United States Department of Labor
Employees' Compensation Appeals Board

J.F., Appellant	)	
and	)	**Docket No. 22-0151**
	)	**Issued: September 26, 2023**
DEPARTMENT OF HOMELAND SECURITY, FEDERAL AIR MARSHAL SERVICE, El Segundo, CA, Employer	)	

Appearances:
Lawrence Berger, 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
VALERIE D. EVANS-HARRELL, Alternate Judge
JAMES D. McGINLEY, Alternate Judge

JURISDICTION

On September 10, 2021 appellant, through counsel, filed a timely appeal from an August 2, 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 his burden of proof to establish a traumatic injury in the performance of duty on April 29, 2018, as alleged.

FACTUAL HISTORY

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

On April 29, 2018 appellant, then a 39-year-old federal air marshal, filed a traumatic injury claim (Form CA-1) alleging that he sustained a back and leg injury when he was involved in a motor vehicle accident (MVA) at 12:15 p.m. that day while in the performance of duty. He indicated that the accident occurred while he was in travel status, in route from his home in San Bernardino, California to Los Angeles International Airport (LAX) where he was to begin a mission. On the reverse side of the claim form, J.L., an employing establishment supervisor, controverted the claim. He noted that appellant's usual duty station was on Walnut Avenue in El Segundo, California, and his regular work hours were 2:00 p.m. to 10:00 p.m., Sunday through Thursday. J.L. contended that appellant was off duty at the time of the MVA on April 29, 2018 as he was to report to work at 1:50 p.m., but was injured at 12:15 p.m. He further asserted that the injury occurred off the employing establishment's premises and that appellant was not involved in official "off premises" duties.

A California Highway Patrol collision information form noted a date for the MVA of April 29, 2018 and a time of 12:40 p.m.

Appellant also submitted an undated statement in which he maintained that, at the time of the MVA, he was "on official duty status, traveling to my location" at LAX to fly a domestic mission. He asserted that he was on official travel status at the time of the MVA, and that his official duty at the airport started at 11:05 a.m. Appellant indicated that he was on the most direct route from his residence to his duty location, and he attached a copy of a map with directions from San Bernardino, California to LAX. He noted that he was not in a government-owned car, but that the expenses of his travel were reimbursable. Appellant also submitted a copy of his flight schedule and an employing establishment voucher for travel from October 1, 2017 to September 30, 2018.

In a development letter dated May 16, 2018, OWCP informed appellant that the evidence submitted was insufficient to establish his claim. It advised him of the type of factual and medical evidence needed and provided a questionnaire for his completion. OWCP requested further information to determine whether appellant was in the performance of duty at the time of his injury. It afforded him 30 days to submit the necessary evidence.

[3] Docket No. 19-0980 (issued December 23, 2020).

In a separate letter of even date, OWCP asked the employing establishment to respond to appellant's claim.

An April 29, 2018 California Highway Patrol collision report indicated that a rear-end traffic collision occurred on I-605 Southbound, 75 feet north of Telegraph Road at 12:40 p.m. on that date.

Medical evidence submitted included an April 29, 2018 work activity status report in which Dr. Doug Plata, a family medicine specialist, diagnosed strain of the muscle, fascia, and tendon at neck level, contusion of the right thigh, and strain of the muscle and tendon of the thorax. He advised that appellant could perform sedentary work with restrictions. In work activity status reports dated May 4 to 11, 2018, Dr. William Downs, an occupational medicine specialist, diagnosed lumbar radiculopathy and strain of muscle and tendon and back. He advised that appellant could not work. A May 17, 2018 magnetic resonance imaging (MRI) scan of the lumbar spine demonstrated stenosis secondary to a disc herniation at L4-5.

In a May 24, 2018 response to OWCP's development questionnaire, appellant indicated that he had reported the incident to J.L. at the Los Angeles field office, and to L.G., the on-duty supervisor. He described immediate symptoms of soreness and tenderness and noted that he had been treated at an urgent care facility that evening and was put on restrictions and prescribed physical therapy. Appellant indicated that he did not have an injury to his neck or back prior to the MVA. He reported that, at the time of the MVA, he was in route to official duty at LAX to go on temporary duty for the government. Appellant reported that his last scheduled day of work at the field office was April 26, 2018 and that he was on the most direct route of travel when the MVA occurred.

