United States Department of Labor
Employees' Compensation Appeals Board

T.T., Appellant	)	
and	)	**Docket No. 20-0383**
	)	**Issued: August 3, 2020**
DEPARTMENT OF VETERANS AFFAIRS, VETERANS AFFAIRS WESTERN COLORADO HEALTH CARE SYSTEM, Grand Junction, CO, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

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

JURISDICTION

On December 9, 2019 appellant filed a timely appeal from an October 16, 2019 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]

[1] 5 U.S.C. § 8101 *et seq.*

[2] The Board notes that, following the October 16, 2019 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*.

ISSUE

The issue is whether appellant has met her burden of proof to establish a traumatic injury in the performance of duty on December 5, 2018, as alleged.

FACTUAL HISTORY

On December 6, 2018 appellant, then a 46-year-old health technician, filed a traumatic injury claim (Form CA-1) alleging that, on December 5, 2018 at 4:20 p.m., she hit her head and back and injured her left arm when trying to prevent herself from falling after she slipped on ice when stepping out of her truck while in the performance of duty. Her regular work hours were listed as 8:00 a.m. to 4:30 p.m. On the reverse side of the claim form, the employing establishment controverted appellant's claim noting that she was starting her vehicle to get it warm before she left work and was thus not injured in the performance of duty. Appellant did not stop work.

X-ray views of appellant's left shoulder, dated December 6, 2018, revealed no fracture or other significant abnormalities. X-ray views of her chest of the same date showed cardiomegaly.

In a December 6, 2018 emergency room discharge report, Dr. David Dreitlein, a Board-certified specialist in emergency medicine, noted that appellant slipped on ice while at work. He reviewed x-rays of her left shoulder and chest and diagnosed left shoulder sprain. In an accompanying work excuse note, Dr. Dreitlein noted that appellant should not work with her left arm until released.

In a December 7, 2018 duty status report (Form CA-17), Dr. John Best, an osteopath specializing in family medicine, noted that appellant slipped on ice before leaving work. He diagnosed left shoulder sprain and listed her work restrictions. Dr. Best indicated that appellant could return to work with restrictions.

Dr. Best reported in a note dated December 14, 2018 that appellant had been wearing a sling and limiting use of her left shoulder. He examined her and diagnosed left shoulder pain and persistent shoulder and thoracic muscle spasm. Dr. Best recommended physical therapy treatment and continued work restrictions.

In a January 4, 2019 note, Dr. Best noted that appellant had left shoulder inflammation and swelling. He indicated that she had visible muscular asymmetry of the left shoulder and diagnosed a left shoulder strain. Dr. Best recommended continued physical therapy treatment and work restrictions. In an accompanying Form CA-17 report, he diagnosed left shoulder strain and indicated that appellant could not perform full-duty work. Dr. Best noted that she should not use her left arm.

Appellant submitted physical therapy treatment notes dated January 4 through March 22, 2019.

In a May 2, 2019 development letter,[3] OWCP indicated that when appellant's claim was first received it appeared to be a minor injury that resulted in minimal or no lost time from work

[3] OWCP previously sent this letter on April 16, 2019 to a different address.

and, based on these criteria and because the employing establishment had not controverted continuation of pay or otherwise challenged the case, payment of a limited amount of medical expenses was administratively approved. It explained that it had reopened the claim for consideration because her medical expenses had exceeded $1,500.00. OWCP requested additional factual and medical evidence in support of appellant's claim and provided a questionnaire for her completion.

In a separate development letter dated April 16, 2019, it requested that the employing establishment provide additional information regarding appellant's traumatic injury claim, including information about the parking lot and policies regarding use of the parking lot where she was injured. OWCP afforded both parties 30 days to submit the necessary evidence. No additional evidence was received.

By decision dated June 3, 2019, OWCP denied appellant's traumatic injury claim, finding that she had not established that the December 5, 2018 traumatic injury occurred in the performance of duty, as alleged. It noted that she had failed to respond to its development questionnaire and thus, it could not determine if she had diverted from her assigned duties. OWCP concluded that "the requirements have not been met for establishing that [appellant] sustained an injury and/or medical condition that arose during the course of employment and within the scope of compensable work factors as defined by FECA."

