

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ERIC W. GIBSON and DEPARTMENT OF JUSTICE,
FEDERAL BUREAU OF INVESTIGATION, Houston, TX

*Docket No. 98-1237; Submitted on the Record;
Issued December 17, 1999*

DECISION and ORDER

Before WILLIE T.C. THOMAS, MICHAEL E. GROOM,
BRADLEY T. KNOTT

The issue is whether appellant has established that he sustained back injury in the performance of duty, causally related to factors of his federal employment.

On February 20, 1997 appellant, then a 39-year-old special agent, filed a claim alleging that on January 21, 1997 while performing leg and lower back exercises in his home gymnasium he injured his lower back. Appellant alleged that this exercising constituted alternate physical training,¹ as required by his employment, which included weight lifting and other exercises, and claimed that magnetic resonance imaging demonstrated two ruptured discs in his lower back. On the reverse of the claim form, Floyd S. Wiltz, acting supervisory special agent noted that appellant's injury occurred after working hours and at his residence, and that the employing establishment was not aware of and did not authorize alternate physical training for appellant.

In a February 5, 1997 report, Dr. Thomas J. Mims, a Board-certified neurosurgeon, stated: "This is not a work[-]related injury. [Appellant] has had back pain intermittently for about the past five years. He now presents with four to six weeks of a different more persistent back pain that is not improving as quickly as it has in the past." Dr. Mims noted that appellant's five-year intermittent history of back pain followed an automobile accident, and that some conditioning exercises and weight lifting exercises might have precipitated his recent problem which "started up around Christmastime." Dr. Mims diagnosed a herniated lumbar disc.

By letter dated August 4, 1997, Zachary T. Lowe, assistant special agent in charge, noted that appellant related that, "while the alleged injury did occur after working hours and at his residence, he was performing exercises prescribed for him to assist in the recovery of an injury previously received while on duty and for which workers' compensation benefits were awarded (see OWCP File Number 160268509). As such, [appellant] is filing a second claim."

¹ Appellant had had a previous foot injury and had undergone recent foot surgery, which evidently required that he alter his regular physical training regime. No evidence regarding the specifics of this was submitted.

On August 21, 1997 appellant filed a claim for a recurrence of disability commencing July 18, 1997 with the date of original injury noted as January 21, 1997.

By letter dated October 30, 1997, the Office of Workers' Compensation Programs requested further information regarding whether the alternate physical training program he was engaged in at the time of his injury was an employing establishment approved physical fitness program.

In response appellant submitted some medical bills and a duplicate copy of Dr. Mims' February 5, 1997 report with an attached patient symptom description dated February 5, 1997 in which appellant indicated that he had had similar injury two to three times per year for the last four years.

Also submitted was a March 21, 1997 letter to appellant from Dr. Jacqueline S. Hart, a Board-certified internist, and Dr. Mims, which noted: "Dr. Mims and I are both concerned about your desire for [w]orkers' [c]ompensation, when you had indicated that the back problem was related to an automobile accident that happened approximately five years ago."

Dr. Mims further provided an August 15, 1997 report which noted that appellant had ruptured discs at L4-5 and L5-S1, and which indicated that he had been doing well until he began increasing his running activities about six weeks earlier, when he tried to increase his jogging to three miles. However, by report dated September 22, 1997, Dr. Mims stated that appellant was doing his weight lifting as part of the employing establishment's physical fitness policy when he developed his back pain which had been persistent since then. Dr. Mims speculated that the employing establishment policy requirement was the only reason appellant was doing any weight lifting.

Appellant also submitted an excerpt from the employing establishment Manual of Administrative and Operational Procedures (MAOP), Part 1, Section 20 – 5.4, para. 4, effective June 24, 1997, which noted as follows:

"(1) Each Special Agent will submit a memorandum indicating the nature of his/her program, location of workout, and projected periods of workout. This record will be maintained by the office in one central control file to provide rapid response of all Agents while they are participants in the program. Availability should be of paramount concern to each Agent. Failure to submit, and have approved, the required memorandum prior to participation in the physical fitness program can result in a denial of workers' compensation benefits to an agent injured during workout."

However, no evidence that appellant submitted the required memorandum or received the required approval for the exercises he was supposedly doing when he was allegedly injured was provided.

By decision dated January 13, 1998, the Office rejected appellant's claim finding that it did not occur in the performance of duty. The Office found that the injury occurred at home

after hours, that the employing establishment was not aware of the alternate physical training program, and that it did not authorize the alternate physical training program.

By letter dated February 20, 1998, appellant requested reconsideration. Appellant alleged that he was injured due to a requirement imposed by his employment, that of physical fitness. He claimed that injuries arising from participation in an employing establishment's physical fitness program are compensable under the Federal Employees' Compensation Act, whether on or off duty. Appellant claimed that he was not notified of the requirements of MAOP 20-5.4 that a memorandum be submitted detailing the nature, location and time of his workouts, or that it be approved by the employing establishment, and argued that therefore this requirement was invalid as a basis for denial of his claim.

