United States Department of Labor
Employees' Compensation Appeals Board

C.L., Appellant	)	
and	)	**Docket No. 19-1985**
	)	**Issued: May 12, 2020**
DEPARTMENT OF LABOR, OCCUPATIONAL SAFETY & HEALTH ADMINISTRATION, Atlanta, GA, 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:
ALEC J. KOROMILAS, Chief Judge
JANICE B. ASKIN, Judge
PATRICIA H. FITZGERALD, Alternate Judge

JURISDICTION

On September 30, 2019 appellant, through counsel, filed a timely appeal from an August 15, 2019 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 her burden of proof to establish that a traumatic injury occurred in the performance of duty on April 5, 2017, as alleged.

FACTUAL HISTORY

This case has previously been before the Board.[3] The facts and circumstances as set forth in the Board's prior decision are incorporated herein by reference. The relevant facts are set forth below.

On April 10, 2017 appellant, then a 56-year-old safety and health clerk, filed a traumatic injury claim (Form CA-1) alleging that, on April 5, 2017, she sustained injuries to her lower back, groin, right leg, ankle, knee, and buttocks when she slipped and fell on wet concrete while entering the employing establishment's parking garage in the performance of duty. She noted that the injury occurred at approximately 4:33 p.m. when she was leaving work for the day. Appellant stopped work on April 7, 2017. On the reverse side of the claim form, the employing establishment noted that appellant's regular work hours were from 8:00 a.m. to 4:30 p.m. It contended that appellant was not injured in the performance of duty as the parking garage was not government property as the parking garage was "not agency owned, maintained, or controlled."

By development letter dated April 21, 2017, OWCP informed appellant that the evidence submitted was insufficient to establish her claim. It specifically noted that the evidence indicated that she was injured off the premises of her employing establishment and requested that she respond to the attached factual questionnaire in order to determine whether the alleged injury occurred while in the performance of duty. OWCP also advised appellant of the type of medical evidence needed to establish her claim. In a separate letter of even date, it requested that the employing establishment answer a series of questions including whether the alleged injury occurred on employing establishment premises and whether the parking facilities were owned, controlled, or managed by the employing establishment. Both parties were afforded 30 days to submit the requested information.

On May 8, 2017 OWCP received the employing establishment's response to its April 21, 2017 development letter. The employing establishment contended that appellant was not injured in the employing establishment's parking garage, rather she was injured in a commercial garage. It asserted that it did not own, control, or manage the parking facility where appellant was injured. Also, the employing establishment did not require employees to park in that garage, nor did it assign parking spaces in the garage or require employees to pay for parking there. It further indicated that the public was permitted to use that garage and that it was free of charge to park in the garage.

OWCP also received a picture of a commercial building with the parking structure and the area surrounding it.

[3] Docket No. 18-0812 (issued February 22, 2019).

On May 15, 2017 appellant completed the factual development questionnaire, reporting that the injury occurred in the parking facility of the building where the employing establishment leased office space. She described that the facility was an "extension" of the premises as it was the designated place to park for that commercial building. Appellant reported that the parking garage was owned by CMK Property Services, LLC. She also replied that she was not required to park in this garage and noted that she did not pay for parking.

Appellant also submitted additional medical evidence, including reports dated May 2 and 9, 2017 by Dr. Louise Sheffield, Board-certified in preventive and occupational medicine, and reports dated April 12 to May 11, 2017 by Dr. Savitha Elam-Kootil, a Board-certified internist.

By decision dated May 26, 2017, OWCP denied appellant's claim. It accepted that the April 5, 2017 incident occurred as alleged and that she sustained diagnosed medical conditions, but denied her claim, finding that the claimed April 5, 2017 incident did not occur in the performance of duty, as alleged.

On June 7, 2017 appellant, through counsel, requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review, which was held on November 17, 2017.

OWCP also received additional medical evidence, including reports by Dr. Sheffield dated May 16 to 30, 2017.

By decision dated January 31, 2018, an OWCP hearing representative affirmed the May 26, 2017 decision. She determined that the evidence of record established that the alleged April 5, 2017 injury did not occur in the performance of duty as the parking garage where the incident occurred was not owned, controlled, or managed by the employing establishment.

Appellant appealed to the Board. By decision dated February 22, 2019, the Board affirmed the January 31, 2018 decision. The Board found that although the injury occurred within a reasonable interval from the end of her work shift, the parking garage where the alleged April 5, 2017 injury occurred was not part of the employing establishment's premises as it was not owned, controlled, or managed by the employing establishment, employees were not required to park in this garage, parking spaces were not assigned, and employees did not have to pay for parking. The Board also determined that the parking garage did not meet the requirements as a "special hazard" exception to the premises rule as the parking garage was not exclusively contracted for use by the employing establishment and slipping on water was an ordinary hazard, which was shared by all travelers.[4]

On June 24, 2019 appellant, through counsel, requested reconsideration and submitted additional evidence including a copy of a June 6, 2019 affidavit wherein she related that the building where she worked was not a U.S. Government building, but rather a commercial building that occupied numerous businesses. Appellant indicated that since 2016 she had parked her personal vehicle in the parking garage located adjacent to the office building. She testified that the adjacent parking garage was the only option for all employees and tenants occupying space in

[4] *Id*.

the building where the employing establishment was located. Appellant also noted that U.S. Government owned vehicles parked in that parking garage and that outside visitors were routinely instructed to use the parking garage when they attended meetings at the employing establishment.

