United States Department of Labor
Employees' Compensation Appeals Board

S.W., Appellant	)	
and	)	**Docket No. 20-0547**
	)	**Issued: December 11, 2020**
DEPARTMENT OF VETERANS AFFAIRS, VETERANS BENEFITS ADMINISTRATION, Cleveland, OH, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
JANICE B. ASKIN, Judge
PATRICIA H. FITZGERALD, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On January 13, 2020 appellant filed a timely appeal from a December 27, 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 December 27, 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 his burden of proof to establish an injury on November 8, 2019 while in the performance of duty, as alleged.

FACTUAL HISTORY

On November 11, 2019 appellant, then a 54-year-old legal aid specialist, filed a traumatic injury claim (Form CA-1) alleging that at 7:20 a.m. on November 8, 2019 he injured his left shoulder, ribs, left foot, lower back, and left knee when the bus he was taking to work made a sudden stop that propelled him towards the windshield, causing impact to the front inside of the bus while in the performance of duty. He did not stop work. On the reverse side of the claim form the employing establishment contended that appellant was not in the performance of duty. It noted appellant was injured when riding a bus to work and that his regular work hours were from 8:00 a.m. to 4:30 p.m.

In support of his claim, appellant submitted a November 8, 2019 after visit summary, wherein Dr. Alexander Daves, an emergency medicine specialist, indicated that appellant was seen following a motor vehicle accident (MVA).

In a November 13, 2019 development letter, OWCP informed appellant of the deficiencies of his claim. It advised him of the type of factual and medical evidence necessary to establish his claim and attached a questionnaire for his completion to determine whether he was in the performance of duty at the time of his injury. OWCP afforded appellant 30 days to submit the necessary evidence.

In a letter dated November 13, 2019, the employing establishment controverted the claim. It contended that the incident occurred at 7:20 a.m. while appellant was commuting on a bus to work, noting that appellant's tour of duty began at 8:00 a.m. The employing establishment argued that appellant was, therefore, not in the performance of duty when injured.

Appellant subsequently submitted a November 14, 2019 report from Ms. Lindsey Kantura, a physical therapy assistant, who indicated that appellant had an accident on November 8, 2019 while he was on a public bus and fell into the windshield when the driver slammed on the brakes.

In a November 22, 2019 work capacity evaluation (Form OWCP-5c), Dr. Jared Levin, a Board-certified orthopedic surgeon, noted that appellant sustained a left shoulder injury on November 8, 2019 and required a magnetic resonance imaging (MRI) scan to determine the extent of his shoulder injury. In an attending physician's report (Form CA-20) of even date, Dr. Levin diagnosed left shoulder strain. He provided a history of injury that appellant was on a bus when it stopped suddenly and he was thrown back while walking to his seat. Dr. Levin diagnosed left shoulder strain. He checked a box marked "Yes" indicating his belief that appellant's injury was caused by employment activity. Dr. Levin further noted that he believed appellant "was on the bus transportation supplied by the Department of Labor" when injured.

In a narrative report dated November 22, 2019, Dr. Levin reiterated his diagnosis and assertion that appellant was on a bus when it suddenly stopped and he was thrown into the windshield while walking to his seat.

Appellant also submitted diagnostic testing and physical therapy reports in support of his claim.

By decision dated December 27, 2019, OWCP denied appellant's claim, finding that the evidence of record was insufficient to establish that his injury arose in the performance of duty on November 8, 2019, as alleged.[3] It noted that he reported that his injury occurred on a public bus and not on property or equipment owned, managed, or operated by the employing establishment.

LEGAL PRECEDENT

An employee seeking benefits under FECA 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 filed within the applicable time limitation period of FECA, 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.[4]

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.[5] 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.[6] To arise in the course of employment, an injury must occur at a time when the employee may reasonably be said to be engaged in the master's business, at a place where he may reasonably be expected to be in connection with the employment, and while he was reasonably fulfilling the duties of his employment or engaged in doing something incidental thereto.[7]

For an employee with fixed hours and a fixed workplace, an injury that occurs on the employing establishment premises when the employee is going to or from work, before or after working hours or at lunch time is compensable.[8] The course of employment for such employees includes acts which minister to their personal comfort within the time and space limits of their

[3] By letter dated February 10, 2020, OWCP determined that it had created two separate cases for the same injury and, therefore, deleted File No. xxxxxx594 and moved the documents in that case record to the current File No. xxxxxx568.

[4] *T.H.*, 59 ECAB 388, 393 (2008); *see Steven S. Saleh*, 55 ECAB 169, 171-72 (2003); *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

[5] 5 U.S.C. § 8102(a).

