United States Department of Labor
Employees' Compensation Appeals Board

M.C., Appellant	)	
and	)	**Docket No. 16-0824**
	)	**Issued: September 1, 2016**
DEPARTMENT OF THE ARMY, PICATINNY ARSENAL, NJ, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
PATRICIA H. FITZGERALD, Deputy Chief Judge
COLLEEN DUFFY KIKO, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On March 15, 2016 appellant filed a timely appeal from October 6, 2015 and February 18, 2016 merit decisions of the Office of Workers' Compensation Programs (OWCP). 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 an injury in the performance of duty on June 22, 2015.

FACTUAL HISTORY

On June 24, 2015 appellant, then a 31-year-old mechanical engineer, filed a traumatic injury claim (Form CA-1) alleging that at 5:45 p.m. on June 22, 2015 he injured his left Achilles tendon while playing in an intramural softball game.

[1] 5 U.S.C. § 8101 *et seq.*

In a report dated June 23, 2015, Dr. Philip D'Ambrosio, a Board-certified orthopedic surgeon, described a history that appellant ruptured his left Achilles tendon while playing softball. Following physical examination, the physician recommended surgery, which would require six to eight weeks of recovery plus physical therapy. On July 1, 2015 Dr. D'Ambrosio surgically repaired a traumatic tear of the left Achilles tendon. He submitted follow-up reports and on August 13, 2015 advised that appellant could return to work on August 22, 2015. On an attending physician's report dated August 13, 2015, Dr. D'Ambrosio reported that appellant injured his left Achilles tendon at a company ball game. He checked a form box marked "yes," indicating that the condition was employment related.

Appellant returned to full-time regular duty with no restrictions on August 24, 2015. He filed a claim for compensation (Form CA-7) on August 24, 2015, for the period August 7 to 21, 2015. The employing establishment indicated that he had received continuation of pay from June 23 to August 6, 2015. Dr. D'Ambrosio provided follow-up care.

By letter dated August 28, 2015, OWCP informed appellant of the evidence needed to support his claim. In a separate letter, it requested that the employing establishment provide information regarding the circumstances of the claimed June 22, 2015 injury.

In a statement dated September 15, 2015, appellant indicated that he was not required to participate in the June 22, 2015 softball game, that it was an optional activity run by the employing establishment's Morale, Welfare, and Recreation (MWR) program, which provided activities to help maintain a healthy and good work environment. He further related that the game, which was played on a field maintained by MWR on the employing establishment's premises, did not occur during regular working hours, but after work. Appellant advised that MWR provided the rules and equipment, organized the schedules, and indicated that all games were played on employing establishment fields.

On September 24, 2015 John F. Kostka, an employing establishment manager, answered OWCP's questions regarding the June 22, 2015 injury. He advised that appellant was not required to participate in the activity which, he assumed, was for employee morale. Mr. Kostka related that all employees were permitted, but not required to participate, and that the claimed injury did not occur during working hours, but after work. He concluded that the employing establishment provided leadership, equipment, and facilities.

By decision dated October 6, 2015, OWCP denied the claim, finding that appellant was not in the performance of duty when injured on June 22, 2015. OWCP explained that the evidence of record was insufficient to establish that the claimed condition arose during the course of employment and within the scope of compensable work factors, noting that he was not required to participate in the softball game which occurred after his regular working hours.

On December 4, 2015 appellant requested reconsideration. He maintained that the claimed injury occurred in the performance of duty, relating that the softball league was a formal recreation activity provided by MWR for both civilians and military personnel, and that all games were played on employing establishment premises. Appellant cited the case *Mary A.*

Minter[2] in support of his claim. He submitted a September 29, 2015 report in which Dr. D'Ambrosio advised that appellant reported a history that, while at work on June 22, 2015, he injured his Achilles tendon running bases at a softball game. Dr. D'Ambrosio described appellant's medical treatment, including the July 1, 2015 surgery, and postoperative care. He opined that the injury clearly occurred during the sporting event and that, it appeared to him, if this was a sponsored event the claim should be accepted. Dr. D'Ambrosio continued to provide follow-up care. The record also includes hospital records of appellant's ambulatory surgery on July 1, 2015.

