United States Department of Labor
Employees' Compensation Appeals Board

S.B., Appellant	)	
and	)	**Docket No. 11-1637**
	)	**Issued: April 12, 2012**
DEPARTMENT OF THE NAVY, NAVAL AMPHIBIOUS BASE FIRE STATION, Virginia Beach, VA, Employer	)	

Appearances:
Allison E. Barger, for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On July 6, 2011 appellant, through his representative, filed a timely appeal from a March 15, 2011 merit decision of the Office of Workers' Compensation Programs (OWCP) denying his traumatic injury claim. 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 the case.

ISSUE

The issue is whether appellant met his burden of proof to establish that he sustained an injury in the performance of duty on August 20, 2010.

[1] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On August 21, 2010 appellant, then a 32-year-old firefighter, filed a traumatic injury claim alleging that he sustained injury in the performance of duty on August 20, 2010. He stated that he sustained injury to his right calf muscle at 7:15 a.m. when he was running sprints on the employing establishment's premises as part of his physical fitness routine. Appellant's supervisor noted on the claim form that appellant's shift had ended at 7:00 a.m., and that firefighters were not permitted to exercise at the fire station while in an off-duty status.

An August 21, 2010 mishap report indicated that appellant was running short sprints on the driveway at the rear of the station when he sustained injury to his right calf.

By report dated August 20, 2010, Dr. Mark A. Bewley, a Board-certified orthopedic sports medicine specialist, diagnosed appellant with right medial gastrocnemius partial rupture. In an August 27, 2010 report, he stated appellant's diagnosis as sprain and strain of knee, caused by running sprints.

The employing establishment controverted appellant's claim on August 21, 2010 on the grounds that firefighters were not allowed to work out on premises when off duty and appellant was in an off-duty status when he was injured.

In an August 25, 2010 letter, Jimmy French, a supervisory captain, stated that, while the Department of Defense Instructions 6055.06 and National Fire Protection Standards recommended that firefighters participate in a physical and wellness program, it was not mandatory for the employees to work out under the established collective bargaining agreement or the department's local operating procedures. Mr. French also stated that the employing establishment provided cardio equipment and weights in the workplace and the leadership encouraged the participation of physical fitness during normal working hours.

On September 27, 2010 OWCP denied appellant's claim on the grounds that appellant failed to establish that his injury occurred in the performance of duty.

Appellant disagreed with the decision and requested a hearing before the Branch of Hearings and Review. He submitted a copy of Department of Defense Instruction, Number 6055.66, which was dated December 21, 2006. Section 6.7 of the Instruction stated that the Fire Department should implement a "Fitness and Wellness Program based on the current DoD requirements … and the International Association of Fire Chiefs/International Association of Fire Fighters Wellness Initiative."

Appellant also submitted a copy of the Guide to Implement the IAFC/IAFF Fire Service Joint Labor Management Wellness/Fitness Initiative (the Guide) issued by the International Association of Fire Chiefs. The introduction of the guide stated that "for the past 20 years, annual firefighter death statistics have shown that 50 percent of firefighter fatalities are the result of poor health conditions. Fire department personnel who respond to emergency incidents are required to put forth a high level of physical effort over a significant length of time. This output, over time, can and will affect the overall fitness and wellness of firefighting and emergency response system." The guide went on to assert that "if significant progress is to be made in the

future to reduce health-related firefighter deaths and serious injury in the fire departments of all sizes, the fire service at large must embrace the improved wellness/fitness program model.

An August 2010 Navy Region Mid-Atlantic Fire & Emergency Services Training Newsletter—Fire Training Schedule stated that "all personnel assigned to operations" are to undergo a one-hour "daily routine" of firefighter physical fitness.

Appellant submitted an undated packet titled Weight/Fat Loss Workout Plan, which, in addition to providing a detailed exercise routine, stated that "as part of the Safety Stand Down for this year, here is a sample workout routine anyone can follow ..., each firefighter is allowed time to actively pursue a workout routine of their choice."

OWCP also received appellant's position description (GS-0081-07) which stated the following physical demands[2] for the position: "the incumbent will be required to work under extreme pressure and cope with stressful situations; ... must maintain the ability to carry weight in excess of 100 pounds in addition to wearing protective clothing and equipment weighing in excess of 50 pounds. The work of the firefighter may be subjected to long hours in precarious locations or positions, in addition to climbing ladders and working at various heights. The firefighter must successfully pass an annual physical and participate in the Navy firefighting physical fitness program."

