United States Department of Labor
Employees' Compensation Appeals Board

J.C., Appellant	)	
and	)	**Docket No. 21-0941**
	)	**Issued: September 20, 2022**
DEPARTMENT OF VETERANS AFFAIRS, VETERANS BENEFITS ADMINISTRATION, Lakewood, CO, 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, Deputy Chief Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On June 8, 2021 appellant filed a timely appeal from a February 23, 2021 merit decision and an April 7, 2021 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[1] and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether appellant has met his burden of proof to establish an injury in the performance of duty on February 3, 2020, as alleged; and (2) whether OWCP properly denied appellant's request for reconsideration of the merits of his claim, pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On April 13, 2020 appellant, then a 69-year-old realty specialist, filed a traumatic injury claim (Form CA-1) alleging that on February 3, 2020 at 6:30 a.m. he injured his left knee and foot

[1] 5 U.S.C. § 8101 *et seq*.

when he arrived at work to begin his shift and slipped and fell on ice-covered steps leading down to his duty station from a parking lot. On the reverse side of the form, appellant's supervisor noted that appellant's scheduled tour of duty began at 6:30 a.m. and acknowledged that he was in the performance of duty at the time of the injury. Appellant stopped work on the date of the claimed injury.

In a development letter dated April 16, 2020, OWCP informed appellant of the deficiencies of his claim. It advised him of the type of evidence required to establish his claim and provided a questionnaire for his completion. In a second development letter of even date, it requested that the employing establishment indicate whether it concurred with appellant's statements, and provide information regarding whether it owned, controlled, managed, or maintained the steps and parking lot where appellant had fallen. If the employing establishment did not control, manage, or maintain the steps and parking lot, OWCP requested information as to who owned these areas and who was responsible for their maintenance. It afforded both parties 30 days to respond.

In response, appellant submitted February 3, 2020 hospital emergency department discharge instructions for a knee sprain, and a February 4, 2020 prescription label from analgesic medication.

In a development questionnaire signed on April 28, 2020, appellant asserted that the parking lot and the steps where he fell were owned by a private-sector realty company and were not controlled or managed by the employing establishment.

In a May 13, 2020 statement, an employing establishment supervisor asserted that a private-sector realty company, owned the building where appellant worked, and that the company also managed and maintained the steps and parking lot.

By decision dated May 21, 2020, OWCP accepted that the February 3, 2020 incident occurred as alleged and that a medical condition had been diagnosed in connection with that event, but it denied the claim as the alleged injury did not occur in the performance of duty. It found that both appellant and the employing establishment asserted that the steps where he slipped and fell were not owned, controlled, managed, or maintained by the employing establishment, but by a private-sector realty company.

On January 21, 2021 appellant requested reconsideration. He contended that he was injured in the performance of duty as the employing establishment controlled and managed the area where he fell under a commercial leasing agreement with the private-sector realty company.

By decision dated February 23, 2021, OWCP denied modification of its prior decision. It found that appellant had not submitted a copy of the commercial leasing agreement to support his legal argument.

On April 5, 2021 appellant requested reconsideration on an appeal request form. He contended that an enclosed lease agreement established that he had been injured in the performance of duty as the employing establishment controlled and managed the employee parking lot and the steps where he had fallen.

OWCP received a copy of a commercial lease agreement between a private-sector realty company and the General Services Administration's Public Buildings Service, executed on February 4, 2015, under which the employing establishment leased the building, parking lot, and the steps where appellant fell. Section 6.10 of the lease provided that the lessor would provide snow removal services of sidewalks, walkways, and other entrances when snow accumulation exceeded two inches no later than 5:00 a.m. The lease further provided that the "[l]essor shall keep walkways, sidewalks, and parking lots free of ice during the normal hours." A map at page 35 of the lease indicates that the steps where appellant fell were within the area leased by the employing establishment.

By decision dated April 7, 2021, OWCP denied reconsideration.

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under FECA has the burden of 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,[2] 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.[3] 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.[4]

The phrase "sustained while in the performance of duty"[5] 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,[7] 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

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

[3] *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).

[4] *See S.B., supra* note 2; *Irene St. John*, 50 ECAB 521 (1999); *Michael E. Smith*, 50 ECAB 313 (1999).

[5] 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).

[6] 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).

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

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.[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] 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 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 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.[11]

ANALYSIS -- ISSUE 1

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

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

[9] *L.P., supra* note 7; *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).

[10] *K.M.*, Docket No. 20-1528 (issued March 23, 2022); *C.L.*, Docket No. 19-1985 (issued May 12, 2020); *Wilmar Lewis Prescott*, 22 ECAB 318, 321 (1971).

[11] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Performance of Duty*, Chapter 2.804.4f. (August 1992); *K.M., id.*; *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).

Whether an injury occurs in the performance of duty is a preliminary issue to be addressed before the remaining merits of the claim are adjudicated.[12] On his Form CA-1 appellant has alleged that on February 3, 2020 he slipped and fell on icy steps leading down from a parking lot to his duty station. In a May 13, 2020 statement, the employing establishment supervisor asserted that a private-sector realty company owned the building where appellant worked, and managed and maintained the parking lot and the steps where he fell.

In determining whether appellant's injury on the steps between the parking lot and his duty station occurred while in the performance of duty, the Board must first consider the factors necessary to determine whether the parking area appellant was en route from should be considered part of the employing establishment's premises.[13] 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. 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.[14]

In an April16, 2020 development letter, OWCP requested additional factual information from the employing establishment with regard to whether appellant was in the performance of duty when injured on February 3, 2020, including specific questions about the ownership, management, and control of the parking lot and steps. While the employing establishment responded to OWCP's development letter and explained that the parking lot, steps, and the building where appellant worked were owned by a private-sector realty company, it failed to elaborate on the terms of the employing establishment's lease of these premises. Despite receiving a response from the employing establishment, which did not fully answer the question of whether appellant was in the

[12] *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).

[13] *See L.P.*, Docket No. 21-1079 (issued February 2, 2022) (the Board first considered whether the parking area appellant was walking to was considered part of the employing establishment's premises before it considered the remaining merits of the claim); *see also 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 sidewalk on which she fell 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).

[14] *C.D.*, Docket No. 20-1174 (issued June 11, 2021); *see also R.M.*, *supra* note 11; *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).

performance of duty when injured, OWCP did not conduct any further development of the evidence before it issued its decision.[15] 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.[16]

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 evidence.[17] It has an obligation to see that justice is done.[18] 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.[19] As OWCP failed to request the factual information 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 February 3, 2020.[20]

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 lot, whether parking was provided without cost to the employees, whether the public was permitted to use the lot, and where other parking was available to the employees. The employing establishment should also be asked to address whether the steps on which appellant fell were used exclusively or principally by employees of the employing establishment for the

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

[16] *See L.P., supra* note 13 (case was remanded for OWCP to obtain additional information from the employing establishment regarding whether the parking lot was considered on the premises of the employing establishment); *see also S.V., supra* note 13 (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).

[17] *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.

[18] *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).

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

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

convenience of the employer,[21] and functioned as a necessary point of ingress/egress.[22] After this, and other such further development as necessary, OWCP shall issue a *de novo* decision regarding appellant's traumatic injury claim.[23]

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the February 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: September 20, 2022
Washington, DC

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

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

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

[21] *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).

[22] *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).

[23] In light of the Board's disposition of Issue 1, Issue 2 is rendered moot.