

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

K.B., Appellant)	
)	
and)	Docket No. 24-0441
)	Issued: June 20, 2024
DEPARTMENT OF COMMERCE, U.S.)	
CENSUS BUREAU, Bethesda, MD, Employer)	

Appearances: *Case Submitted on the Record*
*Jamie V. Parker, Esq., for the appellant*¹
Office of Solicitor, for the Director

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
JANICE B. ASKIN, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On March 22, 2024 appellant, through counsel, filed a timely appeal from a September 25, 2023 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.³

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.*

³ The Board notes that following the September 25, 2023 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 OWCP has met its burden of proof to rescind its acceptance of appellant's claim for nasal bone fracture, laceration without foreign body of other part of head, right radius lower end other fractures, and right ulna shaft other fracture.

FACTUAL HISTORY

On October 27, 2020 appellant, then a 67-year-old census enumerator, filed a traumatic injury claim (Form CA-1) alleging that on October 9, 2020 at 3:20 p.m. she sustained facial lacerations, broken nose, shattered arm/wrist, and distal radius dislocation fracture of the right wrist/arm when the motorcycle she was driving to return census equipment slid on gravel and hit another vehicle. On the reverse side of the form, the employing establishment acknowledged that appellant was injured in the performance of duty. Appellant stopped work on October 9, 2020.

The record contains an October 9, 2020 traffic crash report noting the accident occurred while appellant was traveling northbound on South Diamond and turned right onto Hazen Avenue in Ravenna, Ohio.

By decision dated January 11, 2021, OWCP accepted the claim for nasal bones closed fracture, laceration without foreign body other part of head, right radius lower end closed fracture, and closed fracture of right ulna shaft.

In a letter dated April 2, 2021, the employing establishment, noted that appellant had been paid continuation of pay (COP) from October 10 through 20, 2020. Appellant's temporary position as a census enumerator was terminated on October 21, 2020 due to the lack of work.

On April 7, 2022 the employing establishment informed OWCP that appellant was not in the performance of duty at the time of the claimed accident. It noted that the accident occurred at 3:20 p.m., that appellant was on her motorcycle, and she did not take a direct route to a 4:00 p.m. meeting.

In a letter dated May 17, 2021, the employing establishment controverted appellant's claim contending that she was an intermittent temporary employee and was not in the performance of duty when injured on October 9, 2020. It stated that she was required to use her own vehicle to perform her work duties; however, on her job application she listed automobile as her mode of transportation. On the date of injury, appellant was driving her motorcycle to turn in her census equipment. The employing establishment also asserted that she was not in the performance of duty as she was not on a direct route to the event, she had changed her story regarding the time of the meeting, and she was not on the clock at the time of the incident. It further related that appellant had indicated that she left early for the meeting and rode her motorcycle because this was the first nice weather day of the year.

In an August 23, 2021 letter, OWCP advised appellant that it proposed to rescind its prior acceptance of her claim for nasal bones closed fracture, laceration without foreign body other part of head, right radius lower end closed fracture, and closed fracture of right ulna shaft because the claim was accepted in error. It noted that the employing establishment challenged that she was in the performance of duty on October 9, 2020 since she was not driving an approved vehicle/

transportation mode and had not used the most direct route for her travel. Appellant was afforded 30 days to submit evidence or argument. No response was received.

By decision dated September 23, 2021, OWCP finalized the proposed rescission of the acceptance of appellant's claim for nasal bones closed fracture, laceration without foreign body other part of head, right radius lower end closed fracture, and closed fracture of right ulna shaft. It found that, at the time of her injury, she was not in the performance of duty on October 9, 2020.

On September 23, 2022 appellant, through counsel requested reconsideration. Counsel stated that the application appellant signed did not have the option to select a motorcycle as a type of transportation. Counsel related that appellant asked if a motorcycle could be driven at her orientation, noting that the use of a motorcycle is explicitly allowed in *The Census Employee Handbook for Enumerators and Recruiting Assistants*. Counsel attached a copy of the 2020 handbook, sample application form, and Google maps driving directions from South Chestnut Street and Hazen Avenue, Ravenna, Ohio to Hive Gathering Place, 160 North Chestnut Street, Ravenna, Ohio. Counsel recounted that on the date of the accident, appellant's supervisor, G.A., requested that she attend a meeting to return her equipment at "The Hive Gathering Place" between 3:00 and 5:00 p.m. Prior to leaving for the meeting appellant recorded her departure time from her home on the employing establishment issued iPhone as 3:00 p.m. and noting an end time as 4:00 p.m. Counsel reported that appellant left her home at 3:00 p.m. and the accident took place around 3:20 p.m. about 0.7 miles or three minutes from the drop-off location. Counsel asserted there was no rule requiring census enumerators to take the most direct route, noting that the route taken by appellant was not reflected on the map provided by the employing establishment as she did not take the highway. Additionally, counsel asserted that not taking a Google maps route did not establish a deviation or detour from her assignment. Thus, appellant had been on the clock at the time of the accident and in the performance of duty. Counsel also attached pages from a personnel and payroll manual (D-590).

