United States Department of Labor
Employees' Compensation Appeals Board

N.S., Appellant	)	
and	)	**Docket No. 19-0520**
	)	**Issued: July 17, 2019**
DEPARTMENT OF AGRICULTURE, U.S. FOREST SERVICE, Albuquerque, NM, 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
PATRICIA H. FITZGERALD, Deputy Chief Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On January 4, 2019 appellant, through counsel, filed a timely appeal from a July 12, 2018 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 met her burden of proof to establish an injury on January 9, 2018, while in the performance of duty, as alleged.

FACTUAL HISTORY

On January 25, 2018 appellant, then a 65-year-old project manager, filed a traumatic injury claim (Form CA-1) alleging that on January 9, 2018 at 3:20 p.m. she fractured her right leg and ankle when she slipped and fell on ice on the driveway at her residence.[3] On the reverse side of the claim form, the employing establishment advised that she was not in the performance of duty at the time of the injury as it "occurred at home after teleworking and after hours." It indicated that appellant's regular-duty hours were 6:00 a.m. until 2:30 p.m. Appellant's supervisor, in an addendum to the form, related that appellant "had received a work headset to use, but it was not the correct one. She had to take the headset back to UPS [United Parcel Service] and while in her driveway she slipped on ice, hitting her head and breaking her right leg and right ankle."

In a development letter dated January 31, 2018, OWCP advised appellant of the type of factual and medical evidence needed to establish her claim, including a detailed description of the January 9, 2018 employment incident and whether she was performing her job duties at the time of the alleged incident. It afforded her 30 days to provide the necessary evidence. In a development letter of even date, OWCP requested that the employing establishment address whether appellant was on premises that it owned, operated, or controlled at the time of the January 9, 2018 incident. It further requested that it provide the exact time of the incident and a specific explanation regarding whether she was performing work duties or activities reasonably incidental to her employment.

On February 8, 2018 the employing establishment indicated that it did not own or "control the area in which [appellant] suffered her accident, which is outside her official telework area." It advised that the she had worked until 3:30 p.m. on January 9, 2018 and that the incident had occurred at 3:20 p.m. The employing establishment responded "Yes" to the questions of whether appellant was engaged in official duties that necessitated her being off the premises and whether she was performing her assigned duties or an activity reasonably incidental to employment.

By decision dated March 8, 2018, OWCP denied appellant's traumatic injury claim finding that the January 9, 2018 incident had not occurred in the performance of duty. It accepted that the January 9, 2018 incident occurred as alleged, but determined that appellant was not within the course of employment as the incident had occurred more than 30 minutes after the end of her workday and outside of her residence.

Thereafter, OWCP received appellant's February 12, 2018 response to its development letter. Appellant related that she had fallen on January 9, 2018 on black ice between 3:20 and 3:40

[3] The claim form indicated that the injury occurred at 3:20 a.m., but appellant and the employing establishment subsequently clarified that the incident occurred at 3:20 p.m.

p.m. while going "to return a headset to UPS…." She advised that she had been performing her employment duties at the time of her fall.

Appellant submitted a January 8, 2018 e-mail to her supervisor. She informed her supervisor that she intended to work nine hours on January 8 and 9, 2018 to earn time to take off for an appointment on January 10, 2018. Appellant's supervisor accepted her request in a January 8, 2018 e-mail response.

In a statement dated March 20, 2018, appellant related that she had received an e-mail from a communication vendor on January 9, 2018 requesting that she "send back a headset that was purchased in error." She advised that it was office practice that "the employee returns packages to the UPS store themselves instead of calling UPS for pick up." Appellant indicated that she slipped and fell at approximately 3:20 p.m. on January 9, 2018 on her way to the UPS store to return the headset.

On March 28, 2018 appellant requested a review of the written record by a representative of OWCP's Branch of Hearings and Review.

By decision dated July 12, 2018, OWCP's hearing representative affirmed the March 8, 2018 decision. He found that the employing establishment had not sufficiently explained how appellant's activity on January 9, 2018 occurred within the scope of her work duties. The hearing representative found that the fall occurred as part of a hazard shared by all travelers and that there was no evidence that she was on a special errand or assignment of the employing establishment. He thus found that appellant had not established that she was in the performance of duty at the time of the January 9, 2018 incident.

