

FACTUAL HISTORY

On July 23, 2012 appellant, then a 48-year-old foreign service officer, filed a traumatic injury claim (Form CA-1) alleging that he sustained injuries in the performance of duty on May 31, 2012. In a June 26, 2012 statement, he claimed that he was pushed into a swimming pool during a “management event” and his left knee struck the concrete floor of the swimming pool. Appellant stated that he returned to the office and continued to work through the end of the day, but then the next day he had to take an overnight flight to the United States for a permanent change of duty station. He indicated that he had pain in his right leg, hip, and back, and he was diagnosed with an L5-S1 herniated disc. Appellant stated that he believed his left knee hitting the concrete as well as moving heavy bags during his travel had contributed to his herniated disc.

In response to questions from OWCP, the employing establishment stated that the May 31, 2012 event was a farewell party for departing officers, which included appellant. It indicated that the party was held at a recreational center managed by the U.S. Embassy, with him and his staff encouraged, but not required, to attend. According to the employing establishment, the event was held during working hours, from 3:00 p.m. to 5:00 p.m. on a Friday, and was meant to be a team building exercise.

In support of his claim appellant submitted medical evidence including a June 12, 2012 report from Dr. David Ebelke, a Board-certified orthopedic surgeon. Dr. Ebelke provided a history that appellant’s move back into the U.S. had involved a lot of baggage lifting, travel on airplanes, and moving through airports. He indicated that appellant was seen for low back, right hip, and radiating right leg pain.

By decision dated September 5, 2012, OWCP denied the claim for compensation. It found that there were inconsistencies as to how the injury occurred. OWCP found that while appellant had reported being pushed into a pool, Dr. Ebelke had referred to lifting luggage and other travel activities.

Appellant requested a review of the written record by an OWCP hearing representative in a letter dated October 2, 2012. He stated that he had explained how he had been pushed into the pool and struck his left knee. Appellant submitted a June 18, 2012 treatment note from Dr. Ebelke, noting that appellant had been thrown in a pool and struck his left knee. Dr. Ebelke noted that it was possible that the fall in the pool had precipitated the disc herniation, as it was not unusual for radicular symptoms to appear a day or two after a herniation occurs.

By decision dated January 22, 2013, the hearing representative found the May 31, 2012 incident did not occur in the performance of duty. The hearing representative cited Board precedent with respect to recreational or social activities, and found that appellant was in travel status, attending a voluntary event, with no benefit to the employing establishment.

On September 10, 2013 appellant submitted an August 28, 2013 letter requesting reconsideration. He argued that he was not in travel status on May 31, 2012. In addition, appellant argued that it was not a voluntary event, as it was an official farewell event to honor departing officers. He noted that it was during office hours and on employing establishment

premises, and argued that the employing establishment does derive a benefit from such farewell events.

By decision dated November 21, 2013, OWCP reviewed the merits of the claim and denied modification. It found that the May 31, 2012 incident was a recreational activity not in the performance of duty.

On November 20, 2014 appellant, through his counsel at the time, requested reconsideration and submitted a November 17, 2014 letter.² He reviewed the factual history and prior OWCP decisions. Appellant argued that recreational or social activities are within the course of employment when they occur on the premises during a lunch or recreational period as a regular incident of the employment, when the employing establishment expressly or impliedly requires participation, or when the employing establishment derives substantial direct benefits from the activity beyond the intangible value that is common to all kinds of recreation and social life. According to appellant, OWCP had denied the claim because there was no substantial benefit to the employing establishment in this case. Appellant asserted that OWCP had not properly considered its Federal (FECA) Procedure Manual, Part 2 -- Claims, *Performance of Duty*, Chapter 2.804.8 (August 1992) regarding recreational activity claims. He argued that the manual provided two different scenarios: Section (a) deals with an employee who is 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.” Section (b) addresses employees “engaged in a recreational activity under other circumstances.” The substantial and direct benefit to the employing establishment is only considered under section (b) whereas the present case fell under section (a).

