United States Department of Labor
Employees' Compensation Appeals Board

T.E., Appellant	)	
and	)	**Docket No. 13-99**
	)	**Issued: May 10, 2013**
DEPARTMENT OF VETERANS AFFAIRS, MIDDLETON MEMORIAL VETERANS HOSPITAL, Madison, WI, Employer	)	

Appearances:
Appellant, pro se
Hans K. Wild, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
PATRICIA HOWARD FITZGERALD, Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On October 18, 2012 appellant filed a timely appeal from the September 25, 2012 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[1] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant met his burden of proof to establish an injury in the performance of duty on October 3, 2011.

FACTUAL HISTORY

On October 6, 2011 appellant, then a 38-year-old police officer, filed a traumatic injury claim (Form CA-1) alleging that at 4:00 p.m. on October 3, 2011 he sustained a work-related left

[1] 5 U.S.C. §§ 8101-8193.

biceps tendon rupture. He indicated that the injury occurred while performing free weight bicep curls at the Princeton Club Fitness Center in Madison, WI.[2] On the Form CA-1, Jerry Pierce, a supervisor, indicated that the injury was not sustained in the performance of duty because it occurred off the premises of the employing establishment while appellant was not on duty. He stated that appellant was not required to attend gym training.

In an October 5, 2011 statement, appellant argued that his claimed injury on October 3, 2011 should be accepted because it occurred while he was maintaining physical fitness for his job. He asserted that the employing establishment had a reasonable expectation that he remain physically fit by exercising on his days off work.

By letter dated October 13, 2011, Cindy Gehrt, an employing establishment official, controverted appellant's claim, asserting that he was not in the performance of duty at the time of his October 3, 2011 injury. She indicated that there was no requirement that appellant pass a physical fitness test or engage in fitness training.

On November 4, 2011 OWCP requested that appellant answer a five-question Performance of Duty Questionnaire and provide further evidence in support of his claim.

On November 21, 2011 appellant provided answers to the Performance of Duty Questionnaire, asserting that he must pass an annual physical examination, participate in an off-duty fitness routine as directed by Training Unit 19, Physical Fitness For VA (Veterans Administration) Police Officers, and achieve certification as a ground defense and recovery instructor every two years by passing a mandatory physical fitness test. He claimed that the employing establishment benefited by having a police officer who is physically fit.

In a November 23, 2011 letter, the employing establishment again stated that appellant was not in the performance of duty at the time of his injury. It indicated that Training Unit 19, while written by the Police Academy at the agency, did not constitute a required regulation.[3]

By decision dated December 14, 2011, OWCP denied appellant's claim finding that he was not injured in the performance of duty on October 3, 2011 because he was not participating in an employing establishment-sponsored physical fitness plan, but rather was exercising during nonduty time and at a private fitness center.

In a December 17, 2011 letter, appellant requested reconsideration of his claim. He stated that Training Unit 19 was the agency's physical fitness plan and was "prescribed training that [o]fficers are expected to follow." By written statement dated January 18, 2012, appellant stated that Training Unit 19 was the agency's physical fitness plan and he submitted a copy of Training Unit 19. He also stated that police officers were not provided with facilities or duty hours to conduct fitness routines, so officers were left with no choice but to exercise during nonduty time at a personally selected physical fitness center.

[2] The record reveals that Princeton Club Fitness Center is a private facility.

[3] It was noted that appellant was required to participate in an annual medical examination and demonstrate certain abilities, but his position required no participation in a physical fitness program.

In an April 27, 2012 decision, OWCP affirmed its December 14, 2011 decision. It stated that the employing establishment explained that Training Unit 19, while written by the Police Academy at the agency, was not a required regulation. Per the VA Handbook, appellant was required to participate in an annual medical examination and demonstrate certain abilities, but his position required no participation in a physical fitness program. OWCP noted that workouts for the purpose of remaining fit were not required by the employing establishment.

On May 5, 2012 appellant again requested reconsideration. By written statement, received May 14, 2012, he asserted that Training Unit 19 and all the training units are "rules and regulations expected of the [p]olice force." Appellant also stated that he is a certified VA Ground Defense and Recovery Instructor and a "VA Police instructor must pass a mandatory fitness test in order to be certified as an instructor."

