

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

C.D., Appellant)	
)	
and)	Docket No. 20-1174
)	Issued: June 11, 2021
DEPARTMENT OF THE ARMY, CORPUS)	
CHRISTI ARMY DEPOT, Corpus Christi, TX,)	
Employer)	
)	

Appearances:
Alan J. Shapiro, 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
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On May 19, 2020 appellant, through counsel, filed a timely appeal from an April 23, 2020 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.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 April 23, 2020 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 his burden of proof to establish a traumatic injury in the performance of duty on October 10, 2019, as alleged.

FACTUAL HISTORY

On October 11, 2019 appellant, then a 64-year-old machinist, filed a traumatic injury claim (Form CA-1) alleging that on October 10, 2019 at 10:33 p.m. he injured his right shoulder while in the performance of duty. He explained that, just after he left the employing establishment building, he tripped over a parking block and fell on his right shoulder. Appellant listed C.J., another employee at the employing establishment, as a witness. On the reverse side of the claim form the employing establishment indicated that appellant was not injured in the performance of duty because he had already left work when he fell in the parking lot on October 10, 2019. It listed his regular work hours as 2:00 p.m. to 10:30 p.m., Monday through Friday.

An October 11, 2019 e-mail from C.J. stated that on October 10, 2019, right after he and appellant finished work at 10:30 p.m., he saw appellant stumble or trip by the side of his car in the employee parking lot. Appellant got up after a short moment and C.J. asked if he was okay, he did not recall appellant's response. C.J. stated that just after they were released at 10:30 p.m., he saw appellant fall and believed that appellant tripped over the parking curb stop. He related that as there was little lighting in that area it was hard to see in the dark.

October 22, 2019 medical records signed by Dr. Robert Lowry, a physical medicine and rehabilitation specialist, indicated that appellant presented with right shoulder pain. Appellant recounted to Dr. Lowry that on October 10, 2019 when he exited the employing establishment building he noticed it was very dark, that there was some light on, but that it was not very bright. He indicated that he was walking to his vehicle when he tripped over a parking block and fell, landing on his right shoulder. Dr. Lowry reviewed appellant's medical history, conducted a physical examination, and diagnosed a right shoulder superior labrum anterior and posterior (SLAP) tear, rotator cuff tear, and contusion of the glenohumeral joint, a cervical spine sprain and strain, and a chin abrasion. He opined that appellant's injury was work related because his fall was the direct cause of his diagnosed conditions. Appellant continued to follow up with Dr. Lowry for his shoulder pain. On October 24, 2019 Dr. Lowry indicated that, due to appellant's work-related conditions, he would be incapacitated through December 17, 2019. In a separate report dated October 24, 2019, he diagnosed a right elbow contusion, a head abrasion, a strain of muscle and tendon of the back wall of the thorax, a superior glenoid labrum lesion of the right shoulder, a right shoulder contusion, a sprain of the ligaments of the cervical spine, and a strain of muscle(s) and tendon(s) of the right rotator cuff. Dr. Lowry added that there were clear degenerative findings in the shoulder that were not themselves directly caused by appellant's work-related injury.

An October 22, 2019 magnetic resonance imaging (MRI) scan of appellant's right shoulder revealed supraspinatus tendinosis with questionable interstitial tear *versus* low grade partial thickness articular-sided tear, biceps and scapular tendinosis, acromioclavicular osteoarthritis, edema, subacromial subdeltoid bursitis, and chondrosis throughout the genohumeral joint.

In a development letter dated November 7, 2019, OWCP advised appellant that additional evidence was needed in support of his claim. It advised him of the factual and medical evidence

necessary to establish the claim and attached a questionnaire for his completion. OWCP afforded appellant 30 days to submit the requested evidence.

In a separate development letter to the employing establishment of even date, OWCP through a series of questions requested additional information regarding appellant's traumatic injury claim, including details about the parking lot where appellant was injured. It afforded the employing establishment 30 days to submit the requested evidence.

On November 14, 2019 appellant completed OWCP's questionnaire. He indicated that he did not pay for parking and stated that "no one" pays for parking. Appellant noted that, as he was walking into the parking lot, the lighting was poor and the parking block that he tripped over was larger than most at the employing establishment.

In a November 22, 2019 memorandum, the employing establishment responded to OWCP's development letter. In response to the question regarding whether the employing establishment concurred that appellant was injured in its parking lot, the response was, "[y]es, the employee was in the agency's parking lot when the injury occurred."

By decision dated December 16, 2019, OWCP denied appellant's traumatic injury claim, finding that the evidence of record was insufficient to establish that the October 10, 2019 accepted incident occurred in the performance of duty, as alleged. It stated that the evidence of record was insufficient to establish that appellant's injury "arose during the course of employment and within the scope of compensable work factors as defined by the FECA," specifically because the parking lot where he was injured was not part of the employing establishment's premises and no special circumstances existed, which would require an extension of the premises doctrine.

