

ISSUE

The issue is whether appellant has met his burden of proof to establish an injury in the performance of duty on February 3, 2021, as alleged.

FACTUAL HISTORY

On March 1, 2021 appellant, then a 36-year-old customs and border protection officer, filed a traumatic injury claim (Form CA-1) alleging that on February 3, 2021 he sustained injuries to his right thumb, right wrist, and right shoulder when weights from a bench press became unstable and dropped on him while in the performance of duty. He indicated that he was performing physical fitness activities at home during weather and safety leave when his right shoulder lost strength, which caused the weights to become unstable and drop. Appellant did not stop work. On the reverse side of the claim form, his supervisor, G.W., contended that appellant was not injured in the performance of duty as he was on weather and safety leave when conducting exercises at his residence.

In a report and work restriction note dated March 16, 2021, Dr. Michael D. McCleary, a Board-certified pediatrician and sports medicine specialist, noted appellant's complaints of right lateral shoulder pain radiating to the extremity. He reported right shoulder examination findings of lateral subacromial tenderness, decreased range of motion with abduction and flexion, and positive Hawkins' and Neer's test. Dr. Cleary diagnosed right shoulder impingement syndrome, right shoulder rotator cuff strain, right wrist sprain, and right thumb sprain.

A right shoulder arthrogram report dated March 22, 2021, demonstrated minimal signal alteration undercutting the superior aspect of the posterior labrum, no partial or full-thickness rotator cuff tears, and mild subacromial/subdeltoid bursal inflammation.

In reports dated March 30 and May 11, 2021, Dr. McCleary provided examination findings and diagnosed right shoulder impingement syndrome and right thumb sprain.

In a report dated May 13, 2021, Dr. Michael D. Riggerbach, a Board-certified orthopedic hand surgeon, indicated that appellant was evaluated for right shoulder pain. He provided examination findings and diagnosed right shoulder impingement and right thumb sprain.

In a July 29, 2021 development letter, OWCP informed appellant of the deficiencies of his claim. It advised him of the type of factual and medical evidence necessary to establish his claim and provided a questionnaire for his completion. In a separate development letter of the same date, OWCP requested that the employing establishment provide additional information regarding appellant's claim, including whether appellant was participating in an agency physical fitness plan (PFP). It afforded both parties 30 days to respond.

In an August 19, 2021 response to OWCP's development letter, appellant explained that he did not notify his supervisor of his injury until March 1, 2021, because that was when he was notified by management that he was considered on-duty and eligible for benefits while on weather and safety leave. He indicated that he was not required to participate in the employing establishment PFP, but that the employing establishment encouraged employees to participate in

the program to benefit the overall health of employees. Appellant also reported that officers were required to maintain a high level of physical fitness. He noted that he had an approved reasonable accommodation request from the employing establishment that allowed him to participate in the employing establishment PFP at his personal residence. Appellant explained that the injury occurred at his personal residence during working hours while participating in the PFP as allowed by his reasonable accommodation. He noted that at the time of injury, the employing establishment's gym was closed due to the COVID-19 pandemic.

Appellant submitted a letter dated November 26, 2019 from the employing establishment, which approved his request for up to three hours per week to participate in the employing establishment PFP. The letter explained that management would approve requests for PFP in accordance with the collective bargaining agreement. Appellant also submitted earnings information for pay periods February 3, 2020 through February 2, 2021, and March 16, 2020 through March 15, 2021.

In a letter dated August 22, 2021, K.T., a supervisory officer, indicated that appellant was not required to participate in the exercise activities, but voluntarily participated in the exercise activities. He noted that the injury occurred while appellant was at home and on weather and safety leave due to the COVID-19 pandemic. K.T. reported that there was no record of appellant's self-certification in the PFP, or that appellant had requested approval or was approved for PFP usage prior to the injury time frame. He also asserted that the employing establishment did not derive any direct benefit from appellant's participation in the activity.

