United States Department of Labor
Employees' Compensation Appeals Board

B.H., Appellant	)	
and	)	**Docket No. 20-0804**
	)	**Issued: March 18, 2021**
DEPARTMENT OF COMMERCE, U.S. CENSUS BUREAU, AREA CENSUS OFFICE, Woodland Hills, CA, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
PATRICIA H. FITZGERALD, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On March 2, 2020 appellant filed a timely appeal from a February 26, 2020 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[1] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to consider the merits of this case.

ISSUE

The issue is whether appellant has met her burden of proof to establish an injury in the performance of duty on January 6, 2020, as alleged.

FACTUAL HISTORY

On January 9, 2020 appellant, then a 63-year-old miscellaneous clerk, filed a traumatic injury claim (Form CA-1) alleging that on January 6, 2020 at 7:45 a.m. she injured her hip and

[1] 5 U.S.C. § 8101 *et seq.*

buttock when she was startled by a stray dog and fell while walking from a retail store parking lot to the employing establishment's area census office (ACO) in the performance of duty. On the reverse side of the claim form, the employing establishment controverted appellant's claim noting that she had not started work at the time of the injury. Appellant's regular work hours were 8:00 a.m. to 4:30 p.m. On the reverse side of the claim form, Supervisor S.S. controverted the claim, contending that there was no written agreement between the employing establishment and the retail store where appellant fell. Rather, "an employee talked to the manager [of retail store] and got approval."

In reports dated January 9, 2020, Dr. Barbara Ellen Scott, a Board-certified internist, opined that appellant's January 6, 2020 fall, caused low back and left hip contusions. She noted work restrictions.

In a January 17, 2020 development letter, OWCP notified appellant of the deficiencies in her claim. It requested additional factual and medical evidence in support of her claim and provided a questionnaire for her completion. In a separate development letter dated January 17, 2020, OWCP requested that the employing establishment provide additional information regarding appellant's traumatic injury claim, including information about the parking lot where she fell and policies regarding the use of same. OWCP afforded both parties 30 days to respond.

Appellant subsequently submitted a January 25, 2020 statement, asserting that she was injured "on the sidewalk just north of the [retail store] parking lot." She asserted that the employing establishment had "required" her and other employees to park in the lot, which was not owned, controlled, or managed by the employing establishment. There was "no limit on the parking at this lot" and no assigned spaces.

In a January 22, 2020 letter of controversion, F.M., an employing establishment manager, contended that employees were not instructed to park in a specific location and that the employing establishment offered paid parking in its building. Employees could also choose to park on the street, at a nearby fitness facility, or at the retail store.

In a letter dated January 23, 2020, S.S. further controverted the claim. She contended that appellant stated on January 8, 2020 that she was injured at 7:30 a.m. on January 6, 2020, but changed the time of injury to 7:45 a.m. on her claim form. Appellant alleged that she was walking through a retail store's parking lot and a dog startled her, causing her to fall and land on her left side. S.S. asserted that the parking lot where appellant fell was not an approved employee parking lot, and that employees could choose to park in several paid lots and garages. She noted that "due to the high cost of parking at the ACO and surrounding area," an employee had asked the retail store's manager if employing establishment personnel could park there and the request was granted.

In a January 24, 2020 letter, S.S. noted that according to the employing establishment's space and leasing office, the parking facility was neither owned, controlled, nor managed by the employing establishment, and there was "no assigned parking [at the retail store]. There was just an agreement between [an employing establishment] employee and [retail store's] manager." Parking at the ACO came with a cost, whereas employees could park at the retail store without charge.

In a letter dated February 24, 2020, J.P., an employing establishment compensation specialist, contended that appellant was not on the employing establishment's premises or in the performance of duty at the time of the claimed injury.

Appellant also submitted medical evidence. In a January 22, 2020 report, Dr. Scott noted work restrictions. In a January 28, 2020 report, she returned appellant to modified duty from January 28 to February 25, 2020. Dr. Scott diagnosed a low back contusion and left sacroiliac joint pain.

By decision dated February 26, 2020, OWCP denied appellant's traumatic injury claim, finding that she had not established that the January 6, 2020 traumatic injury occurred in the performance of duty, as alleged.

