United States Department of Labor
Employees' Compensation Appeals Board

S.B., Appellant	)	
and	)	**Docket No. 19-1136**
	)	**Issued: November 22, 2019**
DEPARTMENT OF VETERANS AFFAIRS, VETERANS ADMINISTRATION CENTRAL OFFICE, Washington, DC, Employer	)	

Appearances:
Paul H. Felser, 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
JANICE B. ASKIN, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On April 25, 2019 appellant, through counsel, filed a timely appeal from a November 14, 2018 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.[3]

[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.*

[3] The Board notes that appellant submitted additional evidence on appeal. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

ISSUE

The issue is whether appellant has met her burden of proof to establish an injury in the performance of duty on March 17, 2016, as alleged.

FACTUAL HISTORY

On September 14, 2016 appellant, then a 53-year-old program manager of identity, credential, and access management, filed a traumatic injury claim (Form CA-1) alleging that at 12:15 p.m. on March 17, 2016 she sustained permanent hearing damage and tinnitus in both ears while in the performance of duty. She reported that her injury occurred when a very loud, sustained squealing noise emitted from a speaker. On the reverse side of the claim form, the employing establishment indicated that appellant was injured in the performance of duty.

To support her claim appellant submitted several e-mails. A February 22, 2016 e-mail described a six-week team building activity called March Mayhem Challenge, which encouraged physical activity, camaraderie, and wellness. In e-mails dated March 24 and 25, 2016, appellant informed S.J., a wellness fitness coordinator at the employing establishment, that she had experienced ringing in her ears ever since "that loud noise in the gym class." In e-mails dated September 13 and 14, 2016, appellant requested information about how to file a claim for a work injury at the Veterans Affairs Central Office (VACO). She related that, after several trips to a specialist, she was advised that the damage to her ears was permanent.

OWCP also received medical reports by Dr. Thomas Lee, a Board-certified otolaryngologist. In an initial April 8, 2016 report, Dr. Lee recounted that appellant was exposed to loud noise last month at the gym and now had tinnitus. He reviewed her history and conducted audiometric and tympanogram testing. Dr. Lee diagnosed comprehensive diagnosed sensorineural hearing loss in both ears and tinnitus of both ears. He continued to treat appellant and provided medical reports dated May 23 and August 22, 2016. In a development letter dated September 30, 2016, OWCP informed appellant of the factual and medical deficiencies of her claim. It provided a questionnaire for her completion regarding the circumstances of her claimed March 17, 2016 injury, including whether she was on the employing establishment premises at the time and whether she was performing her regularly assigned duties. OWCP also requested that appellant provide a narrative medical report from her physician explaining how the reported work incident caused or aggravated her medical condition. In a separate development letter of even date, it requested that the employing establishment answer several questions, including whether, at the time of the claimed employment injury, appellant was on the employing establishment's premises during regular working hours and whether she was performing official duties or engaged in activities reasonably incidental to her job. OWCP afforded both parties 30 days to respond.

On October 17, 2016 appellant responded to OWCP's development questionnaire. She noted that her injury occurred on March 17, 2016 at noon during her lunch break. Appellant explained that she was waiting for a fitness class to begin at the gym in the fitness facility located in the VACO building when the speakers malfunctioned, emanating a high-pitched squealing noise. She recounted that the noise persisted for nearly a minute until one of the managers came into the room and turned the sound system off. Appellant indicated that she began to experience ringing in her ears when she left the gym and that she had difficulty hearing her children that evening. She explained that she did not immediately file a claim because she thought the effects of the injury were temporary. Appellant noted that it was not until her last appointment on

August 22, 2016 that she was informed that her hearing loss and tinnitus were permanent. She responded "No" that she did not sustain any other injury or have any similar disability or symptoms before the injury. Appellant clarified that she was on the employing establishment premises in the fitness facility located in the VACO building during her lunch hour when the injury occurred. She reported that her participation in the activity was optional, but that employees were encouraged to participate in health and fitness activities and received monthly newsletters with information, including fitness class schedules. Appellant noted that she was a disabled veteran with a back injury, hip bursitis, and arthritis, and that exercise and stretching are part of her physical therapy.

