

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

S.S., Appellant)	
)	
and)	Docket No. 20-1349
)	Issued: February 16, 2021
DEPARTMENT OF HEALTH AND HUMAN)	
SERVICES, CENTERS FOR DISEASE)	
CONTROL & PREVENTION, Atlanta, GA,)	
Employer)	
)	

Appearances:
Shannon Bravo, Esq., for the appellant¹
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
JANICE B. ASKIN, Judge
PATRICIA H. FITZGERALD, Alternate Judge

JURISDICTION

On June 29, 2020 appellant, through counsel, filed a timely appeal from a January 7, 2020 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 met her burden of proof to establish a traumatic injury in the performance of duty on June 27, 2019, as alleged.

FACTUAL HISTORY

On June 30, 2019 appellant, then a 55-year-old public health advisor, filed a traumatic injury claim (Form CA-1) alleging that at 1:50 p.m. on June 27, 2019 she sustained a broken right ankle, as well as bruises and abrasions to her left knee, while in the performance of duty. She recounted that she was walking from a terminal at John F. Kennedy (JFK) Airport to her car in order to go to the airport's parking office when her right ankle went out from under her, turned in and she fell forward, landing on her left knee. On the reverse side of the claim form her supervisor checked a box marked "No" to indicate her opinion that appellant was not in the performance of duty as she was going to renew her parking pass. She indicated that parking passes were purchased at JFK Airport to allow employees to park their personal vehicles on the property of the Port Authority of New York and New Jersey (Port Authority) and that parking passes were usually obtained on breaks or at the end of their shifts. Appellant stopped work the same day of the incident.

In a July 5, 2019 medical note, Christopher Dominique, a physician assistant, indicated that appellant was seen in his office that day for a left knee and right ankle injuries she sustained on June 27, 2019 while at work. He advised that she was unable to work and would be reevaluated on July 22, 2019 with a plan to return to work on July 29, 2019. In a note of even date, Mr. Dominique diagnosed primary localized osteoarthritis of the left knee, a sprain of the anterior talofibular ligament of the right ankle and a tear of the medial meniscus of the left knee. He referred appellant to physical therapy to treat her conditions.

In a July 19, 2019 report, Mary Yuricic, a physical therapist, evaluated appellant for treatment related to sprain of the other ligament of the right ankle, complex tear of the left knee medial meniscus and left knee primary osteoarthritis that she encountered on June 27, 2019.

In a July 22, 2019 medical note, Michael Zucker, a physician assistant, opined that appellant was unable to perform her work duties. He explained that she was being treated for a right ankle sprain that was exacerbating previously diagnosed lumbar spine pain.

By development letter dated August 6, 2019, OWCP informed appellant that her claim initially appeared to be a minor injury that resulted in minimal or no lost time from work and that continuation was not controverted by the employing establishment and, thus, limited expenses had therefore been authorized. However, a formal decision was now required. It advised her of the factual and medical evidence necessary to establish her claim and provided a factual questionnaire inquiring about the circumstances surrounding her claimed injury for completion. OWCP afforded appellant 30 days to provide the necessary information.

In a June 27, 2019 medical report, Dr. Nabil Farakh, a Board-certified orthopedic surgeon, evaluated appellant for right ankle and foot pain she encountered at work after she tripped and fell. He also made note of her history of chronic left knee pain. Dr. Farakh diagnosed an avulsion chip

fracture of the anterior lateral aspect of the distal tibia with a nondisplaced fracture of the medial malleolus and a strain of other specified muscles and tendons at the ankle and foot level, right foot.

In a medical report dated June 27, 2019 and a state workers' compensation form report dated August 16, 2019, Dr. Paul Cooperman, Board-certified in family medicine, evaluated appellant for complaints of right ankle pain due to a June 27, 2019 work-related injury. He diagnosed a fracture of the right ankle and an abrasion of the left knee.

In medical reports dated July 5 and 22, 2019, Dr. Steven Rokito, a Board-certified orthopedic surgeon, saw appellant for right ankle pain related to the alleged June 27, 2019 employment incident. He diagnosed a tear of the medial meniscus of the left knee, a sprain of the anterior talofibular ligament of the right ankle and primary local osteoarthritis of the left knee.

In an August 7, 2019 medical report, Dr. Rokito reevaluated appellant for her complaints of left knee and right ankle pain. Appellant informed him that her lower back pain had been aggravated because of gait changes. Dr. Rokito noted that appellant underwent surgery on August 1, 2019 to remove a cyst and had significant pain relief in her right leg and ankle following her surgery. He diagnosed a sprain of the anterior talofibular ligament, primary localized osteoarthritis of the left knee, and a complex tear of the medial meniscus of the left knee. Appellant also attached multiple photographs of the injuries on her right and left legs. In a medical note of even date, Mr. Dominique cleared appellant to return to work on August 12, 2019.