In correspondence dated June 5, 2018, Z.N., a senior human resources specialist at the employing establishment, controverted appellant's claim. She maintained that appellant was not in the performance of duty at the time of the MVA because it occurred while he was commuting to his place of work in his personally-owned vehicle. Z.N. reported that on April 29, 2018 appellant was scheduled on a domestic overnight trip and was to report directly to LAX at 1:50 p.m. She referenced an employing establishment policy, identified as OLE 3404, that governed when a mission commenced, noting that it provided that a federal air marshal's "mission day began upon arrival at the temporary-duty location," which in appellant's case was LAX, and that it would begin when the air marshal was "physically inside the airport terminal or, by the direction of a superior, the marshal was to report to a different location for a specific mission." Z.N. indicated that J.L. had advised that he was to report to work at 1:50 p.m. and, therefore, appellant was off duty when the MVA occurred. She noted that, based on the accident report, he was injured at 12:15 p.m., off of the employing establishment premises, and at that time he was not involved in "off premises" official duties. Z.N. maintained that this case involved a routine commute to LAX for a mission assignment, reiterating the policy that, in the case of domestic missions, the start of duty began upon physical arrival inside the airport terminal. She maintained that, at the time of the MVA, appellant was not reasonably thought to be engaged in his master's business as he was not on official duty when it occurred, he was off premises, was not driving a government-owned vehicle, and was to arrive at LAX airport at 1:50 p.m. Z.N. concluded that appellant was not reasonably fulfilling the duties of the employment as his master's business would not have started until he physically arrived inside LAX that day.

On June 1, 2018 Dr. Kamran Aflatoon, a Board-certified orthopedic surgeon, noted a history that appellant was in an MVA and had complaints of radiating low back pain. He reviewed the MRI scan, provided examination findings, and diagnosed lumbar disc bulge, lumbago, and lumbar spine sprain and strain. Appellant was also treated by Dr. Donna Cloughen, a chiropractor, from June 5 to 13, 2018. Dr. Cloughen diagnosed MVA, lumbar disc bulge and lumbar stenosis.

By decision dated July 2, 2018, OWCP denied the claim finding that appellant was not in the performance of duty when injured on April 29, 2018.

On November 26, 2018 appellant requested reconsideration. In an attached statement, he asserted that he was in the performance of duty when injured on April 29, 2018 and he referenced by attachment a prior accepted claim regarding a similarly situated employee.

In support of his reconsideration request, appellant submitted evidence previously of record and reports from Dr. Cloughen and a report by Dr. Aflatoon dated June 29, 2018. In an October 4, 2018 report, Dr. James Brown, a family physician, noted treating appellant for 15 years. He reported the history of the April 29, 2018 MVA and diagnosed lumbar intervertebral disc displacement, and strain of the muscle, fascia, and tendon of the lower back. Dr. Brown opined with reasonable medical certainty that appellant had not been able to perform the essential elements of his job since April 29, 2018 and that he was partially disabled from work.

By decision dated February 13, 2019, OWCP denied modification of the July 2, 2018 decision.

On April 2, 2019 appellant appealed to the Board. In a December 23, 2020 decision, the Board set aside OWCP's February 13, 2019 decision.[4] The Board found the case was not in posture for decision because OWCP failed to request all information as required under its procedures to determine whether appellant was in the performance of duty at the time of the incident and remanded the case for further development. The Board noted that Z.N. had cited to employing establishment policies regarding an air marshal's mission day and duties but that a copy of the policies was not contained in the case record. The Board further noted that appellant's duty start time on that date was unclear and that the record did not establish whether the employing establishment reimbursed him for mileage or other expenses during his travel to the airport.

OWCP thereafter received an undated statement by appellant, who disputed that his regular schedule was Sunday to Thursday from 2:00 p.m. to 10:00 p.m. He further noted that his supervisor had modified his time and attendance sheet. A time and attendance sheet for the pay period April 29 through May 12, 2018 indicated that on the date of the incident appellant was paid for actual hours worked from 1:00 p.m. to 4:00 p.m. and was paid for sick leave from 4:00 p.m. to 9:00 p.m.

