

work-related cardiac arrest at the Foreign Law Enforcement Training Center (FLETC) “outdoor running track by gym.”² Regarding the cause of the claimed injury, appellant stated, “While I was detailed to the FLETC as student at the Spanish language academy, I was engaged in physical training at the facility’s running track when I went into full cardiac arrest.”³ Appellant stopped work on August 22, 2007 and returned to work on October 30, 2007.

On the same form, Ximena Davila, appellant’s supervisor at FLETC, checked a “no” box indicating that appellant was not injured in the performance of duty and stated, “Attending the Basic Spanish Training Program (BSTP) from July 17, 2007 to August 27, 2007. The BSTP had no physical fitness program as part of the curriculum.” Ms. Davila checked a “yes” box indicating that her knowledge of the facts of the injury agreed with the statements of appellant and/or witnesses and noted, “Yes, [appellant] was exercising outside the FLETC gym, on or by the track. [Appellant] suffered a heart attack. Since the incident occurred after hours, another student rendered aid until the health unit responded to [the] scene. [Appellant] was revived and transported to Southeast Georgia Regional Medical Center, to the best of my recollection.”⁴

In an August 14, 2013 letter, OWCP requested that appellant submit additional factual and medical evidence in support of his claim for an August 22, 2007 work injury. It asked appellant to answer questions regarding various aspects of his claim, including the timing of the filing of his claim,⁵ the time and location of the claimed injury, and the nature of any requirement that he engage in recreational or fitness activities.

In a response received on August 20, 2013, appellant stated that Ms. Davila was his first line supervisor when he took Spanish classes at FLETC, the location to which he was detailed on August 22, 2007. He asserted that his claim was timely filed because Ms. Davila had actual knowledge of his claimed August 22, 2007 injury within 30 days. Appellant stated that physical training was a part of his curriculum at FLETC and that he and other students engaged in it for two hours a day, two or three days per week. He indicated that, in order to graduate from FLETC, he had to meet a minimum time on a one-and-a-half-mile run and noted that, as a CBP official, he was expected to continue his physical training beyond the FLETC academy requirements in order to maintain a level of fitness necessary for law enforcement personnel.⁶ Appellant discussed his daily physical fitness routine of running three miles and performing calisthenics and indicated that, at some point after 5:00 p.m. on August 22, 2007, he sustained cardiac arrest during the running portion of this routine.

Appellant submitted an August 23, 2007 e-mail, which Kevin Livingston sent to more than three dozen individuals, including Barbara Johns, a nurse at the FLETC health unit. The

² Appellant indicated that his cardiac arrest required him to undergo quadruple bypass open heart surgery.

³ The FLETC is located in Glynco, GA. Appellant’s usual duty station was in San Diego, CA.

⁴ Ms. Davila indicated that appellant’s regular hours at FLETC were Monday through Friday, 7:30 a.m. to 4:30 p.m.

⁵ OWCP stated, “It does not appear that you filed your claim in a timely manner.”

⁶ Appellant also indicated that he was injured while engaged in an activity that was voluntary but “nonetheless expected” of CBP officers.

e-mail described how on August 22, 2007 appellant (described as a BSTP student) was found collapsed on a FLETC running track and detailed the emergency medical treatment he received at the FLETC health unit and a local hospital on that date. Another August 23, 2007 e-mail from Ms. Johns to Richard Judy provided further details of appellant's medical treatment on August 22, 2007.⁷

Appellant submitted numerous medical records beginning in August 2007. The records showed that appellant sustained cardiac arrest while running on August 22, 2007 and that he underwent coronary artery bypass surgery on August 27, 2007.

In a September 26, 2013 decision, OWCP denied appellant's claim that he sustained an injury in the performance of duty on August 22, 2007. It found that he had established that he was a federal civilian employee who filed a timely claim and that the injury, accident, or employment factor occurred. However, OWCP further found that appellant had not met a basic element of establishing a claim, *i.e.*, that his claimed injury occurred in the performance of duty. Regarding appellant's failure to establish this element, it stated:

“Specifically, your case is denied because the evidence is not sufficient to establish that the injury and/or medical condition arose during the course of employment and within the scope of compensable work factors. Although you contend you are required to continue your physical training beyond the academy to maintain a certain level of physical fitness, your agency indicated there was no physical fitness program as part of your curriculum. Additionally, if you were a participant of a physical fitness program, you were asked to [provide] a copy of your physical fitness plan and log of your exercise activity performed. However, you failed to do so. Lastly, your injury occurred beyond your usual work hours of 7:30 a.m. to 4:30 p.m. You were not authorized to work at the time of your injury, nor were you performing any duty of your federal employment at the time of injury. In your own words, you would engage in a personal exercise routine beginning with a three mile run.”⁸

LEGAL PRECEDENT

An employee seeking benefits under FECA has the burden of establishing the essential elements of his 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 or medical condition for which compensation is claimed is causally related to the employment injury.⁹

⁷ The Board notes that the employer and work title of Mr. Livingston and the e-mail recipients (other than Ms. Johns) remain unclear from the record.

