United States Department of Labor
Employees' Compensation Appeals Board

M.B., Appellant	)	
and	)	**Docket No. 12-1535**
	)	**Issued: January 2, 2013**
DEPARTMENT OF THE NAVY, Norfolk, 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:
ALEC J. KOROMILAS, Alternate Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On July 9, 2012 appellant, through his attorney, filed a timely appeal from a May 11, 2012 merit decision of the Office of Workers' Compensation Programs (OWCP) rescinding acceptance of his traumatic injury claim. 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The issue is whether OWCP properly rescinded acceptance of appellant's traumatic injury claim as he was not in the performance of duty on July 20, 2011.

FACTUAL HISTORY

On July 27, 2011 appellant, then a 58-year-old aircraft freight loader, filed a traumatic injury claim alleging that on July 20, 2011 at 7:30 a.m. he sustained an injury in the performance

[1] 5 U.S.C. § 8101 *et seq.*

of duty. He described the injury as a previous left knee meniscal tear that was not work related. The employing establishment maintained that appellant was not in the performance of duty as the incident occurred before the beginning of his duty shift.

In a statement dated July 26, 2011, appellant related that on July 20, 2011 he came to work to say farewell to Paul Gross, a superintendent with whom he had worked for over 10 years. He was going up the stairs when his knee became tight.

On August 4, 2011 the employing establishment controverted the claim. It noted that the incident occurred at 7:30 a.m. but appellant's tour-of-duty hours were from 2:00 p.m. until 10:00 p.m. The employing establishment further noted that he voluntarily arrived at work and was not in the performance of duty.

On October 20, 2011 OWCP accepted that appellant sustained a lateral collateral ligament sprain of the left knee, a tear of the left medial meniscus of the knee and unspecified derangement of the medial meniscus.

On November 22, 2011 OWCP advised appellant of its proposed rescission of the acceptance of his July 20, 2011 traumatic injury claim as he was not in the performance of duty. It requested that he further explain why he was at work and whether he voluntarily came to work to say farewell to Mr. Gross.

By decision dated January 11, 2012, OWCP rescinded acceptance of appellant's claim for a traumatic injury on July 20, 2011. It noted that it had not received any response from him to its request for additional information.

In an e-mail dated December 23, 2011, received by OWCP on January 17, 2012, appellant related that there was an announcement during the evening shift that Mr. Gross was "having a farewell the next morning" from 8:00 a.m. to 9:00 a.m. He related that he wanted to say good-bye to Mr. Gross because they had worked together more than 11 years and he wanted to show his respect. Appellant noted that he had not been up the stairs in years.

On January 18, 2012 appellant, through his attorney, requested a telephone hearing before an OWCP hearing representative. At the February 28, 2012 hearing, he related that he had an accepted work injury in 2010, assigned File No. xxxxxx633, and that he came to work early three to four times a week to go to the sauna and the gymnasium on his own for therapy. While working on the night shift, appellant learned that Mr. Gross was leaving and that there would be a farewell breakfast from 8:00 a.m. to 10:00 a.m. He decided to stop by after he left the gymnasium. Appellant had known Mr. Gross since 1987. He stated, "My supervisor explained to us that night that Mr. Gross was leaving and if anybody was planning on seeing Mr. Gross the next day he would be leaving between 6:00 and 8:00…." Appellant did not join the breakfast; they shook hands and said good-bye.

In a statement dated March 19, 2012, appellant's supervisor related:

> "The breakfast invitation was put out to supervisor and managers, it was not put out to the employees. The employees were just inquiring about Mr. Gross's leaving, asking when he was leaving and whether or not anything was going to be

done for him, so in answer to the questions, it was stated that he was being given a breakfast, no other details were given out and at no time was this put out as an invitation for any and all employees to attend. [Appellant] took it upon himself to come in and attend.

"The day [appellant] reported that he had an injury to his knee from walking up the stairs, the question arose, 'why was he even there because he was not invited.' Clearly it was not mandatory for him to be there, he was not asked to be there, and he was not invited to be there, he made the decision to attend on his own."

By decision dated May 11, 2012, OWCP's hearing representative affirmed the January 11, 2012 decision. She found that appellant was at the employing establishment for personal reasons and was not engaged in any activities incidental to his employment as a freight loader. The hearing representative noted that the fact that he was on the premises to use the gymnasium did not bring him within the performance of duty.

LEGAL PRECEDENT

Section 8128 of FECA provides that the Secretary of Labor may review an award for or against payment of compensation at any time on her own motion or application.[2] The Board has upheld OWCP's authority to set aside or modify a prior decision and issue a new decision under section 8128 of FECA.[3] The power to annul an award, however, is not an arbitrary one and an award for compensation can only be set aside in the manner provided by the compensation statute.[4]

Workers' compensation authorities generally recognize that compensation awards may be corrected, in the discretion of the compensation agency and in conformity with statutory provision, where there is good cause for so doing, such as mistake or fraud.[5] It is well established that, once OWCP accepts the claim, it has the burden of justifying the termination or modification of compensation benefits.[6] OWCP's burden of justifying termination or modification of compensation holds true where it later decides that it has erroneously accepted a claim of compensation. In establishing that its prior acceptance was erroneous, it is required to provide a clear explanation of its rationale for rescission.[7]

Section 8102(a) of FECA provides for payment of compensation for disability or death of an employee resulting from personal injury sustained while in the performance of his duty.[8] This

[2] 5 U.S.C. § 8128; *see also M.E.*, 58 ECAB 694 (2007).