In a development letter dated February 1, 2021, OWCP requested that the employing establishment provide clarifying information as to whether appellant was in travel status or on a special mission from his regularly assigned work on the date of the incident, whether he was reimbursed for mileage or compensated for expenses related to his mission, and why he was

[4] *Id.*

instructed to report to LAX at 1:50 p.m. on the date of the incident if his regular work hours were from 2:00 p.m. to 10:00 p.m. It further requested that the employing establishment provide copies of its policies pertaining to an air marshal's mission day and duties and mileage/expense reimbursement.

OWCP thereafter received an employing establishment final voucher dated October 29, 2018, which indicated that appellant's request for reimbursement was approved for mileage incurred on April 29, 2018 from his home of record to the location of the MVA.

In a February 8, 2021 response to OWCP's February 1, 2021 letter, L.G. indicated that appellant did not have a regular work schedule, that 2:00 p.m. to 10:00 p.m. was the closest time frame he was able to select to represent appellant's schedule on the date of the incident, and that appellant's scheduled report time at the airport was 1:50 p.m. for a flight departing at 3:20 p.m. He further noted that he was unaware of appellant submitting a mileage reimbursement request for the date of the incident, and he had never encountered a claim for partial mileage when an employee had not reported for duty on the mission day. L.G. asserted that appellant was not in travel status nor on a special mission at the time of the incident and cited a referenced attached employing establishment policy for law enforcement/federal air marshal service (LE/FAMS) 1005 that "for mission travel originating at airports within the 50-mile radius, travel status begins with the scheduled flight's initial pushback from the gate and ends when the final inbound flight arrives at the gate."

The employing establishment provided Letter No. LE/FAMS 1005 dated September 7, 2018, which indicated that it superseded "ADM 1510, FAMS Local Travel and Temporary Travel Rules," dated August 21, 2002. L.G. also attached a copy of employing establishment policy Letter No. OLE 3404, which was dated May 13, 2015 and which indicated that "a FAM in mission status is required to report for duty at his temporary-duty location (*e.g.*, airport) at the time specified in the [systems operations control section] SOCS flight schedule or at a time specified by the [supervisory air marshal in charge] SAC in advance of the scheduled report time and that a FAM's mission day begins upon arrival at the temporary duty location." Letter No. OLE 3404 further indicated that "mission duty shall start when the FAM is physically inside the airport terminal or at the direction of the SAC, the FAM reports to a different location for a specific mission."

By *de novo* decision dated March 4, 2021, OWCP denied the claim finding that appellant was not in the performance of duty when injured on April 29, 2018.

On May 11, 2021 appellant, through counsel, requested reconsideration of OWCP's March 4, 2021 decision. In support of his request, he argued that appellant was an off-premises worker at the time of his injury on a special mission.

By decision dated August 2, 2021, OWCP denied modification of its March 4, 2021 decision.

LEGAL PRECEDENT

An employee seeking benefits under FECA[5] 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,[6] 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.[7] 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.[8]

In providing for a compensation program for federal employees, Congress did not contemplate an insurance program against any and every injury, illness, or mishap that might befall an employee contemporaneous or coincidental with his or her employment. Liability does not attach merely upon the existence of an employee-employer relation. Instead, Congress provided for the payment of compensation for disability or death of an employee resulting from personal injury sustained while in the performance of duty.[9]

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. The phrase "in the course of employment" encompasses the work setting, the locale, and time of injury. The phrase "arising out of the employment' encompasses not only the work setting, but also a causal concept with the requirement being that an employment factor caused the injury. In addressing this issue, the Board has held 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.[10] In deciding whether an injury is covered by FECA, the test is whether, under all the circumstances, a causal relationship exists between the employment itself, or the conditions under which it is required to be performed and the resultant injury.[11]

---

[5] *Supra* note 2.

[6] *J.P.*, Docket No. 19-0129 (issued April 26, 2019); *S.B.*, Docket No. 17-1779 (issued February 7, 2018); *Joe D. Cameron*, 41 ECAB 153 (1989).

