United States Department of Labor
Employees' Compensation Appeals Board

J.F., Appellant	)	
and	)	**Docket No. 19-0980**
	)	**Issued: December 23, 2020**
DEPARTMENT OF HOMELAND SECURITY, FEDERAL AIR MARSHAL SERVICE, El Segundo, CA, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
CHRISTOPHER J. GODFREY, Deputy Chief Judge
PATRICIA H. FITZGERALD, Alternate Judge

JURISDICTION

On April 2, 2019 appellant filed a timely appeal from a February 13, 2019 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[1] (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 his burden of proof to establish a traumatic injury in the performance of duty on April 29, 2018, as alleged.

FACTUAL HISTORY

On Sunday, April 29, 2018 appellant, then a 39-year-old federal air marshal, filed a traumatic injury claim (Form CA-1) alleging that he sustained a back and leg injury when he was

[1] 5 U.S.C. § 8101 *et seq.*

involved in a motor vehicle accident (MVA) at 12:15 p.m. that day while in the performance of duty. He indicated that the accident occurred while he was in travel status, in route from his home in San Bernardino, California to Los Angeles International Airport (LAX) where he was to begin a mission. On the reverse side of the claim form J.L., an employing establishment supervisor, controverted the claim. He noted that appellant's usual duty station was on Walnut Avenue in El Segundo, California, and his regular work hours were 2:00 p.m. to 10:00 p.m., Sunday through Thursday. J.L. contended that appellant was off-duty at the time of the MVA on April 29, 2018 as he was to report to work at 1:50 p.m., but was injured at 12:15 p.m. He further asserted that the injury occurred off the employing establishment's premises and that appellant was not involved in official "off premises" duties.

A California Highway Patrol collision information form noted a date of April 29, 2018 and a time of 12:40 p.m., provided no information other than how to obtain a copy of the collision report.

Appellant also submitted an undated statement in which he maintained that, at the time of the MVA, he was "on official duty status, traveling to my location" at LAX to fly a domestic mission. He asserted that he was on official travel status at the time of the MVA, and that his official duty at the airport started at 11:05 a.m. Appellant indicated that he was on the most direct route from his residence to his duty location, and he attached a copy of a map with directions from San Bernardino, California to LAX. He noted that he was not in a government-owned car, but that the expenses of his travel were reimbursable. Appellant also submitted a copy of an employing establishment voucher for travel from October 1, 2017 to September 30, 2018.

In a development letter dated May 16, 2018, OWCP informed appellant that the evidence submitted was insufficient to establish his claim. It advised him of the type of factual and medical evidence needed, and provided a questionnaire for his completion. OWCP requested further information to determine whether appellant was in the performance of duty at the time of his injury. It afforded her 30 days to submit the necessary evidence.

In a separate May 16, 2018 letter, OWCP asked the employing establishment to respond to appellant's claim.

An April 29, 2018 California Highway Patrol collision report indicated that a rear-end traffic collision occurred on I-605 Southbound, 75 feet north of Telegraph Road at 12:40 p.m. on that date. It noted that the two cars involved sustained minor damage and were driven away by their respective owners. The report noted that the weather was clear, that it was daylight and dry with no unusual conditions, that no pedestrians were involved, that alcohol was not a factor in the collision and that appellant complained of back pain.

Medical evidence submitted included an April 29, 2018 work activity status report in which Dr. Doug Plata, who practices family medicine, diagnosed strain of the muscle, fascia, and tendon at neck level, contusion of the right thigh, and strain of the muscle and tendon of the thorax. Dr. Plata advised that appellant could perform sedentary work with restrictions. In a May 1, 2017 report, Angelica Ross, a physician assistant, provided examination findings and diagnosed cervical and thoracic strains and left thigh contusion. In work activity status reports dated May 4 to 11,

2018, Dr. William Downs, who practices occupational medicine, diagnosed lumbar radiculopathy and strain of muscle and tendon and back. He advised that appellant could not work. A May 17, 2018 magnetic resonance imaging (MRI) scan of the lumbar spine demonstrated stenosis secondary to a disc herniation at L4-5.

In a May 24, 2018 response to OWCP's development questionnaire, appellant indicated that he had reported the incident to J.L. at the Los Angeles field office, and to L.G., the on-duty supervisor. He described immediate symptoms of soreness and tenderness, and noted that he had been treated by urgent care that evening and was put on restrictions and prescribed physical therapy. Appellant indicated that he did not have an injury to his neck or back prior to the MVA. He reported that, at the time of the MVA, he was in route to official duty at LAX to go on temporary duty for the government. Appellant reported that his last scheduled day of work at the field office was April 26, 2018 and that he was on the most direct route of travel when the MVA occurred.