By decision dated September 8, 2021, OWCP denied appellant's traumatic injury claim, finding that the evidence of record was insufficient to establish that the February 3, 2021 employment incident occurred as alleged. Therefore, it concluded that the requirements had not been met to establish an injury as defined by FECA.

On September 20, 2021 appellant, through counsel, requested an oral hearing before a representative of OWCP's Branch of Hearings and Review.

Following a preliminary review, by decision dated December 3, 2021, OWCP's hearing representative set aside the September 8, 2021 decision and remanded the case for OWCP to request additional information from appellant regarding exactly how the alleged injury occurred. The hearing representative also instructed OWCP to request additional information from the employing establishment regarding the requirements to participate in the PFP, and whether employees were required to request preapproval from the employing establishment each time they performed PFP hours during work hours.

In a development letter dated January 28, 2022, OWCP informed appellant of the deficiencies of his claim. It advised him of the additional factual information required regarding the circumstances surrounding the alleged February 3, 2021 incident. In a separate development letter of the same date, OWCP requested that the employing establishment provide additional information and documents regarding the PFP registration form, pre-certification requirements to utilize PFP including appellant's record of self-certification, a copy of the PFP plan and appellant's medical examination report that provided clearance for participation in this PFP, and whether appellant was required to participate in the activity. It afforded both parties 30 days to respond.

OWCP received a registration form for the employing establishment PFP, including an employee's medical self-certification and informed consent agreement.

In an e-mail dated March 1, 2021, appellant informed the employing establishment that he was provided with a memorandum stating that he was considered on-duty while on weather and safety leave. He explained that approximately two weeks prior, he injured himself at home while exercising during weather and safety leave hours. Appellant noted that he wished to file a Form CA-1 for his injury.

OWCP received a copy of Section 4 of the collective bargaining agreement, which described the employing establishment's PFP. It indicated that eligible bargaining unit employees must register on the PFP SharePoint site and electronically accept the medical self-certification and informed consent forms. The document also explained that administrative fitness times were subject to supervisory approval and managers/supervisors were instructed to maintain written records to track all fitness requests, approvals, and denials. It further reported that employees may work out onsite or offsite. Participants were instructed to record all administrative fitness time used in the official time and attendance system.

In a response to the February 10, 2022 development letter, appellant explained that he was exercising at home while on weather and safety leave approved by management. He indicated that he was seeking to maintain a high level of physical fitness as required by his position description as an officer. Appellant described that while performing a bench press exercise with a barbell and weights totaling 185 pounds, he suddenly lost strength in his right shoulder and dropped the weight. He noted that he immediately felt pain and swelling in his right shoulder, right wrist, and right thumb. Appellant also asserted that management did not require employees to request approval prior to using physical fitness time while they were on weather and safety leave. He alleged that timecards would show that no employees that were on weather and safety leave were coded as taking physical fitness time. Appellant contended that, during the COVID-19 pandemic, management gave a daily verbal blanket approval for all PFP requests during the daily telephone muster at 1300 hours. He also alleged that even if management was arguing that he was on unauthorized physical fitness time, appellant explained that he was never given any guidance on what he could or could not do during weather and safety hours at home.

In a response to OWCP's development letter dated February 18, 2022, the employing establishment indicated that appellant registered and self-certified for the PFP on December 24, 2017, but it was unable to upload the document. The employing establishment clarified that appellant voluntarily participated in the exercise activities and that the injury occurred while appellant was at home and on weather and safety leave.

By *de novo* decision dated April 1, 2022, OWCP denied appellant's traumatic injury claim, finding that he had not submitted sufficient evidence to establish that the events occurred as alleged. Consequently, it found that he had not met the requirements to establish an injury in the performance of duty as defined by FECA.

