United States Department of Labor
Employees' Compensation Appeals Board

R.P., Appellant	)	
and	)	**Docket No. 10-1174**
	)	**Issued: January 19, 2011**
DEPARTMENT OF THE NAVY, MARINE CORPS, Barstow, CA, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On March 24, 2010 appellant filed a timely appeal from the November 2, 2009 merit decision of the Office of Workers' Compensation Programs denying injury on June 1, 2009 and the March 8, 2010 nonmerit decision of the Office denying his request for reconsideration. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over these decisions.[1]

ISSUES

The issues are: (1) whether appellant met his burden of proof to establish that he sustained an injury in the performance of duty on June 1, 2009; and (2) whether the Office properly denied appellant's request for further review of the merits pursuant to 5 U.S.C. § 8128(a).

[1] For Office decisions issued prior to November 19, 2008, a claimant had one year to file an appeal. An appeal of Office decisions issued on or after November 19, 2008 must be filed within 180 days of the decision. *See* 20 C.F.R. § 501.3.

FACTUAL HISTORY

On June 5, 2009 appellant, then a 39-year-old sandblaster, filed a traumatic injury claim (Form CA-1) alleging that he injured his right leg at work at 2:00 p.m. on June 1, 2009. While on a run behind 744 Yermo Base with a coworker, Christopher Ware, he tripped and fell and heard his right hamstring muscle pop. On the form, Mr. Ware indicated that, after starting the run on break time, appellant grabbed his right leg and fell to the ground. Roger Hyndman, appellant's immediate supervisor, stated that the claimed running injury did not occur in the performance of duty as it happened during a 10-minute break, did not occur during a sanctioned employer event and did not occur while performing work duties.

On June 12, 2009 the Office requested that appellant submit additional evidence and answer questions regarding his claim. It asked that he address his employer involvement in his running activity on June 1, 2009. On June 12, 2009 the Office also requested that the employing establishment answer questions regarding the incident. It provided both 30 days to respond.

Appellant submitted medical evidence in support of his claim, including reports of Dr. Rama T. Pathi, an attending Board-certified orthopedic surgeon.

In an undated statement received on June 26, 2009, appellant advised that he was not required to participate in the running activity on June 1, 2009, but noted that employees were encouraged to participate in the employer's Wellness Program that included exercise during work breaks. He stated that the specific benefit his employer derived from the activity was having a fitter employee who would have a reduced chance of using sick days or sustaining a work-related injury. Appellant ran with Mr. Ware, who suggested that he take the run with him. He stated that the injury on June 1, 2009 occurred during regular working hours and on the employer's premises. Appellant fell when his right feet got caught on an uneven portion of pavement.

In a July 20, 2009 decision, the Office denied appellant's claim on the grounds that he did not establish that he sustained an injury in the performance of duty on June 1, 2009. The Office found that, while it was reasonable for appellant to be on the premises, there was no evidence to establish that the activity was required, or part of his services as an employee. Further, his employer did not derive a substantial direct benefit from the activity beyond the general improvement of employee health and morale.

In a July 1, 2009 letter, Mr. Hyndman stated that appellant was not required to participate in the running activity on June 1, 2009, that the employer gained no benefit from the activity, that no other employees were required to participate, that appellant's activity did not violate any rules, that the injury occurred during the last scheduled break of the day on base property and that the employer did not provide leadership, equipment or facilities for the activity.

In an undated statement, appellant asserted that the Office improperly characterized his break time as lasting 10 minutes rather than the actual time of 15 minutes. He stated that many agency employees used their 15-minute break times to engage in weight lifting, basketball and light jogging. Appellant asserted that the recreation section of the CA-810 publication provided that employees engaged in informal recreation, such as jogging, while on the agency premises

were considered to be in the performance of duty and there was no requirement to show how the activity benefited the employer. He stated that his workplace had an active Wellness Program that encouraged employees to engage in physical and recreational activities which promoted physical fitness. The employer provided designated exercise areas to run and jog. Appellant asserted that he had met all the guidelines to establish his case for a traumatic work-related injury as it happened within an eight-hour shift, on his employer's property, and he was engaged in an "accepted performance of duty activity." He notified his supervisor within 24 hours of the injury by completing a Form CA-1 and requested medical treatment within 24 hours of the injury. Appellant submitted additional medical evidence.

