United States Department of Labor
Employees' Compensation Appeals Board

J.M., Appellant	)	
and	)	**Docket No. 16-1418**
	)	**Issued: September 20, 2017**
DEPARTMENT OF COMMERCE, PATENT & TRADEMARK OFFICE, Alexandria, VA, 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
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On June 27, 2016 appellant timely filed an appeal from a February 3, 2016 merit decision 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 established an injury in the performance of duty on May 12, 2015.

FACTUAL HISTORY

On June 5, 2015 appellant, then a 31-year-old patent examiner, filed a traumatic injury claim (Form CA-1) alleging that on May 12, 2015 at 12:00 p.m., he sustained a left ankle injury while playing soccer with coworkers at Onelife Fitness Gym in Alexandria, Virginia. His

[1] 5 U.S.C. § 8101 *et seq.*

regular tour of duty was 8:00 a.m. to 5:00 p.m., Monday through Friday. Appellant stopped work on May 12, 2015 and resumed work on May 15, 2015. On Form CA-1, the employing establishment indicated that he was not in the performance of duty at the time of the alleged incident. It further noted that the incident occurred off-site and was unrelated to any performance appraisal plan (PAP) element.

On May 12, 2015 appellant was treated in the Inova Fairfax Hospital emergency room (ER), where he received a diagnosis of left ankle sprain. The ER records reflect that at noon that day, appellant was "playing soccer at work gym" and was kicked in the left lateral ankle by another player. Additional medical evidence submitted with the claim included reports from Dr. Richard S. Mendelsohn, a podiatrist, dated June 10, July 8 and 22, 2015. Dr. Mendelsohn noted a May 11, 2015 history of injury of being kicked in the ankle while playing soccer. He diagnosed left ankle tendinitis. OWCP also received physical therapy notes from June 18 through July 21, 2015.

In an August 18, 2015 claim development letter, OWCP advised appellant of the factual and medical evidence needed to establish his claim. It specifically asked him to provide information regarding his off-premises activities at the time of his May 12, 2015 injury. OWCP inquired whether the recreational activity or physical fitness program was mandatory or voluntary. Additionally, it asked whether appellant participated in an agency physical fitness plan (PFP), and if he had been medically cleared to participate. OWCP requested similar information from the employing establishment regarding appellant's May 12, 2015 recreational and/or physical fitness activities.

In a September 8, 2015 statement, appellant indicated that the employing establishment had a contract with Onelife Fitness gym, and that he and his coworkers used the facility every Tuesday from 11:00 a.m. to 2:00 p.m. for an employee soccer game. He also indicated that he had been playing soccer along with other patent examiners at that same gym for approximately two years. Appellant stated that participation for the soccer game was "optional." He also noted that there were signs in the employing establishment's physical fitness gym "to join the [Tuesday] soccer games…."

In a September 11, 2015 response to OWCP's questions, the employing establishment indicated that appellant was not required to participate in a physical fitness program or any other recreational activity, and that he was not participating in an agency PFP. It stated it did not provide any leadership, equipment or facilities for employee physical fitness or recreation and that it did not derive any benefit from the employee's participation in the activity.

OWCP also received a May 12, 2015 left ankle x-ray that revealed no fracture or dislocation. However, there was a suggestion of a slight widening of the distal tibiofibular syndesmosis.

In a September 17, 2015 decision, OWCP denied appellant's claim finding that he was not in the performance of duty when injured on May 12, 2015. The decision noted that according to the employing establishment, appellant's participation in the soccer game was not related to his employment as a patent examiner, nor was he "required, persuaded, or permitted to participate in the activity."

Appellant timely requested a review of the written record before the Branch of Hearings and Review.

By decision dated February 3, 2016, the hearing representative affirmed OWCP's September 17, 2015 denial of the claim. He found that the May 12, 2015 incident occurred off-premises and that the employing establishment did not require employees to participate. The hearing representative also noted that there was no evidence that the employing establishment derived any benefit from appellant's participation in the weekly soccer game, apart from the intangible health or morale value. He further found that the activity was not part of an employing establishment sponsored physical fitness program. Additionally, while the employing establishment subsidized the activity at Onelife Fitness, the hearing representative found that providing gym access on a voluntary basis was insufficient, by itself, to place the activity in the course of employment.

LEGAL PRECEDENT

FECA provides for payment of compensation for disability or death of an employee resulting from personal injury sustained while in the performance of duty.[2] 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.[3] 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 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.

