# United States Department of Labor
# Employees' Compensation Appeals Board

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| **J.L., Appellant** | ) | |
| | ) | **Docket No. 12-947** |
| **and** | ) | **Issued: March 11, 2013** |
| **DEPARTMENT OF AGRICULTURE, FOREST SERVICE, Mena, AR, Employer** | ) | |

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

*Case Submitted on the Record*

## DECISION AND ORDER

Before:
RICHARD J. DASCHBACH, Chief Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

### *JURISDICTION*

On March 21, 2012 appellant filed a timely appeal of a January 26, 2012 merit decision of the Office of Workers' Compensation Programs (OWCP) denying 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 appellant met his burden of proof to establish that he sustained a right knee injury on September 13, 2011 while in the performance of duty.

### *FACTUAL HISTORY*

On September 16, 2011 appellant, then a 42-year-old law enforcement officer, filed a traumatic injury claim alleging that at 2:30 p.m. on September 13, 2011 he pulled or tore a ligament in his right knee. He was performing cardiovascular exercise on an "EFX" machine at the Quachita Wellness Sports Center in Mena, Arkansas. Appellant noticed pain on the inside of

[1] 5 U.S.C. § 8101 *et seq.*

his right knee. The employing establishment noted that his tour of duty was from 8:00 a.m. to 4:00 p.m., Wednesday through Sunday. Appellant stopped work on September 13, 2011 and then returned later that day. Timothy Fincham, appellant's supervisor, reported that no time was lost from work but medical expenses were incurred.

A September 26, 2011 medical form requested a magnetic resonance imaging (MRI) scan to evaluate appellant's right knee pain. In a September 26, 2011 medical report, Dr. Jonathan C. Welsh, a Board-certified radiologist, advised that an MRI scan of the right knee revealed a tear of the posterior horn of the medial meniscus and evidence of a prior tear of the anterior horn of the lateral meniscus with meniscal cyst formation. He stated that the meniscal cyst measured roughly 2 x 2 x .6 centimeters. Dr. Welsh advised that the right knee also had small joint effusion.

In a November 3, 2011 report, Dr. Christopher M. Young, a Board-certified orthopedic surgeon, advised that appellant was seen for treatment of a right knee medial meniscus tear. In a November 14, 2011 note, he listed a history that appellant injured his right knee when he stepped off an "EFX" machine while performing wellness training for work. On November 29, 2011 Dr. Young requested that OWCP authorize right knee arthroscopic surgery to repair the medial meniscus tear.

In a December 23, 2011 letter, OWCP noted that, when appellant's claim was received, it appeared to be a minor injury that resulted in minimal or no lost time from work. Because the employing establishment did not controvert the merits of the case, payment of medical expenses was administratively approved. OWCP had not formally considered the merits of appellant's claim and noted that it had been reopened because he requested authorization for surgery. Further, it did not appear that appellant was injured while in the performance of duty and the evidence of record was insufficient to establish his claim. OWCP requested additional factual and medical evidence be submitted within 30 days. It also requested that the employing establishment answer questions regarding the September 13, 2011 incident.

On January 6, 2012 Mr. Fincham forwarded materials pertaining to the Forest Service Law Enforcement Health and Fitness Program. He noted that while appellant was not required to participate in the exercise activity; the Forest Service strongly encouraged law enforcement personnel to participate in the program in accordance with written guidelines. Mr. Fincham submitted a copy of appellant's January 8, 2009 request for approval for participation in the exercise program. Appellant noted that he was allowed five hours a week of official time to participate in physical fitness activities and be required to take an annual fitness assessment and complete a mandatory health screening. He described his exercise program as consisting of a total body workout utilizing free weights and cardiovascular activities and that his time and attendance would be recorded in conformance to the agency manual. The time spent for exercising would be between 8:00 a.m. and 4:00 p.m. and conducted during official base work hours. Appellant noted that he was a member of a local fitness center, where he would conduct his program. The employing establishment approved his request for participation on January 12, 2009.

