

**United States Department of Labor
Employees' Compensation Appeals Board**

D.C., Appellant)	
)	
and)	Docket No. 19-0846
)	Issued: October 17, 2019
U.S. POSTAL SERVICE, POST OFFICE,)	
Charles City, IA, Employer)	
)	

Appearances:
Appellant, pro se
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
JANICE B. ASKIN, Judge

JURISDICTION

On March 11, 2019 appellant filed a timely appeal from a December 27, 2018 merit decision of the Office of Workers' Compensation Programs (OWCP).¹ Pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.³

¹ The Board notes that, during the pendency of this appeal, OWCP issued a March 22, 2019 decision which denied an oral hearing before a representative of OWCP's Branch of Hearings and Review concerning the December 27, 2018 merit decision currently on appeal. OWCP's March 22, 2019 decision is null and void as the Board and OWCP may not simultaneously exercise jurisdiction over the same issue(s) in a case on appeal. 20 C.F.R. §§ 501.2(c)(3), 10.626; *see e.g., M.C.*, Docket No. 18-1278 (issued March 7, 2019); *Lawrence Sherman*, 55 ECAB 359, 360 n.4 (2004).

² 5 U.S.C. § 8101 *et seq.*

³ The Board notes that, following the December 27, 2018 decision, OWCP received additional evidence. However, the Board's *Rules of Procedure* provides: The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the

ISSUE

The issue is whether appellant has met his burden of proof to establish a left leg injury on November 11, 2018 in the performance of duty, as alleged.

FACTUAL HISTORY

On November 11, 2018 appellant, then a 46-year-old rural carrier associate, filed a traumatic injury claim (Form CA-1) alleging that on that date he stepped in a pothole in the parking lot and heard his leg pop while in the performance of duty. He alleged that he sustained a left calf tear. On the reverse side of the Form CA-1, appellant's supervisor, S.K., indicated that the injury was not sustained in the performance of duty because he was in the parking lot while coming into work. In regards to appellant's work schedule, S.K. indicated that appellant worked "as needed," and therefore did not have a regular, fixed schedule. The Form CA-1 indicated that appellant stopped work on the date of the injury and had not returned.

In a November 11, 2018 attending physician's report, an unknown healthcare provider indicated that morning at 8:00 a.m., appellant stepped his left foot into a pothole and heard a pop. The provider diagnosed a torn left calf muscle.

In a development letter dated November 16, 2018, OWCP acknowledged receipt of appellant's claim and informed him that additional evidence was needed in support of his claim. It advised him of the type of factual and medical evidence needed to establish his claim and provided a questionnaire for his completion. The questionnaire inquired as to the ownership of the parking lot, whether appellant was required to park in the parking lot, whether he was required to pay for parking, and his scheduled duty hours. In a separate letter of even date, OWCP also requested additional information from the employing establishment, and warned that appellant's factual allegations would be taken as factual if it failed to respond. It afforded both he and the employing establishment 30 days to respond.

Subsequent to the development letter, OWCP received an emergency room report from Dr. Iftexhar A. Awan, an emergency medicine specialist, dated November 11, 2018, which noted that appellant presented for an injury to his left calf which occurred that morning at around 8:00 a.m. Dr. Awan reported that the injury occurred when his left foot went into a pothole causing the stretching of the calf, and he heard a pop in his left leg followed by swelling and pain in the left calf.

In a November 16, 2018 duty status report (Form CA-17) signed by Dr. Anthony G. Slinger, a chiropractor, diagnosed a severe sprain/strain of the left calf musculature, with a possible tear, and restricted appellant from returning to work.

In a November 16, 2018 attending physician's report (Form CA-20), Dr. Slinger noted that appellant stepped into a pothole by accident in the parking lot while walking into work. He

Board for the first time on appeal. 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

diagnosed a severe strain/sprain of the left gastrocnemius and soleus. Dr. Slinger indicated that appellant was totally disabled from November 11, 2018 until a date yet to be determined.

By decision dated December 27, 2018, OWCP denied the claim, finding that appellant had not established that the injury occurred in the performance of duty, as alleged. It noted that he had not responded with evidence pertinent to that requested in the development letter, and that he failed to respond to the development letter's attached questionnaire.

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,⁴ 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.⁵ 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.⁶

To determine whether a federal employee has sustained a traumatic injury in the performance of duty, it first must be determined whether fact of injury has been established. Fact of injury consists of two components that must be considered in conjunction with one another. The first component is whether the employee actually experienced the employment incident that allegedly occurred.⁷ The second component is whether the employment incident caused a personal injury.⁸

FECA provides compensation for the disability of an employee resulting from personal injury sustained while in the performance of duty.⁹ 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 employment.¹⁰ In the course of employment pertains to the work setting, locale, and time of injury, whereas arising out of the

⁴ *S.B.*, Docket No. 17-1779 (issued February 7, 2018); *J.P.*, 59 ECAB 178 (2007); *Joe D. Cameron*, 41 ECAB 153 (1989).

