United States Department of Labor
Employees' Compensation Appeals Board

R.E., Appellant	)	
and	)	**Docket No. 18-0515**
	)	**Issued: February 18, 2020**
DEPARTMENT OF THE NAVY, MARINE CORPS, Indianapolis, IN, Employer	)	

Appearances:
Andrew Douglas, 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
JANICE B. ASKIN, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On January 16, 2018 appellant, through counsel, filed a timely appeal from an August 10, 2017 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 his burden of proof to establish an injury in the performance of duty on August 26, 2015, as alleged.

FACTUAL HISTORY

On August 27, 2015 appellant, then a 53-year-old information technology specialist, filed a traumatic injury claim (Form CA-1) alleging that he sustained a fractured right pelvis and fractured left shoulder joint on August 26, 2015 when struck by a car while in the performance of duty. He stated that he was injured at 6:30 a.m. as a result of a hit and run, which occurred in the crosswalk of Pennsylvania and Market Streets while walking from a parking garage to work. Appellant's work schedule was Monday through Friday from 6:30 a.m. to 4:30 p.m.

In a September 15, 2015 development letter, OWCP advised appellant of the deficiencies in his claim and instructed him as to the evidence necessary to support his claim. It afforded him 30 days to respond.

In response appellant submitted a September 21, 2015 work capacity evaluation (Form OWCP-5c) from Dr. Greg Gaski, a Board-certified orthopedic surgeon, who diagnosed a left-sided four-part proximal humerus fracture and advised that appellant was disabled from work until November 2, 2015 with restrictions on sitting, walking with an assistive device for the bilateral lower extremities, and no weight-bearing or reaching above the shoulder with the left upper extremity.[3]

Appellant also submitted an August 26, 2015 emergency medical services report indicating that he had been struck by a vehicle at an unknown rate of speed and transported to the hospital for left shoulder and right hip pain.

In a September 22, 2015 narrative statement, appellant indicated that the parking facility he was walking from was not owned, controlled, or managed by the employing establishment, but it issued him a parking pass, assigned him a parking spot, and paid for his parking.

By decision dated October 19, 2015, OWCP accepted that the August 26, 2015 employment incident occurred as alleged, resulted in a diagnosed condition, and occurred in the performance of duty, but denied the claim finding that the medical evidence of record failed to establish a causal relationship between appellant's diagnosed conditions and the August 26, 2015 employment incident.

On April 4, 2016 appellant, through counsel, requested reconsideration.

In August 26 and September 14, 2015 reports, Dr. Jared L. Gayken, a Board-certified radiologist, noted his review of x-ray and computerized tomography (CT) scans and noted findings provided to Dr. Gaski. In a March 15, 2016 report, Dr. Gaski diagnosed multiple pelvic fractures

[3] On September 16, 2015 Dr. Gaski had released appellant to limited-duty work on September 21, 2015 starting with half-a-day at home at a desk job for one month.

and a four-part left proximal humerus fracture of appellant's shoulder. He opined that appellant's fractures were a direct result of the vehicle hitting him and he recommended nonoperative management of his pelvis and operative treatment of his left arm. Counsel also submitted an operative report from Dr. Gaski who performed an open reduction and internal fixation of appellant's left proximate humerus fracture on August 27, 2015.

Appellant submitted Dr. Gaski's progress reports dated September 14, October 30, and December 4, 2015 regarding appellant's postoperative visits and his recommendation for physical therapy. He also submitted physical therapy reports dated November 2 and 30, 2015 and diagnostic testing reports dated August 26, September 14, and October 30, 2015 in support of his claim.

In an August 5, 2016 letter, the employing establishment controverted appellant's claim asserting that the injury occurred on the "crosswalk of Pennsylvania and Market Street' which was an intersection located in downtown Indianapolis and was not controlled or owned by the employing establishment. It noted that the injury had not occurred in the parking area, but did acknowledge that it leases the parking area and assigns spaces to its employees. The employing establishment further submitted an accident report, which included a map of the location where the injury occurred, and bolded two crosswalk options at the same intersection.

By decision dated October 21, 2016, OWCP modified its prior decision finding that the injury had not occurred in the performance of duty as his injury occurred off-premises in an area with hazards common to all travelers.

On March 31, 2017 appellant, through counsel, requested reconsideration. Counsel contended that appellant's injury was sustained in the performance of duty and submitted a map of the location, arguing that it established an exception to the premises rule as appellant was taking the necessary route from his parking garage to his assigned work building when he was injured. In an accompanying narrative statement, appellant indicated that he was injured walking from the parking garage provided to him by the employing establishment to his place of work, which was approximately 1.5 blocks away from his duty station. He stated that he and another person were struck by a hit and run driver in the crosswalk on the west side of the interaction of East Market Street and North Pennsylvania Street.