Mr. Fincham forwarded excerpts of the agency's manual pertaining to law enforcement health and fitness program guidelines. Law enforcement personnel were strongly encouraged to participate in a voluntary exercise program; be granted up to five hours of official time per week

to participate, but not to exceed one hour per day. Health and fitness time could not be carried over past any given work week. Authorized physical fitness activities included "stretching, brisk walking, jogging, running, bicycling, aerobic dancing, aerobic fitness exercises, calisthenics, swimming and strength training." Competitive sports such as, tennis, golf, basketball, football, softball, handball, racquetball or any other activity not stated were not permitted. Mr. Fincham noted that, at the time of injury, appellant was performing cardiovascular exercise on an "EFX" elliptical machine. An accompanying exercise log indicated that appellant exercised on 15 days for one hour periods during his work shift from September 1 through 30, 2011. The employing establishment stated that it derived a benefit from his participation in the exercise activity under section 5375.02. This section stated that the objectives of the law enforcement health and fitness program were:

> "1. To develop and maintain optimal effectiveness and job performance of law enforcement personnel under FSM 5305.
>
> "2. To reduce time lost from illness and disability.
>
> "3. To increase the ability to absorb emotional and physical stress, increase mental alertness and reduce tension and fatigue.
>
> "4. To promote the morale and personal well-being of law enforcement personnel.
>
> "5. To provide a workforce capable of responding to the rapidly changing and increasing physical demands of law enforcement."

The employing establishment stated that, under section 5375.03, law enforcement employees were strongly encouraged to maintain a level of health and fitness commensurate with the physical and mental demands of their law enforcement responsibilities. Appellant's participation in the activity did not violate any of its rules or regulations. His injury did not occur on its premises but at his gym, Quachita Wellness and Sports Center. The employing establishment stated that it provided leadership to employees regarding its fitness program under section 5375.04a-f, which addressed the responsibilities of management officials and national and regional fitness coordinators.

On January 13, 2012 appellant stated that he completed weight training after experiencing right knee pain while on the "EFX" machine. There was no witness to the claimed incident. Larry Wood, owner of the sports center, was nearby when appellant was on the machine. Appellant first sought medical treatment on September 15, 2011. He did not sustain any other injury between September 13, 2009, the date of the incident and September 14, 2009, when he first reported his injury to his supervisor. Appellant experienced right knee pain and performed no treatment at home. He experienced prior knee pain in June 2011 during cardiovascular training that went away and he was not treated or evaluated by a physician. Appellant was not required to participate in the claimed recreational activity. He was influenced to participate in the employing establishment's wellness program to obtain overall health and to safely conduct his job. Appellant contended that the employing establishment benefited from his improved physical fitness, which was needed to perform his law enforcement duties and to

participate in a yearly Physical Efficiency Battery (PEB) test.[2] He stated that all employees could enroll in a law enforcement supported exercise program. Appellant's participation in the exercise activity did not violate any of the employing establishment's rules and regulations. The employing establishment did not provide equipment or facilities to appellant for the activity.

In a January 19, 2012 report, Dr. Young advised that appellant had reached maximum medical improvement and discharged him from his care following a right knee arthroscopic procedure.

In a January 26, 2012 decision, OWCP denied appellant's claim, finding that his September 13, 2011 injury did not arise within the performance of duty. It found that he was conducting an authorized physical fitness activity at the time of injury; however, the claimed injury did not occur on the employing establishment premises during regular work hours. In addition, the employing establishment did not provide leadership, equipment or facilities for the authorized activity. Further, the medical evidence was not sufficient to establish that appellant sustained a diagnosed condition causally related to a work incident.

## ***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 filed within the applicable time limitation; that an injury was sustained while 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.[3] These are the essential elements of each and every compensation claim regardless of whether the claim is predicated on a traumatic injury or an occupational disease.[4]

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.[5] 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.[6] 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.[7] For the purposes of determining entitlement to compensation under FECA, arising in the course

[2] The Board notes that section 5375.05 of the employing establishment's health and fitness program guidelines required that law enforcement personnel undergo a mandatory annual PEB test. A 25th percentile score for each component of the PEB was the minimum fitness goal.

[3] *Joe D. Cameron*, 41 ECAB 153 (1989).

[4] *See Irene St. John*, 50 ECAB 521 (1999); *Michael E. Smith*, 50 ECAB 313 (1999).

[5] 5 U.S.C. § 8102(a).

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

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

of employment, *i.e.*, performance of duty must be established before arising out of the employment, *i.e.*, causal relation, can be addressed.[8]

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.[9]

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 conjunction with one another. The first component to be established is that the employee actually experienced the employment incident or exposure, which is alleged to have occurred.[10] 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.[11] The second component is whether the employment incident caused a personal injury and generally can be established only by medical evidence.[12]

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.[13] 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.[14]

Causal relationship is a medical issue and the medical evidence generally required to establish causal relationship is rationalized medical opinion evidence.[15] The opinion of the

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

[9] *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 8. *See also* A. Larson, *The Law of Workers' Compensation* § 22.00 (2012).

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

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

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

[13] *Roma A. Mortenson-Kindschi*, 57 ECAB 418 (2006); *Katherine J. Friday*, 47 ECAB 591 (1996).