[6] *Valerie C. Boward*, 50 ECAB 126 (1998).

[7] *R.A.*, 59 ECAB 581 (2008); *Mary Keszler*, 38 ECAB 735 (1987).

[8] *Roma A. Mortenson-Kindschi*, 57 ECAB 418, 423-24 (2006).

employment.[9] However, the same employee with fixed hours and fixed workplace would generally not be covered when an injury occurs off the employing establishment premises while traveling to or from work.[10] The reason for the distinction is that the later injury is merely a consequence of the ordinary, nonemployment hazard of the journey itself, which are shared by all travelers.[11]

The employing establishment premises may include all the property owned by the employer.[12] The premises of the employer, as the term is used in workers' compensation law, are not necessarily coterminous with the property owned by the employer;[13] they may be broader or narrow and are dependent more on the relationship of the property to the employment than on the status or extent of the legal title.[14] In some cases, premises may include all the property owned by the employer; in other cases, though the employee does not have ownership and control of the place where the injury occurred, the place is nevertheless considered part of the premises.[15]

The Board recognizes exceptions to the premises rule. Underlying some of these exceptions is the principle that 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.[16] 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.[17] This exception contains 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 are concerned.[18] The main consideration in applying this rule is whether the conditions giving rise to the injury are causally connected to the employment.[19]

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

[10] *Idalaine L. Hollins-Williamson*, 55 ECAB 655, 658 (2004).

[11] *Id.*

[12] *Denise A. Curry*, 51 ECAB 158, 160 (1999).

[13] *Jimmie Brooks*, 22 ECAB 318, 321 (1971); *see also D.C.*, Docket No. 08-1782 (issued January 16, 2009).

[14] *Wilmar Lewis Prescott*, 22 ECAB 318, 321 (1971).

[15] *Denise A. Curry*, *supra* note 12.

[16] *R.O.*, Docket No. 08-2088 (issued February 18, 2011).

[17] *Shirley Borgos*, 31 ECAB 222, 223 (1979).

[18] *M.L.*, Docket No. 12-0286 (issued June 4, 2012).

[19] *Id.*; *see also Jimmie Brooks*, *supra* note 13.

ANALYSIS

The Board finds that appellant has not met his burden of proof to establish an injury on November 8, 2019 while in the performance of duty, as alleged.

The record reflects that appellant was injured while commuting to work on a public bus at 7:20 a.m. on November 8, 2019 when the bus stopped suddenly, causing appellant to propel forward into the windshield. At the time of his injury, appellant had a fixed workplace and fixed work hours from 8:00 a.m. to 4:30 p.m.

To be covered, an injury must occur at a time when the employee may reasonably be said to be engaged in his master's business, at a place where he may reasonably be expected to be in connection with his employment, and while he was reasonably fulfilling the duties of his employment or engaged in doing something incidental thereto.[20] As a general rule, off premises injuries sustained by employees having fixed hours and places of work while going to or coming from work, are not compensable as they do not arise out of and in the course of employment. Such injuries are merely the ordinary, nonemployment hazards of the journey itself which are shared by all travelers.[21]

The evidence of record establishes that appellant had a fixed workplace with fixed hours and the injury occurred outside of his regular tour of duty. Further, appellant was not fulfilling any duties incidental to his employment when injured. The Board finds that the public bus where the accident occurred does not constitute a special hazard or an access route closely associated with the employing establishment.[22] The accident occurred on a means of public transportation. The Board finds that appellant has not established that the public bus where the accident occurred was used exclusively or principally by employees of the employing establishment for the convenience of the employer. There is no evidence that the bus was restricted to the employees of the employing establishment. The evidence reflects that the injury occurred on public transportation. The Board has consistently held that an employee with fixed hours and fixed workplace will generally not be covered when an injury occurs off the employing establishment premises while traveling to or from work.[23] For these reasons, the Board finds that appellant's injury occurred while he was exposed to an ordinary, off-premises nonemployment hazard of the journey shared by all travelers.[24]

[20] *Supra* note 7.

[21] *Jon Louis Van Alstine*, Docket No. 03-1600 (issued November 1, 2004).

[22] *See supra* note 17 and 18.

[23] *See supra* note 9; *Mary Keszler*, *supra* note 7.

[24] On return of the case record, OWCP should consider administratively combining the present claim with OWCP File Nos. xxxxxx723, xxxxxx315, and xxxxxx677.

CONCLUSION

The Board finds that appellant has not met his burden of proof to establish an injury in the performance of duty on November 8, 2019, as alleged.

ORDER

IT IS HEREBY ORDERED THAT the December 27, 2019 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: December 11, 2020
Washington, DC

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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

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