United States Department of Labor
Employees' Compensation Appeals Board

K.D., Appellant	)	
and	)	**Docket No. 18-0617**
	)	**Issued: February 13, 2019**
DEPARTMENT OF HOMELAND SECURITY, TRANSPORTATION SAFETY ADMINISTRATION, Tulsa, OK, Employer	)	

Appearances:
Alan J. Shapiro, Esq., for the appellant[1]
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On January 30, 2018 appellant, through counsel, filed a timely appeal from a December 18, 2017 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 to over the merits of the 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 March 10, 2017, as alleged.

FACTUAL HISTORY

On March 10, 2017 appellant, then a 60-year-old transportation security officer, filed a traumatic injury claim (Form CA-1) alleging that, at approximately 12:00 p.m. on that date, she tripped on uneven pavement when going to work. She noted that she "flew" across the sidewalk and landed on her knees and wrists, resulting in scratched and swollen knees and wrists. A coworker, S.G., provided a statement noting that while walking to work on March 10, 2017 she heard something and looked up and saw appellant lying on the ground under the covered sidewalk on B side parking. Appellant told S.G. that she tripped on the sidewalk.

Appellant's supervisor, J.C., contended that appellant was not injured in the performance of duty. He noted that appellant's injury occurred before the start of her work shift as her regular work hours were from 12:00 p.m. to 8:30 p.m., although he did not note the specific time of the fall, J.C. further noted that the injury occurred off of the employing establishment's premises and that appellant was not involved in official off-premises duties.

By March 20, 2017 development letters, OWCP requested information from appellant and the employing establishment regarding the location and time of her injury. It also requested that she provide medical evidence in support of her claim. OWCP afforded 30 days for responses.[3]

Appellant provided treatment notes dated March 13, 2017 from Dr. Homer Hardy, an osteopath, diagnosing contusions of both knees.

On March 23, 2017 the employing establishment controverted appellant's claim, asserting that appellant's injury occurred at 11:56 a.m. on March 10, 2017 when her work shift began at 12:00 p.m. It noted that she had not clocked in for duty and was not in a work location when the injury occurred. The employing establishment reported that it did not own, lease, or maintain the area where appellant's injury occurred. It further noted that it did not direct appellant to park her car in any of the various public parking lots that surrounded her duty station.

[3] Appellant submitted numerous reports to the record dating from March 10, 2017. On April 7 and 25, and June 26, 2017 Dr. Robert Coye, a Board-certified internist, diagnosed right medial knee pain. On May 9 and 30, June 1 and 6, and July 18, 2017 Dr. James D. Cash, a Board-certified orthopedic surgeon, diagnosed bilateral knee contusions. On June 2, 2017 Dr. Kelly Lindauer, a Board-certified diagnostic radiologist, reviewed appellant's magnetic resonance imaging (MRI) scan and found tear of the medial meniscus, chondromalacia, and effusion. Dr. Thomas Kern, a Board-certified internist, examined appellant on July 31, 2017 and diagnosed derangement of medial meniscus of both knees. Dr. Seth Migdalski, a psychiatrist, examined appellant on October 30, 2017 for emotional conditions. Appellant also submitted numerous reports from Timothy Marlow, Chad Perkins, Dianne Briscoe, and Eve Fitzpatrick, physician assistants, as well as notes from Whitney Ellsworth, a physical therapist. *See K.J.*, Docket No. 16-1805 (issued February 23, 2018); *M.M.*, Docket No. 17-1641 (issued February 15, 2018).

J.M., an AirServ supervisor, witnessed appellant's fall and described the location as the sidewalk coming up from the B side parking.

By decision dated April 25, 2017, OWCP denied appellant's traumatic injury claim finding that the evidence submitted was insufficient to establish that she was injured in the performance of duty. It found that she was not reasonably fulfilling the duties of her employment or doing something incidental thereto at the time of her injury. Appellant had not begun her tour of duty and was walking on a public road toward the employing establishment. OWCP noted that under FECA, an employee going to work who was injured off premises is not in the course of employment.

On May 4, 2017 counsel requested an oral hearing before a representative of OWCP's Branch of Hearings and Review.

In an e-mail dated July 16, 2017, appellant reported that she fell on the sidewalk between the employee parking lot and the employing establishment office. She noted that the parking was paid for by using the Green Option Commuter Card (For Federal Government Transit Subsidy Use Only). Appellant's card, provided by the employing establishment, allotted $240.00 and she paid parking costs of $135.00 every six months. She noted that she would fax a copy of the employer-paid parking receipt from July 14, 2017.

