

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

A.G., Appellant)	
)	
and)	Docket No. 18-1560
)	Issued: July 22, 2020
U.S. POSTAL SERVICE, POST OFFICE,)	
Stevensville, PA, Employer)	
)	

Appearances:
Jason S. Lomax, Esq., for the appellant¹
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Deputy Chief Judge
JANICE B. ASKIN, Judge
PATRICIA H. FITZGERALD, Alternate Judge

JURISDICTION

On August 13, 2018 appellant, through counsel, filed a timely appeal from a May 23, 2018 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to consider the merits of this case.³

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.*

³ The Board notes that, following the May 23, 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 Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this evidence for the first time on appeal. *Id.*

ISSUE

The issue is whether appellant has met her burden of proof to establish a traumatic injury in the performance of duty on March 17, 2016, as alleged.

FACTUAL HISTORY

On March 17, 2016 appellant, then a 49-year-old part-time flexible clerk, filed a traumatic injury claim (Form CA-1) alleging that, at 11:35 a.m. that day, she tripped and fell on a parking lot curb and injured her right foot while in the performance of duty. She stopped work on the date of injury. On the reverse side of the claim form, an employing establishment supervisor contended that appellant was not in the performance of duty at the time of the claimed injury as she had gone outside the building to turn off her car alarm.

In a development letter dated March 21, 2016, OWCP informed appellant of the type of additional evidence needed to establish her claim, including factual evidence supporting that the claimed injury occurred in the performance of duty, and medical evidence from her attending physician explaining how and why the March 17, 2016 incident would have caused the claimed injury. In a separate development letter of the same date, it requested that the employing establishment provide a statement and relevant information as to whether it owned, managed, or controlled the parking lot where she fell, if there were assigned parking spaces, or if it paid for employees to park in that location. OWCP afforded both parties 30 days to submit the necessary evidence.

In response, appellant submitted a statement dated March 31, 2016. She explained that on March 17, 2016 she had parked in a customer parking space leased and managed by the employing establishment, but at other times parked across the street in a community parking lot. Appellant did not pay for parking. On the date she was injured, she had been assigned to work four hours at the employing establishment, close out, and then report to a second facility. Near the end of her tour at the employing establishment, appellant heard a car alarm go off and went outside to investigate. She ascertained that it was her vehicle's alarm and used her car key to turn it off. M.C., who worked at an automotive business across the street, walked over and offered to check the alarm for code defects. Appellant gave him her key as she had only a few minutes to finish closeout procedures before driving to the next duty station. She then heard a postal customer call her name so she "turned to go back toward office and the next thing [appellant] knew she was falling." Appellant reached forward to grab a railing and then felt severe pain in her right foot. She walked a few steps to the lobby entrance door and removed an American flag as part of her close out duties. Appellant then entered the building, finished reports on a computer, and completed other assigned tasks. She then drove to her next duty station, opened the office, and telephoned a supervisor for assistance as her right foot remained painful.

In an undated statement, M.C. asserted that, on an unspecified date, he saw appellant turn toward the employing establishment and trip over a concrete barrier in the handicapped parking space.

In an e-mail dated March 24, 2016, and received by OWCP on April 28, 2016, an occupational health nurse noted appellant's account to her of the March 17, 2016 incident.⁴

By decision dated April 28, 2016, OWCP denied the claim finding that appellant had not met her burden of proof to establish that she was in the performance of duty at the time of the claimed injury. Specifically, it found that she fell in a parking area which the employing establishment did not own, control, or manage.

On April 26, 2017 appellant, through counsel, requested reconsideration. Counsel contended that at the time of the claimed March 17, 2016 employment incident, appellant had resumed the performance of her duties as she had turned toward the employing establishment with the intention of taking down the American flag near the entrance door as part of her assigned close-out duties when she was injured.

Appellant also provided her statement dated April 24, 2017 in which she contended that she tripped and fell over a concrete barrier in the handicapped parking space directly adjacent to the employing establishment where she had parked. She clarified that on March 17, 2016 she had not parked or walked across the street. Rather, M.C. crossed the street to assist her with the car alarm. Appellant asserted that, when she finished speaking to M.C. about her car alarm, she turned toward the employing establishment with the intention of walking to the door to remove the flag. She attempted to step over the concrete parking barrier in the handicapped parking space and caught her foot on an iron rod that held the barrier in place, causing her to trip and fall.

Appellant also submitted progress notes and diagnostic test results from Dr. Guido LaPorta, an attending podiatrist.

