

ISSUE

The issue is whether appellant has met her burden of proof to establish an injury on July 20, 2016 in the performance of duty as alleged.

FACTUAL HISTORY

On August 3, 2016 appellant, then a 47-year-old nurse, filed a traumatic injury claim (Form CA-1) alleging that, while in the performance of duty at 3:40 p.m. on July 20, 2016, she slipped and fell in the employing establishment's retail store, causing injury to her right knee, backside, hip, back, hand, wrist, arm, shoulder, and neck. She stopped work on July 21, 2016 and has not returned. On the reverse side of the claim form, T.K., a supervisor, contended that appellant was not in the performance of duty when injured.

In a July 21, 2016 incident report, T.K. indicated that appellant reported that on July 20, 2016 at 3:40 p.m. to 3:50 p.m., she had gone to the Veterans Canteen Store, located on the third floor of the employing establishment, she crouched down to look at a computer on the bottom row of the display rack and lost her balance. Although appellant placed her right hand out to break her fall, she hit her knees on the floor and then fell onto her buttocks. She indicated that after this incident she purchased her items, left the store and returned to her workstation. Appellant noted that she awoke the next morning and noticed pain in her right hand, wrist and arm, up across the shoulders, the right side of her neck, and right knee. T.K. indicated that appellant was sent to Occupational Health and that she had returned with work restrictions and a recommendation to see a private physician.

A copy of a July 21, 2016 document entitled "Employee Injury Report" was provided.⁴ It noted the history of injury that appellant was at the employing establishment's retail store lost her balance and fell while squatting down to look at the bottom area of the display case. An assessment that the fall appeared to have exacerbated preexisting chronic pain from a fall at work years ago was provided. A copy of appellant's July 21, 2016 restrictions and recommendations from an occupational health physician with an illegible signature were also provided.

In an August 1, 2016 report, Dr. Michael D. Cirigliano, a Board-certified internist, noted that appellant fell at work on July 20, 2016 and injured her knees, and her neck and hip on the right side. He indicated that x-ray studies showed significant cervical spine pathology and a small effusion of the right knee. No diagnosis was provided.

In an August 3, 2016 statement, D.C., operational manager of Veteran Canteen Service, related that on July 20, 2016 she was ringing up a customer at the retail store and heard a loud thump. When she turned around, she saw appellant down on the floor in front of the electronics case. D.C. recounted that appellant repeatedly stated that she was okay when asked and continued shopping. She indicated that there was nothing on the floor to cause appellant to fall.

In an August 4, 2016 statement, S.S., an employing establishment workers' compensation specialist, noted that appellant worked on the first floor in Building 1 and that the July 20, 2016 incident occurred while she was performing personal shopping at the employing establishment's canteen store located on the third floor of Building 2. She alleged that, while the alleged injury

⁴ The author of this report cannot be identified.

occurred on premises, it was not in the performance of duty as appellant continued to shop after the alleged injury and that she was not on an authorized break time at the time of incident, 3:40 p.m.

In a development letter dated August 9, 2016, OWCP informed appellant of the type of evidence needed to establish her claim. It asked her to further explain what exactly she was doing in the employer's canteen store when the injury occurred. In a separate letter of even date, OWCP asked that the employing establishment address whether appellant was assigned duties that required her to be in the employer's canteen store on July 20, 2016 or whether she was performing any activity which, by its nature, was considered reasonably incidental to the assignment. It afforded both parties 30 days to provide additional information.

In a September 6, 2016 statement, S.S., asserted that appellant was not on an official break or engaged in any official duties at the time and place of the injury. Diagrams of the area where appellant worked and the area where the alleged injury took place were provided.

By decision dated September 14, 2016, OWCP denied appellant's claim, finding that she was not in the performance of duty on July 20, 2016, as alleged. It found that she was not performing official duties and that there was no medical evidence of record which established a medical condition causally related to the work injury or event.

On October 20, 2016 appellant requested a review of the written record before an OWCP hearing representative. Additional evidence, including medical evidence, was submitted.

In an undated statement, appellant asserted that she was at work and on the employing establishment premises when she slipped and fell on July 20, 2016. In a December 19, 2016 Form CA-110 telephone record, she indicated that she was on her afternoon break at the employer's retail store because the cafeteria was closed and she went to grab something to eat. Appellant also submitted her department lunch schedule for July 20, 2016, indicating her lunch break was scheduled from 1:30 p.m. to 2:00 p.m.

By decision dated January 13, 2017, an OWCP hearing representative affirmed OWCP's September 14, 2016 decision. He found that while appellant was on break and on the employing establishment premises, she was performing a personal activity with a specific nonemployment-related objective when she bent down or crouched to look at a computer on the bottom shelf in the store and fell. Accordingly, appellant had not established that the injury occurred in the performance of her federal employment duties.

On January 9, 2018 counsel requested reconsideration and provided factual and legal arguments. He stated, as indicated in appellant's statement, that appellant's injury occurred while she was purchasing a snack in the employing establishment's multipurpose room. Counsel argued that appellant's presence in the multipurpose room, which she was authorized to use while the canteen and snack shop were under construction, fell within the Personal Comfort Doctrine and that her actions in crouching to view the items in the glass display case failed to amount to a deviation from her performance of duty.

