United States Department of Labor
Employees' Compensation Appeals Board

E.A., Appellant	)	
and	)	**Docket No. 11-1845**
	)	**Issued: March 14, 2012**
DEPARTMENT OF DEFENSE, DEFENSE LOGISTICS AGENCY, Fort Belvoir, VA, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
RICHARD J. DASCHBACH, Chief Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On August 9, 2011 appellant, through his attorney, filed a timely appeal from the April 28, 2011 merit decision of the Office of Workers' Compensation Programs (OWCP) denying his claim for an October 15, 2007 injury. Pursuant to the Federal Employees' Compensation Act[1] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant met his burden of proof to establish that he sustained an injury in performance of duty on October 15, 2007.

[1] 20 C.F.R. § 8101 *et seq.*

FACTUAL HISTORY

On August 26, 2010 appellant then a 42-year-old supervisory police officer, filed a traumatic injury claim alleging that on October 15, 2007 while running in order to train for the 300-meter dash, he heard a pop in his left knee and experienced pain. He indicated that the injury occurred at 5:45 p.m. at his duty station in Tracy, CA. Regarding the nature of the injury, appellant indicated that he sustained a tear of the posterior horn of the left meniscus and a stress fracture of the left medial femoral condyle and tibial plateau. On the same form, his supervisor stated that appellant's regular work schedule was Tuesday through Saturday, 3:00 p.m. to 11:00 p.m., and that he was on his regular day off work at the time of the claimed injury.[2]

In support of the claim, OWCP received statements from appellant and the agency, along with a master time history and work status request. Appellant also submitted medical records from Dr. Rahul L. Patel, an attending Board-certified internist.

In an August 23, 2010 letter, appellant indicated that he had received a letter regarding a proposal to remove him from federal service.[3] He argued that the agency failed to accommodate his physical condition which included a work-related left knee injury. Appellant asserted that he injured his left knee on October 15, 2007 while practicing the 300-meter dash on the work premises. He indicated that he had been instructed by Chief Walter Murken to work out during the three hours of gym time granted by the agency by going to the gym or working out anywhere on the work premises. Appellant claimed that he reported his October 15, 2007 injury to Chris Thornton, who in turn reported it to Mr. Murken, but that the agency did not file the proper forms.[4] He indicated that he had initially been informed that the mandatory agility test for his work included a 300-meter dash, but asserted that he was not informed in a timely manner when the 300-meter dash was dropped from the test.

In a statement dated September 3, 2010, Marlene Davis, an injury compensation program administrator, indicated that the agency was challenging appellant's claim because he failed to file a timely claim and did not establish that he was in the performance of duty when the alleged injury occurred. She stated that on October 15, 2007 appellant was on his regular day off. Appellant may have been on the agency premises that day to practice running, but he was not directed to do so and he was not in overtime work status. Ms. Davis noted that police officers were allowed to work out on the premises for three hours a week on duty time so that they did not have to use their days off for this activity. Prior to August 26, 2010, no written record of the claimed injury had been produced by appellant, his supervisor or a safety department official. Ms. Davis indicated that appellant received a letter of proposed removal on August 10, 2010 and then filed his claim for an alleged October 15, 2007 injury on August 26, 2010. She stated that it was the position of the agency that appellant's claim should be denied in its entirety.

[2] It should be noted that October 15, 2007 was a Monday.

[3] The record contains an August 10, 2010 notice of proposed termination.

[4] In an undated statement, Mr. Thornton indicated that appellant informed him, on a date he could not recall, that he had injured his left knee while practicing for the police physical fitness test. He stated that he did not file a report on the matter because appellant advised him that the injury occurred on his regular day off work.

In a September 15, 2010 statement, Mr. Murken stated that he did not direct appellant to work out for three hours per week. He noted, "The policy then, as it is now, is if shift staffing permits, officers are allowed three hours per week of work time to use the fitness center to exercise. No one is mandated to do this and it [i]s strictly voluntary. No one was mandated to come in on their days off to use the gym or otherwise exercise."

In a statement dated September 15, 2010, Ms. Davis stated that the agency had a written policy that allowed security force officers time up to three hours per week to initiate and maintain a personal exercise, health and wellness program. She indicated that the policy guidelines made clear that, although the agency provided assistance in terms of time, facilities and resources as best as possible, initiation and maintenance of a personal exercise program was an individual responsibility and the individual determined what type of exercise he or she performed in order to prepare for the required physical fitness test.[5]

By decision dated October 8, 2010, OWCP denied the claim for the reason that the evidence of record failed to demonstrate that appellant sustained an injury on October 15, 2007 in the performance of duty as alleged. It indicated that the claimed injury occurred on appellant's day off work and that he was not required by the agency to exercise in a structured program.

