United States Department of Labor
Employees' Compensation Appeals Board

R.K., Appellant	)	
and	)	**Docket No. 20-1638**
	)	**Issued: December 14, 2022**
SOCIAL SECURITY ADMINISTRATION, New York, NY, Employer	)	

Appearances:
Thomas R. Harkins, 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
PATRICIA H. FITZGERALD, Deputy Chief Judge
JANICE B. ASKIN, Judge

JURISDICTION

On September 18, 2020 appellant, through counsel, filed a timely appeal from an April 8, 2020 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 a traumatic injury in the performance of duty on December 30, 2016, as alleged.

FACTUAL HISTORY

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

On January 6, 2017 appellant, then a 65-year-old claims representative, filed a traumatic injury claim (Form CA-1) alleging that on December 30, 2016 at 8:00 a.m. he slipped on black ice and fell while in the performance of duty. He indicated that he was walking from the employing establishment parking lot into the employing establishment building when he fell, causing injuries to his right upper and lower extremities while in the performance of duty. On the reverse side of the form, appellant's supervisor indicated that appellant's work hours were 8:00 a.m. to 4:30 p.m. and acknowledged that appellant was injured while in the performance of duty.

In a January 18, 2017 development letter, OWCP informed appellant of the deficiencies of his claim. It advised him of the type of factual and medical evidence needed. In a separate development letter of even date, OWCP requested that the employing establishment provide information regarding whether appellant was injured in the employing establishment parking lot; whether it owned, controlled, or managed the parking lot where he was injured; and whether the public was permitted to use the lot. It also asked whether he paid for parking or was entitled to reimbursement for parking expenses and afforded both parties 30 days to respond.

In a January 26, 2017 response, the employing establishment noted that appellant was injured in the employing establishment parking lot. It contended that the parking lot was part of his duty station as the employing establishment was a tenant and occupant of the building and grounds. The employing establishment indicated that the parking lot was used only for employees and visitors of the employing establishment and that there was no fee for parking.

In a January 29, 2017 statement, appellant asserted that the parking lot was provided for employees and clients of the employing establishment. He noted that it was located directly behind the building and that the employees' entrance was at the end of the lot. Appellant reported that he was not required to park in the lot, that parking was free, and that the public visiting the employing establishment was allowed to use the parking lot. He recounted that on December 30, 2016 he parked his car and walked toward the employee entrance. Before reaching the door, appellant fell on black ice and landed on his right side. He noted that he experienced severe pain in his right shoulder, arm, elbow, and leg. Appellant declined to immediately seek medical treatment and his supervisor drove him home. His wife subsequently took him to the hospital later that day and he reported his treatment to the employing establishment.

[3] Docket No. 18-1269 (issued February 15, 2019).

By decision dated February 27, 2017, OWCP denied appellant's traumatic injury claim, finding that he had not established that his December 30, 2016 traumatic injury occurred in the performance of duty. It found that because the parking lot was open to visitors of the employing establishment and not restricted solely to employees, it was not owned, controlled, or managed by the employing establishment.

On February 19, 2018 appellant, through counsel, requested reconsideration of the February 27, 2017 decision. He contended that the employing establishment leased the building and parking lot which consisted of 99 parking spaces. Counsel submitted a page from the lease, indicating that both the employing establishment and another federal agency occupied the building and 99 parking spaces, 100 percent of which was leased by the Federal Government. Counsel further provided a copy of the relevant portion of a collective bargaining agreement, which required the employing establishment to provide parking for employees. He asserted that appellant was required to park in the lot as a condition of his employment. Counsel also provided copies of signs located on the parking lot fence, indicating that the lot was private property for employing establishment visitors and personnel only, and that unauthorized vehicles would be ticketed. He also provided additional medical evidence.

By decision dated May 21, 2018, OWCP denied modification of the February 27, 2017 decision.

Appellant appealed to the Board. By decision dated February 15, 2019, the Board found that the evidence of record was insufficient to determine whether appellant was on the premises of the employing establishment at the time of the alleged December 30, 2016 work injury. The Board remanded the case for OWCP to obtain clarifying information from the employing establishment and determine whether the parking lot was managed or controlled by the employing establishment and, thus, part of the premises.

In a February 22, 2019 development letter, OWCP requested that the employing establishment further explain whether it managed or controlled the parking lot. It afforded the employing establishment 30 days to respond.