On April 8, 2022 appellant, through counsel, requested an oral hearing before a representative of OWCP's Branch of Hearings and Review. During the hearing held on September 23, 2022, appellant testified that at the time of the February 3, 2021 incident, he was

on weather and safety leave at home because the ports were closed due to the COVID-19 pandemic. He alleged that he was still considered “on duty” as he was required to have his telephone on him at all times and be able to come into the office if the employing establishment called him. Appellant indicated that he had a muster call every morning and afternoon where he had to call into a conference line. He reported that because the employing establishment gym was closed, employees were working out at home in order to maintain their physical fitness. Appellant explained that when he exercised at the employing establishment gym, there was a process to sign in and out for physical fitness, but while working from home, there was no supervision or protocols in place for physical fitness. He noted that he did not have access to any employing establishment systems while at home.

By decision dated December 8, 2022, OWCP’s hearing representative set aside the April 1, 2022 decision and remanded the case for further development of the factual evidence. On remand, she instructed OWCP to obtain a response from the employing establishment regarding whether appellant was authorized to perform fitness activities at home while on weather and safety leave in lieu of the employing establishment’s gym being closed due to the COVID-19 pandemic.

In a January 26, 2023 development letter, OWCP requested that the employing establishment clarify whether appellant was authorized to do fitness activities at home while on weather and safety leave during the COVID-19 pandemic and to provide documentation to support its response. It also requested that appellant’s supervisor provide a statement verifying the facts presented on appellant’s Form CA-1, whether appellant was participating in a PFP and a written copy of the plan, what exercises appellant was performing, and whether appellant’s participation in the activity violated any rules or regulations of the employing establishment.

In a January 26, 2023 response to OWCP’s development letter, G.W., acting chief agriculture specialist, indicated that there was no authorization to conduct fitness activities at home in lieu of the employing establishment gym due to the COVID-19 pandemic. He clarified that procedures for requesting and receiving approval from a supervisor prior to participation in physical fitness activities were not altered. G.W. noted that the policy was clearly stated on the PFP instruction page. He indicated that he was attaching the PFP registration form with appellant’s medical self-certification and informed consent agreement. G.W. also reported that the registration page contained instructions and registration requirements for self-certification, but no record of appellant’s self-certification could be located. He further explained that appellant did not seek advanced approval from a supervisor prior to conducting PFP activities while at home. G.W. pointed out that in a March 12, 2021 e-mail, appellant’s request to utilize PFP was denied until he was able to provide a doctor’s note clearing him for participation in the PFP program.

By *de novo* decision dated March 30, 2023, OWCP denied appellant’s claim, finding that he was not in the performance of duty when injured on February 3, 2021.

On April 7, 2023 appellant, through counsel, requested an oral hearing before a representative of OWCP’s Branch of Hearings and Review.

A hearing was held on September 13, 2023. Appellant testified that he was authorized to participate in the employing establishment PFP program in November 2019. He explained that the procedure for working out at the employing establishment gym was to get verbal approval from

a supervisor and later on there was a process where an individual inputted the time onto the payroll system. Appellant indicated that during the COVID-19 pandemic when everyone was sent home on weather and safety leave, they had a telephone call every morning and afternoon similar to a roll call. He asserted that during the telephone call, the supervisor would essentially give blanket approval if anyone would like to take PFP.

By decision dated November 22, 2023, OWCP's hearing representative affirmed the March 30, 2023 decision.

LEGAL PRECEDENT

An employee seeking benefits under FECA³ has the burden of proof to establish the essential elements of his or her claim, including 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,⁴ 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 the employment injury.⁵ 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.⁶

FECA provides for the payment of compensation for the disability of an employee resulting from personal injury sustained while in the performance of duty.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 To arise "in the course of employment," in general, an injury must occur: (1) at a time when the employee may reasonably be [stated] to be engaged in the master's business; (2) at a place where 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.⁹ This alone is not sufficient to establish entitlement to benefits for compensability. The concomitant requirement of an injury "arising out

³ *Id.*

⁴ *F.H.*, Docket No. 18-0869 (issued January 29, 2020); *S.B.*, Docket No. 17-1779 (issued February 7, 2018); *Joe D. Cameron*, 41 ECAB 153 (1989).