In a statement dated July 21, 2017, A.B., an employing establishment human resources specialist, explained that the flag hung to the right side of the lobby door. However, when appellant fell she was allegedly closer to the left side of the lobby door.

By decision dated July 25, 2017, OWCP denied modification finding that the claimed incident had not occurred on the employing establishment's premises. It found that the evidence of record established that the parking area where appellant tripped and fell was not owned, controlled, or managed by the employing establishment.

⁴ The nurse noted that appellant had parked across the street at a community building, she heard her car alarm and "rushed across the street" to turn it off, and as she spoke to someone about the car alarm she "suddenly lost her balance and nearly fell." The nurse wrote that appellant had believed that she "must have tripped on the curb" at the employing establishment.

On February 23, 2018 appellant, through counsel, requested reconsideration. Counsel contended that the March 17, 2016 injury occurred in the performance of duty as the employing establishment managed and controlled the parking area. He submitted additional evidence regarding the employing establishment's management and control of the parking area.⁵

In a letter dated August 4, 2017, R.H., a community resident, asserted that during the previous 10 years, he had volunteered to remove snow from the parking lot where appellant had fallen and had observed her and other employees shoveling in areas not accessible by plow.

In a statement dated February 22, 2018, appellant asserted that she and her coworkers had been assigned to shovel snow from the parking lot immediately adjacent to the employing establishment as there was no longer a snow removal contract.

In a statement dated March 20, 2018, A.B. contended that appellant was not in the performance of duty at the time of the March 17, 2016 injury as she had gone outside to deactivate her car alarm, which was not part of her assigned tasks or incidental to her employment.

By decision dated May 23, 2018, OWCP modified its prior decision and accepted that appellant was on the employing establishment's premises at the time of the March 17, 2016 incident. However, it continued to deny the claim finding that her fall had not occurred while in the performance of duty as she had been engaged in a personal errand at the time of her injury.

LEGAL PRECEDENT

An employee seeking benefits under FECA⁶ 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 filed within the applicable time limitation, that an injury was sustained while in the performance of duty as alleged, and that any disability or specific condition for which compensation is claimed is causally related to the employment injury.⁷ These are the essential elements of each and every compensation claim regardless of whether the claim is predicated on a traumatic injury or an occupational disease.⁸

To determine whether a federal employee has sustained a traumatic injury in the performance of duty it must first be determined whether fact of injury has been established.⁹ Fact of injury consists of two components that must be considered in conjunction with one another.

⁵ Counsel submitted a copy of the employing establishment's lease of the parking area dated February 1, 2011. The lease specified that customers, employees, agents, and invitees would have use of all areas of the property of which the "demised premises is a part, including parking, driveways, walkways, entries [and] service areas." The lease expired on January 31, 2016. Counsel also provided a copy of the employing establishment's undated request for quotations for snow removal and salting in the parking area for a one-year period commencing October 2017.

⁶ *Supra* note 2.

⁷ *J.M.*, Docket No. 17-0284 (issued February 7, 2018); *J.P.*, 59 ECAB 178 (2007); *Joe D. Cameron*, 41 ECAB 153 (1989).

⁸ *K.M.*, Docket No. 15-1660 (issued September 16, 2016); *Delores C. Ellyet*, 41 ECAB 992 (1990).

⁹ *C.F.*, Docket No. 18-0791 (issued February 26, 2019); *T.H.*, 59 ECAB 388, 393-94 (2008).

The first component is whether the employee actually experienced the employment incident that allegedly occurred.¹⁰ The second component is whether the employment incident caused a personal injury.¹¹

Congress, in providing for a compensation program for federal employees, 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/employing establishment relationship. Instead, Congress provided for the payment of compensation for the disability or death of an employee resulting from personal injury sustained while in the performance of his or her duty.¹² The phrase “while in the performance of duty” has been interpreted by the Board to be the equivalent of the commonly found prerequisite in workers’ compensation law of “arising out of and in the course of employment.” 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 found to be engaged in his or her employer’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.¹³ In deciding whether an injury is covered by FECA, the test is whether, under all the circumstances presented, causal relationship exists between the employment itself, or the conditions under which it is required to be performed, and the resultant injury.¹⁴

Injuries arising on the employing establishment’s premises may be approved if the claimant was engaged in activity reasonably incidental to his or her employment.¹⁵

ANALYSIS

The Board finds that appellant has met her burden of proof to establish that her traumatic injury occurred in the performance of duty on March 17, 2016, as alleged.