By letter dated June 4, 2012, the employing establishment responded that a police officer is only required to take an annual medical examination, not a physical fitness test. Appellant's position as ground training instructor was a voluntary position, and Training Unit 19 was only a "recommendation" to police officers to maintain good physical fitness.

In an August 6, 2012 letter, appellant responded that he was a certified defensive tactics instructor and that defensive tactics instructors had to take a mandatory fitness test prior to being certified. The certification was good for a couple of years and then a recertification physical training test was conducted. Appellant stated, "I was injured in the course of employment in preparations for these very tests, along with preparing for the annual employee physical."

In a September 25, 2012 decision, OWCP affirmed its April 27, 2012 denial of appellant's claim. It stated that there was no evidence to substantiate his claim the that employing establishment "required, persuaded, or permitted" participation in a fitness program at a private health club. Training Unit 19 was an educational tool for the benefits of good physical conditioning and maintaining an appropriate level of fitness, but left the development of a fitness plan to the individual. OWCP noted that the file did not contain any evidence that the employing establishment sponsored or financed appellant's private health club exercise activity and indicated that participation in this activity was at his discretion. With respect to his assertion, appellant was required to pass a mandatory fitness test to be certified as a defensive tactics instructor, OWCP found his participation as an instructor was voluntary, not an express or implied requirement of his employment.

LEGAL PRECEDENT

An employee seeking benefits under FECA has the burden of proof to establish the essential elements of his or her claim by the weight of the reliable, probative and substantial evidence including that he or she sustained an injury in the performance of duty.[4] FECA provides for payment of compensation for disability or death of an employee resulting from personal injury sustained while in the performance of duty.[5] The phrase "sustained while in the

[4] *M.M.*, Docket No. 08-1510 (issued November 25, 2010); *G.T.*, 59 ECAB 447, 450 (2008).

[5] 5 U.S.C. § 8102(a).

performance of duty" is regarded as the equivalent of the coverage formula commonly found in workers' compensation laws, namely, "arising out of and in the course of employment."[6] "In the course of employment" relates to the elements of time, place and work activity.[7] 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 his or her master's business, at a place when 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.[8] As to the phrase "in the course of employment," the Board has accepted the 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.[9] As a general rule, off-premises injuries sustained by employees having fixed hours and place of work are not compensable as they do not arise out of and in the course of employment.[10]

With regard to recreational or social activities, the Board has held that such activities arise in the course of employment when: (1) they occur on the premises during a lunch or recreational period as a regular incident of the employment; or (2) the employing establishment, by expressly or impliedly requiring participation, or by making the activity part of the service of the employee, brings the activity within the orbit of employment; or (3) the employing establishment derives substantial direct benefit from the activity beyond the intangible value of improvement in employee health and morale that is common to all kinds of recreation and social life.[11]

OWCP's procedures address "Employing Agency Physical Fitness Programs [PFP]" and provides that "employees enrolled in a PFP are in the performance of duty for FECA purposes while doing authorized PFP exercise, including off-duty exercises." Under Part 2.804.18(c), "Forms CA-1 which attribute an injury to PFP activity must be accompanied by a statement from the employee's supervisor indicating that the employee was enrolled in the PFP, and that the injury was sustained while the employee was performing authorized exercises under the program."[12]

ANALYSIS

Appellant alleged that on October 3, 2011 he sustained a work-related left biceps tendon rupture while performing free weight bicep curls at the Princeton Club Fitness Center. The

[6] *See Bernard D. Blum*, 1 ECAB 1 (1947).

[7] *G.N.*, Docket No. 12-261 (issued July 23, 2012).

[8] *Id.*

[9] *Narbik A. Karamian*, 40 ECAB 617, 618 (1989).

[10] *Mary Keszler*, 38 ECAB 735, 739-40 (1987).

[11] *See Lawrence J. Kolodzi*, 44 ECAB 818, 822 (1993); A. Larson, *The Law of Workers' Compensation* § 22.00 (2012).

[12] *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Performance of Duty*, Chapter 2.804.18 (March 1994).

Board finds that he has not established that he sustained an injury in the performance of duty on October 3, 2011.

