United States Department of Labor
Employees' Compensation Appeals Board

K.M., Appellant	)	
and	)	
DEPARTMENT OF HOMELAND SECURITY, TRANSPORTATION SECURITY ADMINISTRATION, Tulsa, OK, Employer	)	**Docket No. 20-1528** **Issued: March 23, 2022**

Appearances:
Alan J. Shapiro, 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 August 20, 2020 appellant, through counsel, filed a timely appeal from a July 15, 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 her burden of proof to establish that she sustained an injury in the performance of duty on March 10, 2017, 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 March 10, 2017 appellant, then a 60-year-old transportation security officer, filed a traumatic injury claim (Form CA-1) alleging that, at approximately 12:00 p.m. on that date, her knees and wrists were scratched, bloodied and swollen when she tripped on uneven pavement when she was walking to work while in the performance of duty. A coworker, S.G., provided a statement on the Form CA-1 noting that while walking to work on March 10, 2017 she saw appellant lying on the ground under the covered sidewalk on B side parking. Appellant informed S.G. that she tripped on the sidewalk. On the reverse side of the claim form, the employing establishment controverted the claim contending that appellant was not in the performance of duty when she was injured, as the incident occurred before the start of her work shift, she was off premises and was not engaging in official duties. It noted that her work schedule was 12:00 p.m. to 8:30 p.m., Tuesday through Saturday. Appellant did not stop work.

In a March 20, 2017 development letter, OWCP advised appellant of the deficiencies of her claim. It informed her of the type of factual and medical evidence needed to establish her claim and provided her with a factual questionnaire for her completion. In a separate development letter of even date, OWCP requested that the employing establishment provide information regarding the location and time of appellant's injury. It afforded both parties 30 days to submit the requested information.[4]

OWCP received medical evidence, including treatment notes dated March 13, 2017 from Dr. Homer Hardy, an osteopath, diagnosing contusions of both knees.

On March 23, 2017 the employing establishment controverted appellant's claim, asserting that appellant's injury occurred at 11:56 a.m. on March 10, 2017, but that her work shift did not

[3] Docket No. 18-0617 (issued February 13, 2019).

[4] Appellant submitted numerous reports to the record dating from March 10, 2017. On April 7 and 25, and June 26, 2017 Dr. Robert Coye, a Board-certified internist, diagnosed right medial knee pain. On May 9 and 30, June 1 and 6, and July 18, 2017 Dr. James D. Cash, a Board-certified orthopedic surgeon, diagnosed bilateral knee contusions. On June 2, 2017 Dr. Kelly Lindauer, a Board-certified diagnostic radiologist, reviewed appellant's magnetic resonance imaging (MRI) scan and found tear of the medial meniscus, chondromalacia, and effusion. Dr. Thomas Kern, a Board-certified internist, examined appellant on July 31, 2017 and diagnosed derangement of medial meniscus of both knees. Dr. Seth Migdalski, a psychiatrist, examined appellant on October 30, 2017 for emotional conditions. Appellant also submitted numerous reports from Timothy Marlow, Chad Perkins, Dianne Briscoe, and Eve Fitzpatrick, physician assistants, as well as notes from Whitney Ellsworth, a physical therapist. *See M.M.*, Docket No. 17-1641 (issued February 15, 2018); *K.J.*, Docket No. 16-1805 (issued February 23, 2018).

begin until 12:00 p.m. It noted that she had not clocked in for duty and was not in any work location when the injury occurred. The employing establishment reported that it did not own, lease, or maintain the area where appellant's injury occurred. It further noted that it did not direct her to park her car in any of the various public parking lots that surrounded her duty station. J.M., an AirServ supervisor, witnessed appellant's fall and described the location as occurring on the sidewalk coming up from B side parking.

By decision dated April 25, 2017, OWCP denied appellant's traumatic injury claim finding that the evidence submitted was insufficient to establish that she was injured in the performance of duty. It found that she was not reasonably fulfilling the duties of her employment or doing something incidental thereto at the time of her injury, that she had not begun her tour of duty, and was walking on a public sidewalk toward the employing establishment. OWCP noted that under FECA, an employee who is injured off premises while commuting to work is not in the course of employment.

On May 4, 2017 counsel requested an oral hearing before a representative of OWCP's Branch of Hearings and Review.

In an e-mail to counsel dated July 16, 2017, appellant reported that she fell on the sidewalk between the employee parking lot and the employing establishment office. She noted that she paid for parking with the Green Option Commuter Card (For Federal Government Transit Subsidy Use Only). Appellant's card allotted $240.00 and she paid parking costs of $135.00 every six months. She indicated that she would fax counsel a copy of the employer-paid parking receipt from July 14, 2017.

