United States Department of Labor
Employees' Compensation Appeals Board

D.B., Appellant	)	
and	)	**Docket No. 13-133**
	)	**Issued: July 19, 2013**
DEPARTMENT OF JUSTICE, FEDERAL BUREAU OF INVESTIGATION, Quantico, VA, Employer	)	

Appearances:
Todd Boehlje, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
RICHARD J. DASCHBACH, Chief Judge
PATRICIA HOWARD FITZGERALD, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On October 24, 2012 appellant, through his attorney, filed a timely appeal from an April 27, 2012 decision of the Office of Workers' Compensation Programs (OWCP) that denied his 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 appellant sustained an injury in the performance of duty on May 28, 2011.

On appeal his attorney asserts that appellant's injury occurred in the performance of duty.

[1] 5 U.S.C. §§ 8101-8193.

FACTUAL HISTORY

On July 28, 2011 appellant, then a 36-year-old new agent trainee (NAT), filed a traumatic injury claim alleging that he strained his right hamstring during a practice for a required physical fitness test that was administered by his personal trainer while at home on Saturday, May 28, 2011. The employing establishment advised that the injury did not occur on the employing establishment premises and occurred outside of appellant's normal work schedule of 8:00 a.m. to 5:00 p.m., Monday through Friday. Appellant did not stop work.

In letters dated August 17, 2011, OWCP informed appellant of the evidence needed to support his claim and asked the employing establishment to respond. In an undated statement, appellant alleged that he developed a weakness in his right leg while training at the employing establishment in Quantico, Virginia, and subsequently strained his right hamstring while practicing for a physical fitness test, while at home in St. Louis, Missouri. He stated that as a result of this injury, he had to cease training for the agent position and return to St. Louis where he began rehabilitation, including physical therapy.[2] Appellant noted that he developed additional pain higher up in his right leg and that a magnetic resonance imaging (MRI) scan study demonstrated two stress fractures to his pubic bone.[3] On June 27, 2011 appellant completed a history form for Dr. Matthew C. Bayes, an attending physician Board-certified in pediatrics and sports medicine, who stated that appellant sustained pain in his upper right leg on May 28, 2011 while sprinting on a track, and that he continued to have sharp, stabbing, shooting pain, weakness and stiffness.

In a June 28, 2011 report, Dr. Bayes reported that appellant sustained an injury to his right hip and groin while sprinting during a workout at the employing establishment and had returned home to St. Louis because he was unable to complete his training. He reported that appellant had physical therapy and had seen a chiropractor. Following physical examination, Dr. Bayes advised that appellant had severe medial groin pain which was a possible sports hernia vs. adductor tendinosis vs. superior pubic ramus stress fracture. He noted that appellant had 90 days in which to recover and resume training and recommended an MRI scan study. On July 8, 2011 Dr. Bayes reviewed a July 1, 2011 pelvic MRI scan study that demonstrated bilateral parasymphyseal pubic stress fractures of the pubic ramii. He stated that he was pessimistic that appellant would be able to resume training in September. A July 18, 2011 MRI scan study of the right hip without contrast demonstrated a low-grade strain of the right hamstring. On July 18, 2011 Dr. Bayes reported that appellant was limping badly and complained of circumferential right proximal hip pain. He diagnosed severe hip pain with weakness in abduction. In a July 20, 2011 report, Dr. Bayes reviewed the July 18, 2011 MRI scan study and did not think it was clinically significant. He reported that appellant was continuing physical therapy.[4]

[2] Appellant was employed as an analyst with the employing establishment when he began NAT training. He resumed this employment when he returned to St. Louis.

[3] The record indicates that appellant has an accepted occupational disease of the right hip and thigh sprain, adjudicated under OWCP file number xxxxxx060. The instant case was adjudicated under file number xxxxxx252.

[4] Appellant also submitted physical therapy treatment notes dated July 15 to August 3, 2011 and a June 28, 2011 report from a chiropractor.

By letter dated August 29, 2011, Terri E. Royster, supervisory special agent at the employing establishment, noted that all NATs were required to participate in physical fitness tests during weeks one and nine of training. She stated that there were no regulations or policies that mandated that students workout after hours or on weekends but that they were encouraged to do so in order to pass the fitness tests as there was no time during the workday for them to engage in such activity. Agent Royster indicated that appellant had not passed the week one physical fitness test and, therefore, it was very important that he pass the week nine test. If it could be shown that a NAT did not engage in his or her own workout regimen, this could be used to show a lack of judgment, consciousness and initiative. Agent Royster indicated that the physical requirements for a special agent were severe and submitted a position description for the special agent position.