In an August 19, 2019³ letter, Dr. Rokito reviewed the events of the alleged June 27, 2019 employment incident where appellant indicated she was walking from her office at JFK airport to her car in order to go to the parking office and renew her parking pass, which she was required to do monthly. Appellant stated that she slipped in the parking lot, twisted her ankle, and landed on her left knee. Dr. Rokito diagnosed a sprain of the right ankle more likely than not caused by her slip and fall and reviewed her history of treatment for her right ankle, left knee, and spine. He indicated that she was cleared to return to work.

In an August 23, 2019 response to OWCP's development questionnaire, appellant again explained the events of the June 27, 2019 employment incident in which she was walking to her car in the parking lot across the street from the airport terminal and slipped and fell, injuring her right ankle and left knee. She indicated that she was a field employee that worked at the JFK Airport terminal full time and not at the employing establishment's headquarters. After her injury, appellant immediately notified her supervisor, filed a report and went to an urgent care center as her ankle and knee began to swell and hurt. She discussed her history of medical treatment related to her injury and also indicated that she had previously torn her meniscus, but it did not require treatment. Appellant asserted that she was required to renew her parking permit with the airport as a part of her job and that she had done so each month for 27 years. She also indicated that she would be submitting emails from multiple supervisors that would demonstrate that parking was something that was addressed during the workday. Appellant acknowledged that the parking lot was owned and operated by the Port Authority and not the employing establishment, but contended that she was required to park there because she was a part of the federal government's parking program. She indicated that A.L., a supervisor ordered her to participate in the program, and that

³ Dr. Rokito's letter was dated August 19, 2018, however, this appears to be a typographical error.

she was required to pay for parking. Appellant asserted that she was on duty when the injury occurred and that going to the parking office was incidental to her employment duties. She noted that a previous supervisor claimed that going to the parking office was “a part of the job,” that the time allotted in a break would not be enough time in order to complete the task and that station staff routinely went to the parking office in order to renew their parking passes.

Appellant also submitted emails dated from December 2, 2013 to October 15, 2014 where the renewal process for parking passes was discussed. In a December 2, 2013 email, H.G., a supervisor, designated a time for her to pick up her parking pass as a part of Tuesday duty station responsibilities. In the October 15, 2014 email, A.L. provided a letter for her to take to the parking office in order to obtain her parking pass that day.

By decision dated September 10, 2019, OWCP denied appellant’s traumatic injury claim, finding that the evidence of record was insufficient to establish that her injury and/or medical condition arose during the course of employment and within the scope of compensable work factors.

OWCP continued to receive evidence. In reports dated July 23 and 25, 2019, Ms. Yuricic provided updates on appellant’s physical therapy treatment related to her right ankle and left knee injuries.

In an October 14, 2019 memorandum, appellant, through counsel, requested reconsideration of OWCP’s September 10, 2019 decision

Counsel attached emails from appellant and her supervisors. A June 2, 2014 email revealed that a supervisor instructed her to retrieve a parking coupon book from the parking office and also that she was the only employee who routinely used the parking coupon. In an email dated October 14, 2014, A.L. instructed her to report to the parking office at 7:00 a.m. so that she would not have to pay for parking again. She also provided a May 27, 2016 email demonstrating that her normal work schedule was from 7:00 a.m. to 3:30 p.m. Attached to the emails, counsel included a letter from Y.H., another supervisor, indicating that appellant was a current federal employee and was, therefore, entitled to the federal employee parking rate.

In a June 27, 2019 diagnostic report, Curtis Hammerman, a Board-certified radiologist, performed an x-ray of appellant’s right ankle, finding a fracture involving the lateral articular surface of the tibia.

In a post injury evaluation form of even date, Dr. Cooperman diagnosed a right ankle avulsion fracture.

In a November 26, 2019 development letter, OWCP requested that the employing establishment provide additional factual information regarding appellant’s claim, including information about the parking lot and policies regarding use of the parking lot where she was injured. It afforded the employing establishment 30 days to respond. No additional evidence was received.

By decision dated January 7, 2020, OWCP denied modification of its September 10, 2019 decision.

LEGAL PRECEDENT

An employee seeking benefits under FECA⁴ 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,⁵ 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.⁶ 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.⁷

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.”⁸ 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 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.⁹

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.¹⁰ 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.”¹¹

⁴ *Supra* note 3.

⁵ *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).

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

⁷ *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).

⁸ *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).

⁹ *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).

¹⁰ *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).

