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

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| **E.O., Appellant** | ) | |
| **and** | ) | **Docket No. 19-0390** |
| | ) | **Issued: January 9, 2020** |
| **DEPARTMENT OF VETERANS AFFAIRS, VETERANS ADMINISTRATION MEDICAL CENTER, Portland, OR, Employer** | ) | |

*Appearances:*
*Alan J. Shapiro, 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
PATRICIA H. FITZGERALD, Deputy Chief Judge
ALEC J. KOROMILAS, Alternate Judge

### ***JURISDICTION***

On December 12, 2018 appellant, through counsel, filed a timely appeal from an October 30, 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.

[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 January 17, 2018 as alleged.

## ***FACTUAL HISTORY***

On January 22, 2018 appellant, then a 48-year-old police officer, filed a traumatic injury claim (Form CA-1) alleging that on January 17, 2018 at 4:05 p.m. he injured his knee when he slipped and fell on wet steps while in the performance of duty. He stopped work on that date. On the reverse side of the claim form, appellant's supervisor, G.A., indicated that appellant's regular work hours were from 7:00 p.m. to 7:00 a.m. He also checked a box marked "No" indicating that the alleged injury did not occur in the performance of duty. G.A. noted that the injury was reported about 55 minutes prior to appellant's scheduled work time.

Emergency department discharge instructions dated January 17, 2018 indicated that appellant was treated for complaints of right knee pain after a fall at work.

In a January 24, 2018 development letter, OWCP informed appellant that the evidence submitted was insufficient to establish his claim. It advised appellant of the type of medical and factual evidence needed and provided a questionnaire for his completion. OWCP afforded him 30 days to submit the necessary factual information and medical evidence.

OWCP received a work status note dated January 19, 2018 by Thalia Brent, a nurse practitioner, who recommended no patrolling or duties that would require significant walking or climbing stairs until February 5, 2018.

In a January 22, 2018 e-mail, a supervisor, G.A., addressed the time discrepancy in appellant's traumatic injury claim. He explained that appellant had signed up for overtime from 3:00 p.m. to 7:00 p.m. before his scheduled 7:00 p.m. tour of duty started, but appellant had called prior to the 3:00 p.m. overtime shift and advised that he would not be coming in to work until 5:00 p.m. G.A. reported that he claimed that he slipped in the stairwell coming in from Lot 8 area, into building 101 after parking in the reserved police parking area lot. G.A. indicated that he did not know if this was a normal routine for appellant because he worked nightshift and was not appellant's direct supervisor. He also reported that appellant was to begin work at 5:00 p.m.

In a January 22, 2018 employing establishment incident form report, G.A. noted a date of injury of January 17, 2018 at 4:05 p.m. He recounted that appellant slipped and fell in a stairwell due to wet stairs while reporting for his duty shift. G.A. indicated that weather conditions were rainy.

In a January 24, 2018 report of contact, G.H., with the VA Police Service, related that on January 17, 2018 at 3:03 p.m., he called appellant on his cell phone, but the call went to voicemail. At 3:35 p.m. appellant returned his call and G.H. inquired if he was coming in for the overtime shift he had signed up for, which had been scheduled to start at 3:00 p.m. Appellant noted that he had been instructed that if he had come in at 3:00 p.m. it would have put him over 16 hours worked

for the day. G.H. reported that appellant stated that he would be in and start work at 5:00 p.m. so not to exceed his hours.

In a January 26, 2018 examination report, Dr. Stephen Southerland, a Board-certified orthopedic surgeon, described the January 17, 2018 slip and fall injury at work. He provided examination findings for appellant's right knee and assessed a medial collateral ligament (MCL) sprain. Dr. Southerland recommended further diagnostic evaluation to rule out a meniscal tear or reduced patellar dislocation. He completed a work status report, recommending that appellant not return to work. Dr. Southerland subsequently requested authorization for a magnetic resonance imaging (MRI) scan.

On February 6, 2018 appellant completed the development questionnaire. He noted that on January 17, 2018 he was reporting for a scheduled overtime shift at 5:00 p.m. Appellant explained that the staircase was wet due to rainy weather and when he stepped down onto his right foot, he slipped. He indicated that his right knee folded to the left and he felt a severe pop and immediate pain. Appellant noted that he made his way to Room 131 and called his Sergeant on the emergency line. In response to the question regarding why appellant was on agency premises at 4:00 p.m., even though his regular tour of duty began at 7:00 p.m., he reported that he was on the premises to "gear up" as a police officer for scheduled overtime from 5:00 to 7:00 p.m.