Appellant further argued that even if the substantial benefit analysis was applied, the case cited by OWCP was distinguishable from the present case. He stated that in *Barbara Roy*,³ the Board addressed voluntary participation after work hours, while the present case was during work hours and was not voluntary. Appellant also discussed the Foreign Affairs Manual covering appellant and other employees, and a Community Liaison Office (CLO), whose responsibility was to implement recreational and social activities for post employees. It was argued that the establishment of the CLO indicated the importance and benefit to the employing establishment of recreational activities. Appellant submitted an employing establishment “report of mishap” with respect to the May 31, 2012 incident and argued that the evidence of record demonstrated that the injury occurred in the performance of duty.

By decision dated December 1, 2014, OWCP denied merit review of the claim. It found that appellant had not met any of the standards to require a merit review of the claim for compensation.

² Appellant had not previously been represented by counsel, and is not represented on appeal.

³ 42 ECAB 960 (1991).

LEGAL PRECEDENT

To require OWCP to reopen a case for merit review under section 8128(a) of FECA,⁴ OWCP regulations provide that a claimant may obtain review of the merits of the claim by submitting a written application for reconsideration that sets forth arguments and contains evidence that either: “(1) shows that OWCP erroneously applied or interpreted a specific point of law; (2) advances a relevant legal argument not previously considered by OWCP; or (3) constitutes relevant and pertinent evidence not previously considered by OWCP.”⁵ 20 C.F.R. § 10.608(b) states that any application for review that does not meet at least one of the requirements listed in 20 C.F.R. § 10.606(b)(3) will be denied by OWCP without review of the merits of the claim.⁶

ANALYSIS

The claim in this case was denied based on a finding by OWCP that appellant was not in the performance of duty on May 31, 2012 when he was pushed into a pool, during work hours, at an Embassy event for departing Foreign Service officers. OWCP found that he was involved in a voluntary recreational activity that was not covered under FECA.

As noted above, a claimant is entitled to a decision on the merits of the claim if he advances a relevant legal argument not previously considered by OWCP. The Board finds that appellant submitted a reconsideration request that advanced new and relevant legal arguments. On reconsideration appellant argued, for the first time, that under OWCP procedures regarding recreation he would be covered for any injury resulting from the May 31, 2012 incident. Appellant discussed Federal (FECA) Procedure Manual, Part 2 -- Claims, *Performance of Duty*, Chapter 2.804.8 (August 1992). Section (a) states that a claimant is in the performance of duty if injured while engaged in a recreational activity organized and directed by the employing establishment and the claimant was paid to participate, or the activity was required as part of assigned duties or training. Section (b) discusses recreational activity under other circumstances.

In its December 1, 2014 decision, OWCP acknowledged that appellant raised the argument, but did not consider the argument under the standard of “advances a relevant legal argument not previously considered by OWCP” to determine whether he was entitled to a merit review. Appellant has clearly raised a new and relevant legal argument with respect to the provisions of OWCP procedure manual regarding recreational activity. He argued that the procedure manual provides a framework with respect to recreational or social activity, and OWCP did not follow its procedure manual. Appellant also raised a new argument that even if a substantial benefit to the employing establishment analysis was applied, OWCP had not properly applied Board case law.

⁴ 5 U.S.C. § 8128(a) (providing that “[t]he Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application”).

⁵ 20 C.F.R. § 10.606(b)(3).

⁶ *Id.* at § 10.608(b); *see also Norman W. Hanson*, 45 ECAB 430 (1994).

For the above reasons, the Board finds that appellant has advanced relevant legal arguments not previously considered by OWCP with respect to the primary legal issue raised in this case. Pursuant to 20 C.F.R. § 10.606(b)(3), appellant was entitled to a review of the merits of his claim for compensation. The case will be remanded for a proper merit decision.

CONCLUSION

The Board finds that appellant's application for reconsideration was sufficient to warrant a merit review of the claim for compensation.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated December 1, 2014 is set aside and the case remanded for further action consistent with this decision of the Board.

Issued: January 27, 2016
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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