United States Department of Labor
Employees' Compensation Appeals Board

STEVEN F. JACOBS, Appellant	)	
	)	**Docket No. 03-2251**
and	)	**Issued: January 14, 2004**
DEPARTMENT OF THE ARMY, ARMY AVIATION & MISSILE COMMAND, Redstone Arsenal, AL, Employer	)	

Appearances:
Steven F. Jacobs, pro se
Office of the Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEN DUFFY KIKO, Member
DAVID S. GERSON, Alternate Member
MICHAEL E. GROOM, Alternate Member

JURISDICTION

On September 16, 2003 appellant filed a timely appeal from the Office of Workers' Compensation Programs merit decision dated June 5, 2003. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.

ISSUE

The issue on appeal is whether appellant has established that he sustained an injury on August 22, 2001 in the performance of duty as alleged. On appeal, appellant alleges that the injury he sustained during his off-site birthday luncheon was work related because the event was planned, funded and hosted by the government and that he was required to participate.

FACTUAL HISTORY

On August 30, 2001 appellant, then a 58-year-old general engineer, filed a notice of traumatic injury alleging that on August 22, 2001 he injured himself during a fall while attending

his off-site birthday luncheon with his supervisor and coworkers. Appellant did not stop work following the incident.

In a report dated August 28, 2001, Dr. Rhett B. Murray, a Board-certified neurologist, diagnosed cervical myelopathy due to multilevel compression based on an August 25, 2001 magnetic resonance imaging (MRI) scan. He recommended a three level anterior cervical discectomy and fusion. Dr. Murray related appellant's condition to the August 22, 2001 incident. Appellant submitted various reports from Dr. Murray and other physicians in support of his claim.

In letters dated January 22, 2002, the Office requested additional information from appellant and the employing establishment regarding the circumstances of the August 22, 2001 incident.

In a letter dated March 26, 2002, appellant addressed the incident, as follows:

> "Even though the prime purpose of the meeting was to honor me, there was other work done. During the entire period of time of the meeting, there were various employees in various states of official clock time due to the fact that there are flexible schedules involved. No employee was required to take annual leave, management allowed and clearly gave approval to the meeting and it was set up and orchestrated by management for a management purpose…. The approach that was chosen by management to fund the meeting was both cost effective and prudent. Multiple and legitimate government objectives were accomplished by the meeting…. An accident occurred that was not the fault of government management, but was associated with and was part and parcel to the conduct of work, *e.g.*, I fell at a meeting and was injured…. Obviously, given that the meeting, by primary purpose, was held by management to honor the employee, it was mandatory that the employee be there, whether there was correspondence to that effect or not or even a management directive. An employee being honored and he and his coworkers being given government time for government purpose to attend the meeting tells me that the event is by management requirement and clearly is approved."

In e-mail correspondence dated April 8, 2002, the employing establishment controverted appellant's claim on the basis that he was off-premises and not acting in an official capacity at the time of the August 22, 2001 incident. A representative of the employing establishment explained that appellant was attending an office birthday luncheon off-site and, while employee morale and stress reduction were achieved in these type of activities, the primary purpose of the luncheons was to honor the employees with birthdays each month. The representative indicated that the off-site luncheon was not mandatory and while appellant's birthday was the occasion for that particular event, he was not required to attend and that not all of the division employees attended. The representative further indicated that if the employees had been required to attend, a statement from the supervisor would have been necessary.

In e-mail correspondence dated April 15, 2002, appellant acknowledged that the injury did not occur on government premises; however, he asserted that the reservations were made on

government time by a government employee under the supervision of a supervisor and that his meal was not paid by him but by his supervisor or through some other means. He stated that the government benefited by improvement in morale and *esprit de corps* by meetings of this nature and further that supervisors commonly handled some other business during these meetings. Appellant indicated that the supervisors regularly had breakfast and birthday meetings with inter-office staff, which promoted health, education and *esprit de corps* goals, advanced in office coordination of work efforts, honored employees; and accomplished duties associated with work conduct. He acknowledged that these meetings were not normally classified as mandatory by official correspondence, however, he opined that it was understood that the meetings were mandatory and approved by the supervisor.

By decision dated July 12, 2002, the Office denied the claim on the grounds that appellant was not in the performance of duty at the time of the August 22, 2001 incident. The Office found that appellant failed to demonstrate that his claimed injury arose out of or was sustained while in the course of employment and, therefore, was not considered to have occurred in the performance of duty.

In a letter dated August 10, 2002, appellant requested a hearing before an Office hearing representative. The hearing was held on April 1, 2003. Appellant testified as to the events, which transpired on August 22, 2001. He testified that the luncheon was planned in his honor by his supervisor for the staff during work hours and that it would have been rude and disrespectful to decline. Appellant stated that he was a high level employee and in charge of prioritizing his own schedule; however, his attendance at social meetings hosted, supported and approved by management was expected, unless he had something more urgent to do at the time. Appellant testified that because he was being honored at his own birthday luncheon, he saw his attendance as mandatory. After the hearing, appellant submitted a March 31, 2003 statement reiterating his contention.

By decision dated June 5, 2003, the Office hearing representative affirmed the July 12, 2003 decision, on the grounds that the injury sustained on August 22, 2001 did not occur in the performance of duty.