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

[8] *R.R.*, Docket No. 19-0048 (issued April 25, 2019); *L.M.*, Docket No. 13-1402 (issued February 7, 2014); *Delores C. Ellyett*, 41 ECAB 992 (1990).

[9] *See* 5 U.S.C. § 8102(a); *see M.B.*, Docket No. 20-1072 (issued November 10, 2022); *J.N.*, Docket No. 19-0045 (issued June 3, 2019).

[10] *K.G.*, Docket No. 18-1725 (issued May 15, 2019); *Kathryn S. Graham Wilburn*, 49 ECAB 458 (1998).

[11] *See K.K.*, Docket No. 21-0538 (issued July 25, 2022); *J.C.*, Docket No. 17-0095 (issued November 3, 2017); *Mark Love*, 52 ECAB 490 (2001).

The Board has recognized that, as a general rule, off-premises injuries sustained by employees having fixed hours and places of work while going to or coming from work, are not compensable, as they do not arise out of and in the course of employment. Such injuries are merely the ordinary, nonemployment hazards of the journey itself, which are shared by all travelers. There are recognized exceptions which are dependent upon the particular facts relative to each claim: (1) where the employment requires the employee to travel on the highways; (2) where the employing establishment contracts to and does furnish transportation to and from work; (3) where the employee is subject to emergency calls, as in the case of firefighters; and (4) where the employee uses the highway to do something incidental to his employment with the knowledge and approval of the employing establishment.[12]

The Board has also held that an exception to the general going and coming rule is made for travel from home when the employee is to perform a special errand. In such a situation, the employing establishment is deemed to have agreed, expressly or impliedly, that the employment service should begin when the employee leaves home to perform the special errand. Ordinarily, cases falling within this exception involve travel which differs in time, or route, or because of an intermediate stop, from the trip which is normally taken between home and work. In such a case, the hazard encountered during the trip may differ from that involved in normally going to and returning from work. The essence of the exception, however, is not found in the fact that a greater or different hazard is encountered, but in the agreement to undertake a special task. For this reason, coverage is afforded from the time the employee leaves home, even though in time and route the journey may be, in part, identical to that normally followed in going to work.[13]

In addressing the going and coming rule, Larson in his workers' compensation treatise has explained, "when the employee is paid an identifiable amount as compensation for time spent in a going or coming trip, the trip is within the course of employment."[14] Regarding payment for expense of travel, Larson further provides that in the majority of cases involving a deliberate and substantial payment for the expense of travel, or the provision of an automobile under the employee's control, the journey is held to be in the course of employment.[15]

OWCP's procedures indicate that for injuries sustained while on travel status, the record must contain evidence showing when and where the employee last performed official duty; the distance between the place of injury and the place where official duty was last performed; between what points the employee was traveling when injured; the purpose of the trip; when and where the employee was next expected to perform official duty; whether the injury occurred on the direct or most usually traveled route between the place of last official duty and the place where the employee was expected to next perform official duty and, if not, the nature and extent of the deviation should be given with a full explanation of the reason for such deviation; whether at the time of the injury

[12] *K.G.*, Docket No. 18-1725 (issued May 15, 2019); *J.H.*, Docket No. 10-0185 (issued July 19, 2010); *Connie J. Higgins (Charles H. Higgins)*, 53 ECAB 451 (2002); *Melvin Silver*, 45 ECAB 677 (1994).

[13] *See C.C.*, Docket No. 20-0759 (issued September 22, 2021); *M.H.*, Docket No. 10-1337 (issued April 19, 2011); *Elmer L. Cook*, 11 ECAB 163 (1964).

[14] A. Larson, *The Law of Workers' Compensation* § 14.06(1).

