United States Department of Labor
Employees' Compensation Appeals Board

L.P., Appellant	)	
and	)	**Docket No. 21-1079**
	)	**Issued: February 2, 2022**
DEPARTMENT OF HOMELAND SECURITY, TRANSPORTATION SECURITY ADMINISTRATION, LONG ISLAND ISLIP-MacARTHUR AIRPORT, East Elmhurst, NY, Employer	)	

Appearances:
Paul Kalker, 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
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On July 1, 2021 appellant, through counsel, filed a timely appeal from an April 23, 2021 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 an injury in the performance of duty on January 18, 2021, as alleged.

FACTUAL HISTORY

On March 5, 2021 appellant, then a 47-year-old security guard, filed a traumatic injury claim (Form CA-1) alleging that on January 18, 2021 at 10:00 a.m. she sustained a tibia stress fracture, torn ankle tendon, and right arm injury while in the performance of duty. She reported that she was leaving work en route to the employee parking lot when she "tripped and fell on the sidewalk between the terminal and [A]uto[P]lane building." Appellant stopped work on January 19, 2021. On the reverse side of the claim form the employing establishment indicated that appellant was not injured in the performance of duty. It listed her regular work hours as 4:15 a.m. to 12:45 p.m., Monday through Friday.

An employing establishment field report dated March 1, 2021 indicated that on January 18, 2021 appellant claimed to have fallen between the terminal and sidewalk next to the AutoPlane building.

Appellant submitted a January 27, 2021 report by Dr. John Feder, a Board-certified orthopedic surgeon, who recounted that on January 18, 2021 appellant fell and braced with her hands and hit her knees and left ankle. Dr. Feder provided examination findings, reviewed diagnostic testing, and diagnosed tear of the right peroneal tendon and ligament laxity. He also signed a medical form, report which indicated that appellant was unable to work from January 18 through April 18, 2021.

In a March 15, 2021 letter, P.M., a human resources analyst for the employing establishment, asserted that on January 18, 2021 appellant was not on property owned or maintained by the employing establishment. He also asserted that appellant was off work at the time of the incident because she had left work early to attend an appointment.

A time and attendance summary indicated that on January 18, 2021 appellant worked 5.15 hours on that day and used 8 hours of leave for "Paid Holiday Time Off."

In a development letter dated March 16, 2021, OWCP notified appellant of the deficiencies of her claim. It advised her of the factual and medical evidence necessary to establish the claim and attached a questionnaire for her completion. By separate development letter to the employing establishment of even date, OWCP requested additional information, including details about the parking lot where appellant was injured. It afforded both parties 30 days to respond.

Appellant completed the OWCP development questionnaire on March 22, 2021. She explained that she was "en route to the employing parking lot when the injury occurred." Appellant reported that the location was between the airport terminal and the AutoPlane Auto Transport building right outside the airport terminal. She indicated that employees were required to park in the parking lot and that the parking lot was on the airport's parking premises. Appellant noted that the town owned and operated the airport, including the airport parking premises. She

claimed that employing establishment employees were required to park in the airport lot and were not required to pay for parking.

In a March 31, 2021 letter, the employing establishment controverted appellant's claim alleging that the reported incident did not occur in the performance of duty because appellant was on premises that were not owned, operated, or controlled by the employing establishment. It also noted that there was no inclement weather on January 18, 2021.

The employing establishment submitted a March 18, 2021 report by Dr. James Caviness, a Board-certified preventive medicine physician, who performed a records review and opined that appellant's diagnosed medical conditions predated the reported incident and were not causally related to the claimed January 18, 2021 employment incident.

On March 31, 2021 OWCP also received the employing establishment's response to its development letter. The employing establishment responded, "No" to the question about whether, at the time of the alleged injury, appellant was on premises which were owned, operated, or controlled by this employing establishment. It also responded, "No" to the question regarding whether the parking lot was owned, controlled, or managed by the employing establishment. The employing establishment also indicated that employees were not required to park in this lot and that other options were available if an employee wished to pay for parking. It further reported that employees were not charged for parking as long as they parked in the lot authorized by the airport operator. The employing establishment provided two aerial photographs, which showed where the parking lot was located and the area where appellant was injured.

By decision dated April 23, 2021, OWCP denied appellant's claim, finding that the evidence of record was insufficient to establish that appellant's alleged injury "arose during the course of employment and within the scope of compensable work factors" as defined by FECA. Specifically, it found that the parking lot where she was injured was not part of the employing establishment's premises and the parking lot was not owned, controlled or managed by the employing establishment. OWCP, therefore, concluded that the requirements had not been met to establish an injury as defined by FECA.

