United States Department of Labor
Employees' Compensation Appeals Board

S.V., Appellant	)	
and	)	**Docket No. 18-1299**
	)	**Issued: November 5, 2019**
DEPARTMENT OF HOMELAND SECURITY, TRANSPORTATION SECURITY ADMINISTRATION, Charlotte, NC, Employer	)	

Appearances:
Erik B. Blowers, Esq., for the appellant[1]
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
PATRICIA H. FITZGERALD, Deputy Chief Judge
JANICE B. ASKIN, Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On June 19, 2018 appellant, through counsel, filed a timely appeal from a June 6, 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.

ISSUE

The issue is whether appellant has met her burden of proof to establish an injury on January 27, 2017 while in the performance of duty.

[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.*

FACTUAL HISTORY

On February 21, 2017 appellant, then a 46-year-old master behavioral detection analyst/officer) filed a traumatic injury claim (Form CA-1) alleging that on January 27, 2017 at approximately 2:40 p.m. she sustained sprains/strains of her neck, arm, and back when she was a passenger in an employee airport shuttle bus traveling to the employee parking lot. She explained that the bus driver slammed on the brakes to avoid hitting another bus. Appellant also alleged that the bus driver was speeding and tailgating. On the reverse side of the claim form, the employing establishment noted that her regular shift was from 6:00 a.m. to 2:30 p.m. Appellant did not stop work.

In a February 3, 2017 ambulatory work/school release form, Dr. Louie A. Anquilo, a Board-certified family practitioner, provided work restrictions for appellant, including no lifting more than five pounds.

On March 6, 2017 the employing establishment controverted the claim. It argued that appellant was not in the performance of duty at the time of injury because she was "not on shift when the injury occurred, she was not inside the airport at a work location, and she was not actually in the performance of duty, screening passengers."

In development letters dated March 6, 2017, OWCP requested additional factual and medical information from both appellant and the employing establishment. It posed eight questions requesting that the employing establishment provide information relative to parking and transportation at appellant's duty station, including whether or not appellant was injured while on the employee bus #108, whether the bus and parking lots were owned, controlled, or managed by the employing establishment, and whether appellant was required to use/park in the "employee lot" or if other parking was available.

In a narrative statement dated January 27, 2017, appellant provided additional details of the incident and indicated that at approximately 2:40 p.m. on that date she was waiting for the employee bus, which was delayed, to transport her to the employee parking lot. Eventually, three employee buses arrived at the same time and she boarded the first bus #108, along with her coworkers E.P. and C.B., as well as other airport employees. After the bus passed the upper and lower level merger and the hourly parking garage and was half-way to the employee parking lots, the driver slammed on the brakes while driving on the main road. Appellant asserted that the driver was speeding and tailgating another bus. She reported that everyone on the bus was screaming and yelling at the driver asking, "Why are you speeding?" Appellant held onto a railing so that she would not fall on the floor and moved forward and backwards while still hanging onto the railing. E.P. was in the front of the bus holding onto the railing and was thrown forward after the driver suddenly braked and hit the windshield and the front inside panel of the bus. The driver did not ask anyone if they were hurt and continued to drive. Appellant exited the bus in the employee lot 1. She got into her car and started driving, but could not turn her neck to the left and experienced pain in her left arm and shoulder. Appellant returned to work on January 28, 2017, the following day, and reported the incident to her manager, E.M., who provided her with the contact information for the bus driver's supervisor, L.D. She called L.D. and he advised her to make a report, but when she followed up with him to inquire when he was available to meet, he indicated that he had nothing to do with it and that she would need to contact T.R. in Risk Management who would be in on February 2, 2017. Appellant advised L.D. that she was in pain

and needed to get to the urgent care. L.D. responded by saying that he did not know what to tell her. Appellant went to an urgent care facility on January 28, 2017.

Appellant also submitted a report dated January 28, 2017 from Dr. Anquilo diagnosing elevated blood pressure, neck muscle spasm, strain of back, and strain of neck muscle.

On March 2, 2017 the employing establishment offered appellant a limited-duty job as a modified master behavioral detection officer (BDO) effective March 3, 2017, in accordance with Dr. Anquilo's February 3, 2017 restrictions. Appellant accepted the modified job offer.

In a statement dated March 14, 2017, the employing establishment indicated: (1) appellant did suffer an injury while riding on the employee bus #108; (2) the bus and parking lot was not owned, controlled, or managed by the Transportation Security Agency (TSA), but the City of Charlotte; (3) the lot was available for all airport employees to use, including airline employees, concession employees, and TSA employees, but the general public did not have access to the parking lot; (4) appellant was not required to park in this parking lot and there was a parking lot available directly across from the terminal, within walking distance, however there was a fee to park in that lot; (5) parking spaces in the airport employee lot were not assigned by the agency; (6) the parking lot was monitored on occasion to ensure that cars in that lot had airport issued hang tags; (7) TSA uniformed employees did not pay for parking as TSA paid the airport directly for their parking hang tags; and (8) appellant was not entitled to reimbursement for travel to and from the parking lot or for parking expenses, but employees did not pay for parking expenses.