⁸ OWCP also indicated that, even if appellant established that the claimed injury/event occurred in the performance of duty, he had not submitted medical evidence showing a causal relationship between the injury/event and the claimed medical condition.

⁹ *J.H.*, Docket No. 14-1219 (issued November 24, 2014).

The issue of whether a claim was timely filed is a preliminary jurisdictional issue that precedes any determination on the merits of the claim.¹⁰ In cases of injury on or after September 7, 1974, section 8122(a) of FECA provides that an original claim for compensation for disability or death must be filed within three years after the injury or death. Compensation for disability or death, including medical care in disability cases, may not be allowed if a claim is not filed within that time unless:

“(1) the immediate superior had actual knowledge of the injury or death within 30 days. The knowledge must be such as to put the immediate superior reasonably on notice of an on-the-job injury or death; or

“(2) written notice of injury or death as specified in section 8119 was given within 30 days.”¹¹

FECA provides for payment of compensation for disability or death of an employee resulting from personal injury sustained while in the performance of duty.¹² 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.¹³ To arise in the course of employment, an injury must occur at a time when the employee may reasonably be said to be engaged in his master’s business, at a place when he may reasonably be expected to be in connection with his employment, and while he was reasonably fulfilling the duties of his employment or engaged in doing something incidental thereto.¹⁴

The Board has recognized that FECA covers an employee 24 hours a day when the employee is on travel status and engaged in activities essential or incidental to such duties.¹⁵ When the employee, however, deviates from the normal incidents of his trip and engages in activities, personal or otherwise, which are not reasonably incidental to the duties of the temporary assignment contemplated by the employer, the employee ceases to be under the protection of FECA and any injury occurring during these deviations is not compensable.¹⁶

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 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

¹⁰ *Charles Walker*, 55 ECAB 238 (2004); *Charles W. Bishop*, 6 ECAB 571 (1954).

¹¹ 5 U.S.C. § 8122(a).

¹² *Id.* at § 8102(a).

¹³ *G.N.*, Docket No. 12-261 (issued July 23, 2012).

¹⁴ *Id.*

¹⁵ *S.B.*, Docket No. 10-842 (issued December 9, 2010).

¹⁶ *Id.*

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.”¹⁷

OWCP procedures provide that, although it is a claimant’s responsibility to establish the basic elements of a claim, OWCP has the obligation to aid in this process by giving detailed instructions for developing the required evidence. This includes aiding in developing the evidence with respect to the question of whether the claim was timely filed within the applicable time limitation period of FECA and whether the claimed injury occurred in the performance of duty.¹⁸ Additional evidence may be needed where the official superior disagrees with the claimant’s allegations, has no knowledge of the facts concerning the allegations, or is unable to furnish sufficient details.¹⁹

OWCP procedures also provide that the employee is considered to be in the performance of duty while engaged in formal recreation and either the employee is paid for participating or the recreational activity is required and prescribed as a part of the employee’s training or assigned duties. It is OWCP claims examiner’s responsibility to obtain a statement from the official superior if such a circumstance is claimed.²⁰ Where injuries are sustained while the employee is engaged in a recreational activity under other circumstances, it is necessary to ascertain what benefit, if any, the employing establishment derived from the employee’s participation in the activity, the extent to which the employing establishment sponsored or directed the activity, and whether the employee’s participation was mandatory or optional. OWCP procedures further provide that the claims examiner should require the official superior to submit a statement showing: (1) whether the employee was required to participate in the activity and, if so, the reason for such requirement (as well as whether persuasion was used to influence the employee’s participation if participation was not mandatory); (2) what specific benefit the employer derived from the employee’s participation in the activity (increasing employee morale is not considered a direct benefit); (3) whether other employees were required, persuaded, or permitted to participate in the activity and, if so, this should be explained; (4) whether the employee’s participation in the activity violated any rules or regulations of the employer and, if so, these should be explained, including discussion of the manner in which the rule or regulation was enforced; (5) whether the injury occurred on the employer’s premises and during the employee’s regular working hours and, if not, this should be explained; and (6) what leadership, equipment, or facilities the employer provided for the activity.²¹

¹⁷ *T.E.*, Docket No. 13-99 (issued May 10, 2013).