On January 14, 2020 Dr. Lowry related that appellant worked on a military base and the parking lot where appellant was injured was on the base facility and certainly maintained and controlled by the Federal Government. He stated that federal law indicated that if an employing establishment owned a parking lot then an injury that occurred on that parking lot was compensable. On January 17, 2020 appellant underwent right shoulder surgery.

On January 27, 2020 appellant requested reconsideration.

By decision dated April 23, 2020, OWCP denied modification of its December 16, 2019 decision.

LEGAL PRECEDENT

An employee seeking benefits under FECA⁴ 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,⁵ 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

⁴ *Supra* note 2.

⁵ *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).

to the employment injury.⁶ 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.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 To arise 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 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.⁹

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.¹⁰ 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 employing establishment does not have ownership and control of the place of injury, the place may nevertheless still be considered part of the “premises.”¹¹

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 employing establishment 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 unauthorized 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 insufficient 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

⁶ *M.H.*, Docket No. 19-0930 (issued June 17, 2020); *R.C.*, 59 ECAB 427 (2008); *James E. Chadden, Sr.*, 40 ECAB 312 (1988).

⁷ *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).

⁸ *C.L.*, Docket No. 19-1985 (issued May 12, 2020); *S.F.*, Docket No. 09-2172 (issued August 23, 2010); *Valerie C. Boward*, 50 ECAB 126 (1998).

⁹ *S.V.*, Docket No. 18-1299 (issued November 5, 2019); *Roma A. Mortenson-Kindschi*, 57 ECAB 418 (2006); *Mary Keszler*, 38 ECAB 735, 739 (1987).

¹⁰ *R.K.*, Docket No. 18-1269 (issued February 15, 2019); *Narbik A. Karamian*, 40 ECAB 617, 618 (1989); *Eileen R. Gibbons*, 52 ECAB 209 (2001).

¹¹ *C.L.*, Docket No. 18-0812 (issued February 22, 2019); *Wilmar Lewis Prescott*, 22 ECAB 318, 321 (1971).

facility, used the facility with the owner's special permission, or provided parking for its employees.¹²

ANALYSIS

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

In its November 22, 2019 memorandum, the employing establishment indicated that appellant was injured in an employing establishment parking lot. As stated above, 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.¹³ The employing establishment parking lot is located on a military base and, in previous cases, the Board has found that injuries sustained on a military base occurred on the employing establishment's premises.¹⁴ Therefore, the Board finds that appellant was on the premises of the employing establishment when he was injured in the parking lot on October 10, 2019. 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

In appellant's October 17, 2019 CA-1 form, he stated that as he was leaving the employing establishment building, he tripped and fell over a parking block at 10:33 p.m. The October 11, 2019 witness statement e-mail from C.J. indicated that right after he and appellant were released from work at 10:30 p.m. he saw appellant stumble or trip by the side of his car in the employee parking lot. On the back of appellant's CA-1 form the employing establishment stated that appellant's regular work hours were from 2:00 p.m. to 10:30 p.m.

It is well established that within the performance of duty includes a reasonable time before and after work to allow for coming and going.¹⁶ In this case, as appellant's regular work hours were from 2:00 p.m. to 10:30 p.m. and his fall occurred between 10:30 p.m. and 10:33 p.m. as he was leaving work after his shift ended, the Board finds that it happened within a reasonable interval after work and within the course of employment.¹⁷

As appellant has established that the October 10, 2019 employment incident occurred in the performance of duty, as alleged, the question becomes whether this accepted employment

¹² *C.L., id.; R.K., supra* note 10; *see also R.M.*, Docket No. 07-1066 (issued February 6, 2009); *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).

¹³ *Id.*

¹⁴ *See John F. Castro*, Docket No. 03-1653 (issued May 14, 2004) (the Board found that an appellant who was injured on the internal roads of a military base was on the premises of the employing establishment); *see Anneliese Ross*, 42 ECAB 371 (1991) (the Board found that an appellant who was injured in her vehicle on a military base was on the premises of the employing establishment).

¹⁵ *E.O.*, Docket No. 19-0390 (issued January 9, 2020).

¹⁶ *C.L., supra* note 11

¹⁷ *See id.*

incident caused appellant's diagnosed medical conditions. The Board will, therefore, set aside OWCP's April 23, 2020 decision and remand the case to OWCP for consideration of the medical evidence. Following this and other such further development as deemed necessary, OWCP shall issue a *de novo* decision.

CONCLUSION

The Board finds that appellant has met his burden of proof to establish an employment incident on October 10, 2019 in the performance of duty, as alleged. However, the Board further finds that this case is not in posture for decision with regard to whether appellant's diagnosed medical conditions are causally related to the accepted October 10, 2019 employment incident.

ORDER

IT IS HEREBY ORDERED THAT the April 23, 2020 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: June 11, 2021
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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