

fitness center located on the employing establishment's premises. He reported that he was playing basketball with coworkers when he came down on his foot and sustained his injury at 2:00 p.m. When his condition did not improve, appellant sought treatment on April 3, 2013 where he was diagnosed with Achilles strain. He notified his supervisor on April 11, 2013. Appellant stated that his normal work hours were Monday through Friday from 6:00 a.m. to 2:30 p.m. Her supervisor, Andrew Headley, controverted the claim stating that appellant was not in the performance of duty.

By letter dated April 19, 2013, OWCP informed appellant that the evidence of record was insufficient to support his claim. It afforded him 30 days to submit additional evidence and respond to its inquiries.

By letter of the same date, OWCP requested that the employing establishment respond to its inquiries as to appellant's duties. It asked whether appellant was required to participate in a Physical Fitness Plan (PFP), whether the employing establishment derived any benefit from his participation in the activity, whether his participation violated any rules or regulations, whether the injury occurred on the employing establishment's premises during regular work hours, whether the employing establishment provided leadership, equipment, or facilities, and requested a copy of the employing establishment's PFP.

In an April 12, 2013 witness statement, Jayson T. Johnson, a fellow coworker, reported that he drove appellant to the fitness center on base for an hour of wellness and fitness. He stated that he witnessed appellant injure himself while playing basketball on March 29, 2013.

In an April 16, 2013 narrative statement, appellant reported that he had previously injured his left bicep on March 4, 2013 while lifting material at work but did not report the injury because he did not want to jeopardize his employment. He stated that he had no disciplinary actions in his career.

In support of his right ankle injury, appellant submitted medical reports documenting treatment from Dr. Ernest R. Rubbo, a Board-certified orthopedic surgeon.

By letter dated April 24, 2013, Jenny Potts, appellant's supervisor, responded to OWCP questionnaire stating that appellant was not required to participate in the PFP program. She noted that participation was voluntary by filling out the Defense Logistics Agency (DLA) Form 1939 for approval/authorization from his supervisor. Ms. Potts alleged that appellant did not submit this form and was not participating in the PFP program. She further stated that the employing establishment did not derive any benefit from appellant's participation and the program was voluntary. When asked if appellant's participation violated any rules or regulations, Ms. Potts stated that he was not authorized to leave the worksite at the time of the injury, explaining that the injury occurred at 2:00 p.m. during his regular work hours. She noted that the employing establishment did not provide leadership, equipment, or facilities to appellant for the activity.

By letter dated May 21, 2013, the employing establishment controverted the claim arguing that appellant was not in the performance of duty at the time he sustained his injury. It provided a copy of the DLA Civilian Wellness and Fitness Program, which was implemented in

December 2012. The employing establishment noted that the program permitted eligible employees to voluntarily participate in wellness/fitness program during the workday for a maximum of one-hour a day, three times a week. Activities were expected to be cardiovascular and aerobic in nature, addressing endurance, muscular strength, flexibility, and body conditioning. The employing establishment enclosed a series of “Frequently Asked Questions” which addressed some of the more common aspects of the program.

The employing establishment noted that a required condition of participation was that employees must initiate a written request to their first level supervisor, including the projected times, location, and nature of the fitness activity(ies) they would be doing. Additionally, employees were required to maintain an appropriate accountability of time and attendance to report their participation in the program. This included ensuring that the supervisor was aware of specific times/dates that the employee was participating in wellness/fitness programs. Locally, appellant’s organization had established a sign-out policy to meet this requirement. It stated that review of the employing establishment’s administrative records indicated that appellant did not complete the wellness/fitness program participation request as required, nor did he sign out of the office on the date of injury. As such, appellant did not have express supervisory approval for his work absence. The employing establishment further noted that a review of official time and attendance records indicated that he was not on administrative leave connected to participation in the wellness/fitness program on the date of injury. It stated that Ms. Potts was a knowledgeable supervisor who had previously addressed the employing establishment concerns and provided an official response to OWCP’s April 19, 2013 development letter. For the reasons above, the employing establishment argued that appellant was not in the performance of duty when he was injured playing basketball.

In support of its controversion, the employing establishment provided a blank unsigned copy of a Request for Approval of Administrative Leave for Civilian Fitness Activities, a copy of the DLA Civilian Wellness and Fitness Program Employer Guidelines Agreement Form, Wellness and Fitness Frequently Asked Questions, a Memorandum for Employees regarding the DLA Civilian Wellness and Fitness Program, and a Memorandum for Headquarters and DLA Primary Level Field Activities for the DLA Fitness Program (Directive Type Memorandum (DTM)-13-002).