In a February 18, 2016 decision, OWCP denied modification of the October 6, 2015 decision. It found that the June 22, 2015 injury did not occur in the performance of duty, noting that it was a recreational activity that was not a requirement of employment and that his employing establishment did not incur a benefit from his participation beyond boosting morale.

LEGAL PRECEDENT

An employee seeking benefits under FECA has the burden of proof to establish 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 traumatic injury or occupational disease, an employee must satisfy this burden of proof.[3]

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.[4] 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.[5] "Arising in the course of employment" relates to the elements of time, place, and work activity. To arise in the course of employment, an injury must occur at a time when the employee may reasonably be stated to be engaged in her master's business, at a place where he or she may reasonably be expected to be in connection with the employment and while he or she was reasonably fulfilling the duties of employment or engaged in doing something incidental thereto. This alone, however, is not sufficient to establishment entitlement to compensation. The employee must also establish the concurrent requirement of an injury "arising out of the employment." This requires that a factor of employment caused the injury.[6]

[2] 52 ECAB 127 (2000).

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

[4] 5 U.S.C. § 8102(a).

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

[6] *R.S.*, 58 ECAB 660 (2007).

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.[7] 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.[8] The second component is whether the employment incident caused a personal injury which generally can be established only by medical evidence.[9]

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.[10]

The mere fact that a claimant was on the premises at the time of injury is not sufficient to establish entitlement to compensation benefits. It must also be established that the claimant was engaged in activities which may be described as incidental to the employment, *i.e.*, that he or she was engaged in activities which fulfilled his employment duties or responsibilities thereto.[11]

ANALYSIS

The Board finds that appellant had failed to meet his burden of proof to establish an injury in the performance of duty on June 22, 2015.

While the facts indicate that appellant was on the employing establishment premises when he injured his left Achilles tendon on June 22, 2015 while playing softball, the injury did not occur during a lunch or recreational period as a regular incident of his employment. By his own admission, the softball game was played after work. Thus, while appellant met the premises

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

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

[9] *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).

[10] *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*, 44 ECAB 176 (1992); *see also* A. Larson, *The Law of Workers' Compensation* § 22.00 (2012).

[11] *A.K.*, Docket No. 09-2032 (issued August 3, 2010).

aspect of the first test, he did not meet the time aspect of the first test for coverage of recreational activities.[12]

With respect to an express or implied requirement to participate in the activity, appellant acknowledged and Mr. Kostka indicated that appellant was not required to participate in the softball game, nor was softball part of his work or tasks incidental to his work. Rather, softball was merely a recreational activity provided for employee morale. Even though the employing establishment provided equipment and facilities and set the schedule for the games, the record supports that this was part of the employing establishment's MWR program.

There is no evidence of record to show that participation in the activity was made part of the services of appellant. When the degree of employing establishment involvement descends from compulsion to mere sponsorship or encouragement, the questions become closer and the tests include whether the employing establishment sponsored or financed the event and whether attendance was voluntary.[13] However, there is no evidence that the employing establishment encouraged appellant's activity as part of his employment, and its involvement must be considered *de minimis* and insufficient to bring the activity within the course of employment.[14] Accordingly, there is no evidence that the second test has been met.

With respect to the third test, Mr. Kostka essentially indicated that the only benefit to the employing establishment was related to employee morale and well-being. No evidence in the record suggests that the activity was related in any notable way to the employing establishment's business. Consequently, there is no evidence that the employing establishment derived substantial direct benefit from the activity beyond that intangible value of improvement in employee health and morale that is common to all kinds of recreational activity.[15]

Considering these various factors, the Board finds that the evidence of record does not show that appellant's activities on June 22, 2015 at the time of his claimed injury constituted recreational activities within the performance of duty.[16]

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 June 22, 2015.

[12] *Ricky A. Paylor, supra* note 10.

[13] *See Kenneth B. Wright, supra* note 10.

[14] *Ricky A. Paylor, supra* note 10.

[15] *Id*.

[16] As to appellant's reliance on *Minter, supra* note 2, in that case the Board found that appellant had failed to establish that an injury during a volleyball game occurred in the performance of duty.

ORDER

IT IS HEREBY ORDERED THAT the February 18, 2016 and October 6, 2015 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: September 1, 2016
Washington, DC

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board