United States Department of Labor
Employees' Compensation Appeals Board

P.R., Appellant	)	
and	)	**Docket No. 17-1038**
	)	**Issued: September 22, 2017**
DEPARTMENT OF THE TREASURY, INTERNAL REVENUE SERVICE, Richmond, VA, Employer	)	

Appearances:
Alan J. Shapiro, Esq., for the appellant[1]
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 April 12, 2017 appellant, through counsel, filed a timely appeal from a March 20, 2017 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[2] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

[1] In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.; see also* 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

[2] 5 U.S.C. § 8101 *et seq.*

ISSUE

The issue is whether appellant met her burden of proof to establish an injury in the performance of duty on March 29, 2016.

FACTUAL HISTORY

On March 29, 2016 appellant, then a 50-year-old computer assistant, filed a traumatic injury claim (Form CA-1) alleging that on that date she started the treadmill at the fitness center located at the employing establishment and the machine automatically accelerated to "91." She attempted to stop the treadmill, but could not, causing her to fall off the back. Appellant stated that her left knee and leg were injured and that she was scheduled for surgery to repair a fracture.

By letter dated April 5, 2016, OWCP informed appellant that further information was necessary to support her claim. It noted that the evidence was insufficient to support that she was injured while performing employment duties and that she had not submitted any medical evidence to support her claim. OWCP also provided appellant a list of questions to answer. It afforded her 30 days to submit this information.

In an undated and unsigned typed document with a handwritten caption, "Managers Response to DOL letter," the author indicated that appellant was performing in an "acting supervisor role" and was permitted to adjust her break schedule. The author further noted that the fitness center was open for use by all employees and that currently the fitness center was not being used for any agency-sponsored activity, nor was the agency providing leadership for activity during personal use of the fitness center.

In an April 18, 2016 response to OWCP's development letter, appellant stated that she was not required to participate in the specific activity, but that she was on her required break which was paid for by the government. She also alleged that the employing establishment provided employees information on health tips and that walking was one health tip. With regard to questions about whether appellant was participating in an agency fitness plan, whether the employing establishment derived benefits from her participation in the activity, or whether other employees were required or persuaded to participate in the activity, appellant indicated that these questions were not applicable. She noted that the injury occurred on her last 15-minute break at 7:05 a.m.

The medical evidence establishes that on March 29, 2016 appellant received treatment for the treadmill fall by Dr. Mateusz Ciejka, an emergency room physician, who diagnosed acute left tibial plateau fracture and acute head contusion with no loss of consciousness. On March 31, 2016 Dr. Paul J. Dougherty, a Board-certified orthopedic surgeon, performed an open reduction and internal fixation of the left proximal tibia.

By decision dated May 13, 2016, OWCP denied appellant's claim, finding that the medical evidence of record did not demonstrate that the claimed medical condition was causally related to the established work events. It determined that the incident occurred while in the performance of duty as it took place during a regularly scheduled work break at the employing establishment's exercise facility.

On June 8, 2016 appellant, through counsel, requested a telephonic hearing before an OWCP hearing representative. Appellant submitted additional medical evidence.

At the hearing held on February 15, 2017, appellant testified that she has worked as a computer assistant for the employing establishment since 2004. She testified that her usual work hours were from 11:30 p.m. to 8:00 a.m., that she was allowed two 15-minute breaks and a half an hour for lunch, and was permitted to take those breaks at her discretion. Appellant testified that the workout facilities were located in the building where she was stationed, that management encouraged the use of the fitness center, and that management sent out notices and information on staying fit. She also noted that a nurse was on staff and encouraged employees to exercise. Appellant testified that it was common for her to use exercise equipment during breaks or lunch. Counsel argued that appellant was encouraged by the employing establishment to use the fitness facility, that she had been doing it for a number of years, that she worked out with coworkers and management, and that exercise was a good stress reliever.

By decision dated March 20, 2017, the hearing representative determined that appellant was not in the performance of duty at the time of the alleged injury. The hearing representative affirmed the May 13, 2015 decision, as modified.

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.[3] 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.[4] Arising out of the employment tests the causal connection between the employment and the injury; arising in the course of employment relates to the time, place, and work activity involved.[5] For the purposes of determining entitlement to compensation under FECA, arising in the course of employment, *i.e.*, performance of duty, must be established before arising out of employment, *i.e.*, causal relation, can be addressed.[6]

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 a part of the service of the employee, brings the activity within the orbit of employment; or

[3] *Id.* at § 8102(a).