The Memorandum for Headquarters and DLA Primary Level Field Activities for the DLA fitness program describes the purpose of the program stating: This DTM establishes a civilian wellness/fitness program which enhances the well-being of DLA employees and contributes to a healthy and productive workforce. Full and part-time civilian employees may voluntarily participate in civilian wellness/fitness program during the workday for a maximum of one-hour a day, three times a week. The goal is to encourage and motivate employees to develop a healthy lifestyle and enhance the quality of work.

The DTM goes on to describe procedures for participation in the fitness aspect of the civilian wellness/fitness program, noting that prior to beginning the program, individuals must initiate, *via* attachment, a written request to the first level supervisor, including the employee’s projected times, location, and nature of the fitness activity. The procedures also provide that within three workdays of receipt of the employee’s submitted request, the supervisors shall provide the employee a response, unless the supervisor is on leave or temporary duty. With the

approval of their supervisor, employees may establish civilian fitness periods at a set time within the workday. Employee requests to participate are maintained by their first level supervisor, if approved. Copies of all agreements will be kept by supervisors, and organizations are to provide a copy upon request to satisfy any reporting requirements. The DTM explains that DLA must maintain appropriate accountability of time and attendance and will use information to report participation and evaluate the agency civilian fitness/wellness program. Organizations must ensure employees and timekeepers enter "LN" in EAGLE for the dates and times employees participate in the program.

The Request for Approval of Administrative Leave for Civilian Fitness Activities notes that employees are responsible for keeping their supervisors advised of when and where they are participating in wellness/fitness programs. The document further notes that employees may be granted a maximum of one-hour a day three times a week of administrative leave during duty time for wellness/fitness programs.

By decision dated May 21, 2013, OWCP denied appellant's claim finding that the evidence of record failed to demonstrate that he sustained an injury on March 29, 2013 in the performance of duty as alleged. It indicated that he was not performing regular duties or activities incidental to his job and failed to provide documentation to participate in the employing establishment's optional wellness/fitness program.

On June 7, 2013 appellant requested an oral hearing before the Branch of Hearings and Review.

Appellant responded to OWCP's April 19, 2013 questionnaire and stated that he was injured at 2:00 p.m. when he was participating in the employing establishment's wellness/fitness program on the base fitness center. He stated that the employing establishment's wellness/fitness program was encouraged to adopt a healthy lifestyle and did not require him to have a physical examination. Appellant reported that following his injury, he could not put weight down on his foot due to pain, but reported back to work as required at 2:15 p.m.

In support of his claim, appellant submitted an April 30, 2013 statement from Edward Purdie, a fellow employee at DLA Distribution Susquehanna, PA. Mr. Purdie stated that his tour of duty was Monday thru Friday from 6:00 a.m. to 2:30 p.m. and was assigned to the area known as DK under the direct supervision of a coworker. He noted that he was one of many employees, along with appellant, who participated in the employing establishment's wellness/fitness program. Mr. Purdie described the process for participation in the program, stating that employees were required to fill out the Request for Approval of Administrative Leave for Civilian Fitness Activities. He stated that to the best of his knowledge, employees from DK were not required to sign-in or out in an established book and were not required to utilize the Common Access Card (CAC) for tracking purposes. As of April 22, 2013, DK was assigned new supervision under Doug Smith, who instructed employees to fill out OPM-71 Leave Request Forms for tracking purposes due to appellant's injury.

In a May 1, 2013 narrative statement, Shanan Johnson, a fellow employee, reported that his immediate work area was known as DK which was supervised by Brian Taylor, a coworker, through April 22, 2013. He stated that in order for employees to participate in the

wellness/fitness program, they were required to fill out the Request for Approval of Administrative Leave and submit a schedule of the days, time, and place for participation. Mr. Johnson did not recall any discussion about signing in and out within his work area or at the fitness center, nor did he recall directive to use the CAC as a tracking method. He noted that he would cover himself by noting his times on his Individual Standard Performance (ISP) sheet, which was the employing establishment nonelectronic tracking method at that time, and that information would be submitted electronically by work leaders or supervisors. Mr. Johnson further stated that, since the arrival of their new supervisor Doug Smith, there had been a change in the tracking procedure for the wellness/fitness program as employees were required to fill out an OPM-71 Leave Request Form.

