United States Department of Labor
Employees' Compensation Appeals Board

A.F., claiming as widow of, F.F., Appellant	)	
	)	**Docket No. 09-1970**
and	)	**Issued: September 27, 2010**
KENOSHA COUNTY SHERIFF'S DEPARTMENT, Kenosha, WI, Employer	)	

Appearances:
Gino M. Alia, Esq., for the appellant
Paul Klingenberg, Esq., for the Director

Oral Argument May 4, 2010

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On July 28, 2009 appellant filed a timely appeal of the March 4, 2009 decision of the Office of Workers' Compensation Programs which denied her claim for death benefits on behalf of her deceased husband pursuant to section 8191 of the Federal Employees' Compensation Act.[1] Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant has established entitlement to death benefits pursuant to section 8191 of the Act.

FACTUAL HISTORY

On September 17, 2007 appellant, then a 41-year-old widow, filed a compensation claim for death benefits under 5 U.S.C. § 8191. On May 17, 2007 the employee, a deputy sheriff

[1] 5 U.S.C. §§ 8101-8193.

employed by the Kenosha County Sheriff's Department, was shot and killed in the line of duty during a traffic stop. Appellant asserted that, at the time of the shooting, the employee was involved in the apprehension of an individual who was in the commission of a crime against the United States, placing him within coverage of the Act. A notice of law enforcement officer's death stated that the employee was shot by an illegal immigrant who was in violation of probation, liable for federal deportation because he possessed a firearm and was operating a motor vehicle under the influence of drugs (cocaine) and alcohol.

A medical examiner's report dated May 17, 2007 noted that the employee's cause of death was a gunshot wound to the head and it was ruled a homicide. A death certificate noted that the employee died on May 17, 2007 of gunshot wounds.

By letter dated October 15, 2007, the Office advised appellant of the factual evidence needed to establish her claim. It advised that, in order to fall within the purview of 5 U.S.C. § 8191, the employee must have been engaged in the attempted apprehension of a person for a crime against the United States which required that the stimulus for the officer's response was an actual federal crime. The Office advised that the later discovery of a federal crime was not sufficient to bring the death within the coverage of 5 U.S.C. § 8191. No additional information was received.

In a January 11, 2008 decision, the Office denied appellant's claim. It indicated that the stimulus for the apprehension or attempted apprehension of a suspect must be a federal crime or an integral part of a federal crime. In this instance, however, the stimulus for the suspect's apprehension was a local matter, a routine traffic stop, and the employee's injury occurred prior to the discovery of the federal offense. The Office found that the subsequent discovery of a federal crime did not bring the employee into the scope of coverage. Therefore appellant's claim did not fall within the purview of 5 U.S.C. § 8191.

By letter dated December 30, 2008, appellant requested reconsideration. She argued that the Office's procedure manual provides that an officer does not need to know at the time of apprehension or attempted apprehension that the violation for which the individual is being arrested is a federal offense. In a December 29, 2008 affidavit, Lieutenant Paul J. Falduto, Jr., stated that the individual who shot the employee was in violation of several federal statutes. Employing establishment investigative reports noted that, at approximately 11:40 a.m. on May 16, 2007, the employee was shot as he approached the motor vehicle subsequent to a routine traffic stop and died of his injuries. He fired four rounds from his Glock semi-automatic duty pistol. Responding officers estimated that the employee was shot with a 9 mm handgun at a distance of approximately five feet. Ezequiel Lopez was arrested three hours later for the shooting. He tested positive for cocaine and alcohol.

By decision dated March 9, 2009, the Office affirmed the January 11, 2008 decision.[2]

[2] Subsequent to the March 9, 2009 Office decision, additional evidence was associated with the file. The Board's jurisdiction is limited to the evidence that was before the Office at the time it issued its final decision. *See* 20 C.F.R. § 501.2(c). The Board may not consider this evidence for the first time on appeal, but it may be filed with the Office along with a request for reconsideration.