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.[4] The phrase "sustained while in the performance of duty" in 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.[5]

In order to be covered under FECA, an injury must occur at a time when the employee may reasonably be stated to be engaged in his or her 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 reasonably fulfilling the duties of employment or engaged in doing something incidental thereto.[6]

[4] 5 U.S.C. § 8102(a).

[5] *See M.S.*, Docket No. 18-0465 (issued August 1, 2018).

[6] *A.C.*, Docket No. 17-1927 (issued April 12, 2018).

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

> "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 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."[7]

OWCP's procedures further provide that if the statements are not "sufficiently detailed or are otherwise insufficient to permit a proper determination, additional statements should be obtained from others in a position to know the circumstances."[8]

ANALYSIS

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

OWCP accepted that on January 9, 2018 appellant, during a scheduled telework shift, slipped and fell on ice on her driveway at her residence. However, it denied the claim finding that the evidence of record was insufficient to establish that she had sustained the injury while in the performance of duty.

Appellant alleged that she slipped and fell on ice on the driveway outside of her residence when she left her home to return a work headset to the UPS store, consistent with instructions from a communication vendor.

OWCP requested that the employing establishment address whether appellant was performing her assigned duties or activities reasonably incidental to her employment at the time she slipped and fell. On February 8, 2018 the employing establishment responded affirmatively that her work duties required her to be off the premises and that she was engaged in her assigned duties or an activity reasonably incidental to employment at the time of the January 9, 2018 incident.

[7] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Performance of Duty*, Chapter 2.804.5(f)(1) (August 1992); *see also M.T.*, Docket No. 17-1695 (issued May 15, 2018).

[8] Federal (FECA) Procedure Manual, *id*. at Chapter 2.804.5(f)(3).

OWCP's procedures provide coverage under FECA for off-premises workers who perform services from home for their employing establishment.[9] OWCP has provided that employees engaged in the performance of their duties during authorized telework are covered under FECA.[10] In these cases, the procedures direct OWCP to determine whether the employee was performing assigned duties, was engaged in an activity reasonably incidental to the assignment, or had deviated from the assignment and was engaged in a personal activity.[11]

The Board finds that OWCP failed to properly adjudicate whether appellant's off-premises activity was part of or incidental to her employment duties at the time of the claimed injury on January 9, 2018.[12] As noted, OWCP's procedures provide that the official superior should submit a statement regarding the details of the matter and, if such statements are not sufficiently detailed, additional statements should be obtained from others in a position to know the circumstances.[13] Appellant's supervisor generally maintained that she was in the performance of duty at the time of the alleged incident, but did not provide any detail regarding the work activities that she was performing or why her action of returning the headset on January 9, 2018 occurred during the course of employment. Consequently, this statement is insufficiently detailed to constitute proper development of the factual basis of the claim.[14]

It is well established that proceedings under FECA are not adversarial in nature and while the claimant has the burden of proof to establish entitlement to compensation, OWCP shares responsibility in the development of the evidence to see that justice is done.[15] Accordingly, the case is remanded for further development, including obtaining and analyzing evidence regarding whether appellant was reasonably fulfilling the duties of her federal employment or was engaged in activities incidental thereto on January 9, 2018.

Following this and any other development deemed necessary, OWCP shall issue a *de novo* decision on the merits of appellant's claim.

CONCLUSION

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

[9] Federal (FECA) Procedure Manual, *supra* note 7 at Chapter 2.804.5(a)(4).

[10] *Id*.

[11] Federal (FECA) Procedure Manual, *supra* note 7 at Chapter 2.804.5(b); *R.H.*, Docket No. 15-1339 (issued June 13, 2016).

[12] *R.H.*, *id*.

[13] *See supra* notes 7 and 8; *see also A.S.*, Docket No. 18-1381 (issued April 8, 2019).

[14] *See A.S.*, *id*.

[15] *See A.G.*, Docket No. 19-0153 (issued May 13, 2019).

ORDER

IT IS HEREBY ORDERED THAT the July 12, 2018 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.

Issued: July 17, 2019
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