In a letter dated July 31, 2017, counsel indicated that he was providing OWCP with medical records, physical therapy notes, and a "copy of the receipt and the subsidized public transportation pass paid for by the employing agency."

Appellant testified during an oral hearing on October 6, 2017 before an OWCP hearing representative. She alleged that she was required to wear a uniform for her position, but that the employing establishment regulated the activities she could perform in uniform. Appellant testified that the employing establishment rented a portion of the airport parking lot for its employees and assigned them a place to park. The employing establishment required employees to go straight from the parking lot to the employing establishment without diversion. Appellant asserted that her parking was fully paid for by the employing establishment, and that she had to park in an assigned area otherwise her car would be booted. She noted that the employing establishment provided her with a commuter payment card and a placard for her car. Appellant testified that there was only one sidewalk from the parking lot to her duty station and that no other route was available. She noted that the parking area in question was encircled by a six-foot fence and that she had a badge for that parking area. Appellant again alleged that she could not enter the employing establishment from another parking location. She noted that other airport employees parked in the fenced lot including pilots and stewardesses. Counsel contended that it was not plausible that the employing establishment was not in control of the area as they paid for parking and that there was only one entrance that appellant could utilize to get to her duty station.

On December 5, 2017 the employing establishment terminated appellant's employment. It noted that her appointment was subject to completion of a two-year trial period. The termination was noted to promote the efficiency of the service and was primarily based on her extensive use of leave.

By decision dated December 18, 2017, OWCP's hearing representative found that appellant was injured on the sidewalk between the off-premises parking lot and the worksite. She noted that there was no evidence that the employing establishment controlled or maintained the area where the fall occurred. OWCP's hearing representative determined that the facts did not establish an exception to the premises rule and that appellant's injury did not arise out of and in the course of her federal employment.

Appellant, through counsel, appealed to the Board. In its February 13, 2019 decision,[5] the Board set aside the December 18, 2017 decision and found that the case was not in posture for decision as OWCP had not properly developed the factual evidence to establish whether the secured parking facility and the covered sidewalk were in control of the employing establishment such that appellant was on the premises when injured. The Board remanded the case for further development and a *de novo* decision.

In an April 2, 2019 development letter, OWCP requested that the employing establishment provide a diagram demonstrating the boundaries of its premises and the location of appellant's injury site in relation to those premises.

On April 16, 2019 the employing establishment submitted several photographs with notations identifying parking lot B, the sidewalk maintained by the Tulsa Airport Authority, identified as the general area where appellant fell, and the employees' entrance.

In an April 24, 2019 e-mail, OWCP requested that the employing establishment respond to the remainder of the questions posed by the Board. In response, the employing establishment reported that appellant was not required to park in parking lot B. It further noted that there were various locations where she could have chosen to park, as parking lot A and B were open to all employees that worked at the airport and maintained by American Parking. The employing establishment further noted that there was an additional American Parking lot, and a lot maintained by Fine Parking. It reported that parking lot B was opened to all employees of the airport, not just its employees; however, it was not open to the general traveling public. The employing establishment noted that it provided a parking subsidy to appellant, not a specific parking space, and that she could have chosen not to accept it. It reported that she was not assigned to parking lot B, that it did not assign or provide parking, but that it provided an optional subsidy to help to pay for parking. The employing establishment denied responsibility for monitoring or inspecting the parking lots for security purposes and added that it did not pay a third party for those services. It reported that the covered sidewalk where appellant fell was the normal route that she would have traveled after parking in lot B.

By decision dated May 16, 2019, OWCP denied appellant's traumatic injury claim finding that her injury did not occur in the performance of duty as she was not on the employing

[5] *Supra* note 2.

establishment premises at the time her injury occurred. On May 21, 2019 appellant, through counsel, requested an oral hearing before a representative of OWCP's Branch of Hearings and Review, which was held on August 27, 2019.

Appellant testified before an OWCP hearing representative and asserted that the general public did not park in lot B. She further asserted that the general public did not use the sidewalk where she fell, that it was the only way to get from parking lot B to the building, and that she paid more to park in lot B as it was closer to her duty station than lot A. Appellant reported that there was no mass public transit to the airport, only taxis or other automobile-based modes of transport.

By decision dated October 3, 2019, OWCP's hearing representative vacated the May 16, 2019 decision. She remanded the case and directed OWCP to ascertain whether the employing establishment was accessible to employees *via* public transportation and whether any employees, in fact, traveled to work using public transportation.

On October 17, 2019 appellant provided a link to the Tulsa Transit System and noted that it did not list the airport as a destination.