LEGAL PRECEDENT

Under the Act, an individual seeking death benefits has the burden of proof to establish the essential elements of his of her claim, including the fact that the employee was an employee of the United States within the meaning of the Act.[3] In this case, the employee was a nonfederal law enforcement officer.[4] Appellant has the burden of establishing that the employee became an eligible officer as defined by section 8191 of the Act.[5] In pertinent part, this section provides that an eligible officer is any person who is determined by the Secretary of Labor, in her discretion, to have been on any given occasion--

> "(1) [A] law enforcement officer and to have been engaged on that occasion in the apprehension or attempted apprehension of any person--
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> (A) for the commission of a crime against the United States, or
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> (B) who at that time was sought by a law enforcement authority of the United States, for the commission of a crime against the United States, or
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> (C) who at that time was sought as a material witness in a criminal proceeding instituted by the United States; or
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> "(2) a law enforcement officer and to have been engaged on that occasion in protecting or guarding a person held for the commission of a crime against the United States or as a material witness in connection with such a crime; or
>
> "(3) a law enforcement officer and to have been engaged on that occasion in the lawful prevention of, or lawful attempt to prevent, the commission of a crime against the United States."[6]

The Board has recognized that the issue of whether a local law enforcement officer was attempting to apprehend someone for, or prevent the commission of, a federal crime, turns initially on the question of whether, at the time the injury was sustained, the local law enforcement officer knew that a federal crime or potential federal crime was being committed and therefore formed the intent to apprehend someone for, or to prevent the commission of, a federal crime.[7]

The knowledge of a potential federal crime at the time of injury or death does not, alone, establish eligibility to receive benefits under the Act. The claimant must establish that, the activities in which the employee was engaged at the time of injury constituted the apprehension

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[3] *See Louis T. Blair, Jr.*, 54 ECAB 348 (2003).

[4] *See* 5 U.S.C. § 8101(1) (defining a federal employee).

[5] *See Lance D. Coleman*, 41 ECAB 604 (1990).

[6] 5 U.S.C. § 8191 (1)-(3); *see also* 20 C.F.R. §§ 738-39 (2007).

[7] *Joel Goldberg*, 45 ECAB 448 (1994).

or attempted apprehension of a federal offender or the lawful prevention of, or lawful attempt to, prevent the commission of a federal crime.[8]

ANALYSIS

Appellant asserts that, at the time of the shooting, the employee was involved in the apprehension of an individual who was in the commission of a crime against the United States. Mr. Lopez was an illegal immigrant who was in violation of probation and liable for federal deportation because he possessed a firearm and was operating a motor vehicle under the influence of cocaine and alcohol.

The Board has held that section 8191 was not intended to cover every event that could be remotely connected to the real or alleged commission of a federal crime, but rather to cover the specific occurrence or prevention of a federal crime.[9] Although section 8191 does not explicitly state that, in order to be eligible, an officer must be aware of a federal link, the legislative history supports that the local officer must be purposely, not accidentally, engaged in the federal law enforcement activity.[10] The statute's wording suggests a contemporaneous specificity. The phrases "on that occasion" and "at that time" in the statute indicate that to be eligible for coverage under the Act, the local officer must be apprehending or trying to apprehend an individual who is committing or is wanted for committing a federal crime at the time of the local officer's activity. The congressional sponsors of section 8191 were clear that the crime for which the person was being apprehended would be "controlling" in determining coverage.[11] The purpose of section 8191 is to provide compensation benefits for state and local law enforcement officers who expose themselves to the dangers of enforcing federal laws or who provide assistance to federal authorities.[12]

The Board has consistently held that coverage will not be afforded where the law enforcement officer is engaged in a purely local police matter,[13] nor is coverage appropriate if, only after the injury or death, is it discovered that a federal crime was involved. In such a case the initial police activity which resulted in the injury or death would have been a purely local matter.[14] Thus the proximate cause of the injury or death was related to whatever prompted the

[8] *Michael Kosowski*, 57 ECAB 233 (2005).