In a letter dated July 31, 2017, counsel wrote that he was providing OWCP with medical records, physical therapy notes, and a "copy of the receipt and the subsidized public transportation pass paid for by the employing agency."

Appellant testified during the oral hearing on October 6, 2017 before an OWCP hearing representative. She noted that she was required to wear a uniform for her position, including that she was required to wear her uniform while driving to work, but that the employing establishment regulated the activities she could perform in uniform. Appellant testified that the employing establishment rented a portion of the airport parking lot for its officers for security reasons and assigned them a place to park. The employing establishment required employees to go straight from the parking lot to the employing establishment without diversion. Appellant asserted that her parking was completely paid for by the employing establishment and that she had to park in an assigned area otherwise her car would be booted. She noted that the employing establishment provided her with a commuter payment card and a placard for her car. Appellant testified that there was only one sidewalk from the parking lot to her duty station and that no other route was available. She noted that her parking area was encircled by a six-foot fence and that she had a badge for that parking area. Appellant again alleged that she could not enter the employing establishment from another parking location. She noted that other airport employees parked in the fenced-off area including pilots and stewardesses. Counsel contended that it was not plausible that the employing establishment was not in control of the area as they paid for parking and that there was only one entrance that appellant could utilize to get to her duty station.

On December 5, 2017 the employing establishment terminated appellant's employment. It noted that her appointment was subject to completion of a two-year trial period. The termination was noted to promote the efficiency of the service and was primarily based on her extensive use of leave.

By decision dated December 18, 2017, OWCP's hearing representative found that appellant was injured on the walkway between the off-premises parking lot and the worksite. She noted that there was no evidence that the employing establishment controlled or maintained the area where appellant's fall occurred. OWCP's hearing representative determined that the facts did not establish an exception to the premises rule and that appellant's injury did not arise out of and in the course of her federal employment.

LEGAL PRECEDENT

FECA provides compensation for the disability of an employee resulting from personal injury sustained while in the performance of duty.[4] The phrase sustained while in the performance of duty is regarded as the equivalent of the coverage formula commonly found in workers' compensation laws, namely, arising out of and in the course of performance.[5] In the course of employment relates to the elements of time, place, and work activity. To arise in the course of employment, an injury must occur at a time when the employee may reasonably be stated to be engaged in the employing's establishment business, at a place where he or she may reasonably be expected to be in connection with his or her employment, and while he or she was reasonably fulfilling the duties of his or her employment or engaged in doing something incidental thereto.[6]

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 injury occurs off the premises, it is not compensable, subject to certain exceptions. One of these is the proximity exception to the premises rule, which allows constructive extension of the premises to those hazardous conditions which are proximate to the premises and may, therefore, be considered as hazards of the employment.[7] Underlying the proximity exception is the principle that course of employment should extend to an injury that occurred at a point where the employee was within the range of dangers associated with the employment.[8] The most common ground of extension is that the off-premises point at which the injury occurred lies on the only route, or at least on the normal route, which employees must traverse to reach the premises, and that, therefore, the special hazards of that route become the hazards of the employment.[9] This exception contains two components. The first is the presence

[4] 5 U.S.C. § 8102(a); *J.K.*, Docket No. 17-0756 (issued July 11, 2018).

[5] 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).

[6] *See J.K., supra* note 4; *Eugene G. Chin,* 39 ECAB 598 (1988); *Clayton Varner,* 37 ECAB 248 (1985); *Thelma B. Barenkamp (Joseph L. Barenkamp),* 5 ECAB 228 (1952).

[7] *D.K.*, Docket No. 11-1029 (issued February 1, 2012).

[8] *See J.K., supra* note 4; *Jimmie Brooks,* 54 ECAB 248 (2002); *Syed M. Jawaid,* 49 ECAB 627 (1998).

[9] 1 Arthur & Lex Larson, *The Law of Workers' Compensation* § 13.01(3) (2006). *See also J.K, supra* note 4; *R.O.*, Docket No. 08-2088 (issued May 18, 2009).

of a special hazard at the particular off-premises point. The second is the close association of the access route with the premises, so far as going and coming are concerned.[10]

ANALYSIS

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

At the time of appellant's injury she had fixed hours and place of work and she was walking, minutes prior to her scheduled start time, on a covered sidewalk between a secure parking facility and her duty station. She was in uniform per employing establishment policy at the time she fell. As she was walking between two locations, barring an exception to the general going and coming rule, appellant's injury would be an ordinary, nonemployment hazard of the journey shared by all travelers.[11] The issue, therefore, is whether the secure parking facility and/or the covered sidewalk should be considered a part of the employing establishment premises.