[4] *See Bernard D. Blum*, 1 ECAB 1 (1947).

[5] *See Eugene G. Chin*, 39 ECAB 598, 601-02 (1988); *Clayton Varner*, 37 ECAB 248, 250 (1985).

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

"(3) The [employing establishment] derives substantial direct benefit from the activity beyond the intangible value of improvement in employee health and moral that is common to all kinds of recreation and social life."[7]

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 her employment duties or responsibilities thereto.[8]

ANALYSIS

Appellant alleged that she sustained an injury to her left leg and knee in the performance of duty on March 29, 2016 when she fell off a treadmill while taking a break in the employing establishment's fitness center. OWCP denied appellant's claim by decision dated May 13, 2016, finding that the medical evidence of record was insufficient to establish an injury causally related to the accepted incident. Appellant subsequently requested a hearing. The hearing representative denied appellant's claim, finding that she was not in the performance of duty at the time of her March 29, 2016 accident.

The Board finds that appellant has failed to meet her burden of proof to establish an injury in the performance of duty on March 29, 2016.

Although appellant's injury occurred on the premises of the employing establishment,[9] appellant has not established that the injury occurred during an authorized break period or as a regular incident of her employment.[10] OWCP procedures provide that employees who are injured while exercising or participating in a recreational activity during authorized lunch or break periods in a designated area of the employing establishment premises have the coverage of FECA whether or not the exercise or recreation was part of a structured fitness program.[11] Appellant's injury occurred at 7:05 a.m. less than one hour before the end of her regular work shift.[12] While appellant has alleged that she was allowed to take her breaks at her discretion, the evidence she submitted in support of this allegation consisted of an unsigned, undated document

[7] *See Lawrence J. Kolodzi*, 44 ECAB 818, 822 (1993); *see also* A. Larson, *The Law of Workers' Compensation* § 22.00 (2015).

[8] *M.C.*, Docket No. 16-0824 (issued September 1, 2016); *A.K.*, Docket No. 09-2032 (issued August 3, 2010).

[9] In *R.P.*, Docket No. 10-1174 (issued January 19, 2011) the claimant was injured while jogging during a 10-minute break on the employing establishment's premises. OWCP determined however that the injury did not occur as a regular incident of appellant's employment. It noted that there was no indication that the employing establishment required or sponsored recreational activities during break periods.

[10] *See Ricky A. Paylor*, 57 ECAB 568 (2006).

[11] *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Performance of Duty*, Chapter 2.804.18(b) (March 1994).

[12] Appellant's regular work hours were 11:30 p.m. to 8:00 a.m.

entitled "[Manager's] Response to DOL letter." She has, therefore, not established that she was on an authorized break at the time of injury.[13]

At the time of the accident appellant was not engaged in activities which were incidental to her employment duties or responsibilities.[14] She acknowledged in her April 18, 2016 statement that she was not participating in any employing establishment physical fitness program at the time of injury. The Board also notes that there is no evidence that exercising in the fitness center was related in any way to the employing establishment's business.[15]

The Board further finds that appellant has not established an express or implied requirement to participate in the treadmill activity. The evidence of record reveals that participation in the activity was purely voluntary on the part of appellant. Although appellant alleged that the employing establishment encouraged physical fitness, such encouragement would not bring appellant's activities within the performance of duty as the employing establishment had neither expressly nor impliedly required participation or made it part of appellant's service as a computer assistant.

Finally, the Board also finds that the evidence of record does not establish that the employing establishment derived any direct benefit from the activity beyond the intangible value of improvement in health and morale that is common to all kinds of recreation and social life.[16]

For these reasons, appellant has not met her burden of proof to establish an employment-related injury in the performance of duty on March 29, 2016.[17]

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 met her burden of proof to establish an injury in the performance of duty on March 29, 2016.

[13] *B.P.*, Docket No. 14-0411 (issued July 17, 2014); *see also K.M.*, Docket No. 10-1350 (issued March 1, 2011).

[14] *M.C.*, *supra* note 8.

[15] *Supra* note 8.

[16] *Archie L. Ransey*, 40 ECAB 1251 (1989); *see also Z.C.*, Docket No. 12-330 (issued June 19, 2012).

[17] As appellant has not established an injury in the performance of duty, it is not necessary to discuss the probative value of the medical evidence. *See C.R.*, Docket No. 17-0065 (issued March 28, 2017); *see also Tracey P. Spillane*, 54 ECAB 608 (2003).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated March 20, 2017 is affirmed.

Issued: September 22, 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