In a letter dated November 15, 2019, the employing establishment reported that the Tulsa Transit System provided public transportation to and from the airport. It was located curbside outside of baggage claim. The employing establishment noted that only one employee had utilized this form of transportation. It also noted that taxi, other private vehicle transport, and airport shuttle services were provided by the parking companies.

By decision dated December 31, 2019, OWCP denied appellant's claim finding that she was not injured in the performance of duty. On January 6, 2020 appellant, through counsel, requested an oral hearing from a representative of OWCP's Branch of Hearings and Review, which was held on May 14, 2020.

Appellant testified before an OWCP hearing representative and asserted that at the time of her injury on March 10, 2017 there was no public transportation available to the employing establishment due to construction on the airport premises. Appellant alleged that she had no choice but to park in a lot at the airport. She noted that Tulsa had instituted a new bus service in 2019, the Aero bus. Appellant testified that she was not currently working due to her knee conditions and had undergone surgery on one knee.

By decision dated July 15, 2020, OWCP's hearing representative found that there were public parking lots available to appellant, that she chose to park in lot B, even though it was more expensive, and that the employing establishment did not contract for parking lot B, maintain it, police it, or otherwise demonstrate any control over parking lot B or the walkway where appellant fell. He noted that were other means of ingress to the work facility, particularly those routes from lot A, such that the walkway were appellant fell was not the only access to work. OWCP's hearing representative found that appellant was not on the premises when her March 10, 2017 injury occurred and was, therefore, not in the performance of duty.

LEGAL PRECEDENT

An employee seeking benefits under FECA has the burden of establishing 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,[6] 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.[7] These are the essential elements of each and every compensation claim regardless of whether the claim is predicated on a traumatic injury or an occupational disease.[8]

The phrase "sustained while in the performance of duty"[9] 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."[10] To arise in the course of employment,[11] 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 the employment; and (3) while he or she was reasonably fulfilling the duties of her employment or engaged in doing something incidental thereto.[12]

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[13] but if the injury occurs off the premises, it is not compensable, subject to certain exceptions. 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

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

[7] *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).

[8] *See S.B., supra* note 6; *Irene St. John*, 50 ECAB 521 (1999); *Michael E. Smith*, 50 ECAB 313 (1999).

[9] 5 U.S.C. § 8102(a); *S.S.*, Docket No. 20-1349 (issued February 16, 2021); *J.K.*, Docket No. 17-0756 (issued July 11, 2018).

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

[11] *See L.P.*, Docket No. 17-1031 (issued January 5, 2018).

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

[13] *L.P., supra* note 11; *Narbik A. Karamian*, 40 ECAB 617, 618 (1989). The Board has also applied this general rule of workers' compensation law in circumstances where the employee was on an authorized break. *See Eileen R. Gibbons*, 52 ECAB 209 (2001).

ownership and control of the place of injury, the place may nevertheless still be considered part of the premises.[14]

The Board has also held that the factors, which determine whether a parking area used by employees may be considered 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 area 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 area, whether parking was provided without cost to the employees, whether the public was permitted to use the area, and whether other parking was available to the employees. Mere use of a parking facility alone is insufficient to bring the parking area 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.[15]

As noted above, there are exceptions to the premises rule, and one is the proximity exception, 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.[16] Underlying the proximity exception is the principle that course of employment should extend to an injury that occurred at a point where the employee was within the range of dangers associated with the employment.[17] The most common ground of extension is that the off-premises point at which the injury occurred lies on the only route, or at least on the normal route, which employees must traverse to reach the premises, and that, therefore, the special hazards of that route become the hazards of the employment.[18] This exception contains two 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 are concerned.[19]

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[14] *S.S., supra* note 9; *C.L.*, Docket No. 19-1985 (issued May 12, 2020); *Wilmar Lewis Prescott*, 22 ECAB 318, 321 (1971).

[15] Federal (FECA) Procedure Manual, Part 2 - Claims, *Performance of Duty*, Chapter 2.804.(4)(f) (August 1992); *C.L., id.*; *R.K.*, Docket No. 18-1269 (issued February 15, 2019); *Diane Bensmiller*, 48 ECAB 675 (1997); *Rosa M. Thomas-Hunter*, 2 ECAB 500 (1991); *see also Edythe Erdman*, 36 ECAB 597 (1985); *Karen A. Patton*, 33 ECAB 487 (1982); *R.M.*, Docket No. 07-1066 (issued February 6, 2009).

[16] *D.K.*, Docket No. 11-1029 (issued February 1, 2012).

[17] *See J.K., supra* note 9; *Jimmie Brooks*, 54 ECAB 248 (2002); *Syed M. Jawaid*, 49 ECAB 627 (1998).

