

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

S.T., Appellant)	
)	
and)	Docket No. 20-0388
)	Issued: September 16, 2020
DEPARTMENT OF COMMERCE, NATIONAL)	
OCEANIC & ATMOSPHERIC)	
ADMINISTRATION, Silver Spring, MD,)	
Employer)	
)	

Appearances:
Demetry Pikrallidas, Esq., for the appellant¹
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 November 19, 2019 appellant, through counsel, filed a timely appeal from a November 14, 2019 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 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 that he sustained a traumatic injury in the performance of duty, as alleged.

FACTUAL HISTORY

On September 27, 2019 appellant, then a 61-year-old physical scientist, filed a traumatic injury claim (Form CA-1) alleging that on September 21, 2019 he experienced seat belt impact to the left ribs, back trauma, and neck stiffness when he was involved in a motor vehicle collision while in the performance of duty. He explained that the taxi he was riding in was struck from behind while he was travelling from Dulles International Airport to his home following a trip to Honolulu, Hawaii for a work conference. On the reverse side of the claim form the employing establishment contended that appellant was not injured in the performance of duty as he was returning from a work trip when his taxi was involved in an accident. Appellant stopped work on September 23, 2019.

In support of his claims, appellant submitted a photograph of the damage to the motor vehicle he was riding in which was involved in the collision.

In an October 3, 2019 development letter, OWCP informed appellant that the evidence of record was insufficient to establish his claim. It advised him of the type of factual and medical evidence needed, specifically noting that documentation had not been received to establish that the injury occurred in the performance of duty. It also noted that medical evidence had not been received which supported that the alleged incident caused or aggravated a medical condition. OWCP attached a questionnaire for his completion, which noted that the evidence of record indicated that appellant was injured while in travel status; however, to determine whether he was in the performance of duty at time of the accident, additional evidence was necessary. OWCP specifically inquired as to the following: when and where he last performed his official duties; whether the injury occurred while he was on the most direct route from the last official duty to the next expected duty location; whether the travel expenses were reimbursable and, if so to provide a copy of the travel authorization; to submit a police report or an investigation report from his employing establishment regarding the September 21, 2019 incident. OWCP afforded him 30 days to submit the necessary evidence. No additional evidence was received.

By decision dated November 14, 2019, OWCP denied appellant's traumatic injury claim, finding that the medical evidence of record was insufficient to establish a valid diagnosis causally related to the accepted September 21, 2019 employment incident.

LEGAL PRECEDENT

An employee seeking benefits under FECA³ 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

³ *Id.*

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

The phrase sustained while in the performance of duty has been interpreted by the Board to be the equivalent of the commonly found requisite in workers' compensation law of arising out of and in the course of employment.⁷ In the course of employment deals with 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.⁸

To occur in the course of employment, in general, an injury must occur: (1) at a time when the employee may reasonably be stated 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.⁹

This alone is not sufficient 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 in order for an injury to be considered as arising out of the employment.¹⁰

OWCP's procedure manual provides that the employing establishment is required to complete the reports and statements needed and then submit the evidence to OWCP. In several types of claims (*e.g.*, stress claims, claims with performance of duty issues such as premises, temporary duty travel, or recreational injuries), a statement from the employing establishment is imperative to properly develop and adjudicate the claim.¹¹ OWCP's procedure manual further provides that the protection of FECA is not limited to injuries which occur on the industrial

⁴ *S.S.*, Docket No. 19-1815 (issued June 26, 2020); *S.B.*, Docket No. 17-1779 (issued February 7, 2018); *Joe D. Cameron*, 41 ECAB 153 (1989).

⁵ *M.H.*, Docket No. 19-0930 (issued June 17, 2020); *R.C.*, 59 ECAB 427 (2008); *James E. Chadden, Sr.*, 40 ECAB 312 (1988).

⁶ *S.A.*, Docket No. 19-1221 (issued June 9, 2020); *L.M.*, Docket No. 13-1402 (issued February 7, 2014); *Delores C. Ellyett*, 41 ECAB 992 (1990).

⁷ *A.K.*, Docket No. 09-2032 (issued August 3, 2010); *C.O.*, Docket No. 09-0217 (issued October 21, 2009).