In correspondence dated June 5, 2018, Z.N., a senior human resources specialist at the employing establishment, controverted appellant's claim. She maintained that appellant was not in the performance of duty at the time of the MVA because it occurred while he was commuting to his place of work in his personally-owned vehicle. Z.N. reported that on April 29, 2018 appellant was scheduled on a domestic overnight trip and was to report directly to LAX at 1:50 p.m. She referenced an employing establishment policy, identified as OLE 3404, that governed when a mission commenced, noting that it provided that a federal air marshal's "mission day began upon arrival at the temporary-duty location," which in appellant's case was LAX, and that it would begin when the air marshal was "physically inside the airport terminal or, by the direction of a superior, the marshal was to report to a different location for a specific mission." Z.N. indicated that J.L., appellant's supervisor, had advised that he was to report to work at 1:50 p.m. and, therefore, appellant was off duty when the MVA occurred. She noted that, based on the accident report, he was injured at 12:15 p.m., off of the employing establishment premises, and at that time he was not involved in "off premises" official duties. Z.N. maintained that this case involved a routine commute to LAX for a mission assignment, reiterating the policy that, in the case of domestic missions, the start of duty began upon physical arrival inside the airport terminal. She maintained that, at the time of the MVA, appellant was not reasonably thought to be engaged in his master's business as he was not on official duty when it occurred, he was off premises, was not driving a government-owned vehicle, and was to arrive at LAX airport at 1:50 p.m. Z.N. continued that it could not be asserted that appellant was reasonably fulfilling the duties of the employment as his master's business would not have started until he physically arrived inside LAX that day.

On June 1, 2018 Dr. Kamran Aflatoon, an osteopath specializing in orthopedic surgery, noted a history that appellant was in an MVA and had complaints of radiating low back pain. He reviewed the MRI scan, provided examination findings, and diagnosed lumbar disc bulge, lumbago, and lumbar spine sprain and strain. Appellant was also treated by Dr. Donna Cloughen, a chiropractor, from June 5 to 13, 2018. Dr. Cloughen diagnosed MVA, lumbar disc bulge and lumbar stenosis.

By decision dated July 2, 2018, OWCP denied the claim finding that appellant was not in the performance of duty when injured on April 29, 2018.

On November 26, 2018 appellant requested reconsideration. In an attached statement, he asserted that he was in the performance of duty when injured on April 29, 2018 and he referenced by attachment a prior accepted claim regarding a similarly situated employee.

In support of his reconsideration request, appellant submitted evidence previously of record and reports from Dr. Cloughen dated April 29 to June 26, 2018 who reiterated her diagnoses. In a report dated June 29, 2018, Dr. Aflatoon noted seeing appellant in follow up and recommended that his care be transferred to a physiatrist. In an October 4, 2018 report, Dr. James Brown, a family physician, noted treating appellant for 15 years. He reported the history of the April 29, 2018 MVA and diagnosed lumbar intervertebral disc displacement, and strain of the muscle, fascia, and tendon of the lower back. Dr. Brown opined with reasonable medical certainty that appellant had not been able to perform the essential elements of his job since April 29, 2018 and that he was partially disabled from work.

By a decision dated February 13, 2019, OWCP denied modification of the July 2, 2018 decision.

LEGAL PRECEDENT

An employee seeking benefits under FECA[2] 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]

In providing for a compensation program for federal employees, Congress did not contemplate an insurance program against any and every injury, illness, or mishap that might befall an employee contemporaneous or coincidental with his or her employment. Liability does not attach merely upon the existence of an employee-employer relation. Instead, Congress provided for the payment of compensation for disability or death of an employee resulting from personal injury sustained while in the performance of duty.[6]

[2] *Supra* note 1.

[3] *J.P.*, Docket No. 19-0129 (issued April 26, 2019); *S.B.*, Docket No. 17-1779 (issued February 7, 2018); *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] *R.R.*, Docket No. 19-0048 (issued April 25, 2019); *L.M.*, Docket No. 13-1402 (issued February 7, 2014); *Delores C. Ellyett*, 41 ECAB 992 (1990).

[6] *See* 5 U.S.C. § 8102(a); *see J.N.*, Docket No. 19-0045 (issued June 3, 2019).