By decision dated August 10, 2017, OWCP denied modification of its prior decision. It found that the employee parking area fell within the employing establishment's premises, but the injury had not occurred on the premises because appellant failed to establish that employees had to walk across the street at that particular intersection.

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]

FECA provides compensation for the disability of an employee resulting from personal injury sustained while in the performance of duty.[7] 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.[8] 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.[9]

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.[10] 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.[11] 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.[12] 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

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

[8] 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).

[9] *See J.K., supra* note 7; *Eugene G. Chin*, 39 ECAB 598 (1988); *Clayton Varner*, 37 ECAB 248 (1985); *Thelma B. Barenkamp (Joseph L. Barenkamp)*, 5 ECAB 228 (1952).

[10] *S.V.*, Docket No. 18-1299 (issued November 5, 2019).

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

[12] *See J.K., supra* note 7; *Jimmie Brooks*, 54 ECAB 248 (2002); *Syed M. Jawaid*, 49 ECAB 627 (1998).

hazards of the employment.[13] This exception contains two components. The first is the presence 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.[14]

ANALYSIS

The Board finds that appellant has met his burden of proof to establish fractures of his pelvis and left arm while in the performance of duty on August 26, 2015.

In determining whether the crosswalk between the employing establishment parking area and the workplace should be considered part of the employing establishment's premises, the Board first considers the factors necessary to determine whether the parking area was under sufficient control of the employing establishment. However, OWCP has already found, and it is uncontested, that the parking area was a part of the employing establishment's premises, finding that it was leased by the employing establishment and provided an assigned space without cost to the employee. Therefore, the Board must determine whether the crosswalk in which appellant was injured was on the only route, or at least on the normal route, which employees must traverse to reach the contiguous part of the premises. The Board finds that the evidence of record establishes that the crosswalk was the normal route which appellant and others using the parking area traversed to reach their workplace. The maps in evidence show that there were four crosswalks, from which an employee would use two in order to cross the intersection. Although there are two options to cross the intersection, the routes obviously cross the same intersection. Thus, whether an employee crosses Market Street and then Pennsylvania Street, or Pennsylvania Street and then Market Street is not determinative. Rather, appellant was required to cross the intersection of these two streets to traverse between the two areas of the employing establishment premises. Thus, the Board finds that appellant has proven an exception to the premises rule and has therefore established that his August 26, 2015 injury occurred in the performance of duty.

OWCP has not previously reviewed the merits of the medical evidence of record to determine whether appellant's diagnosed medical conditions were causally related to the August 26, 2015 incident. However, the Board finds that the evidence of record is sufficient to determine that appellant's pelvis and left arm fractures are causally related to the hit and run accident in which he was injured. OWCP procedures provide that in cases where there is a serious injury from motor vehicle accident, amongst other types of incidents, and the employing establishment does not dispute the facts of the incident alleged, that the claim may be accepted for conditions even without a medical report with other more serious conditions being developed through obtaining medical evidence.[15] The accepted incident was a serious motor vehicle-related incident which left appellant injured and in need of emergency medical services. Upon obtaining emergency medical treatment, and after diagnostic testing, it was confirmed that appellant sustained fractures of his pelvis and left arm on that date. The contemporaneous medical reports

[13] Arthur & Lex Larson, *The Law of Workers' Compensation* § 13.01(3) (2006). *See also J.K., supra* note 7; *R.O.*, Docket No. 08-2088 (issued May 18, 2009).

[14] *Id.* at § 13.01(3)(b).

[15] *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Initial Development of Claims*, Chapter 2.800.6 (June 2011).

provide a consistent history of injury and Dr. Gaski, in his March 15, 2016 report, diagnosed fractures of the pelvis and left arm directly related to the hit and run incident in which he had been involved. The Board finds that this evidence is sufficient to establish that appellant sustained fractures to his pelvis and left arm and those conditions are causally related to the accepted August 26, 2015 employment incident.

As appellant has established pelvis and left arm fractures as accepted employment-related conditions in his claim, the Board will reverse the August 10, 2017 decision and remand the case for payment of medical costs and wage-loss compensation, if any.

CONCLUSION

The Board finds that appellant has met his burden of proof to establish fractures of his pelvis and left arm while in the performance of duty on August 26, 2015.

ORDER

IT IS HEREBY ORDERED THAT the August 10, 2017 decision of the Office of Workers' Compensation Programs is reversed and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: February 18, 2020
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board