In a statement dated October 18, 2016, C.L., a supervisory program analyst, responded to OWCP's development letter. He indicated "Yes" that the employing establishment concurred with appellant's allegations. C.L. related that appellant immediately shared details with him of the employment incident that occurred while at work at VACO. He clarified that appellant's participation in the activity was optional and explained that many VA employees participated in exercise activities during their break periods. C.L. responded "Yes" that the injury occurred on the employing establishment's premises during regular work hours.

OWCP also received an October 18, 2016 statement from D.S., a wellness and fitness specialist at the VACO Fitness Center, who related that he learned of appellant's injury after talking with her and discussing it with S.J., the program coordinator, who confirmed the incident and circumstances.

The employing establishment also provided an official position description for a supervisory program manager.

In an October 24, 2016 letter, Dr. Rithu Chea, a Board-certified internist, noted dates of examination and treatment as April 8, May 23, and August 22, 2016. She related that appellant received comprehensive audiometry and tympanometry testing and was diagnosed with "sensorineural hearing loss in both ears and tinnitus of both ears secondary to mild acoustic trauma and cerumen impaction as a result of exposure to loud noise while [appellant] was at the fitness center in her office building." Dr. Chea reported that appellant was exposed to loud noise while at the fitness center in her office building on March 17, 2016 that caused sensorineural hearing loss in both ears and tinnitus of both ears. She concluded that appellant's reported work incident caused sensorineural hearing loss in both ears and tinnitus of both ears. Dr. Chea also provided an April 8, 2016 examination report and audiological testing report.

By decision dated November 4, 2016, OWCP denied appellant's claim, finding that she was not in the performance of injury when injured on March 17, 2016. It found that, although the injury occurred on the employing establishment's premises and during her tour of duty, the act of going to the gym during her lunch break was a matter of personal convenience, and she was not performing duties incidental to her employment or from which her employing establishment derived substantial benefit.

On November 30, 2016 appellant, through counsel, requested a hearing before a representative of OWCP's Branch of Hearings and Review. A telephonic hearing was held on May 30, 2017.

Appellant submitted various printouts from the employing establishment's website about the Employee Health and Well-Being program. It noted that the mission of the VA Health

Administration's Employee Health and Well-Being program was to provide staff with the educational and training opportunities and resources needed to reduce the incidence of preventable illness, injury, and impairment. The program was designed to focus on the overall health and well-being of VA employees by helping them to establish and maintain healthy lifestyles through educational tools and resources. It explained that the VA Employee Health and Wellness Program provided monthly health observances, events, guidance on establishing health and wellness program, wellness resources, and educational material.

Appellant also submitted a May 2017 newsletter about employee health, a Spring 2016 VA Employee Health and Wellness bulletin, and a schedule of fitness classes from the VACO Fitness Center. She also provided a copy of the Office of Personnel Management (OPM) Health and Wellness Policy and provided additional printouts from OPM's website about work-life reference materials.

OWCP also received an employing establishment memorandum entitled "Liability Related to Physical Fitness Activities in the Workplace." It explained that, according U.S. Department of Labor (DOL) guidelines, FECA coverage for employees injured while engaged in physical fitness activities was provided when an injured employee was engaged in an activity that was specifically identified in that employee's Physical Fitness Program (PFP). The memorandum defined a PFP as an "[employing establishment] initiated and structured program that allowed employees to participate in specified physical exercise activities." It indicated: "If an employee is injured while engaging in a physical fitness activity or recreational activity that is not part of a PFP, FECA coverage is considered on a case-by-case basis."

Appellant submitted a copy of OWCP's "A Handbook for Employing Agency Personnel" Publication CA-810, section 304 "Performance of Duty." She also submitted a printout of FECA's Frequently Asked Questions.

In a January 5, 2017 statement, appellant related that, as part of its health and wellness program, the employing establishment published a quarterly "VA Employee Health and Wellness" newsletter. She indicated that she was including a newsletter from earlier that year that encouraged employees to do yoga, which she noted that was the class that she was waiting for when she suffered the hearing loss injury.

Appellant submitted her fitness center membership contract with the VACO Fitness Center. She had checked a box indicating that she selected the option for Personalized Program with Comprehensive screening.

By decision dated August 31, 2017, the hearing representative affirmed the November 4, 2016 decision finding that the injury did not occur in the performance of duty. She found that the evidence failed to establish that appellant's March 17, 2016 activity was a regular part of or a regular incident of her employment or the requirements of her job duties. The hearing representative noted that appellant's participation in the fitness class was voluntary.