Appellant submitted a January 28, 2018 police report which indicated that on January 17, 2018 he called the emergency line to report that he had fallen down and injured his right knee in building 101 while on his way to work. He was transported to the emergency room for treatment.

By decision dated February 26, 2018, OWCP denied appellant's claim. It accepted that the January 17, 2018 incident occurred as alleged and that appellant was diagnosed with a knee condition, but denied appellant's claim finding that he failed to establish that the alleged injury occurred while in the performance of duty. OWCP specifically noted that it did not receive evidence that appellant was required to arrive at work 55 minutes prior to his scheduled start time.

Appellant continued to submit medical reports and letters by Dr. Southerland dated March 5 to September 6, 2018 for treatment of a grade 2 sprain of his right knee MCL. He was released to modified duty on March 6, 2018 and to full duty on April 9, 2018. In a September 6, 2018 letter, Dr. Southerland opined that appellant's fall at work was the cause of his MCL sprain.

On March 22, 2018 appellant, through counsel, requested a telephonic hearing before an OWCP hearing representative. A telephonic hearing was held on August 1, 2018. Counsel contended that the January 17, 2018 injury occurred in the performance of duty because appellant was "furthering the employer's business" at the time of the injury. Appellant testified that prior to their shift starting, police officers came to work in plain clothes, went to the locker room, changed into their uniform, and put on their gear. He also indicated that approximately 15 minutes before every duty shift, police officers were required to be in full uniform and have all gear and equipment for a brief meeting. Appellant alleged that he had parked his car around 3:55 p.m. in his designated parking area and was walking down the stairs in the building on his way to the locker room in order to change when he slipped on the stairs and fell down.

Appellant submitted additional diagnostic evaluations, including a February 14, 2018 right knee MRI scan, a March 23, 2018 lumbar spine MRI scan, an April 9, 2018 electromyography and nerve conduction velocity (EMG/NCV) study, and an April 9, 2018 cervical spine MRI scan.

OWCP also received reports dated April 24 and June 25, 2018 regarding medical treatment that appellant had received for cervical and lower back conditions.

By decision dated October 30, 2018, an OWCP hearing representative affirmed the February 26, 2018 decision.

## ***LEGAL PRECEDENT***

An employee seeking benefits under FECA[3] 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 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" 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."[8] The phrase "in the course of employment" pertains to the work setting, locale, and time of injury, whereas arising out of the employment encompasses not only the work setting, but also the requirement that an employment factor caused the injury.[9]

To arise in the course of employment, an injury must occur: (1) at a time when the employee may reasonably be said to be engaged in the master's business; (2) at a place when he

[3] *Id.*

[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); *T.M.*, Docket No. 19-0050 (issued June 18, 2019); *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. *R.K.*, Docket No. 18-1269 (issued February 15, 2019); *J.K.*, *id.*

[9] *L.B.*, Docket No. 19-0765 (issued August 20, 2019); *L.P.*, Docket No. 17-1031 (issued January 5, 2018); *G.R.*, Docket No. 16-0544 (issued June 15, 2017); *Cheryl Bowman*, 51 ECAB 519 (2000).

or she may reasonably be expected to be in connection with his or her employment; and (3) while he or she was reasonably fulfilling the duties of his or her employment or engaged in doing something incidental thereto.[10] This alone is insufficient to establish entitlement to benefits for compensability. The concomitant requirement of an injury "arising out of the employment" must be shown, and this encompasses not only the work setting, but also a causal concept, the requirement being that the employment caused the injury.[11]

It is well established as a general rule of workers' compensation law that, as to employees having fixed hours and places of work, injuries occurring on the premises of the employing establishment, while the employees are going to or from work, before or after working hours or at lunch time, are compensable.[12]