On October 21, 2022 OWCP received the employing establishment's response to appellant's reconsideration request. It noted that appellant had received one hour of pay, from 3:00 to 4:00 p.m. on the date of injury, but reiterated that she had not been in the performance of duty at the time of the accident and requested that OWCP deny her reconsideration request.

By decision dated October 26, 2022, OWCP denied modification. It found counsel's argument of diminished probative value as he cited appellant's home address inconsistent with appellant's home address of record. Thus, OWCP found the evidence insufficient to establish that she did deviate from the route from her house to the scheduled meeting with her employer.

On November 15, 2022 appellant, through counsel, requested reconsideration asserting that the rescission decision was based on factual errors. He noted that the address used in that Google map submitted with the prior reconsideration request was the accident site and was not intended to represent appellant's home address. The accident address was used for comparison with the employing establishment's Google map to dispute its allegations of deviation from a direct route.

By decision dated November 21, 2022, OWCP denied modification.

On June 27, 2023 appellant, through counsel, requested reconsideration asserting that the rescission was based on erroneous information and misrepresentation of the information provided in the prior reconsideration request. According to counsel, the map provided with the prior reconsideration request noted the site of the accident which showed it was less than a mile from the meeting location. Counsel again reiterated that at appellant's initial job orientation she asked about using a motorcycle.

In a letter dated July 14, 2023, the employing establishment reiterated that appellant had not been in the performance of duty at the time of the October 9, 2020 accident.

By decision dated September 25, 2023, OWCP denied modification. It found that the most direct route to the meeting place from appellant's home address was the interstate highway and that the residential route she took was five minutes longer. Thus, OWCP found that she did not take the most direct route.

LEGAL PRECEDENT

Section 8128 of FECA provides that the Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application.⁴ The Board has upheld OWCP's authority to reopen a claim at any time on its own motion under section 8128 of FECA and, where supported by the evidence, set aside or modify a prior decision and issue a new decision.⁵ The Board has noted, however, that the power to annul an award is not an arbitrary one and that an award for compensation can only be set aside in the manner provided by the compensation statute.⁶

Workers' compensation authorities generally recognize that compensation awards may be corrected, in the discretion of the compensation agency and in conformity with statutory provision, where there is good cause for so doing, such as mistake or fraud. Once OWCP accepts a claim, it has the burden of proof to justify termination or modification of compensation benefits. This also holds true where OWCP later decides that it erroneously accepted a claim.⁷

OWCP bears the burden of proof to justify rescission of acceptance on the basis of new evidence, legal argument and/or rationale. Probative and substantial positive evidence or sufficient legal argument must establish that the original determination was erroneous. OWCP must also provide a clear explanation of the rationale for rescission.⁸

⁴ 5 U.S.C. § 8128.

⁵ See *L.H.*, Docket No. 21-0293 (issued May 4, 2023); *L.M.*, Docket No. 19-0705 (issued September 11, 2019); *John W. Graves*, 52 ECAB 160, 161 (2000). See also 20 C.F.R. § 10.610.

⁶ *L.H.*, *id.*; *D.W.*, Docket No. 17-1535 (issued February 12, 2018).

⁷ *L.H.*, *id.*; *V.R.*, Docket No. 18-1179 (issued June 11, 2019).

⁸ See *L.H.*, *id.*; *L.G.*, Docket No. 17-0124 (issued May 1, 2018).

