United States Department of Labor
Employees' Compensation Appeals Board

L.P., Appellant	)	
and	)	
DEPARTMENT OF HOMELAND SECURITY, TRANSPORTATION SECURITY ADMINISTRATION, East Elmhurst, NY, Employer	)	**Docket No. 23-0378** **Issued: September 25, 2023**

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
JAMES D. McGINLEY, Alternate Judge

JURISDICTION

On January 13, 2023 appellant, through counsel, filed a timely appeal from a December 14, 2022 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 a traumatic injury in the performance of duty on January 18, 2021, as alleged.

FACTUAL HISTORY

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

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, T.P., appellant's supervisor, indicated that appellant was not injured in the performance of duty. He listed her regular work hours as 4:15 a.m. to 12:45 p.m., Monday through Friday. Appellant also submitted medical evidence in support of her claim.

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 she 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.

In a development letter dated March 16, 2021, OWCP informed appellant of the deficiencies of her claim. It advised her of the type of 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 questionnaire on March 22, 2021. She reported that the alleged incident occurred between the airport terminal and the Auto Plane Auto Transport building right outside the airport terminal. Appellant explained that employees were required to park in the parking lot, were not required to pay for parking, and that the town owned and operated the parking premises.

[3] Docket No. 21-1079 (issued February 2, 2022).

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 she was on premises which were not owned, operated, or controlled by the employing establishment.

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 the locations of the parking lot and the area where appellant had fallen.

By decision dated April 23, 2021, OWCP denied appellant's traumatic injury claim, finding that she had not established that the January 18, 2021 traumatic injury occurred in the performance of duty.

On July 1, 2021 appellant, through counsel, appealed to the Board. By decision dated February 2, 2022, the Board set aside the April 23, 2021 OWCP decision, finding that OWCP failed to properly develop the factual evidence with respect to whether appellant's January 18, 2021 employment incident occurred while in the performance of duty.[4] It remanded the case for OWCP to obtain clarifying information from the employing establishment and determine whether the parking lot was part of the employing establishment's premises, whether the sidewalk on which she fell was owned or maintained by the employing establishment, and whether she was approved to leave work early.

In a development letter dated March 9, 2022, OWCP requested additional information from the employing establishment. It provided a series of questions about the employing establishment's premises, the parking lot where appellant was walking to, the location where she fell, and her duty status at the time of the alleged injury. OWCP afforded the employing establishment 30 days to respond.

In an April 6, 2022 response, 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 the 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 explained that the parking lot was managed by Long Island MacArthur Airport and that the airport provided parking for all employees without cost. It also indicated that the general public was not allowed to use the parking lot, employees were not required to park in this lot, and that other parking options were available to employees if they wished to pay for parking. The employing establishment also responded "No" to the question about whether the employing establishment contracted for the exclusive use of the parking area by its employees. It further indicated that the sidewalk where appellant fell was not owned or

[4] *Id.*

maintained by the employing establishment and was the point of ingress or egress for the parking lot. Regarding her work status, the employing establishment noted that she was authorized to leave work at 10:00 a.m. on January 18, 2021.

The employing establishment provided an email dated March 18, 2021 from T.P. who indicated that appellant was scheduled to work until 12:45 p.m., but had requested, and had been approved to leave early utilizing holiday leave. T.P. noted that she went off duty at 10:00 a.m. He provided a request for leave or an approved absence form dated January 18, 2021.

By decision dated December 14, 2022, OWCP denied appellant's traumatic injury claim, finding that the evidence of record was insufficient to establish that she was in the performance of duty at the time of the alleged January 18, 2021 employment injury.

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 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,[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]

FECA provides compensation for disability of an employee resulting from personal injury sustained while in the performance of duty.[9] 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."[10] To arise "in the course of employment," in general, an injury must occur: (1) at a time when the employee may reasonably be [stated] 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

[5] *Supra* note 2.

[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); *James E. Chadden, Sr.*, 40 ECAB 312 (1988).

[8] *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).

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

[10] *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).

she was reasonably fulfilling the duties of his or her employment or engaged in doing something incidental thereto.[11]

As to an employee having fixed hours and a fixed place of work, an injury occurring on the premises while the employee is going to and from work before or after working hours or at lunch time is compensable, but if the only occurs off the premises, it is not compensable, subject to certain exceptions.[12] 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 employer does not have ownership and control of the place of injury, the place may nevertheless still be considered part of the "premises."[13]

The Board has also 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]

ANALYSIS

The Board finds that appellant has not met her burden of proof to establish an injury in the performance of duty on January 18, 2021 as alleged.