LEGAL PRECEDENT

An employee seeking benefits under FECA[3] has the burden of proof to establish the essential elements of his or her claim, including 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,[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

[3] *Id*.

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

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 prerequisite in workers' compensation law of "arising out of and in the course of employment."[7] The phrase "in the course of employment" is recognized as related to the work situation, and more particularly, relating to elements of time, place, and circumstance. 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 where 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.[8]

It is well established as a general rule of workers' compensation law that, under the premises doctrine, off-premises injuries sustained by employees having fixed hours and places of work while going to or from work or during a lunch period, are not compensable, as they do not arise out of and in the course of employment. Rather, such injuries are merely the ordinary, nonemployment hazards of the journey itself, which are shared by all travelers, subject to certain exceptions.[9]

Exceptions to the premises doctrine have been made to protect activities that are so closely related to the employment itself as to be incidental thereto,[10] or which are in the nature of necessary personal comfort or ministration.[11] One of these exceptions is the proximity exception to the premises rule, which allows constructive extension of the premises to those hazardous conditions which are proximate to the premises and may, therefore, be considered as hazards of the employment.[12] The Board has determined that underlying the proximity principle is the principle that course of employment should extend to any injury that occurred at a point where the employee was within the range of dangers associated with the employment.[13] This exception has two

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

[6] *R.R.*, Docket No. 19-0048 (issued April 25, 2019); *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).

[7] *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).

[8] *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).

[9] *V.P.*, Docket No. 13-0074 (issued July 1, 2013); *M.L.*, Docket No. 12-0286 (issued June 4, 2012); *John M. Byrd*, 53 ECAB 684 (2002).

[10] *M.T.*, Docket No. 17-1695 (issued May 15, 2018).

[11] *J.L.*, Docket No. 14-368 (issued August 22, 2014).

[12] *K.D.*, Docket No. 18-0617 (issued February 13, 2019); *D.K.*, Docket No. 11-1029 (issued February 1, 2012).

[13] *J.K.*, Docket No. 17-0756 (issued July 11, 2018); *Eugene G. Chin*, 39 ECAB 598 (1988).

components. The first is the presence of a special hazard at the particular off-premises point. The second is the close association of the access route with the premises, so far as going and coming is concerned.[14]

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 or adjudicated.[15] On her Form CA-1 appellant has alleged that on January 18, 2021 she tripped and fell down on the sidewalk between the terminal and AutoPlane building on her way to the employee parking lot after work. The employing establishment has contended that appellant was not injured in the performance of duty because she was off duty at the time of the injury and was not on the employing establishment's premises.

In determining whether appellant's injury on the sidewalk between the terminal and AutoPlane building occurred while in the performance of duty, the Board must first consider the factors necessary to determine whether the parking area that appellant was en route to should be considered part of the employing establishment's premises.[16] The Board has 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. 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.[17]

In a March 16, 2021 development letter, OWCP requested additional factual information from the employing establishment with regard to whether appellant was in the performance of duty

[14] *B.H.*, Docket No. 14-0829 (issued July 8, 2015).

[15] *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).

[16] *See R.E.*, Docket No. 18-0515 (issued February 18, 2020) (the Board first considered whether the parking area that appellant was walking from was considered part of the employing establishment's premises before it considered whether the crosswalk between the parking area and the workplace should be considered part of the employing establishment's premises); *see also S.V.*, Docket No. 18-1299 (issued November 5, 2019) (the Board first considered whether a satellite parking lot was considered on the employing establishment's premises before it considered whether an injury that occurred while the employee stepped off a transport bus had occurred on the employing establishment premises).

[17] *C.D.*, Docket No. 20-1174 (issued June 11, 2021); *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).

when injured on January 18, 2021, including specific questions about the parking lot that appellant was on her way to after work. While the employing establishment responded to OWCP's development letter, it provided only brief answers to OWCP's questions without sufficient explanation. For example, it simply responded "No" to the question of whether the parking lot was owned, controlled, or managed by the employing establishment. The employing establishment provided no further explanation regarding who owned or maintained the parking lot or whether it contracted for the exclusive use of the parking lot. It also indicated that employees were not required to park in this parking lot and that "other options" were available if an employee wished to pay for parking. However, the employing establishment did not elaborate on the location, usage, and access of the other parking lots. Appellant alleged that employees were in fact required to park in the assigned parking lot in question. Despite receiving a response from the employing establishment, which did not fully answer the posed questions, OWCP did not conduct any further development of the evidence before it issued its decision.[18] The Board finds, therefore, that OWCP did not properly develop the evidence with respect to whether appellant's slip-and-fall injury occurred on the employing establishment's premises.[19]