On August 16, 2018 appellant, through counsel, requested reconsideration. Counsel asserted that pursuant to Federal (FECA) Procedure Manual 2.0804.18, injuries that arise from participation in an employing establishment's physical fitness program are compensable under FECA, regardless of whether participation occurs during regular work hours or on the employing establishment's premises. He also cited that employees who are injured while exercising in a

recreational activity during authorized lunch break periods in a designated area of the employing establishment premises are covered under FECA whether or not the exercise was part of a structured PFP. Counsel further contended that, according to Federal (FECA) Procedure Manual 2.0804.4, an affirmative response by the official superior is sufficient to establish performance of duty unless the facts or other evidence indicate that the answer may be incorrect. He related that he was enclosing an October 25, 2017 memorandum from the employing establishment, which demonstrated that appellant was injured while participating in an employer-sponsored program on its premises. Counsel further argued that she had submitted sufficient medical evidence to establish a medical diagnosis of her injury and requirement of ongoing care for her work-related conditions. He concluded that appellant had met all of the requirements to establish her traumatic injury claim.

OWCP received an August 10, 2018 impact statement from appellant. Appellant described the March 17, 2016 employment incident and the permanent hearing loss and tinnitus that she sustained in both ears. She expressed the difficulties she experienced in her daily activities and the depression she had suffered from since the claimed employment incident.

In an October 26, 2017 letter, C.L., a supervisory program analyst at VACO, noted his disagreement with the August 31, 2017 decision. He asserted that appellant was injured while participating in an "employer-sponsored program on the [employing establishment] premises." C.L. also related that the employing establishment derived substantial benefit from appellant's participation in the VA Employee Health & Wellness Program and referenced its mission and policy. He cited to Guidance on Performance of Duty from DOL in support of his argument that appellant was injured while in the performance of duty. C.L. pointed out that appellant was injured during her lunch break on the employing establishment's premises and while engaged in activities that were approved as part of an individual plan developed under a formal physical fitness program managed by the employing establishment.

OWCP also received a March 26, 2018 examination and audiology report by Dr. Lee.

By decision dated November 14, 2018, OWCP denied modification of the August 31, 2017 decision. It found that the evidence of record failed to establish that appellant's March 17, 2016 injury arose out of the performance of her duties.

LEGAL PRECEDENT

An employee seeking benefits under FECA[4] 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 of FECA,[5] 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

[4] *Supra* note 2.

[5] *S.B.*, Docket No. 17-1779 (issued February 7, 2018); *J.P.*, 59 ECAB 178 (2007); *Joe D. Cameron*, 41 ECAB 153 (1989).

the employment injury.[6] These are the essential elements of each and every compensation claim, regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.[7]

The phrase "sustained while in the performance of duty" has been interpreted by the Board to be the equivalent of the commonly found prerequisite in workers' compensation law of "arising out of and in the course of employment."[8] The phrase "in the course of employment" is recognized as relating to the work situation, and more particularly, relating to elements of time, place, and circumstance.[9] To arise in the course of employment, an injury must occur: (1) at a time when the employee may reasonably be stated to be engaged the master's business; (2) at a place when he or she may reasonably be expected to be in connection with his or her employment; and (3) while he or she was reasonably fulfilling the duties of his or her employment or engaged in doing something incidental thereto.[10] This alone is insufficient to establish entitlement to benefits for compensability. The concomitant requirement of an injury "arising out of the employment" must be shown, and this encompasses not only the work setting, but also a causal concept, the requirement being that the employment caused the injury.[11]

It is well established as a 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, or at lunch time, are compensable.[12]

With regard to recreational or social activities, the Board has held 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

[6] *J.M.*, Docket No. 17-0284 (issued February 7, 2018); *R.C.*, 59 ECAB 427 (2008); *James E. Chadden, Sr.*, 40 ECAB 312 (1988).

[7] *K.M.*, Docket No. 15-1660 (issued September 16, 2016); *L.M.*, Docket No. 13-1402 (issued February 7, 2014); *Delores C. Ellyett*, 41 ECAB 992 (1990).