⁵ *J.M.*, Docket No. 17-0284 (issued February 7, 2018); *R.C.*, 59 ECAB 427 (2008); *James E. Chadden, Sr.*, 40 ECAB 312 (1988).

⁶ *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).

⁷ *See G.H.*, Docket No. 18-0989 (issued January 3, 2019).

⁸ *Id.*

⁹ 5 U.S.C. § 8102(a); *R.K.*, Docket No. 18-1269 (issued February 15, 2019); *J.K.*, Docket No. 17-0756 (issued July 11, 2018).

¹⁰ 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).

employment encompasses not only the work setting, but also the requirement that an employment factor caused the injury.¹¹

Regarding what constitutes the premises of an employing establishment, the Board has held:

“The term premises as it is generally used in [workers’] compensation law, is not synonymous with property. The former does not depend on ownership, nor is it necessarily coextensive with the latter. In some cases premises may include all the property owned by the employing establishment; in other cases even though the employing establishment does not have ownership and control of the place where the injury occurred the place is nevertheless considered part of the premises.”¹²

The Board has also held that factors which determine whether a parking area used by employees may be considered a part of the employing establishment’s premises include whether the employing establishment contracted for the exclusive use by its employees of the parking area, whether parking spaces on the lot were assigned by the employing establishment to its employees, whether the parking areas were 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. Mere use of a parking facility, alone, is insufficient to bring the parking lot within the premises of the employing establishment. The premises doctrine is applied to those cases where it is affirmatively demonstrated that the employing establishment owned, maintained, or controlled the parking facility, used the facility with the owner’s special permission, or provided parking for its employees.¹³

ANALYSIS

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

In determining whether the parking lot should be considered part of the employing establishment’s premises, the Board must consider such factors as whether the employing establishment contracted for its exclusive use by its employees, whether the employing establishment assigned spaces, whether the area was checked to see that no unauthorized cars were

¹¹ *L.P.*, Docket No. 17-1031 (issued January 5, 2018).

¹² *Id.*

¹³ *Id.*; Federal (FECA) Procedure Manual, Part 2 -- Claims, *Performance of Duty*, Chapter 2.804.4(f) (August 1992). See also Chapter 2.804.4(b). If the employee has a fixed place of work, the claims examiner (CE) must ascertain whether the employee was on the premises when the injury occurred. The answers to the appropriate sections of CA-1, CA-2, and CA-6 forms contain information on this point. If clarification is needed, it should be secured from the official superior in the form of a statement which describes the boundaries of the premises and shows whether the employee was within those boundaries when the injury occurred. Where indicated, the clarification should include a diagram showing the boundaries of the industrial premises and the location of the injury site in relation to the premises. See also *D.D.*, Docket No. 15-0837 (issued July 10, 2015).

parked in the lot, whether the public was permitted to use the lot, whether parking was provided without cost to the employees, and whether employees were reimbursed for parking expenses.¹⁴

While S.K. stated on the CA-1 form that appellant was not within the performance of duty because he was in the parking lot, he did not provide information as to whether the employing establishment owned, reserved, or otherwise required employees to use the parking lot at issue. OWCP's procedures provide that it should obtain relevant information from an official superior if it requires clarification before determining whether or not the employee was on the premises.¹⁵ Its procedures further provide that it should request that an official superior relate whether the parking facilities are owned, controlled, or managed by the employing establishment.¹⁶ OWCP, however, failed to obtain a statement from the employing establishment in accordance with its procedures prior to finding that appellant had not shown that he was on the premises of the employing establishment when injured.¹⁷

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.¹⁸ The Board finds that OWCP did insufficiently develop the evidence regarding whether he was on the premises of the employing establishment at the time of injury.¹⁹

On remand OWCP should obtain information from the employing establishment needed to determine whether the parking lot was owned, managed, or controlled by the employing establishment and thus part of the premises. It should then determine whether appellant was in the performance of duty and under any control by the employing establishment at the time of the incident and, if so, adjudicate whether the factual and medical evidence establishes that he sustained an injury in the performance of duty as alleged. Following such further development as deemed necessary, OWCP shall issue a *de novo* decision.²⁰

¹⁴ *Id.*

¹⁵ *See supra* note 13.

¹⁶ *Id.*

¹⁷ *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Initial Development of Claims*, Chapter 2.800.5(d)(1) (If an employing agency fails to respond to a request for comments on the claimant's allegations, the CE may usually accept the claimant's statements as factual. However, acceptance of the claimant's statements as factual is not automatic in the absence of a reply from the employing establishment, especially in instances where performance of duty is questionable. The Board has consistently held that allegations unsupported by probative evidence are not established).

¹⁸ *R.K.*, *supra* note 9; *supra* note 11.

¹⁹ *See id.*; *see also supra* note 17.

²⁰ *Supra* note 18.

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the December 27, 2018 decision of the Office of Workers' Compensation Programs is set aside, and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: October 17, 2019
Washington, DC

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

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board