At the September 11, 2013 hearing, Robert Boutselis, appellant's union representative, asserted that the employing establishment did not conduct an investigation to determine whether appellant submitted the appropriate documentation. He explained that appellant was injured during work hours on the employing establishment premises, stating that ISP sheets documented that he would be at the fitness center on March 29, 2013 from 1:15 p.m. to 2:15 p.m. Mr. Boutselis further argued that no work leader challenged appellant who had documented on his ISP sheets that he was participating in the wellness/fitness program. He noted that appellant thought he was on administrative leave for the time spent for the wellness/fitness program but that his time was actually covered under regular time.

By decision dated November 26, 2013, the Branch of Hearings and Review affirmed the May 21, 2013 decision finding that appellant failed to establish that he was injured in the performance of duty on March 29, 2013. It noted that the evidence of record indicated that he did not complete the requisite form to participate in the wellness/fitness program. Mr. Headley averred that appellant was not in the performance of duty and the employing establishment maintained that appellant did not complete the form. While appellant argued that the employing establishment was in error, he provided no evidence in support of his claim.²

LEGAL PRECEDENT

In providing for a compensation program for federal employees, Congress did not contemplate an insurance program against any and every injury, illness, or mishap that might befall an employee contemporaneous or coincidental with his or her employment. Liability does not attach merely upon the existence of an employee-employer relation. Instead, Congress provided for the payment of compensation for disability or death of an employee resulting from personal injury sustained while in the performance of duty.³

The Board has interpreted the phrase while in the performance of duty to be the equivalent of the commonly found requisite in workers' compensation law of arising out of and

² The Board notes that appellant submitted additional evidence after OWCP rendered its November 26, 2013 decision. The Board's jurisdiction is limited to reviewing the evidence that was before OWCP at the time of its final decision and therefore, this additional evidence cannot be considered on appeal. 20 C.F.R. § 510.2(c)(1); *Dennis E. Maddy*, 47 ECAB 259 (1995); *James C. Campbell*, 5 ECAB 35, 36 n.2 (1952).

³ See 5 U.S.C. § 8102(a).

in the course of employment. In the course of employment deals with the work setting, the locale and time of injury whereas, arising out of the employment, encompasses not only the work setting but also a causal concept, the requirement being that an employment factor caused the injury. In addressing this issue, the Board has stated that in the compensation field, to occur in the course of employment, in general, an injury must occur: (1) at a time when the employee may reasonably be said to be engaged in his or her master's business; (2) at a place where he or she may reasonably be expected to be in connection with the employment; and (3) while he or she was reasonably fulfilling the duties of his or her employment or engaged in doing something incidental thereto.⁴

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.⁵

OWCP's procedures address employing establishment PFP's and provide 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 that 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 PFP.⁶

ANALYSIS

Appellant alleged that he sustained a work-related right Achilles injury on March 29, 2013 when he was playing basketball and participating in the employing establishment's wellness/fitness program. OWCP's hearing representative denied his claim finding his injury was not sustained in the performance of duty. The Board finds that this case is not in posture as to whether appellant was in the performance of duty at the time of his March 29, 2013 injury.⁷

Appellant reported that his injury occurred at 2:00 p.m. during his regular work hours while on base at the employing establishment's fitness center. His injury did not occur during a lunch or recreational period as a regular incident of his employment.⁸ Appellant further testified

⁴ *Kathryn S. Graham Wilburn*, 49 ECAB 458 (1998).

⁵ See *Lawrence J. Kolodzi*, 44 ECAB 818, 822 (1993); A. Larson, *The Law of Workers' Compensation* § 22.00 (2012).

⁶ See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Performance of Duty*, Chapter 2.804.18 (March 1994).

⁷ *D.M.*, Docket No. 13-1821 (issued March 26, 2014).

⁸ *R.P.*, Docket No. 10-1174 (issued January 19, 2011).

that he submitted the required request form to participate in the wellness/fitness program to his supervisor and had appropriately noted his times on his ISP sheets. He stated that he did not receive administrative leave as expected for his time spent in the wellness/fitness program and rather received regular time.