In a March 9, 2017 report, Tony Connot, a certified physician assistant, diagnosed left shoulder pain and indicated that appellant had sustained a left shoulder injury on January 27, 2017 when a bus she was riding at work to the parking lot stopped suddenly.

A magnetic resonance imaging (MRI) scan of the left shoulder dated March 14, 2017 demonstrated mild acromioclavicular (AC) degenerative joint disease (and minimal subacromial/ subdeltoid bursitis.

In a March 23, 2017 report, Dr. Scott Burbank, a Board-certified orthopedic surgeon, diagnosed left shoulder sprain. He asserted that appellant injured her left shoulder at work on January 20, 2017 while she was on a bus on her way to work. Appellant explained that she was holding the handrail and was abruptly thrown forward. She described an abduction and externally rotated force to her left shoulder. Appellant also stated that her shoulder began hurting immediately after her injury. Dr. Burbank released appellant to return to work without restrictions on March 24, 2017.

By decision dated April 10, 2017, OWCP denied appellant's claim finding that the evidence of record was insufficient to establish that her injury occurred in the performance of duty. It found that the injury occurred after appellant's work shift, on a bus which was not owned and operated by the employing establishment, and that she was not performing any part of her assigned duties at the time of the event.

On March 9, 2018 appellant, through counsel, requested reconsideration and argued that the injury occurred on the employing establishment's premises because: (1) the employee parking lot was monitored by the employing establishment; (2) appellant's parking was full subsidized by the TSA; (3) the parking area for employees at the airport was separate and apart from public parking areas and could only be accessed *via* employee parking buses from the terminal area; and

(4) the option of enrolling with the prior TSA parking contractor had been cancelled, thus, this was the only parking option available to TSA employees at the airport. Counsel also submitted the Board's decision in *M.C.*, Docket No. 09-1718 (issued March 5, 2010) in support of his arguments.

OWCP received a memorandum dated March 1, 2018 from M.A., an employee parking coordinator, addressed employee rights and responsibilities as related to parking at Charlotte Douglas International Airport (CLT) in Charlotte, North Carolina. The memorandum stated that all TSA-CLT employees were welcome to enroll in the employee parking assistance program (EPAP) and beginning April 1, 2016 screening personnel were eligible for fully-subsidized parking, including BDOs. It further noted that employees could not be enrolled in both transit benefits (Ex: bus, light rail) and the parking subsidy program (free airport parking). Nonscreening personnel were not eligible for the fully-subsidized parking benefit and the cost of employee parking at CLT Airport was $25.00 per month.

In a signed sworn affidavit dated March 8, 2018, appellant confirmed that she was employed by TSA as a behavioral detection analyst and had been so employed for nine years. She worked at the CLT Airport. Appellant stated that her work location was inside the terminal at the security checkpoints; however, she was "required" to park her vehicle in an employee parking lot and thereafter take a city-owned employee bus to the terminal. Beginning in 2016 TSA began paying the cost for her parking, access to the parking lot was controlled by key card, and the TSA monitored employee use to prevent unauthorized access during nonwork hours. The employing establishment provided the parking at no cost to employees. The general public did not have access to the parking garage, as it was solely for use by airport employees only. The parking location was over two miles from the terminal and employees were required to take a city bus to and from the location. Appellant stated that there was no alternate parking available for employees other than this lot and it was on the bus en route to the employee parking lot that she sustained her injury on January 27, 2017.

Counsel further submitted a copy of an employing establishment PowerPoint presentation entitled "Fully Subsidized Parking Implementation (EPAP Airports)" that provided fully subsidized parking for screening personnel, including transportation security officers (TSO) and behavior detection officers. The program's start date was targeted for April 1, 2016. Fully subsidized parking was for designated lots only.

By decision dated June 6, 2018, OWCP denied modification of its April 10, 2017 decision, finding that appellant was no longer performing her federal duties at the time of injury, the accident happened when the shuttle bus was en route to a parking lot, which was not owned, operated, or maintained by the Federal Government, the adjacent area was owned and controlled by the City of Charlotte, and all the employees of the airport (including nonfederal employees) were allowed to park there. It concluded that because neither the parking lot, nor the shuttle bus, was owned, operated, or maintained by the employing establishment for the use of its employees, and she had another option for parking, appellant was not injured on the employing establishment's premises or an extension of such premises and she was not performing employment-related work at the time of the incident.

