

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

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<b>G.N., Appellant</b>	)	
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<b>and</b>	)	<b>Docket No. 24-0684</b>
	)	<b>Issued: August 2, 2024</b>
<b>DEPARTMENT OF VETERANS AFFAIRS,</b>	)	
<b>KENT COUNTY VA CLINIC, Dover, DE,</b>	)	
<b>Employer</b>	)	
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*Appearances:*  
Alan J. Shapiro, Esq., for the appellant<sup>1</sup>  
Office of Solicitor, for the Director

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:  
JANICE B. ASKIN, Judge  
VALERIE D. EVANS-HARRELL, Alternate Judge  
JAMES D. MCGINLEY, Alternate Judge

**JURISDICTION**

On June 14, 2024 appellant, through counsel, filed a timely appeal from a May 16, 2024 merit decision of the Office of Workers’ Compensation Programs (OWCP). Pursuant to the Federal Employees’ Compensation Act<sup>2</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.<sup>3</sup>

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<sup>1</sup> 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.

<sup>2</sup> 5 U.S.C. § 8101 *et seq.*

<sup>3</sup> The Board notes that following the May 16, 2024 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 June 1, 2023, as alleged.

## FACTUAL HISTORY

On June 8, 2023 appellant, then a 49-year-old health aid technician, filed a traumatic injury claim (Form CA-1) alleging that on June 1, 2023 she sustained mental trauma; headaches; left upper extremity pain, numbness and tingling; and left knee pain when a bird struck the back side of her head, causing her to fall onto parking lot pavement while in the performance of duty. The incident occurred at 4:28 p.m. The employing establishment controverted the claim noting that appellant was going home at the time of the injury and that the injury occurred off employing establishment premises.

OWCP received medical evidence including work excuse notes indicating that it was unknown when appellant could return to work.

In a June 12, 2023 memorandum, Dr. Adnan Mehboob, an osteopath specializing in family medicine, reported that appellant was evaluated on June 5 and 7, 2023 for soft tissues injuries from a June 1, 2023 fall while walking to her car.

In a development letter dated June 20, 2023, 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 provided a questionnaire for her completion. OWCP afforded appellant 60 days to respond.

OWCP also received diagnostic tests dated June 5 and 23, 2023, a July 6, 2023 patient plan from an eye care center, as well as physical therapy notes.

In a July 15, 2023 statement, appellant related that her injury occurred during regular work hours and to the best of her knowledge her injury occurred on employing establishment premises. She asserted that the facilities were leased, managed, and controlled by the employing establishment and that employees were required to park in the lot where the incident occurred. Additionally, appellant reported that all official government vehicles were parked or stored in this parking lot.

In a follow-up July 24, 2023 letter, OWCP advised appellant that it had conducted an interim review, and the evidence remained insufficient to establish her claim. It noted that she had 60 days from the June 20, 2023 letter to submit the requesting supporting evidence. OWCP further advised that if the evidence was not received during this time, it would issue a decision based on the evidence contained in the record.

In a July 26, 2023 letter, the employing establishment challenged appellant's claim. It asserted that the parking lot where appellant was injured was not on any property or facility owned, leased, maintained, or operated by the employing establishment. The employing establishment noted that the evidence revealed that appellant was injured in a parking lot located at a shopping mall complex where other federal agencies and multiple businesses operate, and which was open to public use. It stated that it did not control or maintain the parking lot, did not have exclusive use, and did not designate, assign, or require employees to park in the lot. In support of its

controversion, the employing establishment submitted copies of maps and images of its facility and the parking lot where appellant's alleged incident occurred.

Dr. Mehbobo, in an August 7, 2023 report, noted that appellant sustained an injury on June 1, 2023 when a flying bird struck her in the head when she was walking out of the front door at work into the parking lot causing her to fall awkwardly onto the pavement. He summarized diagnostic test results and examination findings. Diagnoses due to the June 1, 2023 incident included left elbow abrasion and pain, left knee abrasion, left leg pain, cervicalgia, post-traumatic headaches, left side medial orbital wall fracture, animal-type phobia, generalized anxiety disorder, and part of left clavicle fracture. Dr. Mehbobo also noted that it was unclear when appellant would be able to return to work.

By decision dated August 21, 2023, OWCP denied appellant's traumatic injury claim, finding that she had not established that the June 1, 2023 traumatic injury occurred in the performance of duty.