## ***ANALYSIS***

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

Appellant alleged that on January 17, 2018 at 4:05 p.m. he slipped and fell in an employing establishment building while he was on his way to the locker room prior to his overtime shift starting at 5:00 p.m. Whether an injury occurs in the performance of duty is a preliminary issue addressed before the merits of the claim are adjudicated.[13] The factors considered in determining whether an employee arriving at work is in the performance of duty are whether the injury occurred on the employing establishment's premises, the time interval before the work shift, and the activity at the time of the injury.[14] Appellant has established that he was injured on the employing establishment's premises. However, location alone is insufficient to establish performance of duty. The Board must also consider the time of the injury and whether it arose out of appellant's employment.[15]

The evidence of record establishes that appellant's injury occurred 55 minutes before he had planned to commence work at 5:00 p.m. The record also contains evidence that on that date, at approximately 3:00 p.m., the time at which the shift he had signed up for was scheduled to begin, G.H. left him a message inquiring if he intended to cover his 3:00 p.m. shift. Approximately 30 minutes later, appellant returned this call to G.H. and informed him that he planned to be in at 5:00 p.m. due to the number of hours he had worked. The Board concludes that it is not in a position

[10] *A.S.*, Docket No. 18-1381 (issued April 8, 2019); *Roma A. Mortenson-Kindschi*, 57 ECAB 418 (2006); *Mary Keszler*, 38 ECAB 735, 739 (1987).

[11] *D.C.*, Docket No. 18-1216 (issued February 8, 2019); *R.B.*, Docket No. 16-1071 (issued December 14, 2016); *Eugene G. Chin*, 39 ECAB 598 (1988).

[12] *R.K.*, *supra* note 8; *Narbik A. Karamian*, 40 ECAB 617, 618 (1989). The Board has also applied this general rule of workers' compensation law in circumstances where the employee was on an authorized break. *See Eileen R. Gibbons*, 52 ECAB 209 (2001).

[13] *P.L.*, Docket No. 16-0631 (issued August 9, 2016); *see also M.D.*, Docket No. 17-0086 (issued August 3, 2017).

[14] *T.M.*, *supra* note 7; *E.V.*, Docket No. 16-1356 (issued December 6, 2016).

[15] *Supra* note 9.

to make an informed decision on whether appellant was permitted by G.H. to commence his workday following the telephone call which inquired whether appellant was planning to report to work. Based on the record currently before the Board it is unclear whether G.H. intended to permit appellant to report to work as he was needed to cover the shift, or whether he was not permitted to report to work until 5:00 p.m.

OWCP's procedures provide that it should obtain relevant information from an official superior to determine why an employee was on the premises for more than "reasonable interval" before the start of his or her work shift.[16] Its procedures further provide that if the supervisor is unaware of why the employee was on the premises, OWCP should seek this information from coworkers and procure a statement from the injured employee.[17] The Board thus finds that OWCP has not properly developed the evidence as to whether appellant was properly on the premises of the employing establishment at the time of injury such that she should be considered in the performance of duty.[18] OWCP should have fully discharged its responsibility to obtain a statement from an official superior or appellant specifically addressing the question of why he was on the employing establishment premises 55 minutes before the start of his work shift and whether he was permitted by G.H. to report to duty following the 3:35 p.m. phone conversation.[19]

On remand OWCP should obtain clarifying information from the employing establishment and determine whether appellant was either instructed or permitted to be on the employing establishment premises at 4:05 p.m. and, if so, whether appellant was acting in the furtherance of his master's business and with its knowledge or benefit. Following such further development as deemed necessary, OWCP shall issue a *de novo* decision.

## ***CONCLUSION***

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

[16] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Performance of Duty,* Chapter 2.804.4.d (August 1992).

[17] *Id.*

[18] Appellant also alleged that the employing establishment's policy required him to arrive prior to work to change from civilian clothing into his law enforcement uniform and be prepared for a briefing. OWCP did not inquire whether the employing establishment has a policy relating to the preparations allowed on its premises prior to the commencement of a work shift. The record should also be developed to determine whether the employing establishment required its officers in appellant's position to report to work to comply with its policies, if any, regarding preparations for the start of work.

[19] *See T.M.*, Docket No. 19-0050 (issued June 18, 2019) (the Board found that although the employee had arrived 55 minutes prior to her scheduled work shift, OWCP had not properly developed why she was on the employing establishment premises at the time of injury).

## ***ORDER***

**IT IS HEREBY ORDERED THAT** the October 30, 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: January 9, 2020
Washington, DC

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

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

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