[8] *See M.T.*, Docket No. 17-1695 (issued May 15, 2018); *S.F.*, Docket No. 09-2172 (issued August 23, 2010); *Valerie C. Boward*, 50 ECAB 126 (1998).

[9] *L.B.*, Docket No. 19-0765 (issued August 20, 2019); *G.R.*, Docket No. 16-0544 (issued June 15, 2017); *Cheryl Bowman*, 51 ECAB 519 (2000).

[10] *A.S.*, Docket No. 18-1381 (issued April 8, 2019); *Roma A. Mortenson-Kindschi*, 57 ECAB 418 (2006); *Mary Keszler*, 38 ECAB 735, 739 (1987).

[11] *D.C.*, Docket No. 18-1216 (issued February 8, 2019); *R.B.*, Docket No. 16-1071 (issued December 14, 2016); *Eugene G. Chin*, 39 ECAB 598 (1988).

[12] *Eileen R. Gibbons*, 52 ECAB 209 (2001); *Narbik A. Karamian*, 40 ECAB 617, 618 (1989).

substantial benefit from the activity beyond the imaginable value of improvement in employee health and morale is common to all kinds of recreation and social life.[13]

OWCP's procedures provide that injuries and occupational diseases arising from participating in an employing establishment's PFP are compensable under FECA.[14] It further provides 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 are covered under FECA whether or not the exercise or recreation was part of a structured PFP.[15] The procedures also outline the evidence necessary to demonstrate that an injury resulted from participation in a PFP. For traumatic injury claims, the CA-1 form must be accompanied by a statement from the employee's supervisor indicating that the employee was enrolled in the PFP, and that the injury was sustained while the employee was performing authorized exercises under the program. If the statement from the supervisor is not submitted with the CA-1 form, it must be requested.[16]

ANALYSIS

The Board finds that appellant has established that an incident occurred in the performance of duty on March 17, 2016 as alleged.

As noted above, OWCP's procedures provide that, to demonstrate that an injury resulted from participation in a PFP, a CA-1 form must be accompanied by a statement from the employee's supervisor indicating that the employee was enrolled in the PFP, and that the injury was sustained while the employee was performing authorized exercises under the program.[17] Appellant's claim form included a statement from the employing establishment acknowledging that she was in the performance of duty at the time of the claimed injury. In an October 18, 2016 statement, C.L., a supervisory program analyst for the employing establishment, indicated that "yes" he agreed with her allegations. In an October 26, 2017 letter, he reiterated that appellant was participating in an "employer-sponsored program on the [employing establishment] premises" when the March 17, 2016 alleged injury occurred. C.L. emphasized that she was engaged in activities that were approved as part of an individual plan developed under a formal PFP.

The Board thus finds that appellant has established that she was in the performance of duty at the time of the March 17, 2016 alleged employment injury.

As appellant has established that the March 17, 2016 employment incident factually occurred, the question becomes whether this accepted employment incident caused an injury.[18]

[13] *L.B.*, Docket No. 19-0765 (issued August 20, 2019); *S.B.*, Docket No. 11-1637 (issued April 12, 2012); *Ricky A. Paylor*, 57 ECAB 568 (2006); *Kenneth B. Wright*, 44 ECAB 176 (1992); *see also A. Larson*, The Law of Workers' Compensation § 22.00 (2015).

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

[15] *Id.*

[16] *Id.* at Chapter 2.804.18(c).

[17] *Id.*

[18] *M.L.*, Docket No., 19-0361 (issued October 24, 2019); *Willie J. Clements*, 43 ECAB 244 (1991).

The Board will, therefore, set aside OWCP's November 14, 2018 decision and remand the case to OWCP for consideration of the medical evidence. Following this and other such further development as deemed necessary, OWCP shall issue a *de novo* decision addressing whether appellant has met her burden of proof to establish an injury causally related to the accepted employment incident.

CONCLUSION

The Board finds that appellant has met her burden of proof to establish an incident in the performance of duty on March 17, 2016, as alleged. However, the Board further finds that this case is not in posture for decision with regard to whether she sustained an injury causally related to the accepted March 17, 2016 employment incident.

ORDER

IT IS HEREBY ORDERED THAT the November 14, 2018 decision of the Office of Workers' Compensation Programs is set aside, and the case is remanded for further action consistent with this decision of the Board.

Issued: November 22, 2019
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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