OWCP also received a series of pictures of the commercial building from different angles, including, individual parking spaces on different parking decks as well as an overhead view of the complete building with the adjacent parking garage in question. The images contained notations of the subject matter of the photos including a notation of no parking on the street.

By decision dated August 15, 2019, OWCP denied modification of the February 22, 2019 decision.

LEGAL PRECEDENT

An employee seeking benefits under FECA[5] 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,[6] 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.[7] 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.[8]

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."[9] To arise 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 the master's business; (2) at a place when he 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

[5] *Supra* note 2.

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

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

[8] *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).

[9] *See M.T.*, Docket No. 17-1695 (issued May 15, 2018); *S.F.*, Docket No. 09-2172 (issued August 23, 2010); *Valerie C. Boward*, 50 ECAB 126 (1998).

[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).

"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] The Board has previously found that the term "premises" as it is generally used in workers' compensation law, is not synonymous with "property" because it does not depend solely on ownership. The term "premises" may include all the property owned by the employing establishment. In other instances, even if the employer does not have ownership and control of the place of injury, the place may nevertheless still be considered part of the "premises."[13]

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 employer contracted for the exclusive use by its employees of the parking area, whether parking spaces in the garage were assigned by the employing establishment to its employees, whether the parking areas were checked to see that no authorized cars were parked in the garage, whether parking was provided without cost to the employees, whether the public was permitted to use the garage, and whether other parking was available to the employees. Mere use of a parking facility alone is not sufficient to bring the parking garage 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.[14]

ANALYSIS

The Board finds that appellant has not met her burden of proof to establish a traumatic injury in the performance of duty on April 5, 2017, as alleged.

Preliminarily, the Board notes that it is unnecessary for the Board to consider the evidence appellant submitted prior to the issuance of OWCP's January 31, 2018 merit decision because the Board considered that evidence in its February 22, 2019 decision. Findings made in prior Board decisions are *res judicata* absent any further review by OWCP under section 8128 of FECA.[15]

[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] *E.O.*, Docket No. 19-0390 (issued January 9, 2020); *Narbik A. Karamian*, 40 ECAB 617, 618 (1989); *Eileen R. Gibbons*, 52 ECAB 209 (2001).

[13] *C.L.*, Docket No. 18-0812 (issued February 22, 2019); *Wilmar Lewis Prescott*, 22 ECAB 318, 321 (1971).

[14] *R.K.*, Docket No. 18-1269 (issued February 15, 2019); *Diane Bensmiller*, 48 ECAB 675 (1997); *Rosa M. Thomas-Hunter*, 42 ECAB 500 (1991); *Edythe Erdman*, 36 ECAB 597 (1985); *Karen A. Patton*, 33 ECAB 487 (1982); *R.M.*, Docket No. 07-1066 (issued February 6, 2009).

[15] *See B.R.*, Docket No. 17-0294 (issued May 11, 2018).

Accordingly, the current analysis will focus on the relevant evidence received since OWCP's January 31, 2018 merit decision, which is the evidence that was not before the Board when it last reviewed appellant's claim on February 22, 2019.

In support of her June 24, 2019 reconsideration request, appellant submitted a June 6, 2019 affidavit. She related that the commercial building where the employing establishment leased office space was not a U.S. Government building and that numerous other businesses also occupied space in that building. Appellant asserted that the parking garage was the only parking option for all employees and tenants who leased space in that building. She also noted that U.S. Government owned vehicles were parked in that parking garage.

As noted above, in determining whether a parking lot or garage should be considered part of the employing establishment's premises, the Board must consider such factors as whether the employer contracted for its exclusive use by its employees, whether the employing establishment assigned parking spaces, whether the parking area was checked to see that no authorized cars were parked in the garage, whether the public was permitted to use the garage, whether parking was provided without cost to the employees, and whether other parking was available to the employees.[16]

The Board finds that appellant has not established that the parking garage where the April 5, 2017 incident occurred was used exclusively or principally by employees of the employing establishment. The Board has previously found that a parking garage attached to a commercial building was not within the premises of the employing establishment as there was no indication that the parking garage was for the exclusive use of the employing establishment.[17] The Board noted that the attached parking garage was provided for occupants of the commercial building. Similarly, in this case, appellant has admitted that numerous businesses occupied office space in the same commercial building as the employing establishment and that their employees also used the parking garage. While appellant noted that the parking garage was the only option for all employees and tenants who leased space in that building, she has not provided any relevant evidence to establish that she was required to park in that parking garage or assigned specific parking spaces.[18]

On appeal counsel alleges that the decision was contrary to law and fact. As explained above, however, the Board finds that under the circumstances of the case, the parking garage where appellant slipped and fell on April 5, 2017 was not part of the premises of the employing establishment. Appellant, therefore, has not met her burden of proof to establish that she sustained an injury in the performance of duty.

[16] *Supra* note 14.

[17] *J.B.* Docket No 17-0378 (issued December 22, 2017)*; Rosa M. Thomas-Hunter*, 42 ECAB 500 (issued March 18, 1991).

[18] While appellant submitted pictures of the commercial building, the parking structure, and the area surrounding it they are not relevant to the issue of whether the employing establishment exercised control over the parking garage.

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

CONCLUSION

The Board finds that appellant has not met her burden of proof to establish that a traumatic injury occurred in the performance of duty on April 5, 2017, as alleged.

ORDER

IT IS HEREBY ORDERED THAT the August 15, 2019 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: May 12, 2020
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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