The premises of the employing establishment are generally extended when an employee must travel a public thoroughfare to traverse between two premises of the employing establishment.[12] Appellant consequently may be covered under an exception to the general rule if the employing establishment exercised sufficient control over the parking facility or the covered sidewalk such that may be considered a part of the premises at the time of the injury.[13]

The Board finds that this case is not in posture for decision as the record is insufficient to determine whether appellant was on the premises of the employing establishment at the time of the March 10, 2017 injury. As noted, in determining whether a secure parking facility should be considered part of the employing establishment's premises, the Board must consider such factors as whether the employing establishment contracted for its exclusive use by its employees, whether spaces were assigned by the employing establishment, whether the area was 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 whether other parking was available to the employees.[14] In the employing establishment's contentions it noted that "the agency did not direct the claimant to park her car in any of the various public parking lots that surround her duty station." That statement is contradicted by appellant's testimony. Furthermore, that contention does not address the primary questions of whether appellant was required to park in Employee Parking Lot B, whether she was permitted to park in another lot at the airport, whether Employee Parking Lot B was a secure parking facility or open to the general traveling public, whether appellant's parking was paid in whole or in part by the employing establishment, whether appellant had been assigned to park in Employee Parking Lot B, and whether the employing establishment had any responsibility for monitoring or inspecting the lot for security purposes or

[10] *Id.* at § 13.01(3)(b).

[11] *See R.B.*, Docket No. 11-1320 (issued September 5, 2012); *Denise A. Curry*, 51 ECAB 158 (1999).

[12] *Id.*

[13] *M.P.*, Docket No. 16-0507 (issued August 11, 2016).

[14] *Supra* note 11; *see also L.P.*, Docket No. 17-1031 (issued January 5, 2018).

paid a third party for such services. The contention also fails to address whether the covered sidewalk where appellant's fall occurred lies on the only route, or at least on the normal route, which employing establishment employees must traverse to reach the premises after parking their vehicles.[15] OWCP's procedures provide that it should obtain relevant information from an official superior if it requires clarification before determining whether or not the employee was on the premises.[16]

The employing establishment, in the development letter of March 20, 2017, was asked to provide a diagram showing the boundaries of the employing establishment premises and the location of the injury site in relation to the premises. No such diagram is found to be of record. As such, the Board finds that the record is incomplete.[17]

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.[18] The Board finds that OWCP did not sufficiently develop the evidence regarding whether appellant was on the premises of the employing establishment at the time of injury.[19]

On remand OWCP should obtain information from the employing establishment relating to the secured parking facility and the covered sidewalk. The deficiencies in the evidence of record, as noted herein, should be addressed so that an informed determination can be made regarding whether appellant was in the performance of duty and under any control by the employing establishment at the time of her injury. If so, OWCP should adjudicate whether the factual and medical evidence establishes that she sustained an employment injury as alleged. Following such further development as deemed necessary, OWCP shall issue a *de novo* decision.

[15] S*ee, Diane Bensmiller*, 48 ECAB 675 (1997) (where the claimant was specifically directed to park in an off-premises lot with a hazardous condition resulted in constructed premises).

[16] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Performance of Duty*, Chapter 2.804.4(f) (August 1992). *See also* Chapter 2.804.4(b). If the employee has a fixed place of work, the CE must ascertain whether the employee was on the premises when the injury occurred. The answers to the appropriate sections of Forms CA-1, CA-2 and CA-6 contain information on this point. If clarification is needed, it should be secured from the official superior in the form of a statement which describes the boundaries of the premises and shows whether the employee was within those boundaries when the injury occurred. Where indicated, the clarification should include a diagram showing the boundaries of the industrial premises and the location of the injury site in relation to the premises; *see also D.D.*, Docket No. 15-0837 (issued July 10, 2015).

[17] Counsel, in a letter dated July 31, 2017, noted that he had provided OWCP with a copy of a receipt and the subsidized public transportation pass paid for by the employing establishment. Neither of those items are found to be of record.

[18] *See L.L.*, Docket No. 12-0194 (issued June 5, 2012); *N.S.*, 59 ECAB 422 (2008); *Richard Kendall*, 43 ECAB 790 (1992).

[19] *See Rosie P. Colmer*, Docket No. 03-0116 (issued May 2, 2003).

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the December 18, 2017 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: February 13, 2019
Washington, DC

Christopher J. Godfrey, 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