Appellant submitted documents from June 2005 concerning the employer's Wellness Program which noted that the program was strictly voluntary and was designed "to improve the health, fitness and the quality of life for our civilian work force." The time that the employee contributed to the program could be in the form of annual leave, leave without pay, lunch time or periods before or after the start of a shift. Appellant also submitted documents outlining general health and safety standards.[2]

In a November 2, 2009 decision, the Office affirmed the July 20, 2009 denial of appellant's claim for a June 1, 2009 injury. It considered his statement, as well as the submitted documents regarding the Wellness Program and safety and health guidelines, but found that he was not required to participate in the running activity on June 1, 2009. The Office stated, "In summary, none of the claimant's arguments are sufficient to alter the findings of this Office. The claimant did not show that the employing establishment received a substantial benefit beyond the … fitness and well being of the employees."

In a February 24, 2010 letter, appellant requested reconsideration of his claim. He indicated that he had never signed nor been accepted for his employers Wellness Program and that he was not "obligated to any special … requirements of this formal program." Appellant stated:

> "I am however a federal employee as described in CA 810. I was at the time of my injury in a paid status as described in CA 810. I was involved in an accepted informal activity on the property of my employer at the time of this injury as described in CA 810. I notified my employer with a CA-1 at the time of this injury as described in CA 810. I requested within 24 hours for medical treatments for this injury as described in CA 810. I provided proper medical evidence as described in CA 810. I have met all requirements concerning this injury as specified in the CA 810; please reconsider this decision in my favor."

Appellant submitted additional medical reports including those of Dr. Pathi.

In a March 8, 2010 decision, the Office denied appellant's request for further review of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

[2] Appellant submitted photographs which he indicated depicted various recreational facilities on the employer's premises, including a jogging track.

LEGAL PRECEDENT -- ISSUE 1

The Federal Employees' Compensation Act[3] provides for payment of compensation for disability or death of an employee resulting from personal injury sustained while in the performance of duty.[4] The phrase "sustained while in the 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."[5] "Arising out of the employment" tests the causal connection between the employment and the injury; "arising in the course of employment" relates to the time, place and work activity involved.[6] For the 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.[7]

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 employer, 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 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."[8]

ANALYSIS -- ISSUE 1

Appellant alleged that he sustained a right leg injury in the performance of duty on June 1, 2009 when he fell while jogging during a work break. The Office denied his claim finding an insufficient nexus between his work and his activities when he was injured on June 1, 2009.

Applying the above criteria to the facts in the present case, the Board finds that appellant was not in the performance of duty when he injured his right leg on June 1, 2009. Appellant's injury occurred on the premises of the military base but it did not occur during a lunch or recreational period as a regular incident of his employment. With respect to an express or implied requirement to participate in the running activity, the evidence of record reveals that participation in the activity was purely voluntary on the part of appellant. There is no evidence to show that participation in the activity was made part of the services of appellant. Appellant made note of the employer's Wellness Program but there is no evidence that he ever participated in such a program.

[3] 5 U.S.C. §§ 8101-8193.

[4] *Id.*. at § 8102(a).

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

[6] *See Eugene G. Chin*, 39 ECAB 598, 601-02 (1988); *Clayton Varner*, 37 ECAB 248, 250 (1985).

[7] *Kenneth B. Wright*, 44 ECAB 176, 181 (1992).

[8] *See Lawrence J. Kolodzi*, 44 ECAB 818, 822 (1993); *Kenneth B. Wright, supra* note 7. *See also* A. Larson, *The Law of Workers' Compensation* § 22.00 (2010).

