

**United States Department of Labor
Employees' Compensation Appeals Board**

M.T., Appellant)	
)	
and)	Docket No. 19-1546
)	Issued: March 5, 2020
DEPARTMENT OF DEFENSE, DEFENSE)	
COMMISSARY AGENCY,)	
Fort Sam Houston, TX, Employer)	
)	

Appearances:
Anthony S. Arenas, Esq., for the appellant¹
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
PATRICIA H. FITZGERALD, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On July 12, 2019 appellant, through counsel, filed a timely appeal from a June 5, 2019 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this 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 his burden of proof to establish an injury in the performance of duty on June 30, 2014, as alleged.

FACTUAL HISTORY

This case has previously been before the Board.³ The facts and circumstances of the case as set forth in the Board's prior decisions are incorporated herein by reference. The relevant facts are as follows.

On July 3, 2014 appellant, then a 40-year-old security specialist, filed a traumatic injury claim (Form CA-1) alleging that, at 1:00 p.m. on Monday, June 30, 2014, he sustained injuries to his neck, shoulder, and right leg due to a fall at his home in San Antonio, TX.⁴ He attached a statement in which he explained that, on the date of injury, he was in the process of relocating his telework items from his home to the Commissary at Fort Sam Houston, TX, at the direction of his supervisor. Appellant indicated that, as he was carrying a box of reference materials and supplies down the stairs in his home, his right leg gave out and he tumbled down the last six steps.

On the reverse side of the Form CA-1, appellant's immediate supervisor indicated that appellant's duty station was at Fort Sam Houston Commissary and that his regular work hours were 7:30 a.m. to 4:00 p.m., Monday through Friday. In a July 9, 2014 statement attached to the Form CA-1, he contended that appellant had not sustained an injury in the performance of duty on June 30, 2014 because his alleged injury occurred at home despite the fact that he had directed appellant on three occasions prior to June 30, 2014 to report to the Fort Sam Houston Commissary at 7:00 a.m. on June 30, 2014.⁵ The supervisor indicated that he knew nothing about appellant making trips back and forth from his home to the Fort Sam Houston Commissary to relocate his office supplies. He indicated that appellant never asked him for permission to carry out this task and he did not approve it. The supervisor noted that appellant's duty station on June 30, 2014 was the Fort Sam Houston Commissary. He indicated that he had advised appellant on June 26, 2014 that he was taking him off his telework schedule of five days per week and that appellant instead had to report to and work at the Fort Sam Houston Commissary.

In a June 27, 2014 statement, a store director for the employing establishment indicated that he was present on June 26, 2014 when appellant's immediate supervisor advised appellant that he was taking him off his telework schedule of five days per week. He noted that appellant's immediate supervisor told appellant to pack up his things and bring them with him on Monday, June 30, 2014, to his workplace at the Fort Sam Houston Commissary.

In a July 22, 2014 e-mail to an injury compensation specialist for the employing establishment, appellant's immediate supervisor indicated that his comment to appellant to "bring

³ Docket No. 16-0927 (issued February 13, 2017); Docket No. 17-1695 (issued May 15, 2018).

⁴ Appellant stopped work on the date of injury.

⁵ The record contains a June 13, 2014 e-mail in which appellant's supervisor directed him to report to the Fort Sam Houston Commissary for work on June 30, 2014.

his work things” with him when he reported to the Fort Sam Houston Commissary on June 30, 2014 was not meant to imply that he had approved trips to and from his residence.

Appellant submitted July 7, 17, and August 21, 2014 reports in which an attending physician listed a date of injury as June 30, 2014 and a diagnosis of “right leg/head.” The physician indicated that appellant was totally disabled from work.

By decision dated August 26, 2014, OWCP denied appellant’s claim, finding that he had established that an employment incident occurred on June 30, 2014 as alleged, but that he had not submitted medical evidence sufficient to establish a medical condition causally related to the accepted employment incident. It concluded, therefore, that the requirements had not been met to establish an injury as defined by FECA.

On October 22, 2014 appellant requested reconsideration of the August 26, 2014 decision. He submitted additional medical evidence and continued to argue that he followed his supervisor’s order in June 2014 to relocate his work belongings from his home to the Fort Sam Houston Commissary.

In a November 18, 2014 letter, an injury compensation specialist for the employing establishment contended that appellant was not in the performance of duty when his accident occurred on June 30, 2014. She advised that he was not authorized to be at his residence at the time of injury.

