United States Department of Labor
Employees' Compensation Appeals Board

P.D., Appellant	)	
and	)	**Docket No. 20-0604**
	)	**Issued: December 16, 2022**
DEPARTMENT OF THE ARMY, PINE BLUFF ARSENAL, Pine Bluff, AR, 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:
ALEC J. KOROMILAS, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
JANICE B. ASKIN, Judge

JURISDICTION

On January 27, 2020 appellant, through counsel, filed a timely appeal from a December 20, 2019 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 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 her burden of proof to establish an injury in the performance of duty on December 14, 2017, 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 decision are incorporated herein by reference. The relevant facts are as follows.

On February 27, 2018 appellant, then a 52-year-old industrial worker, filed a traumatic injury claim (Form CA-1) alleging that on Thursday, December 14, 2017 at 4:15 p.m. she sustained multiple injuries to her ribs, limb and hip fractures, as well as a liver laceration when she was involved in a motor vehicle accident (MVA) just inside of the employing establishment's security check point. She denied any recollection of the accident. On the reverse side of the claim form, the employing establishment asserted that appellant was not injured in the performance of duty, noting that she was returning to her post when the MVA occurred. It also noted that her regular work hours were 6:30 a.m. to 5:00 p.m., Monday through Thursday.

In a March 6, 2018 development letter, OWCP informed appellant of the deficiencies of her claim. It advised her of the type of factual and medical evidence necessary to establish her claim and attached a questionnaire for her completion. OWCP afforded appellant 30 days to submit the necessary evidence.

In a March 30, 2018 letter, the employing establishment challenged the claim. It advised that on December 14, 2017 appellant entered its premises through the Plainview Gate, a controlled access point, but did not stop at the gate to show proper access credentials. The guard noticed the potential threat and activated the final denial barrier, which appellant hit. The employing establishment advised that entry into a controlled access point without the presentation of proper access credentials was deemed an unlawful entry into a controlled area. It further indicated that appellant claimed that she was dizzy or sick at the time and did not remember entering the employing establishment's premises.

The employing establishment also provided a preliminary report which indicated that the Plainview Gate video surveillance confirmed that appellant's vehicle failed to stop at the access control point, continued through, and successfully navigated around the traffic island, without coming into contact with the curbs and proceeded East on Hoadley Road. As the vehicle continued, the guard activated the final access barrier in order to prevent the vehicle from entering the employing establishment. The guard stated that the vehicle's brake lights were never activated and it appeared that the vehicle may have been accelerating prior to the impact with the final defense barrier. Appellant indicated that she must have been dizzy or sick.

In an April 3, 2018 statement, appellant recalled that she was on the employing establishment's premises when the December 14, 2017 MVA occurred. She indicated that she had

[3] *Order Granting Remand*, Docket No. 18-1628 (issued April 12, 2019).

no recollection of the MVA and could only recall waking up to air bags in her face and a wall in front of her. Appellant noted that she later discovered that she had struck a barrier which security had raised in order to stop her vehicle. She was removed from her vehicle by the fire department and taken by ambulance to a hospital. Appellant indicated that she was on the premises to pick up a coworker for a vanpool.

Hospital records dated December 14, 2017 through January 31, 2018 were submitted, which noted appellant's injuries from the MVA.

In a December 21, 2017 treatment note, Dr. Sarahrose Webster, a Board-certified general surgeon, diagnosed rib fractures of the 7th and 8th ribs. She also noted that appellant was traveling between 35 to 45 miles per hour at the time of the accident. On January 31, 2018 Dr. Roy Burrell, an orthopedic surgeon, performed an open reduction internal fixation, right ulnar shaft fracture.

By decision dated May 4, 2018, OWCP denied appellant's claim, finding that she had not met her burden of proof to establish that she sustained an injury in the performance of duty on December 14, 2017. It noted that, earlier that day, she had been released from work to an off-premises location and there was no expectation, requirement, or direction that she was to perform any further work that day or return to the employing establishment's premises. OWCP additionally found that, while appellant returned to the employing establishment premises to participate in a vanpool, vanpool participation was not within the scope of compensable employment factors.

Appellant appealed to the Board. On January 3, 2019 OWCP filed a motion requesting that the Board remand the case so that it could further develop the claim by requesting information from the employing establishment regarding whether she was injured in the performance of duty. The Director noted that OWCP had denied the claim without seeking clarification and additional evidence from the employing establishment regarding her work status on the day of injury and her participation in the vanpool. By order dated April 12, 2019, the Board granted OWCP's motion, set aside OWCP's May 4, 2018 merit decision, and remanded the case for OWCP to undertake further development per the Director's motion.[4]

In development letters dated April 29, 2019, OWCP requested additional information from both appellant and the employing establishment. It provided a series of questions relating to the employing establishment's premises, her duty status at the time of the injury, the off-premises event, procedures for accessing the Plainview Gate, and the vanpool program.