Even if he had participated in such a program, such participation would not bring his activities within the performance of duty as the materials submitted by him show that the Wellness Program was "strictly voluntary" and had the general goal of promoting employee health and well being.[9]

Appellant's immediate supervisor explicitly indicated that appellant was not required to participate in the running activity on June 1, 2009, that the employing establishment gained no benefit from the activity, that no other employees were required to participate, and that the employer did not provide leadership, equipment or facilities for the activity. The employing establishment acknowledged that the injury occurred during a 10-minute break, but there is no indication that the employing establishment required or sponsored recreational activities during break periods.[10]

Both appellant and the employing establishment essentially indicated that the only benefit to the employing establishment was related to employee morale and well being. No evidence in the record suggests that the activity was related in any notable way to the employing establishment's business.[11] Consequently, there is no evidence that the employing establishment derived substantial direct benefit from the activity beyond that intangible value of improvement in employee health and morale that is common to all kinds of recreational activity. For these reasons, appellant did not show that his claimed injury on June 1, 2009 occurred in the performance of duty.

LEGAL PRECEDENT -- ISSUE 2

To require the Office to reopen a case for merit review under section 8128(a) of the Act,[12] the Office's regulations provide that the evidence or argument submitted by a claimant must: (1) show that the Office erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by the Office; or (3) constitute relevant and pertinent new evidence not previously considered by the Office.[13] To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant also must file his application for review within one year of the date of that decision.[14] When a claimant fails to

[9] Appellant asserted that the recreation section of a "CA 810 publication" stated that employees engaged in informal recreation, such as jogging, while on the agency premises are considered to be in the performance of duty and there is no requirement to show how the activity benefits the employer. The record does not contain a copy of a document containing such language. Appellant submitted photographs which he indicated depicted various recreational facilities on the employer's premises, including a jogging track. It is unclear whether appellant was using this jogging track when he was injured, but the mere existence of such a track on the employer's premises would not raise appellant's running activity on June 1, 2009 to the level of a work activity.

[10] Appellant claimed that his break was actually 15 minutes long, but he did not explain the significance of this assertion to the main issue of the present case.

[11] Appellant asserted that his claim was supported by the fact that he notified his supervisor within 24 hours by completing a Form CA-1 and he requested medical treatment within 24 hours of the injury. He did not explain how these facts helped bring his June 1, 2009 activities within the performance of duty.

[12] Under section 8128 of the Act, "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on her own motion or on application." 5 U.S.C. § 8128(a).

[13] 20 C.F.R. § 10.606(b)(2).

[14] *Id*. at § 10.607(a).

meet one of the above standards, the Office will deny the application for reconsideration without reopening the case for review on the merits.[15] The Board has held that the submission of evidence or argument which repeats or duplicates evidence or argument already in the case record[16] and the submission of evidence or argument which does not address the particular issue involved does not constitute a basis for reopening a case.[17]

ANALYSIS -- ISSUE 2

In a February 24, 2010 letter, appellant requested reconsideration of his claim and argued that he had established a work injury on June 1, 2009 because he was injured while on pay status as a federal employee, he was injured while performing "an accepted informal activity" on the employer's premises, he filed a Form CA-1 within 24 hours of the injury and he sought medical care within 24 hours.[18] The submission of this argument would not require reopening of appellant's claim for merit review because he had previously made similar arguments to the Office.[19] Appellant submitted additional medical evidence, but the submission of this evidence would not require reopening of his claim for merit review because the evidence is not relevant to the main issue of the present case.[20] The question of whether appellant's activities on June 1, 2009 were sufficiently related to his work to have occurred within the performance of duty is a factual question.

Appellant has not established that the Office improperly denied his request for further review of the merits of its November 2, 2009 decision under section 8128(a) of the Act, because the evidence and argument he submitted did not to show that the Office erroneously applied or interpreted a specific point of law, advance a relevant legal argument not previously considered by the Office, or constitute relevant and pertinent new evidence not previously considered by the Office.

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 June 1, 2009. The Board further finds that the Office properly denied appellant's request for further review of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

[15] *Id.* at § 10.608(b).

[16] *Eugene F. Butler*, 36 ECAB 393, 398 (1984); *Jerome Ginsberg*, 32 ECAB 31, 33 (1980).

[17] *Edward Matthew Diekemper*, 31 ECAB 224, 225 (1979).

[18] Appellant again asserted that a "CA 810" publication supported his claim.

[19] *See supra* note 16.

[20] *See supra* note 17.

ORDER

IT IS HEREBY ORDERED THAT the March 8, 2010 and November 2, 2009 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: January 19, 2011
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board