By decision dated March 9, 2015, OWCP denied appellant’s claim for a June 30, 2014 employment injury. It noted that it was modifying the basis for the denial because he had not shown that he fell while in the performance of duty on June 30, 2014. OWCP noted, “Your case remains denied as you have not met the performance of duty element of your claim.”

On December 8, 2015 appellant, through counsel, requested reconsideration of the March 9, 2015 decision. Counsel argued that appellant was responding to a direct order from his supervisor to pack up and move his things from his home to the Fort Sam Houston Commissary when he was injured on June 30, 2014. He asserted that appellant’s supervisor did not direct appellant to pack up his things on a day prior to Monday, June 30, 2014, but rather specifically told him to pack them up on June 30, 2014 and bring them with him.

By decision dated February 29, 2016, OWCP denied modification of its March 9, 2015 decision.

On April 1, 2016 appellant appealed to the Board. By decision dated February 13, 2017,⁶ the Board affirmed OWCP’s February 29, 2016 decision, finding that he had not shown that his claimed June 30, 2014 injury occurred in the performance of duty. The Board found that appellant was not at a place where he may have reasonably been expected to be in connection with the employment when he fell at his home on June 30, 2014 because his duty station was the Fort Sam Houston Commissary and his supervisor directed him to report there at 7:00 a.m. on that date. The Board noted that appellant’s supervisor indicated that he had not authorized appellant to travel

⁶ See *supra* note 3.

back and forth between his home and the Fort Sam Houston Commissary on June 30, 2014.⁷ It noted that appellant was expected to report to his duty station at the Fort Sam Houston Commissary and perform his usual duties at the time of his fall on June 30, 2014. Therefore, he was not reasonably fulfilling the duties of his employment or engaged in something incidental thereto at the time of his June 30, 2014 fall.

On May 1, 2017 appellant, through counsel, requested reconsideration of his claim. Counsel argued that appellant's supervisor had the responsibility to make sure that appellant fully understood his instructions in June 2014 particularly given that appellant had cognitive deficits and did not process information the same way as everyone else. He asserted that appellant's supervisor failed to advise appellant that, if he had more items than he could bring in one trip, he could bring the items to work with him on July 1, 2014. Counsel submitted a two-page excerpt from an undated and unsigned report that described appellant's cognitive functioning testing.

In a May 23, 2017 letter, an injury compensation specialist indicated that, prior to the alleged June 30, 2014 incident, appellant teleworked 100 percent of his work schedule, which required him to work independently without constant supervisory oversight and/or directions.

By decision dated June 14, 2017, OWCP denied modification.⁸

On August 1, 2017 appellant again appealed to the Board. By decision dated May 15, 2018,⁹ the Board affirmed OWCP's June 14, 2017 decision, finding that he had not shown that his claimed June 30, 2014 injury occurred in the performance of duty.

On March 7, 2019 appellant, through counsel, requested reconsideration. Counsel again argued that appellant had cognitive deficits to such a degree that he was unable to understand his supervisor's instructions regarding the expectations of his work activities on June 30, 2014. In support of this argument, counsel attached an August 6, 2018 report of Dr. Barbara Hardin, a clinical psychologist.

In her August 6, 2018 report, Dr. Hardin advised that, as the former director of the Student Psychological and Testing Services at St. Mary's University, she supervised the program for students with disabilities and was familiar with appellant's situation and medical diagnosis. She indicated that appellant was evaluated in the fall of 2000 to determine why he was having academic difficulties and noted that, at the time, he was diagnosed with a nonverbal learning disability and an auditory perceptual disorder. Dr. Hardin reported that, under the diagnostic system in use today, this would be considered on the top of the autism spectrum and represented a lifelong

⁷ The Board indicated that, although the supervisor told appellant to "bring his work things" with him when he reported to the Fort Sam Houston Commissary on June 30, 2014, this comment could not be reasonably interpreted as approval for appellant to leave his workplace and travel back and forth between his home and his duty station during the workday without prior approval.

⁸ The decision noted that it denied modification of the Board's February 13, 2017 decision. OWCP is not authorized to review Board decisions. Although the Board's February 13, 2017 decision was the last merit decision prior to OWCP's issuance of its June 14, 2017 decision, OWCP's February 29, 2016 decision was the appropriate subject of possible modification by OWCP. *See* 20 C.F.R. § 501.6(d).