[9] *See Michael Ponenti*, 34 ECAB 319 (1982).

[10] *See Lance D. Coleman supra* note 5.

[11] *See James R. Coon* 43 ECAB 587 (1992); Cong Rec., September 11, 1967, pp 24, 941-42; September 14, 1967, pp 25, 564.

[12] *Michael Kosowski, supra* note 8.

[13] *See James R. Coon, supra* note 11.

[14] *Edward L. Jackson*, 31 ECAB 550 (1980).

local officer's actions. Any subsequent or later discovered link to federal offenses or potential crimes becomes too tenuous to support coverage in keeping with the purpose of the Act.[15]

A review of the Board's case law involving traffic stops demonstrates the distinguishing characteristics of purely local police activity. The Board has denied coverage when the officer was engaged in a local police matter and only later learned that the suspect was a possible federal offender.[16]

In this case, the facts establish that the employee had no knowledge at the time of his traffic stop death that the assailant was in violation of a federal law. Nothing of a federal criminal nature was known to the employee when he approached the motor vehicle. The employee did not act with the necessary intent to prevent the commission of a federal crime. Only after his death were the potential federal violations discovered. The Board finds that the employee's lack of intent precludes coverage under part 3 of section 8191. The circumstances of this case do not afford coverage under section 8191 of the Act.

At the time of death, the employee was approaching the driver of a motor vehicle he had stopped for a traffic violation. Before he reached the vehicle, the driver shot him. The activity of making a traffic stop and approaching the driver did not constitute the apprehension of a federal offender or prevention of a federal crime.[17]

On appeal appellant, through her representative, contends that this case falls within the purview of section 8191 based on the Office's procedure manual. She asserts that coverage is afforded based on the "awareness doctrine" which provides that an officer does not need to know at the time of apprehension or attempted apprehension that the violation for which the individual is being arrested is both a federal and state offense.[18] The offense for which the employee stopped the assailant, a traffic stop, however was not both a local and federal offense.

Appellant argues that, once the assailant began to fire on the employee, he became aware of the federal connection and returned fire in response to the illegal possession of a firearm by and illegal immigrant and at that time had the intent to prevent the federal crime of illegal possession of a firearm. There is no evidence, however, that the employee was aware that the

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[15] *See Alan R. Penberg*, 42 ECAB 610 (1984).

[16] *See Morris W. Farlow*, 48 ECAB 659 (1997) (where a police officer stopped a vehicle because its out-of-state license plate number was registered to a different make of car and the police reported "suspicious activity" by the car's occupants; the Board denied coverage because nothing of a federal criminal nature was known to appellant as he approached the car's driver and was immediately shot); *Lance D. Coleman*, *supra* note 5 at 641 (where a highway patrol officer stopped a vehicle because of a broken taillight and was shot; the Board held that the officer was not covered under section 8191 because only after the incident was it discovered that the assailant was wanted for a federal crime); *Rocco A. Ranaudo*, 35 ECAB 689 (1984) (where a police officer approached an idling vehicle whose driver appeared to be asleep and was injured when the driver accelerated rapidly and was subsequently found to be an illegal alien; the Board denied coverage because the officer was engaged in a local police matter, a potential traffic violation, and only later did the police department learn that the driver was a possible federal offender).

[17] *See Kenneth Dudonis*, 37 ECAB 287 (1986); *see also D.H.*, Docket No. 07-314 (issued July 18, 2007).

[18] Federal (FECA) Procedure Manual, Part 4 -- Special Case Procedures, *Non-Federal Law Enforcement Officers*, Chapter 4.200(7)(a) (September 1994).

assailant's firearm had been obtained illegally in violation of local or federal law. Mere possession of a gun is not always a crime.

CONCLUSION

The Board finds that appellant failed to establish that the employee was an eligible officer under the purview of section 8191 of the Act.

ORDER

IT IS HEREBY ORDERED THAT the March 4, 2009 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 27, 2010
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board