In a response received on May 29, 2019, the employing establishment acknowledged that appellant was on its premises at the time of injury, which occurred approximately 4:20 p.m. on December 14, 2017. The incident occurred when appellant failed to stop at the access control point and failed to stop at the red traffic signal when the final denial barrier was engaged. The employing establishment indicated that those security failures were violations of its policy. It also confirmed that on December 14, 2017 appellant had attended an employing establishment holiday party off premises at a local restaurant. The party took place from 2:30 p.m. to approximately 4:00 p.m. or 4:30 p.m. and attendance was voluntary. The employing establishment advised that the Division Chief and individual section supervisors had informed the employees attending the

[4] *Supra* note 3.

party that they were released for the rest of the day when the party officially concluded between 4:00 p.m. and 4:30 p.m. Appellant left the party at 4:00 p.m. The Division Chief also communicated to all employees that there was no expectation that employees need to return to their place of duty after the party. The employing establishment denied that appellant was barred from returning to base after the party ended. It discussed the procedure for vehicles entering the Plainview Gate access control point, noting that the procedures were in its regulations and communicated upon hire. The employing establishment also advised that since appellant had worked at the employing establishment for a number of years, it was reasonable to assume that she was fully aware of the proper procedures for entering the base. It noted that the procedures must be followed for access to the base. The employing establishment denied that participation in the vanpool was a requirement of appellant's position or part of her official job duties. At the time of the incident, it hosted a vanpool program, which fell under its Mass Transportation Benefit Program, wherein program participants contract directly with approved vehicle rental vendors and receive a subsidy for the rental expense. The employing establishment advised that participation in the vanpool was completely voluntary. It denied that appellant was performing assigned duties or activity which was considered reasonably incidental to her job assignment, noting that the incident occurred after she had been released from duty. Appellant was also not operating a government vehicle. Rather, she was utilizing a vanpool, ride sharing vehicle. A copy of the final investigative report was provided, along with witness statements.[5]

On May 29, 2019 OWCP received a June 8, 2018 memorandum from the employing establishment to appellant entitled "Proposed Removal" and a July 2, 2018 "Notice of Decision – Removal." The removal proceedings were promulgated as a result of the date-of-injury incident.

On May 31, 2019 OWCP received appellant's undated response to the questions posed in its development letter. Appellant indicated that she had attended the December 14, 2017 holiday party off of the employing establishment's premises. She asserted that she was required to attend the party and that the party concluded at 5:00 p.m. Appellant denied being released from duty for the rest of the day after the party ended. To the question of whether there was any expectation or direction that she return to her place of duty after the party ended on December 14, 2017, she responded that she was picking up her van ride passenger as usual. Appellant indicated that she was not barred from returning to the base after the party ended. She indicated that she had driven through the Plainview Gate access control point "thousands" of times. Appellant affirmatively responded "yes" to the questions that there were established procedures for vehicles entering the Plainview Gate access control point and that credentials needed to be presented. She denied willfully disregarding any procedure(s) when driving through the Plainview Gate access contact point on December 14, 2017. Appellant advised that she had stopped at the gate. She denied having a history of fainting or other medical condition which may have contributed to the incident.

[5] The final investigative report recommended appropriate administrative and disciplinary actions in accordance with its regulations for failure to use Access Badge for installation access; failure to obey order; failure to stop/stop sign; failure to stop, traffic signal; careless and prohibited driving; wrongful damage to government property (negligence/willful); and unlawful entry -- trespass on military property. It also recommended charges be filed for wrongful damage to government property and for trespassing of military, naval, or Coast Guard property, restricting appellant's driving privileges for at least six months, and requiring full reimbursement for damages due to gross negligence while operating a motor vehicle.

By decision dated August 1, 2019, OWCP denied the claim, finding that appellant was not in the performance of duty at the time of the December 14, 2017 MVA on the employing establishment's premises.

On August 7, 2019 appellant, through counsel, requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review. A hearing was held November 19, 2019. Appellant testified that the employing establishment provided employees with vans to drive other employees to and from work. She also indicated that part of her regular job duties involved driving the employee van. Upon clarification from the hearing representative, appellant indicated that the van was rented from a private rental company located on the base. She testified that she drove the van every day and that she did not own the van. Appellant also testified that she did not get paid separately from her other duties to do the van driving and that only the gas mileage was free. In response to the hearing representative's further questioning, she related that she was not required to vanpool, that it was not one of her job duties, but a benefit that the employing establishment provided. On the day of the accident, appellant testified that she drove one person into work and was supposed to drive that same person home. She testified that she left the party early to pick up that passenger, as he did not attend the party. Appellant denied hearing anyone say that it was time to go. She testified that she had followed and obeyed all proper procedures going into and through the gate. Appellant also testified that she was wrongfully terminated from work. No further evidence was received.

By decision dated December 20, 2019, OWCP's hearing representative affirmed OWCP's August 1, 2019 decision.