LEGAL PRECEDENT

Section 8102(a) of the Federal Employees' Compensation Act provides for payment of compensation for disability or death of an employee resulting from personal injury "sustained while in the performance of his duty."[1] This phrase 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."[2] Whereas "arising out of the employment" addresses the causal

[1] 5 U.S.C. § 8102(a).

[2] *See Bernard E. Blum*, 1 ECAB 1, 2 (1947).

connection between the employment and the injury, "arising in the course of employment" pertains to work connection as to time, place and activity.[3]

In determining whether an injury arises in the performance of duty, Larson's treatise on workers' compensation law states:

"Recreational or social activities are within 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 employer, by expressly or impliedly requiring participation, or by making the activity part of the services of an employee, brings the activity within the orbit of the employment; or
>
> (3) The employer 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."[4]

These are three independent links, by which recreational or social activities can be tied to employment and, if one is found, the absence of the others is not fatal.[5] Accordingly, when an employee is injured during a recreational or social activity, he or she must meet one of the above-noted criteria in order to establish that the injury arose in the performance of duty.

ANALYSIS

Appellant alleged that his birthday luncheon was "part and parcel to the conduct of work" as the employing establishment planned and hosted the event for the purpose of honoring him and government objectives were met. Appellant contended that the event occurred during work hours and employees were not required to take leave for the period away from work. The evidence of record, however, fails to satisfy any of the above-noted criteria.

The claimed injury is not covered under the first criterion for recreational and social activities as the injury did not occur on the employing establishment premises, but instead occurred in a public restaurant, located off the employing establishment premises.

The second criterion is whether the employing establishment required appellant to participate in the luncheon or otherwise made the activity part of appellant's services as an employee. Appellant argued that the employing establishment implicitly required him to

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[3] *See Robert J. Eglinton*, 40 ECAB 195 (1988); *Clayton Varner*, 37 ECAB 248 (1985); *Thelma B. Barenkamp* (*Joseph L. Barenkamp*), 5 ECAB 228 (1952).

[4] A. Larson, *The Law of Workers' Compensation* § 22.01 2000); *see Hope J. Kahler* (*Roger A. Kahler*), 39 ECAB 588 (1988).

[5] *Archie L. Ransey*, 40 ECAB 1251 (1989); *Clifford G. Smith*, 32 ECAB 1702 (1981); *Stephen H. Greenleigh*, 23 ECAB 53 (1971); *see* Larson, *supra* note 4 at §§ 22.10, 22.30.

participate in the luncheon, although it was not mandated by a specific written directive. Appellant contended that the luncheon was planned in his honor and believed it would be disrespectful if he did not attend the luncheon. The employing establishment asserted that appellant was off-premises at the time of the incident, was not engaged in any official-duty capacity and that the employees attended the luncheon on a voluntary basis. When the degree of employer involvement descends from compulsion to mere sponsorship or encouragement, the questions become closer and it is necessary to conduct a further inquiry.[6] This inquiry focuses on the issue of whether the employing establishment sponsored the event, whether attendance was voluntary and whether the employing establishment financed the event. The record in this case establishes that while employing establishment personnel planned the birthday luncheon in appellant's honor, such luncheons occured regularly to honor staff birthdays and that the employing establishment did not either expressly or implicitly require participation by staff. The Board finds that although the August 22, 2001 luncheon was held in appellant's honor, the record supports that the activity was not one which he was compelled to attend. Participation in the social activity was neither part of appellant's job nor was it an activity for which he would be evaluated, it was a voluntary activity. Although appellant contends that it would have been rude on his part not to attend the birthday function, there was no requirement that he participate. Consequently, appellant has failed to demonstrate that the employing establishment either expressly or implicitly required him to attend the August 22, 2001 luncheon. Appellant and his coworkers were not required to utilize leave in order to attend the luncheon; other than the gratuitous act by employing establishment personnel to pay for appellant's meal, the record does not indicate that the employing establishment financed or sponsored the event.[7] Under the circumstances, appellant has failed to demonstrate that the employing establishment required him to participate in the August 22, 2001 luncheon or otherwise made the activity part of his services as an employee.

Appellant has also failed to satisfy the third criterion that the employing establishment derived substantial direct benefit from the August 22, 2001 luncheon beyond the intangible value of improvement in employee social life and morale. No evidence of record suggests that the social activity in this case was in any way related to the employing establishment's business.[8] Consequently, the evidence of record does not establish that the employing establishment derived substantial direct benefit from the activity beyond the intangible value of improvement in health and morale that is common to all kinds of recreation and social life.[9]

CONCLUSION

The Board finds that appellant has not established that he sustained an injury in the performance of duty on August 22, 2001.

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[6] Larson, *supra* note 4 at § 22.25.

[7] The fact that no deduction is made from an employee's salary for the time he or she engages in a certain activity does not, by itself, constitute that activity as being incidental to employment; *see Julianne Harrison*, 8 ECAB 440 (1955), *petition for recon. denied*, 8 ECAB 573 (1956). *See also Anna M. Adams*, 51 ECAB 149,154 (1999).

[8] *Anna M. Adams*, *supra* note 7 at 149.

[9] Larson, *supra* note 4 at § 22.30.

ORDER

IT IS HEREBY ORDERED THAT the June 5, 2003 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 14, 2004
Washington, DC

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member