¹¹ *C.L.*, *supra* note 8; *Wilmar Lewis Prescott*, 22 ECAB 318, 321 (1971).

The Board has also 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 garage were assigned by the employing establishment to its employees, whether the parking areas were checked to see that no authorized 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 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.¹²

ANALYSIS

The Board finds that this case is not in posture for decision.

In her August 23, 2019 response to OWCP's development questionnaire, appellant indicated that the parking lot was owned and operated by the Port Authority, but that she was required to park there because she was a part of the federal government's parking program. She asserted that her supervisor ordered her to participate in the program and that she was required to pay for the parking as a part of the program. OWCP's procedures provide that it should obtain relevant information from an official superior if it requires clarification before determining whether or not the employee was on the premises.¹³ Its procedures further provide that it should request that an official superior confirm whether the parking facilities are owned, controlled, or managed by the employing establishment.¹⁴ While OWCP sent a November 26, 2019 development letter to the employing establishment requesting this information, it did not receive a response. As such, it failed to obtain a statement from the employing establishment in accordance with its procedures.

The lack of a response from the employing establishment also precludes a full and fair adjudication of whether appellant was in the performance of duty at the time of her fall. OWCP requested information from the employing establishment regarding ownership, control and permitted usage of the parking lot. Appellant also claimed that her supervisor ordered her to participate in the federal government's parking program. It is unclear as to whether her participation in the federal government's parking program was a required function of her employment because the employing establishment did not respond to OWCP's November 26, 2019 development letter. OWCP's procedures provide that it should obtain relevant information from an official supervisor to determine whether the act was one which is regarded as a normal incident of the work experience, or was one which is foreign or extraneous to the work experience,

¹² *C.L.*, *supra* note 8; *R.K.*, *supra* note 10; *Diane Bensmiller*, 48 ECAB 675 (1997); *Rosa M. Thomas-Hunter*, 2 ECAB 500 (1991); *Edythe Erdman*, 36 ECAB 597 (1985); *Karen A. Patton*, 33 ECAB 487 (1982); *R.M.*, Docket No. 07-1066 (issued February 6, 2009).

¹³ *Id.*

¹⁴ *Id.*

and the extent to which the employee diverted from duty to perform the act.¹⁵ It, however, failed to obtain a statement for the employing establishment in accordance with its procedures prior to finding that appellant was not in the performance of duty when her injury occurred.

Proceedings under FECA are not adversarial in nature, nor is OWCP a disinterested arbiter. While appellant has the burden of proof to establish entitlement to compensation, OWCP shares the responsibility in the development of the evidence, particularly when such evidence is of the character normally obtained from the employing establishment or other governmental source.¹⁶ The Board finds that OWCP insufficiently developed the evidence regarding whether she was on the premises of the employing establishment and whether she was in the performance of duty at the time of injury.¹⁷

Although it is appellant's burden to establish his claim, OWCP is not a disinterested arbiter, but rather, shares responsibility in the development of the evidence, particularly when such evidence is of the character normally obtained from the employing establishment or other government source.¹⁸

On remand OWCP shall obtain from the employment establishment the information requested in its November 26, 2019 development letter.¹⁹ Further, as appellant contended that she was performing an accepted practice of employment at the time of her injury, the employing establishment shall address this contention. Following this and such other further development as deemed necessary, OWCP shall issue a *de novo* decision.

CONCLUSION

The Board finds that the case is not in posture for decision.

¹⁵ *Id* at Chapter 2.804.7(b)(1) (August 1992).

¹⁶ *D.C.*, *supra* note 14.

¹⁷ *Id.*; *see also supra* note 14 at Chapter 2.800.5(d)(1) (if an employing establishment fails to respond to a request for comments on the claimant's allegations, the CE may usually accept the claimant's statements as factual. However, acceptance of the claimant's statements as factual is not automatic in the absence of a reply from the employing establishment, especially in instances where performance of duty is questionable. The Board has consistently held that allegations unsupported by probative evidence are not established).

¹⁸ *Judy C. Rogers*, 54 ECAB 693 (2003).

¹⁹ The Board notes that OWCP regulations and the FECA procedure manual provide that, in the absence of a reply from the employing establishment, OWCP may accept the allegation of a claimant as factual -- if the claimant's statement is sufficiently clear and detailed as to matters of which he or she is knowledgeable. *See* 20 C.F.R. § 10.117(b); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Initial Development of Claims*, Chapter 2.800.10(a) (June 2011). *See also J.C.*, Docket No. 15-1517 (issued February 25, 2016).

ORDER

IT IS HEREBY ORDERED THAT the January 7, 2020 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: February 16, 2021
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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