exposure to cold, was distinctly associated with his employment. The employee had been off work for approximately 11 hours and was outside in blizzard-like conditions for approximately 1 hour waiting for his son to pick him up. His employment obligations did not place him outside in the storm to be injured by the neutral risk.

There is no evidence that the employing establishment had required that the employee remain on the premises that day or required any employees to leave the premises. Additionally, the evidence reflects that witnesses saw the employee outside near the guard shack at 6:00 a.m. and 7:00 a.m. on December 27, 2010. As the employing establishment's building remained open to the employee, remaining outside in blizzard-like conditions for more than one hour is an unreasonable amount of time. Thus, the Board finds that the amount of time the employee spent outdoors during the storm on December 27, 2010 when he could have remained indoors or in the guard shack mitigates against a finding that the neutral risk placed the employee outside to be injured by the neutral risk.

Accordingly, the Board finds that appellant has not met his burden of proof to establish that the employee's death on December 27, 2010 was in the performance of duty.

CONCLUSION

The Board finds that the employee's death on December 27, 2010 did not occur in the performance of duty.

[14] *See* A. Larson, *The Law of Workers' Compensation*, sections 7.00, 7.30 (2016).

ORDER

IT IS HEREBY ORDERED THAT the August 23, 2017 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 5, 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