OWCP has accepted that at the time that appellant fell on March 17, 2016 she was on the employing establishment premises. Therefore, the issue presented to the Board is whether she was

¹⁰ *L.T.*, Docket No. 18-1603 (issued February 21, 2019); *Elaine Pendleton*, 40 ECAB 1143 (1989).

¹¹ *B.M.*, Docket No. 17-0796 (issued July 5, 2018); *John J. Carlone*, 41 ECAB 354 (1989).

¹² 5 U.S.C. § 8102(a); *see also Angel R. Garcia*, 52 ECAB 137 (2000).

¹³ *C.C.*, Docket No. 18-0445 (issued August 14, 2018); *George E. Franks*, 52 ECAB 474 (2001).

¹⁴ *J.N.*, Docket No. 19-0045 (issued June 3, 2019); *M.W.*, Docket No. 15-0474 (issued September 20, 2016); *Mark Love*, 52 ECAB 490 (2001).

¹⁵ *A.P.*, Docket No. 18-0886 (issued November 16, 2018); *S.M.*, Docket No. 16-0875 (issued December 12, 2017); *J.O.*, Docket No. 16-0636 (issued October 18, 2016); *T.L.*, 59 ECAB 537 (2008). *See also* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Performance of Duty*, Chapter 2.804.4a(2) (August 1992).

in the performance of duty at the time of the fall, or whether she had sufficiently deviated from her employment duties so as to remove her from the protections of FECA.¹⁶

In determining whether an injury occurs in a place where the employee may reasonably be, or constitutes a deviation from the course of employment, the Board will focus on the nature of the activity in which the employee was engaged and whether it is reasonably incidental to the employee's work assignment or represented such a departure from the work assignment that the employee becomes engaged in personal activities unrelated to his or her federal employment.¹⁷

In determining the purpose of a deviation, the Board must look to the evidence presented within the record to determine whether appellant's actions furthered the employing establishment business.¹⁸ The Board finds that at the time of the fall appellant was engaged in an activity reasonably incidental to her work schedule on that day. Appellant's work schedule required the use of her personal vehicle to travel between two duty stations. She was nearing the end of her scheduled shift at her first duty station when she heard a car alarm and walked outside to see if it was coming from her vehicle. Due to appellant's need to shortly thereafter drive to her second duty station *via* her personal car, it was reasonable for her to maintain that vehicle's safety and availability while parked on the employing establishment's premises. Her actions of going outside, insuring the safety of her car, using a key to turn off the car alarm, and agreeing to allow an auto mechanic to check on her car were all of benefit to the employing establishment as they contributed to her ability to timely report to her second duty station and perform her scheduled duties there. Appellant's fall also occurred as she was responding to a customer calling her name on her way to attend to her duty of removing the U.S. flag, an act done in furtherance of her duties on behalf of the employing establishment. Therefore, her actions were not such a departure from her assigned duties that they would constitute personal activities unrelated her to employment and the Board thus finds she remained in the performance of duty at the time of her fall. As it has been established that appellant was in the performance of duty, the medical evidence of record must be considered.¹⁹

Appellant submitted medical evidence describing treatment of her right foot injury following the accepted March 17, 2016 employment incident. As OWCP has not yet evaluated the medical evidence to determine whether there is a causal relationship between the accepted employment incident and a diagnosed condition, the case will be remanded to OWCP. Upon remand it shall evaluate the medical evidence of record to determine whether appellant sustained an injury/or disability due to the March 17, 2016 employment incident. After this and other such further development as deemed necessary, OWCP shall issue a *de novo* decision.²⁰

¹⁶ See *R.E.*, Docket No. 18-0515 (issued February 18, 2020) (when it has been established that an injury occurred after arrival on premises, OWCP must consider whether the injury occurred in the performance of duty).

¹⁷ *J.S.*, Docket No. 16-1057 (issued May 11, 2017); *Phyllis A. Sjoberg*, 57 ECAB 409 (2006).

¹⁸ *S.M.*, *id.*

¹⁹ *C.R.*, Docket No. 19-1721 (issued June 17, 2020).

²⁰ *P.S.*, Docket No. 19-1818 (issued April 14, 2020).

CONCLUSION

The Board finds that appellant has met her burden of proof to establish that her traumatic injury occurred in the performance of duty on March 17, 2016, as alleged.

ORDER

IT IS HEREBY ORDERED THAT the May 23, 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: July 22, 2020
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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