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

[15] *Y.J.*, Docket No. 08-1167 (issued October 7, 2008); *A.D.*, 58 ECAB 149 (2006); *D. Wayne Avila*, 57 ECAB 642 (2006).

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.[16]

## ***ANALYSIS***

Appellant sustained a torn ligament in his right knee on September 13, 2011 while exercising on an "EFX" elliptical machine at a private health facility. It was sustained at a time when he was on official time during his work shift and at a facility approved by his employing establishment. The question is whether appellant was in the performance of duty at the time of the injury. 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, 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.[17]

The Board has addressed the compensability of injuries sustained by federal employees while exercising. In *William D. Zerrillo*,[18] 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 Marshall's Service manual establishing the need for physical fitness outside of normal duty hours and 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 employer 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*,[19] the employee sustained injury while running on asphalt in a public park at a location off premises of his employer 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 his employer required him to meet a set PEB 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 employer's premises and not at the contracted fitness facility. There was no evidence of record to establish that the employer required him to run in a public park after his work hours.

In the present case, the Board notes that the employing establishment stated that all law enforcement personnel were "strongly encouraged" to participate in the voluntary exercise program and were "granted up to five hours of official time per week" for participation, not to

[16] *I.J.*, 59 ECAB 408 (2008); *Victor J. Woodhams*, 41 ECAB 345, 352 (1989).

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

[18] 39 ECAB 525 (1988).

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

exceed one hour a day. The program guidelines noted that, to participate, law enforcement personnel were required to prepare a written request for approval by the immediate supervisor and to include the time frame and location for participation. The activities authorized for physical fitness were to be described and not include competitive sports. In locations at which it was not feasible for the employing establishment or government to provide an exercise facility, a private fitness center could be utilized with reimbursement of up to $30.00 per month.

The record establishes that, on January 8, 2009, appellant completed the necessary paperwork for his supervisor requesting approval for his participation in the employing establishment's fitness program. He noted that he could use up to five hours a week of official time and would be required to take an annual fitness assessment and complete a mandatory health screening. Appellant stated that his participation would include a total body workout, utilizing free weights and cardiovascular exercises. His participation would be during his work shift and conducted during official work hours. Appellant identified the private fitness center at which location he would conduct the program. His supervisor approved the request on January 12, 2009.

In contrast to *Zerrillo* and *Crow*, appellant's injury on September 13, 2011 was sustained during his official work shift at the local health fitness facility authorized by his employing establishment. The record indicates that the employing establishment did not provide a health or fitness facility at the premises where appellant worked. Appellant's participation in the program was "strongly encouraged" by his employing establishment and conformed to the written guidelines of its exercise program. His request for participation was reviewed and approved by his employing establishment in January 2009 and, when injured, appellant was performing a physical fitness activity that conformed to those described and allowed by his employing establishment, a cardiovascular exercise on a piece of equipment and not during a competitive sport or activity. The Board finds that this particular mix of factors warrants the finding that appellant was in the performance of duty on September 13, 2011 when he sustained injury. The incident giving rise occurred at the off-premises sports center authorized by his employing establishment and arose in the course of appellant's official-duty shift.

The Board further finds, however, that the medical evidence currently of record is insufficient to establish that appellant's right knee injury was caused or contributed by the accepted September 13, 2011 employment incident. Dr. Young's reports provided a history of the accepted employment incident and diagnosed a right knee medial meniscus tear. He advised that appellant reached maximum medical improvement as of January 19, 2012 and discharged him from care following right knee arthroscopic surgery. Dr. Young, however, did not provide any medical opinion addressing the issue of causal relation. Medical evidence which does not offer any opinion regarding the cause of an employee's condition is of diminished probative value on the issue of causal relationship.[20] The Board finds, therefore, that Dr. Young's reports are insufficient to establish appellant's claim.

The September 26, 2011 diagnostic study did not provide any medical opinion addressing the issue of causal relationship.[21] A September 26, 2011 medical form lacks probative value

[20] *A.D., supra* note 15; *Jaja K. Asaramo*, 55 ECAB 200 (2004); *Michael E. Smith*, 50 ECAB 313 (1999).

[21] *Id.*

because the physician's signature is illegible. The Board has held that medical reports lacking proper identification do not constitute probative medical evidence.[22]

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 the September 13, 2011 employment incident arose in the performance of duty; however, the medical evidence is insufficient to establish causal relation.

## ***ORDER***

**IT IS HEREBY ORDERED THAT** the January 26, 2012 decision of the Office of Workers' Compensation Programs is affirmed, as modified.

Issued: March 11, 2013
Washington, DC

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

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

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

[22] *R.M.*, 59 ECAB 690, 693 (2008).