By decision dated September 16, 2011, OWCP denied the claim, finding that appellant did not sustain an injury in the performance of duty.

Appellant timely requested a hearing, and submitted a July 1, 2011 MRI scan study of the pelvis that demonstrated bilateral pubic stress fractures, an intact common rectus adductor aponeurosis and mild right hamstring origin tendinopathy.

At the February 15, 2012 hearing, appellant's attorney contended that, while appellant was injured at a high school track in St. Louis, Missouri, he was in the performance of duty because he was practicing an exact replication of the required physical fitness test, which was a benefit to the employing establishment. Appellant testified that the test in St. Louis was monitored by his personal trainer and that he continued to have pain after his return to Virginia. He had to discontinue NAT training and returned to his usual position as an analyst in St. Louis. After his return to St. Louis, he first saw his family physician, Dr. Brett Foersterling, who referred him to physical therapy.

On a May 31, 2011 treatment note, Tess E. Briggs, a physician's assistant with the employing establishment, noted a history that appellant injured his right hamstring while practicing sprints when he was at home the previous weekend and that he did not limp after the injury. She noted slight tenderness to palpation of the medial mid-hamstring and diagnosed right hamstring strain. Ms. Briggs advised that appellant could continue physical training but should avoid sprinting and leg exercises. She reevaluated appellant on June 6, 2011, noting that appellant reported that he was unable to sprint. In an August 7, 2011 note, Dr. Thomas W. Gross, an employing establishment physician who is Board-certified in emergency medicine, noted a history of hamstring injury. He noted that appellant felt he would not heal in time to complete a physical fitness test scheduled for June 10, 2011 and diagnosed hamstring strain.

In a February 22, 2012 report, Dr. Bayes stated that he first evaluated appellant on June 28, 2011 and related that appellant first experienced pain in his right hip and groin on May 28, 2011 while sprinting as part of a workout. He advised that appellant's right hip, hamstring and groin pain were causally related to the May 28, 2011 incident that occurred while appellant was training for the employing establishment.[5]

[5] In a March 8, 2012 cover letter, appellant's attorney also stated that he was submitting records from Dr. Foersterling's office dated June 10, 2011. These are not found in the record before the Board.

By decision dated April 27, 2012, an OWCP hearing representative affirmed the September 16, 2011 decision, finding that the May 28, 2011 activity did not occur in the performance of duty.

LEGAL PRECEDENT

An employee seeking benefits under FECA has the burden of establishing the essential elements of his or her claim including the fact that the individual is an employee of the United States within the meaning of FECA, that the claim was timely filed within the applicable time limitation period of FECA, that an injury was sustained in the performance of duty as alleged and that any disability and/or specific condition for which compensation is claimed are causally related to the employment injury. Regardless of whether the asserted claim involves a traumatic injury or an occupational disease, an employee must satisfy this burden of proof.[6]

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 duty.[7] 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.[8] 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.[9] 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.[10]

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; (2) the employing establishment, 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 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]

In order to determine whether an employee actually sustained an injury in the performance of duty, OWCP begins with an analysis of whether fact of injury has been established. Generally, fact of injury consists of two components, which must be considered in

[6] *Gary J. Watling*, 52 ECAB 278 (2001).

[7] 5 U.S.C. § 8102(a).

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

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

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

[11] *S.B.*, Docket No. 11-1637 (issued April 12, 2012); *R.P.*, Docket No. 10-1173 (issued January 19, 2011); *Ricky A. Paylor*, 57 ECAB 568 (2006); *Lawrence J. Kolodzi*, 44 ECAB 818, 822 (1993); *Kenneth B. Wright, supra* note 10. *See also* A. Larson, *The Law of Workers' Compensation* § 22.00 (2012).

conjunction with one another. The first component is whether the employee actually experienced the employment incident or exposure, which is alleged to have occurred.[12] In order to meet his or her burden of proof to establish the fact that he or she sustained an injury in the performance of duty, an employee must submit sufficient evidence to establish that he or she actually experienced the employment injury or exposure at the time, place and in the manner alleged.[13] The second component is whether the employment incident caused a personal injury and generally can be established only by medical evidence.[14]