⁸ *Id.*

⁹ *T.F.*, Docket No. 08-1256 (issued November 12, 2008); *Roma A. Mortenson-Kindschi*, 57 ECAB 418 (2006).

¹⁰ *G.R.*, Docket No. 16-0544 (issued June 15, 2017); *M.T.*, Docket No. 16-0927 (issued February 13, 2017).

¹¹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Initial Development of Claims*, Chapter 2.800.7a(2) (June 2011).

premises, and it contains provisions regarding the necessary information to be obtained when an employee has claimed that an injury occurred while on travel status.¹²

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.¹³

ANALYSIS

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

Whether an injury occurs in the performance of duty is a preliminary issue to be addressed before the remaining merits of the claim are adjudicated.¹⁴ On his Form CA-1 appellant claimed that he was injured during a motor vehicle collision on September 21, 2019 while in the performance of duty. He explained that the taxi he was riding in was struck from behind while he was travelling from Dulles International Airport to his home following a trip to Honolulu, Hawaii for a work conference. On the reverse side of the claim form the employing establishment controverted appellant's claim by asserting that appellant was not in the performance of duty when injured as he was off the employing establishment premises and not engaged in official duties at the time. The Board finds that OWCP has not adequately developed this aspect of appellant's claim.

In an October 3, 2019 development letter, OWCP requested additional evidence from appellant, noting that the evidence of record was insufficient to establish that the alleged injury occurred in the performance of duty. It provided a questionnaire for appellant's completion which requested that he provide information relative to his travel status. OWCP, however, did not request all of the information required under its procedures including 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.¹⁵ Without this information, the case record is incomplete. As OWCP failed to request all the information as required under its procedures, the case must be remanded for further development of the claim.

¹² *Id.* at Part 2 - Claims, *Performance of Duty*, Chapter 2.804.5 (August 1992). For injuries sustained in a 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 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. The record must also contain evidence regarding 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. *Id.* at Chapter 2.804.5d.

¹³ *S.T.* Docket No. 16-1710 (issued September 27, 2017); *L.A.*, Docket No. 09-2278 (issued September 27, 2010); *Ann P. Drennan*, 47 ECAB 750 (1996); *Richard Michael Landry*, 39 ECAB 232 (1987) and cases cited therein.

¹⁴ *T.H.*, Docket No. 17-0747 (issued May 14, 2018); *P.L.*, Docket No. 16-0631 (issued August 9, 2016); *see also M.D.*, Docket No. 17-0086 (issued August 3, 2017).

¹⁵ *Supra* note 12.

Furthermore, while the employing establishment generally denied that appellant was engaged in work-related duties on January 9, 2017, it was not asked to specifically respond to appellant's claim. OWCP's procedures provide that the required information regarding injuries sustained while in travel status should be supplied by the injured employee, with the official superior confirming or refuting the employee's allegations.¹⁶ OWCP also has the responsibility to develop the evidence when such evidence is of the character normally obtained from the employing establishment or other government source.¹⁷ In an October 3, 2019 development letter, OWCP requested that appellant submit additional factual and medical evidence in support of his claim and provided a questionnaire for his completion posing specific questions regarding the factual circumstances of the September 21, 2019 motor vehicle accident. OWCP, however, did not send a development letter to the employing establishment asking it to provide further specific information about the factual aspects of appellant's claim, including whether he was on official travel status when injured on September 21, 2019.

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 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.¹⁸

Accordingly, the Board will remand the case for OWCP to further develop the question of whether appellant was in the performance of duty when injured on September 21, 2019. On remand it shall obtain all relevant information from appellant and the employing establishment necessary to determine whether appellant was in travel status when injured while returning from his work trip. Following this and other 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 decision.

¹⁶ *Id.*

¹⁷ *R.G. (K.G.)*, Docket No. 19-1059 (issued July 28, 2020); *G.R.*, Docket No. 18-1490 (issued April 4, 2019); *C.F.*, Docket No. 17-1204 (August 22, 2017).

¹⁸ *A.M.*, Docket No. 18-0630 (issued December 10, 2018).

ORDER

IT IS HEREBY ORDERED THAT the November 14, 2019 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this opinion of the Board.

Issued: September 16, 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