¹⁸ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Initial Development of Claims*, Chapter 2.800.4a (June 2011).

¹⁹ *Id.* at Chapter 2.800.4b (June 2011).

²⁰ *Id.* at Chapter 2.804.8a (August 1992).

²¹ *Id.* at Chapter 2.804.8b (August 1992).

ANALYSIS

On August 12, 2013 appellant filed a traumatic injury claim alleging that on August 22, 2007 at 5:15 p.m. he sustained a work-related cardiac arrest at the FLETC “outdoor running track by gym.” Regarding the cause of the claimed injury, appellant stated, “While I was detailed to the FLETC as student at the Spanish language academy, I was engaged in physical training at the facility’s running track when I went into full cardiac arrest.” In a September 26, 2013 decision, OWCP denied appellant’s claim on the grounds that he did not establish that he sustained an injury in the performance of duty on August 22, 2007.

The Board finds that the case should be remanded to OWCP for further development as the evidence currently in the case record is not sufficiently detailed to allow for a reasoned decision regarding appellant’s claim for an August 22, 2007 work injury.

In its September 26, 2013 decision, OWCP found that appellant filed his claim within the applicable time limitation period of FECA. However, the Board has held that the issue of whether a claim was timely filed is a preliminary jurisdictional issue that precedes any determination on the merits of the claim.²² The Board notes that the record remains vague with respect to whether appellant filed a timely claim for a work-related injury on August 22, 2007. Appellant asserted that his claim was timely filed because Ms. Davila, his immediate supervisor, had actual knowledge of his claimed August 22, 2007 injury within 30 days. Ms. Davila noted on appellant’s claim form that he suffered a heart attack while running on the track at FLETC to the “best of my recollection,” but she did not provide a clear indication that she gained this awareness within 30 days of August 22, 2007, the claimed date of the injury. While an original claim for compensation for disability or death must be filed within three years after the injury or death, a compensation claim would still be considered timely if the immediate superior had actual knowledge of the injury within 30 days.²³

If the claim is found to be timely, the record also lacks sufficient detail regarding whether appellant’s claimed August 22, 2007 injury occurred within the performance of duty. Appellant asserted that engaging in a physical fitness regimen, such as the regimen he performed on August 22, 2007, was part of his curriculum at FLETC and stated that, even if these activities were considered to be voluntary, they were “nonetheless expected” of CBP officers. Ms. Davila merely noted that appellant’s Spanish language program “had no physical fitness program as part of the curriculum” without providing any explanation of whether engaging in a physical fitness regimen was otherwise required by the FLETC program or whether students such as appellant were encouraged to participate in a physical fitness regimen. Gaining additional information on this matter is especially important because it appears that appellant was on travel status at the time of his claimed August 22, 2007 injury.

OWCP procedures indicate that, when the evidence of record is unclear with respect to the performance of duty in recreational/fitness activity cases, OWCP should request additional information from the employing establishment. This would include information about whether a

²² See *supra* note 10.

²³ See *supra* note 11.

given recreational or fitness-related activity was required as a part of the employee's training or assigned duties or, where injuries were sustained while the employee is engaged in a recreational activity under other circumstances, whether the employing establishment gained a substantial benefit from the employee's participation in the activity, whether the employing establishment sponsored or directed the activity, and whether the employee's participation was mandatory or optional.²⁴

Under FECA, although it is the burden of an employee to establish his or her claim, OWCP also has a responsibility in the development of the factual evidence, particularly when such evidence is of the character normally obtained from the employing establishment or other government source.²⁵

For these reasons, the case shall be remanded to OWCP for further development, to include an attempt to obtain the above-detailed information in accordance with its procedure and the relevant precedent. After carrying out this development, OWCP shall issue an appropriate decision regarding appellant's claim for an August 22, 2007 work injury.

CONCLUSION

The Board finds that the case is not in posture for decision regarding whether appellant met his burden of proof to establish that he sustained an injury in the performance of duty on August 22, 2007.

²⁴ See *supra* notes 20 and 21.

²⁵ *Willie A. Dean*, 40 ECAB 1208 (1989).

ORDER

IT IS HEREBY ORDERED THAT the September 26, 2013 decision of the Office of Workers' Compensation Programs is set aside and the case remanded to OWCP for further proceedings consistent with this decision of the Board.

Issued: February 2, 2015
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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