

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

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C.C., Appellant )

and )

**DEPARTMENT OF HOMELAND SECURITY,** )  
**IMMIGRATION & CUSTOMS** )  
**ENFORCEMENT, Rouses Point, NY, Employer** )

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**Docket No. 14-1800**  
**Issued: March 11, 2015**

*Appearances:*

*Alan J. Shapiro, Esq., for the appellant*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

CHRISTOPHER J. GODFREY, Chief Judge  
COLLEEN DUFFY KIKO, Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On August 12, 2014 appellant, through his attorney, filed a timely application for review from a July 7, 2014 merit decision of the Office of Workers' Compensation Programs (OWCP).<sup>1</sup> 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 to review the merits of appellant's claim.

**ISSUE**

The issue is whether appellant met his burden of proof to establish an injury in the performance of duty on February 14, 2012.

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<sup>1</sup> The Board concludes that OWCP's July 7, 2014 decision, purporting to deny reconsideration of the merits, actually conducted a merit review of appellant's claim. *See infra* note 12.

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

## **FACTUAL HISTORY**

On December 3, 2012 appellant, then a 49-year-old special agent/criminal investigator, filed a traumatic injury claim (Form CA-1) alleging that on February 14, 2012 he sustained injury to his right shoulder while exercising at home at 8:00 a.m. Appellant's supervisor indicated on the claim form that the injury had occurred in the performance of duty and that appellant's regular work hours were from 8:30 a.m. to 5:30 p.m.

This case was previously before the Board.<sup>3</sup> In a decision dated April 2, 2014, the Board affirmed an OWCP decision dated June 20, 2013 denying appellant's claim for compensation on the basis that he had not established that his claimed injury of February 14, 2012 occurred within the performance of duty. The Board noted that appellant's injury did not occur during regular work hours and on the premises of the employing establishment. The Board found that, while appellant alleged that he was enrolled in a voluntary physical fitness program (PFP) and was injured while performing authorized PFP exercise, he did not provide a statement from the employing establishment that he was enrolled in an employing establishment PFP or that he was injured while participating in a PFP. The Board concluded that appellant had not established that the employing establishment expressly or impliedly required him to engage in home exercise. Therefore appellant had not established that the employing establishment derived any substantial direct benefit from his home exercise except for the intangible value of improvement in employee health and morale that is common to all kinds of recreation and social life. The facts as set forth in the Board's prior decision are hereby incorporated by reference.

By letter received June 5, 2014, appellant, through his attorney, requested reconsideration. He indicated that he had enclosed activity logs from a voluntary physical fitness program and a memorandum from the employing establishment dated August 25, 2011, which substantiated his participation in the employing establishment's voluntary physical fitness program. Counsel stated that the Board neglected to analyze the memorandum in its decision of April 2, 2014.<sup>4</sup>

In voluntary physical fitness program activity logs dated between September 20, 2011 and January 4, 2012, appellant noted that he exercised at his home gym between September 7 and December 29, 2011.

In a memorandum addressed to supervisors dated August 25, 2011, a deputy executive associate director for the employing establishment stated that it authorized law enforcement personnel to use official duty time up to one hour per day, not to exceed three hours per week. It noted that scheduling of official on-duty hours was subject to the approval of an employee's supervisor and that because the voluntary physical fitness program was authorized only during official on-duty time, an employee had a right to file a claim with OWCP if he sustained injury. The memorandum stated that the requirements of participation in the voluntary physical fitness

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<sup>3</sup> Docket No. 13-2177 (issued April 2, 2014).

<sup>4</sup> The Board notes that the memorandum dated August 25, 2011 was not present in the case record at the time of OWCP's June 20, 2013 decision, upon which the prior appeal docketed as No. 13-2177 was based. Hence, the Board lacked jurisdiction to review the August 25, 2011 memorandum in the prior appeal. *See* 20 C.F.R. § 501.2(c).

program were a consultation with a physician upon beginning participation and annually thereafter; annual submission of a waiver of liability to a supervisor; and the recording of an exercise log noting the date, time, type, and duration of the exercises performed.

In a statement dated May 13, 2013, appellant noted that his employing establishment authorized official duty time to engage in a voluntary physical fitness program. He noted that he was performing one of the approved fitness programs listed in the August 25, 2011 memorandum, and that his workout time was part of his Law Enforcement Availability Program pay.

In an e-mail dated June 3, 2014, a supervisor at the employing establishment noted that there was an annual requirement for all criminal investigators participating in the voluntary physical fitness program to update their waivers of liability. She noted that employees should route their signed waivers through their supervisors.

