

**United States Department of Labor
Employees' Compensation Appeals Board**

E.K., Appellant

and

**DEPARTMENT OF THE NAVY, FLEET
READINESS CENTER SOUTHWEST,
San Diego, CA, Employer**

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**Docket No. 21-0436
Issued: February 21, 2023**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

PATRICIA H. FITZGERALD, Deputy Chief Judge
JANICE B. ASKIN, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On February 1, 2021 appellant filed a timely appeal from an October 1, 2020 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.²

ISSUE

The issue is whether appellant has met his burden of proof to establish an injury in the performance of duty on August 3, 2020, as alleged.

¹ 5 U.S.C. § 8101 *et seq.*

² The Board notes that, following the October 1, 2020 decision, OWCP received additional evidence. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

FACTUAL HISTORY

On August 17, 2020 appellant, then a 36-year-old aircraft mechanic, filed a traumatic injury claim (Form CA-1) alleging that on August 3, 2020 his right knee popped and he sustained a right leg injury as he was walking across a street while in the performance of duty. He noted that the injury occurred at 7:30 p.m. On the reverse side of the claim form, appellant's supervisor noted that appellant's duty hours were from 3:00 p.m. to 11:30 p.m. and she contended that he was not injured in the performance of duty as his knee popped while he was walking across the street after taking a break at 7:30 p.m.

Appellant submitted an undated letter from a coworker, K.G., who related that he saw appellant stumble on August 3, 2020 while walking across the road after a break. He related to K.G. that he tweaked his knee.

OWCP received a medical record dated August 6, 2020 from Jennifer C. Smith, an occupational health nurse. Ms. Smith related that appellant was walking between two buildings at work and his knee popped. Appellant described shooting pains.

In a report dated August 10, 2020, Dr. Waldo Luis Ferrer, a Board-certified family practitioner, noted diagnoses of right knee sprain and osteoarthritis of the right knee, and provided work restrictions.

In a report dated August 19, 2020, Dr. James C. Dunn, II, a Board-certified occupational medicine specialist, indicated that appellant's record was reviewed and that he had provided a referral.

In a development letter dated August 24, 2020, OWCP advised appellant of the type of factual and medical evidence needed and provided a questionnaire for his completion. It requested that he address whether the road he was crossing at the time of the alleged injury was on employing establishment premises. OWCP also requested that appellant clarify whether he was on duty or on a work-related break when the incident occurred. It afforded 30 days for submission of the necessary evidence.

In a report dated August 10, 2020, Dr. Ferrer diagnosed right knee osteoarthritis and right knee sprain. He stated that his findings and diagnosis were consistent with appellant's history and that there was a reasonable degree of medical probability that the patient's symptoms were work related. In follow-up reports dated August 24, September 8 and 22, 2020, Dr. Ferrer provided appellant with work restrictions.

By decision dated October 1, 2020, OWCP denied appellant's claim, finding that he had not established that the incident occurred in the performance of duty, as alleged. It noted that he had not responded to the development questionnaire or otherwise explained whether the injury occurred while he was working or on break, and whether the site of the alleged injury was on government property.

LEGAL PRECEDENT

An employee seeking benefits under FECA³ 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 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 Board has interpreted the phrase while in the performance of duty to be the equivalent of the commonly found requisite in workers' compensation law of arising out of and in the course of employment. In the course of employment deals with the work setting, the locale and time of injury whereas, arising out of the employment, encompasses not only the work setting, but also a causal concept, the requirement being that an employment factor caused the injury. In addressing this issue, the Board has stated that, in the compensation field, to occur 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 his or her 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

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 or authorized break, are compensable.⁸

ANALYSIS

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

Appellant filed a traumatic injury claim alleging that his right knee popped when he walked across the street on August 3, 2020 at 7:30 p.m. while returning to work following a break. 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,

³ *Supra* note 1.

⁴ *F.H.*, Docket No. 18-0869 (issued January 29, 2020); *J.P.*, Docket No. 19-0129 (issued April 26, 2019); *Joe D. Cameron*, 41 ECAB 153 (1989).

⁵ *L.C.*, Docket No. 19-1301 (issued January 29, 2020); *J.H.*, Docket No. 18-1637 (issued January 29, 2020); *James E. Chadden, Sr.*, 40 ECAB 312 (1988).

⁶ *P.A.*, Docket No. 18-0559 (issued January 29, 2020); *K.M.*, Docket No. 15-1660 (issued September 16, 2016); *Delores C. Ellyett*, 41 ECAB 992 (1990).

⁷ *L.T.*, Docket No. 16-0751 (issued September 7, 2016); *Kathryn S. Graham Wilburn*, 49 ECAB 458 (1998).

⁸ *R.K.*, Docket No. 18-1269 (issued February 15, 2019); *see also Narbik A. Karamian*, 40 ECAB 617, 618 (1989).

and relaxation; (b) eating meals and snacks on premises; or (c) taking authorized coffee breaks.⁹ Appellant described his injury; however, whether the injury occurred on government property could not be determined as essential information was not provided.¹⁰ Furthermore, while there is some evidence of record that he was returning from a break, the evidence remains unclear as to whether he was on an authorized break, and remains vague as to other circumstances surrounding the break. The Board notes that on the reverse side of the claim form the employing establishment indicated that appellant was not injured in the performance of duty as he was walking across the street following a break at 7:30 p.m. when his knee popped.

OWCP's procedures recognize that in certain types of claims, such as a claim which involves a performance of duty issue as to whether the alleged injury occurred on premises, a statement from the employer is imperative to properly develop and adjudicate the claim.¹¹ Although it is appellant's burden to establish his claim, OWCP is not a disinterested arbiter, but rather, shares responsibility in the development of the evidence, particularly when such evidence is of the character normally obtained from the employing establishment or other government source.¹²

The Board finds that OWCP did not request that the employing establishment provide a statement regarding the performance of duty issues involved in this claim. The case must, therefore, be remanded to OWCP to obtain additional information from the employing establishment, including a description of the physical location of the alleged injury, whether the site of the alleged injury was on the employing establishment's premises, and whether appellant's alleged injury occurred during an authorized break. After this and other such further development as deemed necessary, OWCP shall issue a *de novo* decision.¹³

CONCLUSION

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

⁹ *T.T.*, Docket No. 20-0383 (issued August 3, 2020); *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).

¹⁰ *Id.*; see also *R.V.*, Docket No. 17-1286 (issued December 5, 2017).

¹¹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Initial Development of Claims*, Chapter 2.800.7a(2) (June 2011); *P.S.*, Docket No. 15-1672 (issued December 7, 2015).

¹² *C.F.*, Docket No. 18-1607 (issued March 12, 2019); *D.M.*, Docket No. 14-0460 (issued February 11, 2016); *C.S.*, Docket No. 14-1994 (issued January 21, 2015).

¹³ *L.B. (R.V.)*, Docket No. 15-0905 (issued September 19, 2016).

ORDER

IT IS HEREBY ORDERED THAT the October 1, 2020 decision of the Office of Workers' Compensation Programs is set aside and this case is remanded for further proceedings consistent with this decision of the Board.

Issued: February 21, 2023
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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