In support, appellant submitted an April 14, 1988 version of the MAOP section regarding the Act which noted:

“(a) Injuries and occupational diseases arising from participation in an employing agency's PFP [physical fitness program] are compensable under the Federal Employees' Compensation Act. This ruling covers all injuries, whether they occur on or off duty or during regular work hours.

“(b) All Forms CA-1 which attribute an injury to a PFP activity should 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.”

Appellant also submitted an April 21, 1994 version of MAOP 20 – 5.4 which stated as follows:

“(1) Each Special Agent will submit a memorandum indicating the nature of his/her program, location of workout, and projected periods of workout. This record will be maintained by the office in one central control file to provide rapid response of all Agents while they are participants in the program. Availability should be of paramount concern to each Agent. Failure to submit, and have approved, the required memorandum prior to participation in the physical fitness program can result in a denial of workers' compensation benefits to an agent injured during workout.”

Regulation changes and modifications made applicable subsequent to appellant's alleged injury, and hence inapplicable to his claim, were also submitted.

By decision dated February 26, 1998, the Office denied modification of the January 13, 1998 decision finding that the evidence submitted in support of the request was insufficient to warrant modification. The Office found that the MAOP requirements effective at the time of appellant's alleged injury mandated that a memorandum be in the appellant's personnel file indicating the location, time frame and events of the work out and that it receive employing establishment approval, for any injury occurring during the workout to be covered by the Act. The Office further found that appellant's excuse of ignorance as a reason for noncompliance

with the regulations was insufficient to waive the regulations in his case. The Office found that appellant failed to establish that he was injured in the performance of duty.

The Board finds that appellant has failed to establish that he sustained back injury in the performance of duty, causally related to factors of his federal employment.

The Federal Employees' Compensation Act provides for the payment of compensation for disability or death of an employee resulting from personal injury sustained while in the performance of duty.² The term "while in the performance of duty" has been interpreted to be the equivalent of the commonly found prerequisite in workmen's compensation of "arising out of and in the course of employment." 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. In the compensation field, to occur in the course of employment, an injury must occur: (1) at a time when the employee may be reasonably said to be engaged in the master's business; (2) at a place where he may reasonably be expected to be in connection with the employment; and (3) while he was reasonably fulfilling the duties of his employment or engaged in doing something incidental thereto. This alone is not sufficient to establish entitlement to benefits for compensability. The concomitant requirement of an injury "arising out of the employment" must be shown, and this encompasses not only the work setting but also a causal concept, the requirement being that the employment caused the injury. For purposes of determining entitlement to compensation under the Act, "arising in the course of employment," *i.e.*, performance of duty, must be established before "arising out of the employment," *i.e.*, causal relation, can be addressed.

In this case, appellant has not submitted evidence which establishes that he was performing authorized exercises as part of an approved alternate physical training program at his home, and the employing establishment denied that it was aware of or authorized any alternate physical training for appellant. No memoranda laying out appellant's proposed home physical training program or any alternate program were submitted and no approval of such memoranda was in evidence, as was required by the applicable employing establishment regulations, for any injury occurring during such exercise to be covered by the Act as occurring in the performance of duty. Accordingly, the evidence of record does not support that appellant sustained injury in the performance of duty.³

Appellant argued that his lack of knowledge of the requirements that he have his home physical training program formalized in a memorandum in his personnel file and approved by the employing establishment, should not be held against him and should not be used to deny workers' compensation benefits, however, the Board has frequently explained that ignorance of statutory requirements will not be an excuse for noncompliance with those regulations.⁴ The

² 5 U.S.C. § 8102(a).

³ Further, the medical evidence of record most contemporaneous to the alleged injury does not support that appellant sustained traumatic injury on January 21, 1997 as alleged, but rather that it had occurred at some time earlier around Christmas and had occurred repeatedly.

⁴ *Robert E. Kimzey*, 40 ECAB 762 (1989).

Board notes that ignorance of regulations is insufficient cause for noncompliance if the employee ought to have known of the regulations by the exercise of ordinary and reasonable diligence.⁵ In this case appellant should reasonably have been aware of the content of his own operations and procedure manual, particularly where it applied to activities outside of the workplace and outside of the regular workday which had a possible work nexus. Therefore, his lack of compliance with operations and procedural directives does provide a valid basis upon which to deny his workers' compensation benefits.

Accordingly, the decisions of the Office of Workers' Compensation Programs dated February 26 and January 13, 1998 are hereby affirmed.

Dated, Washington, D.C.
December 17, 1999

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

Bradley T. Knott
Alternate Member

⁵ *Peter J. Nevin*, 6 ECAB 839 (1954).