LEGAL PRECEDENT

An employee seeking benefits under FECA[2] 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,[3] 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.[4] 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.[5]

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."[6] 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.[7]

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

[2] *Supra* note 1.

[3] *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).

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

[5] *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).

[6] *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).

[7] *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).

establishment, while the employees are going to or from work, before or after working hours or at lunch time, are compensable.[8] 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."[9]

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 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 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 facility, used the facility with the owner's special permission, or provided parking for its employees.[10]

Injuries arising on the premises may be approved if the employee was engaged in activity reasonably incidental to the employment, such as: (a) personal acts for the employee's comfort, convenience, and relaxation; (b) eating meals and snacks on-premises; or (c) taking authorized coffee breaks.[11]

ANALYSIS

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

In a development letter dated January 17, 2020, OWCP notified appellant of the deficiencies in her claim. It requested additional factual and medical evidence in support of her claim and provided a questionnaire for her completion. The Board notes that the questions inquire into the ownership, control, and management of the retail store parking lot, and whether appellant was required or authorized to park in this lot by the employing establishment. In a separate development letter dated January 17, 2020, OWCP also requested that the employing establishment provide additional information about the parking lot where appellant fell, and

[8] *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).

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

[10] *T.T.*, Docket No. 20-0383 (issued August 3, 2020); *C.L.*, *id.*; *R.K.*, *id.*; *Diane Bensmiller*, 48 ECAB 675 (1997); *Rosa M. Thomas-Hunter*, 2 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).

[11] *C.P.*, Docket No. 18-1741 (issued July 5, 2019); *A.P.*, Docket No. 18-0886 (issued November 16, 2018); *T.L.*, 59 ECAB 537 (2008).

policies regarding the use of same. In response, the employing establishment provided an official position description indicating that appellant's duties as a miscellaneous clerk included "clerical duties associated with office processing, including field operations, recruiting, testing, space and leasing, automation, personnel/payroll, and other administration operations, designed to support the responsibilities of the office assigned." In a January 24, 2020 letter, S.S. noted that according to the employing establishment's space and leasing office, the parking facility was neither owned, controlled, nor managed by the employing establishment, and there was "no assigned parking [at the retail store]. There was just an agreement between [an employing establishment] employee and [retail store's] manager." Parking at the ACO came with a cost, whereas employees could park at the retail store without charge. By decision dated February 26, 2020, OWCP denied appellant's traumatic injury claim, finding that she had not established that the January 6, 2020 traumatic injury occurred in the performance of duty as it occurred on a property that was not controlled, managed, owned, or within the influence of the employing establishment.

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 the 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.[12] On January 17, 2020 OWCP requested additional information from the employing establishment regarding the parking lot where appellant fell, and its policies regarding its use. The employing establishment, however, responded only by providing an official position description for the miscellaneous clerk position. In a January 24, 2020 letter, S.S. asserted that the parking facility was neither owned, controlled, nor managed by the employing establishment, and there was "no assigned parking [at the retail store]." Parking at the ACO came with a cost, whereas employees could park at the retail store without charge. Further development of the claim is therefore required.[13]

On remand OWCP shall obtain additional information from the employing establishment including a statement from appellant's supervisor explaining the policy of the employing establishment with regard to parking as it applied to appellant as a miscellaneous clerk. Additionally, as the provided position description does not explain the locus of her work duties, the employing establishment should provide additional information as to whether she was considered an off-premises employee. Following this and other such development as deemed necessary, OWCP shall issue a *de novo* decision regarding appellant's traumatic injury claim.

CONCLUSION

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

[12] *A.C.*, Docket No. 16-0081 (issued August 15, 2016); *Richard Kendall*, 43 ECAB 790 (1992).

[13] OWCP's procedures require that OWCP request specific information from the employing establishment with regard to whether an off premises employee was injured in the performance of duty. *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Performance of Duty*, Chapter 2.804.5 (August 1992).

ORDER

IT IS HEREBY ORDERED THAT the February 26, 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: March 18, 2021
Washington, DC

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

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

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