⁹ *See supra* note 3.

developmental disorder which indicated that appellant has a particular difficulty understanding the pragmatics of language and nonverbal cues. She maintained that appellant would have trouble recognizing a person's facial expression that most people would recognize as signifying annoyance and that he would misunderstand sarcasm and take it literally. Dr. Hardin noted that this condition was compounded by the diagnosis of auditory perceptual disorder. She advised that the examiner who evaluated appellant in 2000 concluded, "[Appellant's] difficulties with oral language and visual auditory learning would likely suggest that he frequently misunderstands directions and has trouble following lectures at class.... He appears to be unable to process visual and auditory information simultaneously."

Dr. Hardin further noted that the testing results from 2000 indicated that appellant had a concrete approach to situations and weak recall or understanding of narrative information. Appellant was below average in his ability to understand directions. Dr. Hardin indicated that appellant's strong points included his expressive vocabulary and reading decoding skills, but asserted that these expression skills might make it appear that he understands more than he actually does. She maintained that appellant's disabilities would cause considerable functional limitations in that he would interpret things literally and miss the subtle nuances of sarcasm, frustration, or annoyance in language in the workplace. Dr. Hardin reported that appellant processed information slower than most people and advised that he was provided assistance for note taking at St. Mary's University and was given additional time for examinations. She maintained that appellant did not advocate well for himself and did not always recognize when he should clarify an interaction or a directive.¹⁰

By decision dated June 5, 2019, OWCP denied modification.¹¹

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."¹² 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."¹³ The phrase "in the course of employment" is recognized as relating to the work situation, and more particularly, relating to elements of time, place, and circumstance. 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 or she may

¹⁰ In connection with the March 2019 reconsideration request, appellant, through counsel, also submitted an undated personnel document from the employing establishment which indicated that he had a handicap of "94 -- Learning Disability." Appellant also submitted December 12, 2017 and May 9, 2018 duty status reports (Form CA-17) from an attending physician who indicated that he was medically retired, as well as diagnostic testing reports from 2018 which evaluated his physical condition.

¹¹ The decision noted that it denied modification of the Board's May 15, 2018 decision. Although the Board's May 15, 2018 decision was the last merit decision prior to OWCP's issuance of its June 5, 2019 decision, OWCP's June 14, 2017 decision was the appropriate subject of possible modification by OWCP. *See supra* note 8.

¹² 5 U.S.C. § 8102(a).

¹³ *T.L.*, Docket No. 19-0805 (issued November 18, 2019); *Charles Crawford*, 40 ECAB 474, 476-77 (1989).

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.¹⁴ This alone is not sufficient to establish entitlement to benefits for compensability. The concomitant requirement of an injury “arising out of the employment” must be shown, and this encompasses not only the work setting, but also a causal concept, the requirement being that the employment caused the injury.¹⁵

As a general rule, off-premises injuries sustained by employees having fixed hours and place of work, while going to or coming home from work or during a lunch period, are not compensable as they do not arise out of and in the course of employment, but are merely the ordinary, nonemployment hazards of the journey itself, which are shared by all travelers.¹⁶ When an employee has a definite place and time for work and the time for work does not include the lunch period, the trip away from, and back to the premises for the purposes of getting lunch is indistinguishable in principle from the trip at the beginning and end of the workday and is governed by the same rules and exceptions.¹⁷ Exceptions to the general rule have been made in order to protect activities that are so closely related to the employment itself as to be incidental thereto,¹⁸ or which are in the nature of necessary personal comfort or ministrations.¹⁹

OWCP’s procedures address off-premises injuries sustained by workers who perform service at home:

“Ordinarily, the protection of [FECA] does not extend to the employee’s home, but there is an exception when the injury is sustained while the employee is performing official duties. In situations of this sort, the critical problem is to ascertain whether at the time of injury the employee was in fact doing something for the [employing

¹⁴ See *A.S.*, Docket No. 18-1381 (issued April 8, 2019); *D.L.*, 58 ECAB 667 (2007); *Mary Keszler*, 38 ECAB 735, 739 (1987).

¹⁵ *D.C.*, Docket No. 18-1216 (issued February 8, 2019); *Eugene G. Chin*, 39 ECAB 598 (1988).

¹⁶ *A.B.*, Docket No. 15-0288 (issued May 21, 2015); *Donna K. Schuler*, 38 ECAB 273-74 (1986).