On May 14, 2024 appellant, through counsel, requested reconsideration. In support of her request, counsel submitted undated photographs of the parking lot, including signs showing notices for disabled parking with an advertisement for the "Veterans in Crisis" hotline.

By decision dated May 16, 2024, OWCP denied modification of its prior decision.

### **LEGAL PRECEDENT**

An employee seeking benefits under FECA<sup>4</sup> 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,<sup>5</sup> that the claim was timely 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.<sup>6</sup> 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.<sup>7</sup>

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."<sup>8</sup> 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

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<sup>4</sup> *Supra* note 2.

<sup>5</sup> *A.S.*, Docket No. 21-1143 (issued March 21, 2024); *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).

<sup>6</sup> *A.S., id.*; *M.H.*, Docket No. 19-0930 (issued June 17, 2020); *R.C.*, 59 ECAB 427 (2008); *James E. Chadden, Sr.*, 40 ECAB 312 (1988).

<sup>7</sup> *A.S., id.*; *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).

<sup>8</sup> *A.S., id.*; *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).

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.<sup>9</sup>

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.<sup>10</sup> 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."<sup>11</sup>

The Board has 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 parking lot were assigned by the employing establishment to its employees, whether the parking areas were checked to see that no unauthorized 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 definition of 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.<sup>12</sup>

### ANALYSIS

The Board finds that appellant has not met her burden of proof to establish a traumatic injury in the performance of duty on June 1, 2023, as alleged.

Appellant alleged that she was struck on the head by a bird and she fell on employing establishment premises as she walked to her vehicle after work on June 1, 2023. However, in a July 26, 2023 letter, the employing establishment stated that the parking lot where appellant was injured was not owned, leased, maintained, or operated by the employing establishment. It explained that the parking lot where appellant was injured was located at a shopping mall complex open to public use. The employing establishment further explained that it did not control or maintain the parking lot, did not have exclusive use, and did not designate, assign, or require

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<sup>9</sup> *A.S., id.; 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).

<sup>10</sup> *A.S., id.; E.O.*, Docket No. 19-0390 (issued January 9, 2020); *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).

<sup>11</sup> *A.S., id.; R.K.*, Docket No. 20-1638 (issued December 14, 2022); *C.L.*, Docket No. 18-0812 (issued February 22, 2019); *Wilmar Lewis Prescott*, 22 ECAB 318, 321 (1971).

<sup>12</sup> *A.S., id.; S.V.*, Docket No. 20-1586 (issued February 24, 2022); *S.S.*, Docket No. 20-1349 (issued February 16, 2021); *T.T.*, Docket No. 20-0383 (issued August 3, 2020); *C.L., id.; R.K., supra* note 10; *R.M.*, Docket No. 07-1066 (issued February 6, 2009); *Diane Bensmiller*, 48 ECAB 675 (1997).

employees to park in the lot. It submitted copies of maps and images of its facility and the parking lot where appellant's incident occurred.

As noted above, 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 employer contracted for its exclusive use by its employees, whether the employing establishment assigned parking spaces, whether the parking 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 other parking was available to the employees.<sup>13</sup>

The Board finds that appellant has not established that the parking lot where the June 1, 2023 incident occurred was used exclusively by employees of the employing establishment or that employees were required to use this parking lot. In this case, the record indicates that the employing establishment facility was located in a shopping mall where other federal agencies and multiple businesses, as well as the employing establishment were located and public visitors to the other agencies and businesses used the parking lot as well. The employing establishment has also related that its employees were not required to park in this lot, and that they were not assigned a specific parking space. The evidence does not establish that she was required to park in that parking lot or that she was assigned a specific parking space.<sup>14</sup> The Board thus finds that the parking lot where the June 1, 2023 incident occurred was not part of the employing establishment's premises. Appellant, therefore, has not met her burden of proof to establish a traumatic injury 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.

### **CONCLUSION**

The Board finds that appellant has not met her burden of proof to establish a traumatic injury in the performance of duty on June 1, 2023, as alleged.

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<sup>13</sup> *R.K.*, Docket No. *supra* note 11; *C.L.*, Docket No. 19-1985 (issued May 12, 2020); *id.*

<sup>14</sup> *Id.*

**ORDER**

**IT IS HEREBY ORDERED THAT** the May 16, 2024 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 2, 2024  
Washington, DC

Janice B. Askin, Judge  
Employees' Compensation Appeals Board

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

James D. McGinley, Alternate Judge  
Employees' Compensation Appeals Board