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,[3] 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.[4] 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.[5]

FECA provides compensation for the disability of an employee resulting from personal injury sustained while in the performance of duty.[6] The phrase sustained while in the performance of duty is regarded as the equivalent of the coverage formula commonly found in workers' compensation laws, namely, arising out of and in the course of performance.[7] In the course of employment relates to the elements of time, place, and work activity. 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 employing establishment business, at a place where he or she may reasonably be expected to be in connection with his or her employment, and while he or she was reasonably fulfilling the duties of his or her employment or engaged in doing something incidental thereto.[8]

As to an employee having fixed hours and a fixed place of work, an injury occurring on the premises while the employee is going to and from work before or after working hours or at lunch time is compensable, but if the injury occurs off the premises, it is not compensable, subject to certain exceptions. One of these is the proximity exception to the premises rule, which allows constructive extension of the premises to those hazardous conditions which are proximate to the premises and may, therefore, be considered as hazards of the employment.[9] Underlying the proximity exception is the principle that course of employment should extend to an injury that occurred at a point where the employee was within the range of dangers associated with the employment.[10] The most common ground of extension is that the off-premises point at which the injury occurred lies on the only route, or at least on the normal route, which employees must traverse to reach the premises, and that, therefore, the special hazards of that route become the hazards of the employment.[11] This exception contains two components. The first is the presence

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

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

[5] *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).

[6] 5 U.S.C. § 8102(a); *J.K.*, Docket No. 17-0756 (issued July 11, 2018).

[7] This construction makes the statute actively effective in those situations generally recognized as properly within the scope of workers compensation law. *J.K., id.*; *Bernard D. Blum,* 1 ECAB 1 (1947).

[8] *See J.K., supra* note 6; *Eugene G. Chin*, 39 ECAB 598 (1988); *Clayton Varner*, 37 ECAB 248 (1985); *Thelma B. Barenkamp (Joseph L.Barenkamp),* 5 ECAB 228 (1952).

[9] *K.D.*, Docket No. 18-0617 (issued February 13, 2019); *D.K.*, Docket No. 11-1029 (issued February 1, 2012).

[10] *See J.K., supra* note 6; *Jimmie Brooks*, 54 ECAB 248 (2002); *Syed M. Jawaid*, 49 ECAB 627 (1998).

[11] Arthur & Lex Larson, *The Law of Workers'* Compensation § 13.01(3) (2006). *See also J.K., supra* note 6; *R.O.*, Docket No. 08-2088 (issued May 18, 2009).

of a special hazard at the particular off-premises point. The second is the close association of the access route with the premises, so far as going and coming are concerned.[12]

ANALYSIS

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

In determining whether a bus should be considered part of the employing establishment's premises, the Board must first consider factors to determine whether the parking facility was under sufficient control by the employing establishment. Factors to be considered include whether the employing establishment contracted for its exclusive use by its employees, whether spaces were assigned by the employing establishment, whether the area was checked to see that no unauthorized cars were parked in the lot, whether parking was provided without cost to the employees, whether the public was permitted to use the lot, and whether other parking was available to the employees. Secondly, the Board must determine whether the shuttle bus is to be considered part of the premises of the employing establishment.

OWCP in a March 6, 2017 development letter, requested additional factual information from the employing establishment with regard to whether appellant was in the performance of duty when injured on January 27, 2017. The employing establishment, however, provided only cursory responses to the questions posed. For example, it contended that appellant was able to park in a lot closer to the airport facility; however, it did not elaborate on location, use, and TSA employee access to that lot at the time of appellant's injury. Conversely, appellant maintained that the satellite lot was her only available parking option. As well, the record contains references to a number of parking lots that were available for employees; however, no specific information was provided as to their location, usage, and TSA employee access. It therefore remains unclear as to whether the satellite parking lot that appellant was traveling to at the time of the injury was the only place that appellant was permitted to park at the time of her injury. The employing establishment also failed to elaborate on the location, route, and criteria for the use of shuttle bus #108.

OWCP's procedures provide that it should obtain relevant information, including relevant diagrams, from an official superior if it requires clarification before determining whether the employee was on the premises.[13] As such, the Board finds that the case record is incomplete.

Proceedings under FECA are not adversarial in nature, nor is OWCP a disinterested arbiter. While appellant has the burden of proof 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. The Board finds that OWCP did not sufficiently develop the evidence regarding whether appellant was on the premises of the employing establishment at the time of injury.

On remand OWCP should obtain additional information from the employing establishment. The deficiencies in the evidence of record, as noted herein, should be addressed so

[12] *Id.* at § 13.01(3)(b).

[13] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Performance of Duty*, Chapter 2.804.4(f) and (g) (August 1992); *see also L.P.*, Docket No. 17-1031 (issued January 5, 2018).

that an informed determination can be made regarding whether appellant was in the performance of duty at the time of her injury. If so, OWCP should adjudicate whether the factual and medical evidence establishes that she sustained an employment injury as alleged. Following this and other such development as deemed necessary, OWCP shall 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 June 6, 2018 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further action consistent with this decision.

Issued: November 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