The Board further finds that OWCP did not make adequate findings of fact regarding whether the alleged January 18, 2021 injury occurred within a reasonable interval after appellant's work shift. It is well established that within the performance of duty includes a reasonable time before and after work to allow for coming and going.[20] In this case, appellant's regular work hours were from 4:15 a.m. to 12:45 p.m. and her fall occurred at 10:00 a.m. The employing establishment has asserted that appellant was off work at the time of her fall injury because she had left work early to attend an appointment. It included a time and attendance summary that indicated that appellant worked 5.15 hours on January 18, 2021. The Board finds, however, that the evidence of record is unclear regarding when appellant clocked out of work and whether she was on approved leave to attend an appointment at the time of the fall injury. OWCP did not request any information from the employing establishment regarding the circumstances surrounding when appellant's work shift ended on January 18, 2021 and whether she was authorized to leave work at that time.[21] Accordingly, the case must be remanded for further factual development in order for the Board to determine a "reasonable interval" after appellant's work shift on January 18, 2021.

Proceedings under FECA are not adversarial in nature, and while appellant has the burden to establish entitlement to compensation, OWCP shares responsibility in the development of the

[18] *See G.R.*, Docket No. 18-1490 (issued April 4, 2019).

[19] *See S.V., supra* note 16 (case was remanded for OWCP to obtain additional information from the employing establishment regarding whether a satellite parking lot was considered on the premises of the employing establishment).

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

[21] *See S.M., claiming as son of J.M.*, Docket No. 16-1725 (issued May 11, 2017) (Board remanded the case for OWCP to obtain additional information from the employing establishment regarding why appellant remained at work after his work shift ended).

evidence.[22] It has an obligation to see that justice is done.[23] OWCP procedures further provide that it should obtain relevant information, including relevant diagrams, from an official superior if it requires clarification before determining whether the employee was on the premises.[24] As OWCP failed to request all the information as required under its procedures, 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 January 18, 2021.[25]

On remand OWCP shall obtain further explanation from the employing establishment regarding 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 where other parking was available to the employees. The employing establishment should also be asked to address whether the sidewalk on which appellant fell was owned or maintained by the employing establishment,[26] used exclusively or principally by employees of the employing establishment for the convenience of the employer,[27] and whether the sidewalk was a necessary point of ingress/egress.[28] Lastly, the employing establishment should provide additional information regarding when appellant's work shift ended on January 18, 2021 and whether she was approved to leave work early. Following this and other such development as deemed necessary, OWCP shall issue a *de novo* decision regarding appellant's traumatic injury claim.

[22] *See e.g., M.G.*, Docket No. 18-1310 (issued April 16, 2019); *Walter A. Fundinger, Jr.*, 37 ECAB 200, 204 (1985); *Dorothy L. Sidwell*, 36 ECAB 699, 707 (1985); *Michael Gallo*, 29 ECAB 159, 161 (1978); *William N. Saathoff*, 8 ECAB 769, 770-71.

[23] *See A.J.*, Docket No. 18-0905 (issued December 10, 2018); *William J. Cantrell*, 34 ECAB 1233, 1237 (1983); *Gertrude E. Evans*, 26 ECAB 195 (1974).

[24] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Performance of Duty*, Chapter 2.804.4(d), (f), and (g) (August 1992); *see also L.P.*, Docket No. 17-1031 (issued January 5, 2018).

[25] *See R.H.*, Docket No. 20-1011 (issued February 17, 2021).

[26] *See J.K.*, Docket No. 17-0756 (issued July 11, 2018) (the Board found that an employee who slipped on ice on the sidewalk in front of the employing establishment's door was not within the performance of duty because the rental lease showed that the employing establishment leased the property from a private owner who was responsible for maintaining the property space).

[27] *See Idalaine L. Hollins-Williamson*, 55 ECAB 655 (2004) (the Board found that an employee's slip-and-fall injury on a public sidewalk while walking from a parking lot to the employing establishment did not occur in the performance of duty as the employee did not establish that the sidewalk on which she fell was used exclusively or principally by the employees of the employing establishment).

[28] *See J.D.*, Docket No. 16-0104 (issued April 5, 2016) (OWCP had found that an employee who slipped and fell on a sidewalk while leaving the parking lot to his duty station was within the performance of duty because the walkway between the parking lot and the employee's duty station was a necessary point of ingress/egress).

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the April 23, 2021 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: February 2, 2022
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