United States Department of Labor
Employees' Compensation Appeals Board

S.S., Appellant	)	
and	)	**Docket No. 18-1604**
	)	**Issued: February 25, 2019**
DEPARTMENT OF HOMELAND SECURITY, U.S. CUSTOMS & BORDER PROTECTION, Washington, DC, Employer	)	

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
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On August 20, 2018 appellant filed a timely appeal from a June 22, 2018 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[1] (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 her burden of proof to establish an employment-related injury while in the performance of duty on April 3, 2018, as alleged.

[1] 5 U.S.C. § 8101 *et seq.*

[2] The Board notes that, following the June 22, 2018 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 May 2, 2018 appellant, then a 52-year-old component audit liaison, filed a traumatic injury claim (Form CA-1) alleging that, on April 3, 2018, she sustained a concussion and a bruised elbow and back when she was hit by a car when crossing the street at 12:15 p.m. The employing establishment controverted the claim alleging that she was at lunch when the injury occurred. Appellant's regular duty hours were from 7:00 a.m. until 4:30 p.m. On April 3, 2018 appellant was treated in the emergency department and diagnosed with left elbow contusion, left ear acute serous otitis media, and concussion.

OWCP, on May 18, 2018, requested that the employing establishment address whether appellant was on premises that it owned, operated, or controlled at the time of the incident and, if so, to provide a diagram showing the boundary of its premises and the location of the alleged incident. It further requested information regarding whether appellant was performing work duties or activities reasonably incidental to her employment at the time of the incident.

In a May 18, 2018 development letter, OWCP informed appellant that the evidence was currently insufficient to show that she was injured while performing her employment duties. It requested that she address whether she was on the premises of the employing establishment when the incident occurred and whether she was performing her assigned duties. OWCP further requested, if the incident had occurred off-premises, that appellant identify the location of the incident and its relationship to her workplace and work activities. It afforded her 30 days for submission of the requested evidence.

Appellant, in a June 7, 2018 response, related that she worked at 13th and F Streets, N.W., Washington, DC and her injury occurred a block from her office on the corner of 13th and G Streets. She had left her office to get lunch and was not on the premises of the employing establishment when a vehicle struck her while she was in a crosswalk. Appellant noted that her work location did not have food available in her office area and that her work schedule included a lunch break.

In a statement dated June 8, 2018, S.H., the employing establishment supervisor, related that appellant was not on the premises of the employing establishment or on property that it owned, controlled, or operated at the time of the April 3, 2018 incident. She related that the injury occurred while appellant was at lunch and not performing any work duties. S.H. advised that employees could use a kitchen area in the office suites, but that food and drink was not for sale. She further indicated that food vendors had locations within appellant's duty station of National Place, 1331 Pennsylvania Avenue, NW. She noted that the building had an entrance on F Street between 13th and 14th Streets.

On June 14, 2018 the employing establishment controverted the claim, contending that appellant was not injured in the performance of duty.

By decision dated June 22, 2018, OWCP denied appellant's traumatic injury claim. It found that she was not in the performance of duty at the time of the alleged April 3, 2018 incident as she was at lunch and not on the premises of the employing establishment.

LEGAL PRECEDENT

FECA provides for the payment of compensation for the disability or death of an employee resulting from personal injury sustained while in the performance of duty.[3] The phrase "sustained while in the performance of duty" in FECA is regarded as the equivalent of the commonly found requisite in workers' compensation law of arising out of and in the course of employment.[4]

In order to be covered under FECA, an injury must occur at a time when the employee may reasonably be stated to be engaged in his or her master's business, at a place where he or she may reasonably be expected to be in connection with the employment, and while he or she was reasonably fulfilling the duties of his or her employment or engaged in doing something incidental thereto.[5]

The Board has recognized a general principle, called the premises doctrine, that off-premises injuries sustained by employees having fixed hours and places of work while going to or coming from work or during a lunch period are not compensable as they do not arise out of and in the course of employment.[6] Rather, such injuries are merely the ordinary, nonemployment hazards of the journey itself, which are shared by all travelers, subject to certain exceptions.[7]

Exceptions to the premises doctrine have been made to protect activities that are so closely related to the employment itself as to be incidental thereto,[8] or which are in the nature of necessary personal comfort or ministration.[9] The Board has also found that the course of employment should extend to any injury that occurred at a point where the employee was within the range of dangers associated with the employment.[10] This exception has two components. The first is the presence 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 is concerned.[11] The main consideration in applying this rule is whether the conditions giving rise to the injury are causally connected to the employment.[12]

[3] 5 U.S.C. § 8102(a).