The Board has interpreted the phrase while in the performance of duty to be the equivalent of the commonly found requisite in workers' compensation law of arising out of and in the course of employment. The phrase "in the course of employment" encompasses the work setting, the locale, and time of injury. The phrase "arising out of the employment" encompasses not only the work setting, but also a causal concept with the requirement being that an employment factor caused the injury. In addressing this issue, the Board has held that in the compensation field, to occur in the course of employment, in general, an injury must occur: (1) at a time when the employee may reasonably be said to be engaged in his or her master's business; (2) at a place where he or she may reasonably be expected to be in connection with the employment; and (3) while he or she was reasonably fulfilling the duties of his or her employment or engaged in doing something incidental thereto.[7] In deciding whether an injury is covered by FECA, the test is whether, under all the circumstances, a causal relationship exists between the employment itself, or the conditions under which it is required to be performed and the resultant injury.[8]

The Board has recognized that, as a general rule, off-premises injuries sustained by employees having fixed hours and places of work while going to or coming from work, are not compensable, as they do not arise out of and in the course of employment. Such injuries are merely the ordinary, nonemployment hazards of the journey itself, which are shared by all travelers. There are recognized exceptions which are dependent upon the particular facts relative to each claim: (1) where the employment requires the employee to travel on the highways; (2) where the employing establishment contracts to and does furnish transportation to and from work; (3) where the employee is subject to emergency calls, as in the case of firefighters; and (4) where the employee uses the highway to do something incidental to his employment with the knowledge and approval of the employing establishment.[9]

The Board has also held that an exception to the general going and coming rule is made for travel from home when the employee is to perform a special errand. In such a situation, the employing establishment is deemed to have agreed, expressly or impliedly, that the employment service should begin when the employee leaves home to perform the special errand. Ordinarily, cases falling within this exception involve travel which differs in time, or route, or because of an intermediate stop, from the trip which is normally taken between home and work. In such a case, the hazard encountered during the trip may differ from that involved in normally going to and returning from work. The essence of the exception, however, is not found in the fact that a greater or different hazard is encountered, but in the agreement to undertake a special task. For this reason, coverage is afforded from the time the employee leaves home, even though in time and route the journey may be, in part, identical to that normally followed in going to work.[10]

[7] *K.G.*, Docket No. 18-1725 (issued May 15, 2019); *Kathryn S. Graham Wilburn*, 49 ECAB 458 (1998).

[8] *J.C.*, Docket No. 17-0095 (issued November 3, 2017); *Mark Love*, 52 ECAB 490 (2001).

[9] *J.H.*, Docket No. 10-0185 (issued July 19, 2010); *Connie J. Higgins* (*Charles H. Higgins*), 53 ECAB 451 (2002); *Melvin Silver*, 45 ECAB 677 (1994).

[10] *M.H.*, Docket No. 10-1337 (issued April 19, 2011); *Elmer L. Cook*, 11 ECAB 163 (1964).

In addressing the going and coming rule, Larson in workers' compensation treatise has explained, "when the employee is paid an identifiable amount as compensation for time spent in a going or coming trip, the trip is within the course of employment."[11] Regarding payment for expense of travel, Larson further provides that in the majority of cases involving a deliberate and substantial payment for the expense of travel, or the provision of an automobile under the employee's control, the journey is held to be in the course of employment.[12]

OWCP's procedures indicate that for injuries sustained while on travel status, the record must contain evidence showing when and where the employee last performed official duty; the distance between the place of injury and the place where official duty was last performed; between what points the employee was traveling when injured; the purpose of the trip; when and where the employee was next expected to perform official duty; whether the injury occurred on the direct or most usually traveled route between the place of last official duty and the place where the employee was expected to next perform official duty and, if not, the nature and extent of the deviation should be given with a full explanation of the reason for such deviation; whether at the time of the injury the employee was riding in or driving a Government-owned vehicle; and whether the employee's travel expenses were reimbursable. In injury cases, this information should be supplied by the injured employee, with the official superior confirming or refuting the employee's allegations.[13] The claims examiner should request a copy of the employee's travel authorization, and a map or diagram showing the location of the place where official duty was last performed, the place where the employee was next expected to perform official duty, the shortest or most usually traveled route between these points, and the place where the accident occurred. For workers having a fixed place of employment, who are injured while on an errand or special mission, the claims examiner will obtain the same information as for workers in travel status.[14]

ANALYSIS

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

In controverting the claim, Z.N., an employing establishment workers' compensation manager, noted that appellant was driving his personal vehicle at the time of the accident and was to report for duty at LAX at 1:50 p.m., and that the accident occurred at 12:15 p.m. She reported that J.L., appellant's supervisor, agreed that appellant was not in the performance of duty. Z.N. maintained that employing establishment policies supported that, during domestic missions, which was appellant's scheduled duty that day, an air marshal's duty began upon the marshal's physical arrival inside the airport which, in this case would have been 1:50 p.m. at LAX.