In a March 5, 2019 response, the employing establishment denied that it owned, controlled, or managed the parking facilities where appellant was injured. It contended that the public was permitted to use the lot, that appellant was not required to park in the lot, that no parking spaces were assigned, that the lot was not monitored for unauthorized use, that he was not required to pay for parking, and that it did not contract for the exclusive use of the parking lot by its employees.

By decision dated March 20, 2019, OWCP found that appellant was not on the employing establishment's premises at the time of his December 30, 2016 fall, and that his injury did not occur in the performance of duty.

On February 22, 2020 appellant, through counsel, requested reconsideration of the March 20, 2019 decision. Counsel contended that OWCP improperly failed to provide him with a copy of the employing establishment's March 5, 2019 response. Appellant also provided a September 12, 2019 statement asserting that the employing establishment's lease requires the

lessor to provide parking spaces and that the employing establishment contacted the lessor to remove snow and ice.

By decision dated April 8, 2020, OWCP denied modification of its prior decision.

LEGAL PRECEDENT

An employee seeking benefits under FECA 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,[4] that an injury was sustained in the performance of duty as alleged, and that any disability or specific condition for which compensation is claimed is causally related to the employment injury.[5]

The phrase "sustained while in the performance of duty" is regarded as the equivalent of the coverage formula commonly found in workers' compensation laws, namely, "arising out of and in the course of employment."[6] 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 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.[7] 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.[8]

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.[9] 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

[4] *S.V.*, Docket No. 18-1211 (issued November 2, 2019); *S.B.*, Docket No. 17-1779 (issued February 7, 2018); *J.P.*, 59 ECAB 178 (2007); *Joe D. Cameron*, 41 ECAB 153 (1989).

[5] *S.V.*, *id.*; *J.M.*, Docket No. 17-0284 (issued February 7, 2018); *R.C.*, 59 ECAB 427 (2008); *Kathryn Haggerty*, 45 ECAB 383, 388 (1994); *James E. Chadden, Sr.*, 40 ECAB 312 (1988).

[6] *J.K.*, *id.*; *Bernard D. Blum*, 1 ECAB 1 (1947) (this construction makes the statute actively effective in those situations generally recognized as properly within the scope of workers' compensation law).

[7] *A.S.*, Docket No. 18-1381 (issued April 8, 2019); *T.F.*, Docket No. 08-1256 (issued November 12, 2008); *Roma A. Mortenson-Kindschi*, 57 ECAB 418 (2006); *Mary Keszler*, 38 ECAB 735, 739 (1987).

[8] *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).

[9] *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).

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."[10]

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.[11]

ANALYSIS

The Board finds that appellant has not met his burden of proof to establish a traumatic injury in the performance of duty on December 30, 2016, as alleged.

On remand OWCP issued a development letter to the employing establishment.

In response, the employing establishment asserted that the public was permitted to use the parking lot, but that appellant was not required to park in the lot, no parking spaces were assigned, the lot was not monitored for unauthorized use, appellant was not required to pay for parking, and it did not contract for the exclusive use of the parking lot by its employees. Appellant admitted that he was not required to park in the lot, that parking was free, and that the public visiting the employing establishment was allowed to use the parking lot. He also provided evidence that another federal agency occupied the building and utilized the parking lot.

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 unauthorized cars were parked in the lot, whether the public was permitted to use the lot, whether parking was provided without cost to the employees, and whether other parking was available to the employees.[12]

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

[11] *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).

[12] *C.L.*, Docket No. 19-1985 (issued May 12, 2020); *supra* note 11.

The Board finds that appellant has not established that the parking lot where the December 30, 2016 incident occurred was used exclusively by employees of the employing establishment. In this case, the record indicates that another agency occupied the same building as the employing establishment and public visitors to both agencies used the parking lot as well. The employing establishment has also asserted that the parking area was not checked to see that no unauthorized cars were parked in the lot, that its employees were not required to park in this lot, and that they were not assigned a specific parking space. Appellant has not provided evidence to establish that he was required to park in that parking lot or assigned a specific parking space.[13]

The Board thus finds that, under the circumstances of the case, the parking lot where appellant slipped and fell on December 30, 2016 was not part of the premises of the employing establishment. Appellant, therefore, has not met his burden of proof to establish that he sustained an injury in the performance of duty.

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 his burden of proof to establish a traumatic injury in the performance of duty on December 30, 2016, as alleged.

[13] *Id*.

ORDER

IT IS HEREBY ORDERED THAT the April 8, 2020 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: December 14, 2022
Washington, DC

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

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board