FECA⁹ provides for payment of compensation for disability or death of an employee resulting from personal injury sustained while in the performance of duty.¹⁰ The phrase “while in the performance of duty” has been construed by the Board as consistent with the phrase “arising out of and in the course of employment” commonly found in workers’ compensation.¹¹ “Arising out of the employment” tests the causal connection between the employment and the injury; whereas “arising in the course of employment” tests work connection as to the time, place and activity.¹² For the purposes of determining entitlement to compensation under FECA, “arising in the course of employment” must be established before “arising out of the employment,” or causal relationship, can be addressed. 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 her master’s business, at a place where she may reasonably be expected to be in connection with her employment and while she was reasonably fulfilling the duties of her employment or engaged in doing something incidental thereto.¹³

ANALYSIS

The Board finds that OWCP failed to meet its burden of proof to rescind its acceptance of appellant’s claim for nasal bones closed fracture, laceration without foreign body other part of head, right radius lower end closed fracture, and closed fracture of right ulna shaft.

In support of its rescission of the acceptance of appellant’s claim, OWCP relied upon the employing establishment’s controversion asserting appellant was not in the performance of duty as she was not on a direct route to the event and was not using an approved mode of transportation.

The Federal (FECA) Procedure Manual provides for compensation for injuries sustained by “off-premises” employees, such as messengers, letter carriers, chauffeurs, traveling auditors or inspectors, employees performing errands or special missions.” OWCP procedures provide for compensation of an injury sustained by an “off-premises” employee if, at the time of the injury, the employee was performing assigned duties or was engaged in an activity which was a reasonable incident of the assignment. Compensation would not be payable if the employee had deviated from the assignment and was engaged in a personal activity which was not related to work.¹⁴

The Board finds that the evidence of record establishes that appellant was enroute to a meeting with her supervisor to return employing establishment equipment, as her temporary employment duties were about to terminate. OWCP has not established that appellant’s travel by motorcycle to fulfill this errand was improper and took her outside the course of employment.

⁹ 5 U.S.C. § 8101 *et seq.*

¹⁰ *Id.* at § 8102(a).

¹¹ *Mark C. Hoist*, 39 ECAB 496 (1988); *Nona J. Noel*, 36 ECAB 329 (1984).

¹² *S.M.*, Docket No. 16-0875 (issued December 12, 2017); *Kathryn S. Graham Wilburn*, 49 ECAB 458 (1998). *See Clayton Varner*, 37 ECAB 248 (1985).

¹³ *Carmen B. Gutierrez*, 7 ECAB 58, 59 (1954); *Bernard D. Blum*, 1 ECAB 1 (1947).

¹⁴ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Performance of Duty*, Chapter 2.804.5(a) (August 1992).

Counsel has submitted evidence that travel by motorcycle was allowed for census enumerators. There is no evidence of record that travel by motorcycle was prohibited. The Board has also previously recognized that it is a well-established principle that where the employee, as part of his or her job, is required to bring along his or her own car, truck, or motorcycle for use during the working day, the trip to and from work is by that fact alone embraced within the course of employment.¹⁵

The Board further finds that the Google map provided by the employing establishment was insufficient to establish a basis for the rescission of appellant's claim. The evidence of record does not establish that appellant's travel by residential streets, rather than highways establishes deviation for a personal purpose. As previously noted, compensation would not be payable if appellant had deviated from the assignment and was engaged in a personal activity which was not related to work. However, appellant's travel by residential streets does not establish such a deviation. The Board finds that OWCP has not established that appellant was engaged in a personal activity unrelated to work at the time of injury, such that she deviated by travel on residential streets.

The Board has held that in order to rescind acceptance of a given condition, OWCP must show that the weight of the reliable evidence establishes that the acceptance of the claim was erroneous.¹⁶ As the evidence of record does not establish that OWCP erred in its acceptance of appellant's claim, the Board finds that OWCP failed to meet its burden of proof.

CONCLUSION

The Board finds that OWCP failed to meet its burden of proof to rescind its acceptance of appellant's claim for nasal bones closed fracture, laceration without foreign body other part of head, right radius lower end closed fracture, and closed fracture of right ulna shaft.

¹⁵ *C.C.*, Docket No. 18-0445 (issued August 14, 2018); *Lex K. Larson*, Larson's Workers' Compensation, § 15.05 (2013).

¹⁶ *See L.H.*, *supra* note 5; *D.P.*, Docket No. 18-1213 (issued July 30, 2020); *L.G.*, Docket No. 17-0124 (issued May 1, 2018).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated September 25, 2023 is reversed.

Issued: June 20, 2024
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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