The claimant has the burden of establishing by the weight of reliable, probative and substantial evidence that the condition for which compensation is sought is causally related to a specific employment incident or to specific conditions of employment.[15] An award of compensation may not be based on appellant's belief of causal relationship. Neither the mere fact that a disease or condition manifests itself during a period of employment nor the belief that the disease or condition was caused or aggravated by employment factors or incidents is sufficient to establish a causal relationship.[16]

Causal relationship is a medical issue and the medical evidence generally required to establish causal relationship is rationalized medical opinion evidence.[17] The opinion of the physician must be based on a complete factual and medical background of the employee, must be one of reasonable certainty and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the employee.[18]

ANALYSIS

The record supports that appellant sustained a hamstring and a public stress fracture injury on May 28, 2011. The Board finds that this injury did not occur in the performance of duty. The record establishes that the injury occurred at a high school track near appellant's home in St. Louis, Missouri and not on the premises of the employing establishment in Quantico, Virginia.

Professor Larson notes that with respect to whether an injury sustained while participating in recreational activities is employment related turns on a different mix of factors,

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[12] *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Fact of Injury*, Chapter 2.803(2)(a) (August 2012, June 1995).

[13] *Linda S. Jackson*, 49 ECAB 486 (1998).

[14] *John J. Carlone*, 41 ECAB 354 (1989); *see* 5 U.S.C. § 8101(5) (injury defined); 20 C.F.R. §§ 10.5 (employing establishment); 10.5(q) (traumatic injury and occupational disease defined, respectively).

[15] *Roma A. Mortenson-Kindschi*, 57 ECAB 418 (2006).

[16] *P.K.*, Docket No. 08-2551 (issued June 2, 2009); *Dennis M. Mascarenas*, 49 ECAB 215 (1997).

[17] *Y.J.*, Docket No. 08-1167 (issued October 7, 2008).

[18] *I.J.*, 59 ECAB 408 (2008); *Victor J. Woodhams*, 41 ECAB 345 (1989).

including: whether it was sustained on or off the premises of the employing establishment; in or out of the employee's work hours; the extent of the employing establishment's initiative for participating and the type of benefit derived by the employing establishment.[19]

The Board has addressed the compensability of injuries sustained by federal employees while exercising. In *William D. Zerrillo*,[20] the employee sustained injury to his left Achilles tendon while exercising at a private health club. The injury was sustained at 6:15 p.m., while his work shift was 8:30 a.m. to 5:00 p.m. The claim was controverted by his employer, noting that there was no written requirement in the United States Marshal's Service manual establishing the need for physical fitness outside of normal duty hours or at an off-premises location. The Board affirmed the denial of the employee's claim. The Board found that the injury did not occur on the premises of the employing establishment during a lunch or recreational period but took place after his work shift at an off premise location for which no funds were paid by the employer. Therefore, appellant was not in the performance of duty when injured.

In *Wesley Crow*,[21] the employee sustained injury while running on asphalt in a public park at a location off premises of his employing establishment and after his work shift. The Board found that he did not sustain his injury while in the performance of duty. The record established that the employing establishment required him to meet a set physical efficient battery and he was granted three hours a week of on duty time for physical conditioning at a contracted fitness facility. As to the time and location of injury, the Board found that it occurred after his work shift, off the employing establishment's premises and not at the contracted fitness facility. There was no evidence of record to establish that the employing establishment required him to run in a public park after his work hours.

The circumstances of this case are similar to those described in *Zerrillo* and *Crow*. In the present case, Agent Royster stated that, while it was recommended that NATs practice physical fitness during off-duty hours, there were no regulations or policies that mandated such activity. Appellant's injury did not occur on the premises of his employing establishment but rather on a track in his home town. The injury took place after his work hours on a weekend. There is no evidence that appellant's employer required him to practice the physical fitness test at the time of injury. The injury did not occur at a time when appellant was reasonably engaged in the master's business, at a place where he was reasonably expected to be in connection with the employment or while he was reasonably fulfilling the duties of his employment or engaged in doing something incidental thereto.[22] Under these circumstances, the Board finds that appellant was not in the performance of duty at the time of his injury.

[19] Larson, *The Law of Workers' Compensation*, Chapter 22. Larson notes that the course of employment does not embrace every spontaneous or unprecedented frolic.

[20] 39 ECAB 525 (1988).

[21] Docket No. 93-1323 (issued August 1, 1994).

[22] *See Annie L. Ivey*, 55 ECAB 480 (2004).

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 the performance of duty on May 28, 2011.

ORDER

IT IS HEREBY ORDERED THAT the April 27, 2012 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 19, 2013
Washington, DC

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

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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