In a partially legible March 17, 2019 Form CA-17 report, a physician with an illegible signature diagnosed left shoulder pain and listed appellant's work restrictions.

In a May 24, 2019 report, Dr. Mark Luker, a Board-certified orthopedic surgeon, noted that appellant had pain in the shoulder and scapular spine region. He indicated that she had some weakness and numbness in her left hand and arm. Dr. Luker examined appellant and diagnosed left scapula pain and scapular dyskinesis.

On June 3, 2019 appellant responded to OWCP's development questionnaire. She noted that she slipped on ice in a parking lot while turning on the heat for her car before leaving for work. Appellant indicated that the employing establishment rented the parking lot and that she was required to park in the lot. She further stated that she was on a break when the incident occurred and that she was performing an accepted practice of employment at the time of her injury.

On July 17 and August 20, 2019 appellant requested reconsideration. In an accompanying statement, she alleged that her fall occurred during her scheduled work hours in the parking lot where the employing establishment was located.

Appellant submitted a December 14, 2018 appointment reminder showing an appointment with Dr. Best on January 4, 2019. She also submitted appointment reminders, dated January 11 through February 8, 2019, showing appointments for physical therapy treatment.

By decision dated October 16, 2019, OWCP denied modification of the June 3, 2019 decision finding that the evidence of record did not establish that appellant was on an authorized break when she slipped on ice. It stated, "[s]tepping outside to warm up your personal vehicle before you are scheduled to leave work is not a work[-]related function." OWCP thus concluded that appellant was not injured in the performance of duty.

LEGAL PRECEDENT

An employee seeking benefits under FECA[4] 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,[5] 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.[6] 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.[7]

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."[8] 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 when he or she may reasonably be expected to be in connection with his or her employment; and (3) while he or she was reasonably fulfilling the duties of his or her employment or engaged in doing something incidental thereto.[9]

It is well established as a general rule of workers' compensation law that, as to employees having fixed hours and places of work, injuries occurring on the premises of the employing establishment, while the employees are going to or from work, before or after working hours or at lunch time, are compensable.[10] 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 employing establishment does not have ownership and control of the place of injury, the place may nevertheless still be considered part of the "premises."[11]

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[4] *Supra* note 1.

[5] *S.S.*, Docket No. 19-1815 (issued June 26, 2020); *S.B.*, Docket No. 17-1779 (issued February 7, 2018); *Joe D. Cameron*, 41 ECAB 153 (1989).

[6] *M.H.*, Docket No. 19-0930 (issued June 17, 2020); *R.C.*, 59 ECAB 427 (2008); *James E. Chadden, Sr.*, 40 ECAB 312 (1988).

[7] *S.A.*, Docket No. 19-1221 (issued June 9, 2020); *L.M.*, Docket No. 13-1402 (issued February 7, 2014); *Delores C. Ellyett*, 41 ECAB 992 (1990).

[8] *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).

[9] *S.V.*, Docket No. 18-1299 (issued November 5, 2019); *Roma A. Mortenson-Kindschi*, 57 ECAB 418 (2006); *Mary Keszler*, 38 ECAB 735, 739 (1987).

[10] *R.K.*, Docket No. 18-1269 (issued February 15, 2019); *Narbik A. Karamian*, 40 ECAB 617, 618 (1989); *Eileen R. Gibbons*, 52 ECAB 209 (2001).