[4] *See M.S.*, Docket No. 18-0465 (issued August 1, 2018).

[5] *A.C.*, Docket No. 17-1927 (issued April 12, 2018).

[6] *K.M.*, Docket No. 17-1263 (issued December 19, 2018).

[7] *Id.*

[8] *See M.T.*, Docket No. 17-1695 (issued May 15, 2018).

[9] *See J.L.*, Docket No. 14-368 (issued August 22, 2014).

[10] *Id*.

[11] *See B.H.*, Docket No. 14-0829 (issued July 8, 2015).

[12] *Id*.

ANALYSIS

The Board finds that appellant has not established an employment-related injury while in the performance of duty on April 3, 2018, as alleged.

Appellant was struck by a car in a crosswalk a block from her workstation at 12:15 p.m. She was at lunch at the time of the incident and not on the employing establishment's premises. The employing establishment confirmed that it did not own, operate, or control the area where the accident occurred.

As noted above, off-premises injuries during a lunch break are generally not compensable.[13] The Board finds that the exceptions to this rule are not applicable in this case. Appellant was not on a special errand when she left her building to obtain lunch and was not exposed to a special hazard that became a hazard of employment. She further was not on an emergency call.[14] Instead, her off-premises excursion was personal in nature.[15]

In *J.K.*,[16] a claimant was in a motor vehicle accident at lunch on his way to a park to take a walk to clear his head. The Board found that leaving his duty station at lunch to go for a walk to clear his head was a personal activity that occurred at a time and place when he was not engaged in employment activities. It determined that the claimant had experienced a nonemployment-related hazard shared by the general public. Likewise, in *S.O.*,[17] a claimant fell at lunch on a public sidewalk trying to cross a street. The Board found that she was not in the performance of duty as she was at lunch and on property that was not owned, operated, or maintained by the employing establishment, but instead open to the general public. Similarly, in this case, appellant's claimed injury occurred away from her place of employment at a time when she was engaged in an activity unrelated to her employment, and resulted from a nonemployment-related hazard shared by the general public. While having lunch may be considered incidental to one's employment under the personal comfort doctrine, the premises rule explicitly excludes off-premises lunches from the course of employment.[18] Consequently, appellant was not in the performance of duty on April 3, 2018 when she was struck by an automobile in a crosswalk.[19]

On appeal, appellant argues that her work schedule included a break for lunch and that food was available within the building, but not in her office suite. She asserts that employees customarily left the building for lunch and that she believed she needed to get outside for a break

[13] *See D.S.*, Docket No. 16-1252 (issued December 1, 2016); *J.E.*, Docket No. 59 ECAB 119 (2007).

[14] *S.O.*, Docket No. 18-0773 (issued September 11, 2018).

[15] *Supra* note 6.

[16] *J.K.*, Docket No. 15-0198 (issued March 10, 2015).

[17] *Supra* note 14.

[18] *Id*.

[19] *Id*.

during her workday.[20] However, as explained above, the Board finds that appellant was not injured in the performance of duty, as alleged.

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 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 employment-related injury while in the performance of duty on April 3, 2018, as alleged.

ORDER

IT IS HEREBY ORDERED THAT the June 22, 2018 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: February 25, 2019
Washington, DC

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

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

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

[20] On December 6, 2018, the Director of OWCP filed a memorandum in justification of OWCP's decision, requesting that the Board affirm the June 22, 2018 decision as appellant was not in the performance of duty at the time of the April 3, 2018 incident.