In a five-page January 9, 2018 statement, appellant noted, in pertinent part, that on July 20, 2016 she was not able to take either her morning or lunch break and that she went to the makeshift store in the multipurpose room to purchase a snack. She indicated that all employees were permitted to utilize the store in the multipurpose room during the reconstruction of the canteen and

snack shop. Appellant described the multipurpose room, noting that large shelving acted as aisles and that the space was cluttered, with merchandise everywhere. She indicated that she picked up a soda and a snack in the back of the “store” and, as she was walking back to the front where the cash register was, she saw a glass display case and, out of curiosity, glanced at its contents. Appellant noted that there was a computer at the bottom of the display case and that, as she started to lean or squat down to look at the computer, she slipped and fell and lost her balance. She noted that she sat on the floor for what seemed like several minutes before getting up from the floor and paying for her purchase. Appellant indicated that she was embarrassed and felt “shaky.” She returned to her office and, on the way to her cubby, informed her Assistant Service Chief of the fall. Appellant also submitted medical evidence.

By decision dated April 9, 2018, OWCP denied modification of its January 13, 2017 decision. Based upon counsel’s explanation that she went to the multipurpose room “store” because the canteen and snack shop were closed for construction, it found that appellant’s presence in the store was not a deviation from duty. However, OWCP found that appellant’s intentional act of bending down to look at the computer at the very bottom shelf of the display case, losing her balance, and falling, was a deviation that was not immaterial and, thus, removed her from the performance of duty.

LEGAL PRECEDENT

An employee seeking benefits under FECA 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 timely filed within the applicable time limitation period of FECA,⁵ that an injury was sustained in the performance of duty as alleged, and that any disability or medical condition for which compensation is claimed is causally related to the employment injury.⁶ These are the essential elements of each and every compensation claim, regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.⁷

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.”⁸ 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.”⁹ 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 said to be engaged in the master’s business, at a place where he or she may reasonably be expected to be in connection with the employment, and while he or she was

⁵ *S.B.*, Docket No. 17-1779 (issued February 7, 2018); *J.P.*, 59 ECAB 178 (2007); *Joe D. Cameron*, 41 ECAB 153 (1989).

⁶ *J.M.*, Docket No. 17-0284 (issued February 7, 2018); *R.C.*, 59 ECAB 427 (2008); *James E. Chadden, Sr.*, 40 ECAB 312 (1988).

⁷ *K.M.*, Docket No. 15-1660 (issued September 16, 2016); *L.M.*, Docket No. 13-1402 (issued February 7, 2014); *Delores C. Ellyett*, 41 ECAB 992 (1990).

⁸ 5 U.S.C. § 8102(a).

⁹ *A.K.*, Docket No. 16-1133 (issued December 19, 2016); *Charles Crawford*, 40 ECAB 474, 476-77 (1989).

reasonably fulfilling the duties of his or her employment or engaged in doing something incidental thereto.”¹⁰ This alone is not sufficient 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.¹¹

Injuries arising on the premises may be approved if the employee was engaged in activity reasonably incidental to the employment, such as: (a) personal acts for the employee’s comfort, convenience, and relaxation; (b) eating meals and snacks on-premises; or (c) taking authorized coffee breaks.¹²

The Board has previously noted that in the workers’ compensation treatise, *The Law of Workers’ Compensation*, A. Larson addresses the close relationship between the deviation doctrine and personal comfort doctrine in those cases where the smallness of the deviation is immaterial.¹³ He relates that there are insubstantial deviations of momentary diversion that, if undertaken by an inside employee working under fixed time and place limitation, would be compensable under the personal comfort doctrine.¹⁴

ANALYSIS

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

The evidence establishes that appellant was injured on the employing establishment premises at approximately 3:40 p.m. on July 20, 2016. At the time of the injury, she was in the employer’s Veterans Canteen Store to get a snack, as she had not been able to take either her morning or lunch break. On her way to the cash register, appellant bent, crouched, or squatted down to look at a computer located on the lower shelf of a display case. She lost her balance and fell. The Board finds that this momentary act to look at a display case while walking to the cash register did not remove appellant from the performance of her duty as it was an inconsequential diversion.¹⁵ For these reasons, the Board concludes that she was in the performance of duty when she was injured on July 20, 2016 as alleged.

As appellant has met her burden of proof to establish the factual portion of her claim, the case is remanded to OWCP for evaluation of the medical evidence to determine causal relationship

¹⁰ See *A.S.*, Docket No. 18-1381 (issued April 8, 2019); *D.L.*, 58 ECAB 667 (2007); *Mary Keszler*, 38 ECAB 735, 739 (1987).

¹¹ *M.T.*, Docket No. 16-0927 (issued February 13, 2017); *Vitaliy Y. Matviiv*, 57 ECAB 193 (2005); *Eugene G. Chin*, 39 ECAB 598 (1988).

¹² See *A.P.*, Docket No. 18-0886 (issued November 16, 2018); *T.L.*, 59 ECAB 537 (2008); see Federal (FECA) Procedure Manual, Part 2 -- Claims, *Performance of Duty*, Chapter 2.804.4a(2) (August 1992).

¹³ See *L.K.*, Docket No. 08-0084 (issued June 23, 2009); *David P. Sawchuk*, 57 ECAB 316 (2006); *Janet M. Abner*, 53 ECAB 275 (2002), citing A. Larson, *The Law of Workers’ Compensation*, Vol. 1, § 19.63. A. Larson, *The Law of Workers’ Compensation*, Vol. 1, § 19.63.

¹⁴ *Id.*; see *A.P.*, *supra* note 12.

¹⁵ *Id.*

between appellant's medical condition(s) and the accepted employment incident. Following further development of the evidence as necessary, OWCP shall issue a *de novo* decision.

CONCLUSION

The Board finds this case is not in posture for decision.

ORDER

IT IS HEREBY ORDERED THAT the April 9, 2018 decision of the Office of Workers' Compensation Programs is set aside and this case is remanded for further proceedings consistent with this opinion.

Issued: July 5, 2019
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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