Applying the time, place and work activity criteria to this case, there is no evidence to establish that appellant was in the performance of duty on October 3, 2011. His alleged injury did not occur during his work hours as October 3, 2011 was a scheduled day off. Appellant's injury did not occur on the premises of the employing establishment, but at a local fitness club. Thus, two important criteria of "course-of-employment," time of the alleged injury and place of the alleged injury, have not been met in this case.[13]

The employing establishment has consistently stated that appellant's position did not require participation in a PFP. Training Unit 19 was only a recommendation for better health and he was not in the performance of duty at the time of his alleged injury. The employing establishment did not provide a statement that appellant was enrolled in a PFP or that he was injured while participating in a PFP. Thus, without the required support from the employing establishment, he may not rely upon OWCP procedure to support his claim for a work-related injury.[14]

With respect to an express or implied requirement to participate in weight lifting at the Princeton Club Fitness Center, the evidence reveals that appellant's physical fitness routine was voluntary. It was not an express or implied requirement of his employment, but rather there was a general encouragement by his employer to maintain good health. The Board has noted that when the degree of employing establishment involvement descends from compulsion to mere sponsorship or encouragement, the questions become closer and the test includes whether the employing establishment sponsored or financed the event and whether attendance was voluntary.[15]

Appellant asserted that he was required to maintain his physical fitness in order to work as a police officer. However, the employing establishment disputes any requirement for police officers to participate in a physical fitness program and did not sponsor or finance his membership at the Princeton Club Fitness Center. Appellant further asserted that he was required to follow the dictates of Training Unit 19. The evidence reveals that Training Unit 19 was not a regulation, but rather constituted an educational tool for the benefit of good physical health. The employing establishment encouraged appellant to follow Training Unit 19, but did not require or compel him to engage in a physical fitness program as a requirement of his employment. Appellant asserted that he was required to pass a mandatory physical fitness test in order to maintain his certification as a defensive tactics instructor. However, certification in this field was voluntary and not a requirement of employment.

With regard to the characterization of appellant's weightlifting workout at the Princeton Club Fitness Center as a "recreational or social activity" of his employer, his alleged injury does

[13] *See supra* notes 7 through 10.

[14] *See supra* note 12.

[15] *Kenneth B. Wright*, 44 ECAB 176, 183 (1992).

not fall within the performance of duty. The activity of weightlifting occurred while he was off duty and while he was off premises and the employing establishment did not expressly or impliedly require him to lift weights, perform a physical fitness program or be a member of a private health club. Appellant voluntarily participated in a physical fitness program and the employing establishment did not financially assist, sponsor, or exercise control over his exercise program. The employing establishment did not derive any substantial direct benefit from his participation in the exercise program except for the intangible value of improvement in employee health and morale that is common to all kinds of recreation and social life.[16]

The Board notes that the facts of appellant's case are similar to those of *Z.C.*, Docket No. 12-330 (issued June 19, 2012). In that case, a police officer for the Department of Veterans Affairs filed a traumatic injury claim alleging that he ruptured his right Achilles tendon on his day off during a self-defense tactics class at a private fitness club. The police officer claimant asserted that staying in shape and maintaining physical fitness and defensive tactics skills by taking a defensive tactics class were work-related tasks because he was being taught skills similar to those required by his employment as a police officer and he was able to improve his performance on required employing establishment physical fitness recertification tests. The claimant submitted a copy of Training Unit 19 in support of his claim. The Board found that the claimant in *Z.C.* did not sustain an injury in the performance of duty noting that the claimant's participation in the self-defense class was voluntary and was not an express or implied requirement of his employment. The Board pointed out that the intangible value of improved health or morale, in and of itself, does not bring a recreational activity within the orbit of employment. Given the similarity of the facts in *Z.C.* and the present case, the reasons for the denial of coverage in *Z.C.* would also apply to the present case.

For these reasons, appellant did not establish that he sustained an injury in the performance of duty on October 3, 2011.

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 did not meet his burden of proof to establish that he sustained an injury in the performance of duty on October 3, 2011.

[16] *See supra* note 11.

ORDER

IT IS HEREBY ORDERED THAT the September 25, 2012 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: May 10, 2013
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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