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

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 authorized 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.[12]

Injuries arising on the premises may be approved if the employee was engaged in activity reasonably incidental to the employment, such as: (a) personal acts for the employee's comfort, convenience, and relaxation; (b) eating meals and snacks on-premises; or (c) taking authorized coffee breaks.[13]

ANALYSIS

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

In determining whether a parking lot 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 the employing establishment assigned spaces, whether the 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 employees, and whether employees were reimbursed for parking expenses.[14]

In her June 3, 2019 response to OWCP's development questionnaire, appellant asserted that she was required to park in "an agency parking lot." She alleged that the employing establishment rented, but did not own the parking lot. OWCP's procedures provide that it should obtain relevant information from an official superior if it requires clarification before determining

[12] *C.L.*, *supra* note 8; *R.K.*, *supra* note 10; *Diane Bensmiller*, 48 ECAB 675 (1997); *Rosa M. Thomas-Hunter*, 2 ECAB 500 (1991); *Edythe Erdman*, 36 ECAB 597 (1985); *Karen A. Patton*, 33 ECAB 487 (1982); *R.M.*, Docket No. 07-1066 (issued February 6, 2009).

[13] *C.P.*, Docket No. 18-1741 (issued July 5, 2019); *A.P.*, Docket No. 18-0886 (issued November 16, 2018); *T.L.*, 59 ECAB 537 (2008).

[14] *D.C.*, Docket No. 19-0846 (issued October 17, 2019); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Performance of Duty*, Chapter 2.804.4(f) (August 1992); *see also id*. Chapter 2.804.4(b). (If the employee has a fixed place of work, the claims examiner (CE) must ascertain whether the employee was on the premises when the injury occurred. The answers to the appropriate sections of CA-1, CA-2, and CA-6 forms 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).

whether or not the employee was on the premises.[15] Its procedures further provide that it should request that an official superior confirm whether the parking facilities are owned, controlled, or managed by the employing establishment.[16] While OWCP sent an April 16, 2019 development letter to the employing establishment requesting this information, it did not receive a response. As such, it failed to obtain a statement from the employing establishment in accordance with its procedures.

The lack of a response from the employing establishment also precludes a full and fair adjudication of whether appellant remained in the performance of duty at the time of her fall. OWCP requested information from the employing establishment regarding ownership, control, and permitted usage of the parking lot. In *J.O.*,[17] the Board found that an employee was injured in the performance of duty when cleaning snow from her car in the employing establishment's parking lot, on premises, during a lunch break because she was engaged in an act reasonably incidental to personal comfort, at the time of the incident. In the present case, it is unclear if appellant was on an authorized break or if she was on premises because the employing establishment did not respond to OWCP's April 16, 2019 development letter. OWCP's procedures provide that it should obtain relevant information from an official superior to determine whether the act was one which is regarded as a normal incident of the work experience, or was one which is foreign or extraneous to the work experience, and the extent to which the employee diverted from duty to perform the act.[18] It, however, failed to obtain a statement from the employing establishment in accordance with its procedures prior to finding that appellant was not on an authorized work break when injured.

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.[19] The Board finds that OWCP insufficiently developed the evidence regarding whether she was on the premises of the employing establishment and whether she was on an authorized break at the time of injury.[20]

On remand OWCP should obtain clarifying information from the employing establishment regarding whether the parking lot was owned, managed, or controlled by the employing establishment and thus part of the premises. Further, as appellant contended that she was

[15] *Id.*

[16] *Id.*

[17] Docket No. 09-1432 (issued February 2, 2010); *see also J.R.*, Docket No. 16-1005 (issued September 23, 2016).

[18] *Supra* note 14 at Chapter 2.804.7(b)(1) (August 1992).

[19] *D.C.*, *supra* note 14.

[20] *Id.*; *see also supra* note 14 at Chapter 2.800.5(d)(1) (If an employing establishment fails to respond to a request for comments on the claimant's allegations, the CE may usually accept the claimant's statements as factual. However, acceptance of the claimant's statements as factual is not automatic in the absence of a reply from the employing establishment, especially in instances where performance of duty is questionable. The Board has consistently held that allegations unsupported by probative evidence are not established).

performing an accepted practice of employment at the time of her injury, the employing establishment should be requested to address this contention. Following this and such other further development as deemed necessary, OWCP shall issue a *de novo* decision.

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the October 16, 2019 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: August 3, 2020
Washington, DC

Christopher J. Godfrey, Deputy Chief Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Alternate Judge
Employees' Compensation Appeals Board

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