While the record indicates that appellant had fixed duty hours from 2:00 p.m. to 10:00 p.m., Sunday through Thursday, the Board finds further development of the record is needed to

[11] A. Larson, *The Law of Workers' Compensation* § 14.06(1) (2008).

[12] *Id*.

[13] *Id*.

[14] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Performance of Duty*, Chapter 2.804.5(d)(e) (August 1992).

determine if appellant was in the performance of duty when the MVA occurred at 12:15 p.m. on Sunday, April 29, 2018.

The Board has recognized that FECA covers an employee 24 hours a day when the employee is on travel status and engaged in activities essential or incidental to such duties.[15] However, as the Board noted in the case *M.H.*,[16] air marshals are not in travel status while commuting to work.

Although Z.N. cited to employing establishment policies regarding an air marshal's mission day and duties, a copy of these policies are not found in the record before the Board. Of further note, the record indicates that appellant was to report to LAX at 1:50 p.m. on April 29, 2018 to begin his duty. This was outside his regular duty hours that began at 2:00 p.m. The Board finds that the record is unclear of the factual chronology on the date of incident as it is unclear whether appellant was to arrive at LAX at 1:50 p.m. or board a domestic flight at that time, thus necessitating an earlier arrival time.

The Board also notes that the record does not contain evidence regarding reimbursement policies of the employing establishment regarding mileage or any other expenses of appellant's air marshal duties during his travel to the airport.[17]

The Board notes that OWCP procedures require that in cases of injured air marshals, certain documentary evidence must be obtained.[18] Herein, although Z.N. provided a statement, she did not provide a copy of employing establishment policies or other information needed for a full and fair adjudication of this case.

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.[19] The Board finds that OWCP insufficiently developed the evidence regarding whether appellant was in the performance of duty at the time of injury on April 29, 2018.[20]

[15] *See A.W.*, 59 ECAB 593 (2008); *Ann P. Drennan*, 47 ECAB 750 (1996); *Richard Michael Landry*, 39 ECAB 232 (1987).

[16] *See M.H.*, *supra* note 10.

[17] *See Jon Luis Van Alstine*, 56 ECAB 136 (2004) (The Board found it readily apparent that monetary reimbursement from the employing establishment was not for "all or substantially all" of the cost of his travel to work where the employee was working a detail at an alternative work site and was reimbursed at 31 cents a mile for the 13-mile difference between the work sites.)

[18] Federal (FECA) Procedure Manual, *supra* note 14 at Chapter 2.804.7 (August 1992).

[19] *T.T.*, Docket No. 20-0383 (issued August 3, 2020).

[20] *D.C.*, Docket No. 19-0846 (issued October 17, 2019); Federal (FECA) Procedure Manual, *supra* note 14 at Chapter 2.800.5(d)(1); *see also* Chapter 2.804.4(f).

As OWCP failed to request all the information as required under its procedures, the case must be remanded for further development of the claim.[21] On remand OWCP shall obtain clarifying information as to the employing establishment policies and appellant's duties on the date of incident including development of whether he was in travel status or on a special mission from his regularly assigned work on the date of incident. It shall further inquire as to whether he was compensated for mileage or was to be reimbursed for mileage or any of his other expenses related to his mission on April 29, 2018. Further OWCP shall determine the basis for why appellant was instructed to report at 1:50 p.m. on the date of incident.

Following this and other such further development as deemed necessary, OWCP shall issue a *de novo* decision.[22]

CONCLUSION

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

[21] *See S.T.*, Docket No. 20-0588 (issued September 16, 2020).

[22] *Id*.

ORDER

IT IS HEREBY ORDERED THAT the February 13, 2019 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded to OWCP for proceedings consistent with this opinion of the Board.

Issued: December 23, 2020
Washington, DC

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

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

Patricia H. Fitzgerald, Alternate Judge
Employees' Compensation Appeals Board