⁵ *L.C.*, Docket No. 19-1301 (issued January 29, 2020); *J.M.*, Docket No. 17-0284 (issued February 7, 2018); *James E. Chadden, Sr.*, 40 ECAB 312 (1988).

⁶ *P.A.*, Docket No. 18-0559 (issued January 29, 2020); *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).

⁷ 5 U.S.C. § 8102(a); *J.K.*, Docket No. 17-0756 (issued July 11, 2018).

⁸ *C.L.*, Docket No. 19-1985 (issued May 12, 2020); *S.F.*, Docket No. 09-2172 (issued August 23, 2010); *Valerie C. Boward*, 50 ECAB 126 (1998).

⁹ *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).

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.¹⁰

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 part of the service of the employee, brings the activity within the orbit of employment; or (3) the employing establishment derives 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.¹¹

OWCP’s procedures provide that employees enrolled in a PFP are in the performance of duty for FECA purposes while doing authorized PFP exercise, including off-duty exercises performed under the auspices of the fitness program. It further indicates that injuries and occupational diseases arising from participation in an employing agency’s PFP are compensable under FECA and that participation will not always occur during regular work hours, and not always on the employing establishment’s premises. Injuries that occur during the use of fitness and recreational facilities furnished by the employing establishment outside of official work hours, on or off the premises, are not compensable if the employee was not participating in a structured PFP. The mere fact that the employing establishment allows employees to use its facilities on their own time does not create a sufficient connection to the employment to bring any resulting injury within the coverage of FECA.¹²

ANALYSIS

The Board finds that this case is not in posture for decision.

In response to OWCP’s development letters, the employing establishment submitted information regarding the policy and procedures for requesting and receiving approval from a supervisor prior to participation in physical fitness activities. However, it did not clarify how those PFP procedures applied specifically while employees were on weather and safety leave during the COVID-19 pandemic. Furthermore, it did not provide a statement from appellant’s supervisor addressing appellant’s allegation that employees were given blanket approval for all PFP activities while on weather and safety leave during the COVID-19 pandemic.

It is well established that proceedings under FECA are not adversarial in nature, and while appellant has the burden to establish entitlement to compensation, OWCP shares responsibility in

¹⁰ *M.H.*, Docket No. 20-1164 (issued September 6, 2023); *M.T.*, Docket No. 16-0927 (issued February 13, 2017); *Vitaliy Y. Matviiv*, 57 ECAB 193 (2005); *Eugene G. Chin*, 39 ECAB 598 (1988).

¹¹ *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).

¹² Federal (FECA) Procedure Manual, Part 2 -- Claims, *Performance of Duty*, Chapter 2.804.18b (March 1994).

the development of the evidence, particularly when such evidence is of the character normally obtained from the employing establishment or other government source.¹³

The case must, therefore, be remanded for further development of the claim.¹⁴ On remand, OWCP shall request that the employing establishment clarify the policy and procedures for approval of PFP activities specifically while employees were on weather and safety leave during the COVID-19 pandemic. It shall also request a statement from appellant's supervisor addressing appellant's allegation that employees were given blanket approval for all PFP activities while on weather and safety leave during the COVID-19 pandemic. After this and other such further development as deemed necessary, OWCP shall issue a *de novo* decision.

CONCLUSION

The Board finds that this case is not in posture for decision.

¹³ *T.T.*, Docket No. 19-0846 (issued October 17, 2019); *Willie A. Dean*, 40 ECAB 1208, 1212 (1989); *Willie James Clark*, 39 ECAB 1311, 1318-19 (1988). See also FECA Procedure Manual, *id.* at *Initial Development of Claims*, Chapter 2.800.5d(1) (November 2023).

¹⁴ *S.D.*, Docket No. 13-90 (issued August 22, 2013); *Colleen A. Murphy*, Docket No. 01-1319 (issued November 6, 2002).

ORDER

IT IS HEREBY ORDERED THAT the November 22, 2023 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: May 28, 2026
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