Appellant disagreed with the decision and requested an oral hearing before an OWCP hearing representative.

At the hearing held on February 7, 2011, appellant indicated that he has been employed with the employing establishment for eight years. He discussed his employment history and the duties of a supervisory police officer. Appellant described the October 15, 2007 incident and the injuries he sustained as a result of that incident. He asserted that he was engaged in an athletic endeavor because the agency decided to introduce a physical fitness program in order for all police officers to maintain their position. Appellant stated that before the agency instituted this program in 2007 he did not work out on a regular basis, but he then realized that he needed to get in better shape. He indicated that he never received a letter from the agency saying that the 300-meter dash had been eliminated from the physical test. Appellant confirmed that the October 15, 2007 incident happened on his day off, but noted that because he is a supervisor he did not have time during work hours to work out.

Subsequent to the hearing, OWCP received a letter from counsel dated February 11, 2011, along with a copy of the physical fitness standards and testing requirements, copies of leave and earning statements and a November 1, 2010 statement from Lydia Jimenez, a coworker, indicating that she observed appellant at the worksite on October 15, 2007 with a bag of ice strapped to his knee. Additional medical records and treatment notes from Doctors Hospital and Dr. Patel, dated between October 15 and 29, 2010, were also received. A copy of

[5] The record contains a copy of the agency's physical fitness standards and testing requirements. The document was issued on July 16, 2007 and updated on April 9, 2010. It noted that, depending on staffing needs, security officers might be excused for up to three hours per week to engage in fitness activities at the worksite or installation fitness facilities where they were working. Fees or expenses for membership or use of fitness facilities were the responsibility of the employee.

the hearing transcript was forwarded to the agency which responded on February 28, 2011 indicating its belief that OWCP's October 8, 2010 decision should be upheld.

In an April 28, 2011 decision, OWCP's hearing representative affirmed OWCP's October 8, 2010 decision.

LEGAL PRECEDENT

FECA provides for payment of compensation for disability or death of an employee resulting from personal injury sustained while in the performance of duty.[6] 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."[7] "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.[8] For the purposes of determining entitlement to compensation under FECA, "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.[9]

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."[10]

ANALYSIS

Applying the above criteria to the facts in the present case, the Board finds no evidence to establish that appellant was in the performance of duty on October 15, 2007. Appellant's claimed injury occurred on the premises of the employing establishment, but it did not occur during his work hours as he was scheduled off work on October 15, 2007.[11] Thus, an important physical indicia of course-of-employment, time of the claimed injury, has not been met in this

[6] *Id.* at § 8102(a).

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

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

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

[10] *See Lawrence J. Kolodzi*, 44 ECAB 818, 822 (1993); *Kenneth B. Wright, supra* note 9; *see also* A. Larson, *The Law of Workers' Compensation* § 22.00 (2012).

[11] The evidence reveals that appellant was not on overtime work status on October 15, 2007, nor was he directed to exercise on October 15, 2007 by any agency official.

case.[12] With respect to an express or implied requirement to participate in the 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. When the degree of employer involvement descends from compulsion to mere sponsorship or encouragement, the questions become closer and the tests include whether the employer sponsored or financed the event and whether attendance was voluntary.[13] Although the employing establishment had some tangential involvement in appellant's activities on October 15, 2007, evidenced by providing use of its premises, this level of involvement would not be sufficient to bring the activity within the course of employment.[14]

No evidence in the record suggests that the activity was related in any notable way to the employing establishment's business. While security officers had physical requirements that had to be met, the agency did not mandate any particular structured exercise regimen. The agency only provided that, depending on staffing needs, security officers might be excused for up to three hours per week to engage in fitness activities at the worksite or installation fitness facilities where they were working. However, there was no requirement that employees exercise for any particular amount per week, whether during work hours or while off work. There is no evidence that the employing establishment derived substantial direct benefit from appellant's 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 October 15, 2007 occurred in the performance of duty and OWCP properly denied his claim.

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 performance of duty on October 15, 2007.

[12] The Board has recognized the "unusual potency" of time and place in identifying recreational activities that are in the course of employment. *See Archie L. Ransey*, 40 ECAB 1251, 1257 (1989).

[13] *See Kenneth B. Wright, supra* note 9.

[14] The furnishing of financial support, athletic equipment, prizes and the like are relevant to the issue of employer encouragement, but standing alone this evidence is ordinarily not enough to establish compensability. *See Donald C. Huebler*, 28 ECAB 17 (1976) (where employer involvement such as printing of game results in the employing establishment newspaper, display of trophies, photographing of players during work hours and printing of admission tickets was insufficient to establish an activity in the performance of duty).

ORDER

IT IS HEREBY ORDERED THAT the April 28, 2011 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 14, 2012
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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