As to the phrase in the course of employment, the Board has accepted the general rule of workers' compensation law that, as to employees having fixed hours and places of work, injuries occurring on the premises of the employing establishment, while the employees are going to or from work, before or after working hours, at lunch time, or on authorized break are compensable.[4]

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] 5 U.S.C. § 8102(a).

[3] This construction makes the statute effective in those situations generally recognized as properly within the scope of workers' compensation law. *Bernard D. Blum*, 1 ECAB 1 (1947).

[4] *Narbik A. Karamian*, 40 ECAB 617, 618 (1989). The Board has also applied this general rule of workers' compensation law in circumstances where the employee was on an authorized break. *See Eileen R. Gibbons*, 52 ECAB 209 (2001).

"(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."[5]

ANALYSIS

At 12:00 p.m. on May 12, 2015 appellant injured his left ankle while participating in a weekly soccer game with fellow employees at an off-premises gym. The incident occurred at the time, place, and in the manner alleged. OWCP's hearing representative denied appellant's claim because his injury was not sustained while in the performance of duty. The Board finds that appellant has not established that he was in the performance of duty when injured on May 12, 2015.

Although appellant's May 12, 2015 injury occurred during a lunch or recreational period, he was off-premises at a private gym, Onelife Fitness, when injured. In his September 8, 2015 statement, appellant acknowledged that his May 12, 2015 injury occurred off-premises. However, he claimed that the employing establishment had a contract with Onelife Fitness, and thus, provided access to the facility where he was injured. In a September 11, 2015 response, the employing establishment indicated that appellant was injured off-premises and that it had not provided "leadership, equipment, or facilities" to appellant "for the activity" in question. Appellant has not submitted any evidence to substantiate his claim that the employing establishment had a contract with Onelife Fitness. Accordingly, his off-premises lunchtime injury does not meet the first of three elements in determining whether a recreational or social activity arose in the performance of duty.[6]

A recreational or social activity may also be considered to have arisen in the course of employment when the employer either expressly or implicitly requires participation, or by making the activity part of the service of the employee. However, in this instance appellant's participation in the off-premises weekly soccer game was strictly voluntary, or as he described it, "optional."[7] Although employees were ostensibly encouraged to join in the weekly soccer games, as evidenced by signs posted in the employing establishment's on-premises physical fitness center, appellant's use of the off-premises gym and his participation in the weekly soccer game were voluntary. Additionally, there is no indication from the record that appellant was required to participate in an agency PFP. Appellant's position as a patent examiner did not

[5] *See T.E.*, Docket No. 13-99 (issued May 10, 2013); *Lawrence J. Kolodzi*, 44 ECAB 818, 822 (1993); *see also* A. Larson, *The Law of Workers' Compensation* § 22.00 (2015).

[6] *See H.S.*, 55 ECAB 554, 558 (2007).

[7] The Board has noted that when the degree of employing establishment involvement descends from compulsion to mere sponsorship or encouragement, the questions become closer, and the test includes whether the employing establishment sponsored or financed the activity and whether attendance was voluntary. *C.C.*, Docket No. 13-2177 (issued April 2, 2014); *Kenneth B. Wright*, 44 ECAB 176, 183 (1992).

require a physical fitness routine as either an express or implied requirement of employment.[8] The employing establishment indicated as much in its September 11, 2015 statement.

Finally, there is no evidence that the employing establishment derived substantial direct benefit from the employees' weekly soccer game beyond the intangible value of improving employee health and morale that is common to all kinds of recreation and social life. The intangible value of improved health or morale, in and of itself, does not bring a recreational activity within the orbit of employment.[9]

On appeal appellant reiterates that he was in the performance of duty at the time of the injury. For the above-noted reasons, the Board finds that he failed to establish that he sustained an injury in the performance of duty on May 12, 2015.

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 has not established an injury in the performance of duty on May 12, 2015.

[8] *See J.L.*, Docket No. 12-947 (issued March 11, 2013) (a law enforcement officer was in the performance of duty while exercising at a private health facility approved by his employing establishment during his work shift; however, the claim was denied as the medical evidence was insufficient to establish causal relationship). *Cf. C.C.*, *supra* note 7 (a special agent/criminal investigator was not injured in the performance of duty as the injury did not occur during regular work hours, on the employing establishment's premises, or during the course of participation in a physical fitness program).

[9] *J.S.*, Docket No. 15-510 (issued June 20, 2015); *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); *see also* Arthur Larson, *The Law of Workers' Compensation* § 22.00 (2012).

ORDER

IT IS HEREBY ORDERED THAT the February 3, 2016 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 20, 2017
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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