[15] *Id*.

the employee was riding in or driving a government-owned vehicle; and whether the employee's travel expenses were reimbursable In injury cases, this information should be supplied by the injured employee, with the official superior confirming or refuting the employee's allegations. The claims examiner should request a copy of the employee's travel authorization, and a map or diagram showing the location of the place where official duty was last performed, the place where the employee was next expected to perform official duty, the shortest or most usually traveled route between these points, and the place where the accident occurred. For workers having a fixed place of employment, who are injured while on an errand or special mission, the claims examiner will obtain the same information as for workers in travel status.[16]

ANALYSIS

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

Preliminarily, the Board notes that it is unnecessary to reconsider the evidence appellant submitted prior to the issuance of OWCP's February 3, 2019 decision because the Board already considered this evidence in its December 23, 2020 decision. Findings made in prior Board decisions are *res judicata* any further review by OWCP under section 8128 of FECA.[17]

The Board has recognized that FECA covers an employee 24 hours a day when the employee is on travel status and engaged in activities essential or incidental to such duties.[18] However, as the Board noted in the case *M.H.*,[19] air marshals are not in travel status while commuting to work.

By decision dated December 24, 2020, the Board set aside OWCP's February 13, 2019 decision and remanded the case to OWCP to, in part, "obtain clarifying information as to the employing establishment policies … including whether appellant was in travel status or on a special mission from his regularly assigned work on the date of incident" and to issue a *de novo* decision.

Following the Board's remand of the case, OWCP undertook further development and received a letter dated February 8, 2021 from L.G., who asserted that appellant was not in travel status nor on a special mission at the time of the April 29, 2018 incident. He cited and submitted Letter No. LE/FAMS 1005, which set forth the employing establishment's policy that, for mission travel originating at airports within a 50-mile radius of appellant's duty station, travel status began with the scheduled flight's initial pushback from the gate and ended when the final inbound flight arrived at the gate. Letter No. LE/FAMS 1005, however, was dated September 7, 2018 and thus

[16] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Performance of Duty*, Chapter 2.804.5d-e (August 1992).

[17] *See C.B.*, Docket No. 19-0121 (issued July 2, 2019); *B.R.*, Docket No. 18-0339 (issued January 24, 2019); *J.W.*, Docket No. 17-0715 (issued May 29, 2018); *G.P.*, Docket No. 14-1150 (issued September 15, 2014); *J.F.*, 58 ECAB 124 (2006); *Clinton E. Anthony, Jr.*, 49 ECAB 476, 479 (1998).

[18] *See T.P.*, Docket No. 22-0893 (issued December 9, 2022); *A.W.*, 59 ECAB 593 (2008); *Ann P. Drennan*, 47 ECAB 750 (1996); *Richard Michael Landry*, 39 ECAB 232 (1987).

[19] *M.H.*, *supra* note 13.

was not in effect at the time of the April 29, 2018 employment incident. Therefore, the Board finds that this evidence did not address the issue of whether appellant was in travel status or on a special mission at the time of the April 29, 2018 employment incident.

Proceedings under FECA are not adversarial in nature, nor is OWCP a disinterested arbiter. While appellant has the burden of proof to establish entitlement to compensation, OWCP shares the responsibility in the development of the evidence, particularly when such evidence is of the character normally obtained from the employing establishment or other governmental source.[20] The Board finds that OWCP insufficiently developed the evidence regarding whether appellant was in the performance of duty at the time of injury on April 29, 2018.[21] Therefore, the case must be remanded for further development of the claim.[22]

On remand OWCP shall obtain clarifying information as to the employing establishment policies in effect at the time of the April 29, 2018 employment regarding whether appellant was in travel status or on a special mission from his regularly assigned work on the date of the incident.

Following this and other such further development as deemed necessary, OWCP shall issue a *de novo* decision.[23]

CONCLUSION

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

[20] *T.T.*, Docket No. 20-0383 (issued August 3, 2020).

[21] *D.C.*, Docket No. 19-0846 (issued October 17, 2019); Federal (FECA) Procedure Manual, *supra* note 17 at Chapter 2.800.5(d)(1); *see also* Chapter 2.804.4(f).

[22] *See S.T.*, Docket No. 20-0588 (issued September 16, 2020).

[23] *Id*.

ORDER

IT IS HEREBY ORDERED THAT the August 2, 2021 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded to OWCP for proceedings consistent with this opinion of the Board.

Issued: September 26, 2023
Washington, DC

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

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

James D. McGinley, Alternate Judge
Employees' Compensation Appeals Board