In its May 21, 2013 letter, the employing establishment argued that appellant's position did not require participation in PFP as the program was voluntary and he was not in the performance of duty at the time of his injury. It stated that he was not enrolled in DLA's PFP nor was he injured while participating in a PFP. The employing establishment noted that the program permitted eligible employees to voluntarily participate in wellness/fitness program during the workday for a maximum of one-hour a day, three times a week of administrative leave. A condition of participation in the program required employees to initiate a written request to their first level supervisor, including the projected times, location, and nature of the fitness activity(ies) they would be doing. Additionally, employees were required to maintain an appropriate accountability of time and attendance to report their participation in the program which included ensuring that the supervisor was aware of specific times/dates that the employee was participating in fitness/wellness activities. The employing establishment stated that locally, appellant's organization had established a sign-out policy to meet this requirement. It noted that he did not have express supervisory approval for his work absence as review of administrative records indicated that he did not complete the fitness/wellness program participation request as required, nor did he sign out of the office on the date of injury. Furthermore, the employing establishment noted that a review of official time and attendance records indicated that appellant was not on administrative leave connected to participation in the fitness/wellness program on the date of injury.

The Board notes that the response by the employing establishment is insufficient to determine whether appellant was participating in DLA's wellness/fitness program.⁹ While the employing establishment stated that review of official time and attendance records indicated that appellant was not on administrative leave connected to participation in the wellness/fitness program on the date of injury, it failed to submit these records in support of its claim. 20 C.F.R. § 10.118(a) provides that the employing establishment is responsible for submitting to OWCP all relevant and probative factual and medical evidence in its possession or which it may acquire through investigation or other means.¹⁰

The May 21, 2013 employing establishment letter also stated that appellant did not have express supervisory approval for his work absence as review of administrative records indicated that he did not complete the wellness/fitness program participation request as required, nor did he sign out of the office on the date of injury. However, appellant provided statements from Mr. Purdie and Mr. Johnson, fellow coworkers, who stated that participation in the program required a Request for Approval of Administrative Leave Form and implementation of the sign-in/sign-out policy did not begin until April 22, 2013, after appellant's injury. Mr. Johnson further stated that he would cover his participation in the wellness/fitness program by logging his

⁹ See *J.L.*, Docket No. 12-947 (issued March 11, 2013). See generally *C.C.*, Docket No. 13-2177 (issued April 2, 2014); *E.A.*, Docket No. 11-1845 (issued March 14, 2012); *Kenneth B. Wright*, 44 ECAB 176, 181 (1992).

¹⁰ 20 C.F.R. § 10.118(a).

times on his ISP sheet which would then be electronically submitted by work leaders or supervisors. Appellant also stated that his ISP sheet documented that he would be at the fitness center on March 29, 2013 from 1:15 p.m. to 2:15 p.m.

Under FECA, although it is the burden of an employee to establish his or her claim, OWCP also has a responsibility in the development of the factual evidence, particularly when such evidence is of the character normally obtained from the employing establishment or other government source.¹¹ Therefore, the case shall be remanded for further development of the factual evidence regarding whether appellant was authorized to participate in the wellness/fitness program at the time of his injury on March 29, 2013.¹²

On remand, OWCP should request the employing establishment provide copies of the ISP sheets for appellant's supervising area from the date of onset of the wellness/fitness program through March 29, 2013, the date of appellant's injury. It should further request the employing establishment provide copies of appellant's official time and attendance records from the date of onset of the program through March 29, 2013 which identifies the number of hours worked and type of leave used. OWCP should request the employing establishment provide any other documentation used in its investigation to determine that appellant was not authorized to participate in the wellness/fitness program, including the "sign-out sheets" it references and the time and attendance records submitted under EAGLE for the period in question. The Board also notes that the employing establishment's April 24, 2013 response to OWCP's development letter indicated that appellant was not authorized to leave the worksite to participate in the program at the time of injury, yet it failed to respond to OWCP's inquiry as to the manner in which the rule or regulation was enforced. OWCP should request further clarification from the employing establishment regarding appellant's alleged violation of the employing establishment rules or regulations and the manner in which they were enforced. After such further development as it deems necessary, it should issue an appropriate decision on this matter.¹³

CONCLUSION

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

¹¹ *Willie A. Dean*, 40 ECAB 1208, 1212 (1989); *Willie James Clark*, 39 ECAB 1311, 1318-19 (1988).

¹² *Colleen A. Murphy*, Docket No. 01-1319 (issued November 6, 2002).

¹³ *S.D.*, Docket No. 13-90 (issued August 22, 2013).

ORDER

IT IS HEREBY ORDERED THAT the November 26, 2013 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further action consistent with this decision of the Board.

Issued: July 27, 2015
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

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

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board