¹⁷ *Id.*

¹⁸ The Board has stated that these exceptions have developed where the hazards of the travel may fairly be considered a hazard of the employment and that they are dependent upon the particular facts and related situations: (1) where the employment requires the employee to travel on the highways; (2) where the employing establishment contracts to and does furnish transportation to and from work; (3) where the employee is subject to emergency calls as in the case of firemen; and (4) where the employee uses the highway to do something incidental to his employment, with the knowledge and approval of the employing establishment. *B.P.*, Docket No. 14-0411 (issued July 17, 2014); *Betty R. Rutherford*, 40 ECAB 496, 498-99 (1989).

¹⁹ *Id.*

establishment]. The official superior should be requested to submit a statement showing --

- (a) What directives were given to or what arrangements had been made with the employee for performing work at home or outside usual working hours;
- (b) The particular work the employee was performing when injured; and
- (c) Whether the official superior is of the opinion the employee was performing official duties at the time of the injury, with appropriate explanation for such opinion.”²⁰

ANALYSIS

The Board finds that appellant has not met his burden of proof to establish an injury in the performance of duty on June 30, 2014, as alleged.

Preliminarily, the Board notes that it is unnecessary for the Board to consider the evidence appellant submitted prior to the issuance of OWCP’s June 14, 2017 merit decision because the Board considered that evidence in its May 15, 2018 decision. Findings made in prior Board decisions are *res judicata* absent any further review by OWCP under section 8128 of FECA.²¹ Therefore, the current analysis now will focus on the relevant evidence received since OWCP’s June 14, 2017 merit decision, which is the evidence that was not before the Board when it last reviewed appellant’s claim on May 15, 2018.

In support of March 2019 reconsideration request, appellant submitted an August 6, 2018 report of Dr. Hardin, a clinical psychologist who worked at St. Mary’s University when appellant studied there. In this report, Dr. Hardin referenced an evaluation conducted by another examiner at St. Mary’s University in 2000, 18 years prior. She generally indicated that the evaluation showed that appellant was below average in his ability to understand directions. Dr. Hardin noted that appellant was diagnosed with nonverbal learning disability and an auditory perceptual disorder and she emphasized that these conditions made it difficult for him to recognize when he was annoying people or when they were using sarcasm.

On appeal counsel argues that this report shows that appellant had cognitive deficits to such a degree that he was unable to understand his supervisor’s instructions regarding the expectations of his work activities on June 30, 2014. The Board notes that Dr. Hardin’s generalized referenced to this evaluation from 2000 would be of limited utility in evaluating appellant’s ability to understand an instruction from his supervisor given approximately 14 years later. The record does

²⁰ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Performance of Duty*, Chapter 2.804.5(f)(1) (August 1992); *see also S.F.*, Docket No. 09-2172 (issued August 23, 2010).

²¹ *See B.R.*, Docket No. 17-0294 (issued May 11, 2018).

not contain a complete, signed copy of the evaluation from 2000 referenced by Dr. Hardin and therefore the specific basis for Dr. Hardin's opinion on appellant's cognitive abilities is unclear.²² The Board finds that appellant has not submitted convincing evidence that he did not have the capability to understand his supervisor's instructions in June 2014.²³

In connection with the March 2019 reconsideration request, appellant also submitted an undated personnel document from the employing establishment which indicated that he had a handicap of "94 -- Learning Disability." However, this vague reference to a learning disability would not show that appellant was unable to understand the instructions given to him by his supervisor in June 2014.

For these reasons, the Board finds that appellant has not established an injury in the performance of duty on June 30, 2014, 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(a) and 20 C.F.R. §§ 10.605 through 10.607.

CONCLUSION

The Board finds that appellant has not met his burden of proof to establish an injury in the performance of duty on June 30, 2014, as alleged.

²² See *K.C.*, Docket No. 18-1330 (issued March 11, 2019) (a report that is or bears an illegible signature lacks proper identification and cannot be considered probative medical evidence as the author cannot be identified as a physician).

²³ Moreover, the Board notes that there is other evidence in the case record which tends to show that appellant had the capability to understand his supervisor's instructions in June 2014. For example, appellant had performed his security specialist position at home for an extended period without direct, onsite supervision.

ORDER

IT IS HEREBY ORDERED THAT the June 5, 2019 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 5, 2020
Washington, DC

Alec J. Koromilas, 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