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 timely filed within the applicable time limitation period of FECA,[6] 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.[7] 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.[8]

FECA provides compensation for the disability of an employee resulting from personal injury sustained while in the performance of duty.[9] The phrase sustained while in the performance of duty is regarded as the equivalent of the coverage formula commonly found in workers'

[6] *S.B.*, Docket No. 17-1779 (issued February 7, 2018); *J.P.*, 59 ECAB 178 (2007); *Joe D. Cameron*, 41 ECAB 153 (1989).

[7] *J.M.*, Docket No. 17-0284 (issued February 7, 2018); *R.C.*, 59 ECAB 427 (2008); *James E. Chadden, Sr.*, 40 ECAB 312 (1988).

[8] *K.M.*, Docket No. 15-1660 (issued September 16, 2016); *L.M.*, Docket No. 13-1402 (issued February 7, 2014); *Delores C. Ellyett*, 41 ECAB 992 (1990).

[9] 5 U.S.C. § 8102(a); *J.K.*, Docket No. 17-0756 (issued July 11, 2018).

compensation laws, namely, arising out of and in the course of employment.[10] 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 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.[11]

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.[12] 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.[13] 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.[14] 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.[15] 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.[16]

The mere fact that a claimant was on the premises at the time of injury is insufficient to establish entitlement to compensation benefits. It must also be established that the claimant was engaged in activities which may be described as incidental to the employment, *i.e.*, that he or she was engaged in activities which fulfilled her employment duties or responsibilities thereto.[17]

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[10] *See J.K., id.*; *Bernard D. Blum*, 1 ECAB 1 (1947).

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

[12] *R.E.*, Docket No. 18-0515 (issued February 18, 2020); *S.V.*, Docket No. 18-1299 (issued November 5, 2019).

[13] *R.E., id.*; *K.D.*, Docket No. 18-0617 (issued February 13, 2019); *D.K.*, Docket No. 11-1029 (issued February 1, 2012).

[14] *See R.E., id.*; *J.K., supra* note 9; *Jimmie Brooks*, 54 ECAB 248 (2002); *Syed M. Jawaid*, 49 ECAB 627 (1998).

[15] *See R.E., id.*; *J.K., id.*; *R.O.*, Docket No. 08-2088 (issued May 18, 2009).

[16] *Id.* at § 13.01(3)(b).

[17] *P.R.*, Docket No. 17-1038 (issued September 22, 2017); *M.C.*, Docket No. 16-0824 (issued September 1, 2016); *A.K.*, Docket No. 09-2032 (issued August 3, 2010).

ANALYSIS

The Board finds that appellant has not met her burden of proof to establish an injury in the performance of duty on December 14, 2017, as alleged.

The record reflects that on December 14, 2017 appellant had attended on off-premises party at a local restaurant, and that the attendees at the party had been released from work by management at the conclusion of the party. She was returning to the employing establishment to pick up a vanpool passenger when she was involved in a MVA inside the security check point of the employing establishment.

In a May 29, 2019 response to OWCP's development letter, the employing establishment acknowledged that appellant was on its premises at the time of injury, which occurred approximately 4:20 p.m. on December 14, 2017. The mere fact that appellant was on the premises at the time of injury is insufficient to establish entitlement to compensation benefits. As noted above, an injury is said to arise in the course of employment when it takes place within the period of the employment, at a place where the employee reasonably may be, and while the employee is fulfilling employment duties or is engaged in doing something incidental thereto. Arising out of employment relates to the causal connection between the employment and the injury claimed.[18] The case record establishes that appellant was not in work status at the time of her injury. Prior to her injury, appellant attended an off-premises holiday party. Attendance was voluntary. The party was scheduled from 2:30 p.m. to 4:00 p.m. or 4:30 p.m. The Division Chief and individual section supervisors had informed the employees at the off-premises holiday party that they were released for the rest of the day when the party officially concluded between 4:00 through 4:30 p.m. While appellant claimed she never heard the announcement releasing employees from work, she acknowledged that she only returned to the employing establishment to pick up a passenger from the vanpool, and not to engage in any specific employment duties. Therefore, she was effectively off the clock when injured.

Appellant was not performing any assigned or reasonably incidental duties when she sustained injury. At the time of the MVA, she was returning to the base to pick up a passenger for a vanpool. The employing establishment advised that there was no expectation, requirement, or direction that appellant was to perform further work that day. The evidence establishes that her participation in the vanpool was completely voluntary and not part of her official duties. Thus, she was not in the performance of her duties when the MVA occurred.[19]

For these reasons, the Board finds that appellant has not met her burden of proof to establish an injury on December 14, 2017 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(a) and 20 C.F.R. §§ 10.605 through 10.607.

[18] *B.C.*, Docket No. 09-0653 (issued December 24, 2009).

[19] *See P.R., supra* note 17; *see also Mary V. Tucker*, Docket No. 00-1409 (issued September 7, 2001).

CONCLUSION

The Board finds that appellant has not met her burden of proof to establish an injury in the performance of duty on December 14, 2017, as alleged.

ORDER

IT IS HEREBY ORDERED THAT the December 20, 2019 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: December 16, 2022
Washington, DC

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

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board