In its previous decision, the Board remanded the case for further factual development regarding appellant's work status at the time of the January 18, 2021 employment incident. On remand OWCP issued a development letter. In response, appellant's supervisor confirmed that appellant was approved to leave work early at 10:00 a.m. on January 18, 2021 and appellant indicated on her Form CA-1 that her fall occurred at 10:00 a.m. The evidence of record establishes,

[11] *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).

[12] *R.E.*, Docket No. 18-0515 (issued February 18, 2020); *S.V.*, Docket No. 18-1299 (issued November 5, 2019); *M.L.*, Docket No. 12-0286 (issued June 4, 2012); *John M. Byrd*, 53 ECAB 684 (2002).

[13] *C.L.*, Docket No. 18-0812 (issued February 22, 2019); *Wilmar Lewis Prescott*, 22 ECAB 318, 321 (1971).

[14] *J.C.*, Docket No. 21-0941 (issued September 20, 2022); *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).

therefore, that appellant's alleged injury occurred within a reasonable time after the end of her approved work shift on that date.[15]

The Board has held that the premises of the employer are generally extended where an employee must travel a public thoroughfare to traverse between two premises of the employer.[16] In order to determine whether the sidewalk between the terminal and Auto Plane building where appellant's January 18, 2021 fall occurred should be considered part of the employing establishment's premises, the Board must first determine whether the parking lot in which she was parked is considered to be part of the employing establishment premises.[17]

OWCP issued a development letter to the employing establishment on March 9, 2022. In response, the employing establishment asserted that the parking lot was not owned, controlled, or managed by the employing establishment, but explained that it was managed by Long Island MacArthur Airport. It also indicated that it did not contract for the exclusive use of the parking lot by its employees, but that the airport provided parking for all employees without cost. The employing establishment also indicated that appellant was not required to park in this lot and could park elsewhere if she was willing to pay for parking.

As noted above, in determining whether a parking lot or garage should be considered as part of the employing establishment's premises, the Board must consider such factors as whether the employer 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 lot, whether the public was permitted to use the lot, whether parking was provided without cost to the employment establishment employees, and whether other parking was available to the employees.[18]

The Board finds that appellant has not established that the parking lot that she was en route to when the January 18, 2021 employment incident occurred was used exclusively by employees of the employing establishment. In this case, the evidence of record indicates that the parking area was controlled and managed by the local airport and that the employing establishment did not contract for the exclusive use of the parking area for its employees. The employing establishment has also asserted that appellant was not required to park in this lot and that other parking was

[15] *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Performance of Duty*, Chapter 2.804.4a(3) (August 1992). *See also C.L.*, Docket No. 18-0812 (issued February 22, 2019) (finding that a fall which occurred three minutes after the end of the work shift happened within a reasonable interval after work); *John F. Castro*, Docket No. 03-1653 (issued May 14, 2004).

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

[17] *See K.M.*, Docket No. 20-1528 (issued March 23, 2022) (the Board first considered whether the parking lot that claimant was enroute to should be considered part of the employing establishment's premises before it considered whether the covered sidewalk between the employing establishment and the parking area should be considered part of the employing establishment's premises); *see also R.E.*, *supra* note 12 (the Board first considered whether the parking area that claimant 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).

[18] *Supra* note 14.

available if employees wished to pay for parking. While appellant has alleged that she was required to park in the airport parking lot, she has not provided evidence to establish that she was required to park in that parking lot or assigned a specific parking space.

The Board finds that, under the circumstances of the case, the parking lot that appellant was en route to when she slipped and fell on January 18, 2021 was not part of the premises of the employing establishment.[19] As the parking area was not part of the employing establishment premises, the off-premises point at which the injury occurred (*i.e.*, the sidewalk outside the terminal) 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.[20]

As the evidence of record is insufficient to establish an injury in the performance of duty on January 18, 2021 as alleged, the Board finds that appellant has not met her burden of proof.

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 an injury in the performance of duty on January 18, 2021, as alleged.

[19] *See R.K.*, Docket No. 20-1638 (issued December 14, 2022); *J.B.*, Docket No. 17-0378 (issued December 22, 2017).

[20] *See K.M.*, *supra* note 17; *see also F.S.*, Docket No. 09-1573 (issued April 6, 2010).

ORDER

IT IS HEREBY ORDERED THAT the December 14, 2022 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 25, 2023
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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