[18] Arthur & Lex Larson, *The Law of Workers' Compensation* § 13.01(3). *See also J.K, supra* note 9; *R.O.*, Docket No. 08-2088 (issued May 18, 2009).

[19] *Id.* at § 13.01(3)(b); *L.P., supra* note 11; *Wilmar Lewis Prescott, supra* note 14. Another exception to the rule is the proximity rule, which the Board has defined by as where, under special circumstances, the industrial premises are constructively extended to hazardous conditions, which are proximately located to the premises and may, therefore, be considered as hazards of the employing establishment. The main consideration in applying the rule is whether the conditions giving rise to the injury are causally connected to the employment. *See William L. McKenney*, 31 ECAB 861 (1980).

ANALYSIS

The Board finds that appellant has not met her burden of proof to establish that she sustained an injury in the performance of duty on March 10, 2017, as alleged.

Preliminarily, the Board notes that it is unnecessary for the Board to consider the evidence appellant submitted prior to the issuance of OWCP's December 18, 2017 merit decision because the Board considered that evidence in its February 13, 2019 decision. Findings made in prior Board decisions are *res judicata* absent any further review by OWCP under section 8128 of FECA.[20]

The Board has held that the premises of the employer are generally extended when an employee must travel a public thoroughfare to traverse between two premises of the employer.[21] In order to determine whether the covered sidewalk between the employing establishment and parking lot B, where appellant's March 10, 2017 fall occurred, should be considered part of the employing establishment's premises, the Board must first consider the factors necessary to determine whether parking lot B was under sufficient control of the employing establishment to constitute its premises.[22] 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 employing establishment 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 parking area, whether the public was permitted to use the parking area, whether parking was provided without cost to the employees, and whether other parking was available to the employees.[23]

The Board finds that appellant has not established that parking lot B, was exclusively or principally used by employees of the employing establishment. Appellant and the employing establishment have agreed that parking lot B was open to airport employees as well as those of the employing establishment. The parties agree that the employing establishment did not assign the space or the lot in which appellant parked. Both parties also agree that appellant could have parked in lot A or B or in other public parking locations at the airport. Appellant chose to park in lot B as it was closest to the employing establishment entrance and paid a premium above the parking subsidy allotment provided to her to park in that lot.[24] While she noted that parking lot B was the

[20] *See B.R.*, Docket No. 17-0294 (issued May 11, 2018); *Clinton E. Anthony, Jr.*, 49 ECAB 476, 479 (1998); *see also* 20 C.F.R. § 501.6(d).

[21] *R.B.*, Docket No. 11-1320 (issued September 5, 2012).

[22] *R.E.*, Docket No. 18-0515 (issued February 18, 2020).

[23] *C.L.*, *supra* note 14.

[24] *C.B.*, Docket No. 12-1849 (issued January 13, 2014).

nearest option for all employees, she has not provided any relevant evidence to establish that she was required to park in that parking lot or assigned specific parking space.[25]

As parking lot B was not a part of the employing establishment premises, and as appellant was not required to park there, the off-premises point at which the injury occurred, the covered sidewalk, does not lie on the only route or on the normal route, which employees must traverse to reach the premises, such that the special hazards of that route become the hazards of the employment.[26] The record reveals that there were multiple places that appellant could park on the airport premises and, therefore, multiple ways that she could have accessed her workplace. She did not establish within the meaning of FECA, that there were hazardous conditions proximately located to the premises, which would establish a constructive extension.[27] Rather appellant's act of tripping on uneven pavement was a hazard common to all travelers on the sidewalk and was not causally related to her employment.[28] Thus, her injury constitutes an ordinary nonemployment hazard of the journey itself, shared by all travelers.[29]

As the record fails to support the application of an exception to the off-premises rule, the Board finds that appellant did not meet her burden of proof to establish that she sustained an injury in the performance of duty on March 10, 2017.[30]

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 her burden of proof to establish that she sustained an injury in the performance of duty on March 10, 2017, as alleged.

[25] *J.B.*, Docket No. 17-0378 (issued December 22, 2017).

[26] *See F.S.*, Docket No. 09-1573 (issued April 6, 2010) (finding that although the crosswalk where the claimant was injured may have been the normal route to reach the employing establishment from the short-term lot, the claimant was not required to park in the short-term lot and, by extension, was not required to use the crosswalk).

[27] *D.B.*, Docket No. 13-0510 (issued June 10, 2013).

[28] *F.S.*, *supra* note 26.

[29] *Id*.

[30] *See Jon Louis Van Alstine*, 56 ECAB 136 (2004). *See also Linda S. Jackson*, 49 ECAB 486 (1998).

ORDER

IT IS HEREBY ORDERED THAT the July 15, 2020 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 23, 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