[3] *John W. Graves*, 52 ECAB 160 (2000).

[4] *See* 20 C.F.R. § 10.610; *Cary S. Brenner*, 55 ECAB 739 (2004); *Stephen N. Elliott*, 53 ECAB 659 (2002).

[5] *L.C.*, 58 ECAB 493 (2007).

[6] *Andrew Wolfgang-Masters*, 56 ECAB 411 (2005).

[7] *See Amelia S. Jefferson*, 57 ECAB 183 (2005); *Delphia Y. Jackson*, 55 ECAB 373 (2004).

[8] 5 U.S.C. § 8102(a).

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.[9] Whereas arising out of the employment addresses the causal connection between the employment and the injury, arising in the course of employment pertains to work connection as to time, place and activity.[10]

In determining whether an injury arises in the performance of duty, Larson's treatise on workers' compensation law states that recreational or social activities are within the course of employment when: (1) they occur on the premises during a lunch or recreation period as a regular incident of the employment; or (2) the employing establishment, 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 employing establishment 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.[11]

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.[12] 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 he injured his left knee medial meniscus on July 20, 2011 at 7:30 a.m. while climbing stairs to say farewell to Mr. Gross, a former colleague. His work hours were from 2:00 p.m. to 10:00 p.m. OWCP accepted the claim; however, in a decision dated January 20, 2011, it rescinded acceptance after finding that he was not in the performance of duty at the time of the incident. The Board finds that appellant was not in the performance of duty at the time of the July 20, 2011 incident. Therefore, OWCP properly rescinded acceptance of his claim.

Appellant's claimed injury is not covered under the first criterion for recreation and social activities. While he was on the premises of the employing establishment at the time of the July 20, 2011 incident, it did not occur during a lunch or recreational period as a regular incident of his employment. Appellant's work duties were from 2:00 p.m. until 10:00 p.m. and the incident occurred at 7:30 a.m., outside of his normal work hours. He has not established that the activities occurred on the premises during a lunch or recreational period as a regular incident of his employment.[13]

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

[10] *See Robert J. Eglinton*, 40 ECAB 195 (1988).

[11] A. Larson, *The Law of Workers' Compensation* § 22.01 (2000); *see Steven F. Jacobs*, 55 ECAB 252 (2004); *see also* FECA (Federal) Procedure Manual, Part 2 -- Claims, *Performance of Duty*, Chapter 2.804.8 (August 1992).

[12] *See Steven F. Jacobs*, 55 ECAB 252 (2004); *Archie L. Ransey*, 40 ECAB 1251 (1989).

[13] *See Ricky A. Paylor*, 57 ECAB 568 (2006).

The second criterion is whether the employing establishment required appellant to participate in the farewell breakfast for Mr. Gross or otherwise made the activity part of appellant's service as an employee. Appellant asserted that while working on the evening shift he heard that there was a farewell event for Mr. Gross from 8:00 a.m. to 9:00 a.m. The following morning after going to the gym he stopped by to say good-bye to Mr. Gross. The gymnasium is also on the premises of the employing establishment. The employing establishment asserted that only managers and supervisors were invited to the retirement breakfast and, while other employees were notified of the breakfast, no invitation was extended. It maintained that appellant was neither required nor invited to be at the farewell breakfast. Under the circumstances, appellant has not established that the employing establishment expressly or impliedly required his participation in the event or made the activity part of his services.[14]

Appellant has also failed to satisfy the third criterion that the employing establishment derives a substantial direct benefit from his stopping by to say good-bye to Mr. Gross. The employing establishment did not invite him to the farewell breakfast and there is no evidence suggesting that the activity was related in any notable way to the employing establishment's business.[15] Appellant related that he was on the premises that morning for private therapy at the gym. Consequently, he has failed to satisfy the third criterion. The Board thus finds that OWCP properly exercised its discretion in reopening appellant's case for further review and determined that he was not in the performance of duty at the time of the July 20, 2011 incident.

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 and 20 C.F.R. §§ 10.605 through 10.607.

CONCLUSION

The Board finds that OWCP properly rescinded acceptance of appellant's claim that he sustained an injury on July 20, 2011 in the performance of duty.

[14] *See H.S.*, 58 ECAB 554 (2007).

[15] *See Anna M. Adams*, 51 ECAB 149 (1999).

ORDER

IT IS HEREBY ORDERED THAT the May 11, 2012 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 2, 2013
Washington, DC

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

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

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