Appellant also submitted blank voluntary physical fitness program waivers of liability.

By decision dated July 7, 2014, OWCP declined appellant's request for reconsideration and stated that it did not review the merits of his case. It noted, "The issue in this case is whether or not you were a participant in the [voluntary physical fitness program] on February 14, 2012 as claimed." OWCP found that the activity logs, memorandum dated August 25, 2011, and e-mail dated June 3, 2014 did not suggest or imply that he was a participant in the voluntary physical fitness program on February 14, 2012.

### **LEGAL PRECEDENT**

An employee seeking benefits under FECA<sup>5</sup> has the burden of establishing 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, that an injury<sup>6</sup> 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>7</sup>

FECA provides for the payment of compensation for the disability or death of an employee resulting from personal injury sustained while in the performance of duty.<sup>8</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

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<sup>5</sup> 5 U.S.C. §§ 8101-8193.

<sup>6</sup> OWCP's regulations define a traumatic injury as a condition of the body caused by a specific event or incident, or series of events or incidents, within a single workday or shift. Such condition must be caused by external force, including stress or strain, which is identifiable as to time and place of occurrence and member or function of the body affected. 20 C.F.R. § 10.5(ee).

<sup>7</sup> *T.H.*, 59 ECAB 388, 393 (2008); *see Steven S. Saleh*, 55 ECAB 169, 171-72 (2003); *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

<sup>8</sup> 5 U.S.C. § 8102(a).

course of employment.<sup>9</sup> The phrase in the course of employment is recognized as relating to the work situation, and more particularly, relating to elements of time, place, and circumstance. 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 the employer's business, at a place where he may reasonably be expected to be in connection with the employment, and while he was reasonably fulfilling the duties of his employment or engaged in doing something incidental thereto.<sup>10</sup>

OWCP's procedures address employing establishment physical fitness programs (PFPs) 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), CA-1 forms 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 program.<sup>11</sup>

### ANALYSIS

Although OWCP's July 7, 2014 decision purported not to review the merits of appellant's claim, the Board finds that this was a decision on the merits. It did more than provide a background summary of its June 20, 2013 denial; it augmented its previous findings. OWCP noted that the issue in this case was whether or not appellant was a participant in a voluntary physical fitness program on February 14, 2012, and analyzed evidence submitted both before and after the Board's April 2, 2014 decision, finding that it had not established that appellant was a participant in this program on February 14, 2012. As the July 7, 2014 decision addressed the merits of appellant's claim, the Board has jurisdiction to review the merits.<sup>12</sup>

The Board's merit review begins with its prior decision on this case under docket number 13-2177. The Board noted that appellant had not submitted a statement from the employing establishment to establish that he, in particular, was enrolled in a voluntary physical fitness program and that the injury was sustained while he was performing authorized exercises under the voluntary physical fitness program. The Board found that without the required documentation from the employing establishment, the evidence did not support appellant's claim for a work-related injury.

Appellant in fact submitted new evidence on reconsideration to OWCP, but none of this new evidence contains the required documentation that appellant, in particular, was enrolled in a voluntary physical fitness program as of February 14, 2012. The memorandum addressed to supervisors and dated August 25, 2011 does not address appellant's enrollment in particular.

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<sup>9</sup> *Charles Crawford*, 40 ECAB 474, 476-77 (1989).

<sup>10</sup> *Mary Keszler*, 38 ECAB 735, 739 (1987).

<sup>11</sup> See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Performance of Duty*, Chapter 2.804.18 (March 1994).

<sup>12</sup> See *D.R.*, Docket No. 12-617 (issued May 9, 2012) (OWCP addressed the merits of the claimant's reasons for refusing a job offer); *D.C.*, 58 ECAB (2007) (OWCP addressed the merits by finding for the first time that specialists were available locally and that the claimant's argument was therefore invalid).

Instead, it comments only on the documentation generally required in order to enroll as a participant. Similarly, the e-mail to all employees dated January 17, 2014 does not address appellant's actual enrollment in the physical fitness program, but enrollment policy generally. The remainder of the new evidence submitted, consisting of blank waivers of liability, home logs of exercise, and appellant's statement also do not address the issue of appellant's particular enrollment in a physical fitness program at the time of the alleged injury. As such, they do not establish that appellant was within the performance of duty at the time of his February 14, 2012 injury in a home gym.

For these reasons, appellant has not established that he sustained an injury in the performance of duty on February 14, 2012.

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 February 14, 2012.

### **ORDER**

**IT IS HEREBY ORDERED THAT** the July 7, 2014 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 11, 2015  
Washington, DC

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

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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