At the January 27, 2011 oral hearing, appellant testified that he was required to participate in an hour of physical fitness activity on a daily basis, but he was not ordered to exercise at the time of his injury.

On February 11, 2011 OWCP received a response to appellant's hearing testimony from his supervisor. This response noted that:

> "The Bargaining agreement negotiated between Naval Amphibious Base, Little Creek-Naval Amphibious School, Little Creek and Local 22 American Federation of Government Employees (AFL-CIO) Multi Unit Agreement 1990, Article 32 General Provisions [p]age 33 [s]ection 6 states: Firefighters desiring to participate in a physical fitness program will be allotted time each shift (after 1500) as long as workload and emergency situations permit. Personnel not participating shall continue in a work/stand-by status."

By decision dated March 15, 2011, OWCP's hearing representative denied appellant's claim finding that appellant was not in the performance of duty when he sustained his alleged injury.

[2] *See* Factor 8.

LEGAL PRECEDENT

FECA[3] provides for payment of compensation for disability or death of an employee resulting from personal injury sustained while in the performance of duty.[4] 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.[5] 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.[6] 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 the employment, *i.e.*, causal relation, can be addressed.[7]

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 employer, 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 employer 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."[8]

ANALYSIS

Appellant alleged that he sustained a right calf injury in the performance of duty on August 20, 2010 when he ran sprints on the employing establishment driveway 15 minutes after his shift ended. The Board finds that he has not established that his injury occurred in the performance of duty.

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[3] 5 U.S.C. §§ 8101-8193.

[4] *Id.* at § 8102(a).

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

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

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

[8] *See Lawrence J. Kolodzi*, 44 ECAB 818, 822 (1993); *Kenneth B. Wright, supra* note 7; *see also* A. Larson, The Law of Workers' Compensation § 22.00 (1994).

Appellant's injury occurred on the premises of the employing establishment, but it did not occur during his work hours, or during a recreational period as a regular incident of his employment.[9]

With respect to appellant's allegations regarding an express or implied requirement to participate in the activity, appellant alleges that he was required to participate in a daily exercise routine in compliance with the Navy Region Mid-Atlantic Fire & Emergency Services Training Newsletter, as well as to maintain his physical fitness level as demanded by his position description. However, the employing establishment controverted the claim stating that firefighters were encouraged to engage in a physical fitness program but participation was voluntary, not mandatory and was to occur during work hours.

While the materials appellant submitted in support of his claim suggested that physical fitness programs should be mandatory for firefighters, the evidence of record establishes that participation in the employing establishment fitness program was to occur during work hours. Appellant's supervisor cited Article 32, page 33, section 6 of the applicable Bargaining Unit Agreement which provided that firefighters participating in a physical fitness program would be allotted time each shift for such participation, as long as workload and emergency situations permitted. Appellant's supervisor also explained that the employing establishment's firefighters worked 24-hour long shifts, from 7:00 a.m. to 7:00 a.m. and were required to leave the workstation at the end of each shift, at 7:00 a.m.

When the degree of employer involvement descends from compulsion to mere sponsorship or encouragement, the questions become closer and the tests include whether the employer sponsored or financed the event and whether participation was voluntary.[10] The Board finds that, while appellant's participation in a fitness program might have been required by the employment establishment, this activity was in no way sanctioned on premises after 7:00 a.m.

The Board also finds that appellant has not established that the employing establishment derived substantial direct benefit from his exercise activity, that would not have been gained had he engaged in his physical fitness exercise during the allotted work hours. Consequently, there is no evidence of record that the employing establishment derived substantial direct benefit from the afterhours activity beyond that intangible value of improvement in employee health and morale that is common to all kinds of recreational activity. For these reasons, appellant did not establish that his claimed injury on August 20, 2010 occurred in the performance of duty.

CONCLUSION

The Board finds that appellant has not met his burden of proof to establish that he sustained an injury in the performance of duty on August 20, 2010.

[9] *See R.P.*, Docket No. 10-1174 (issued January 19, 2011).

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

ORDER

IT IS HEREBY ORDERED THAT the March 15, 2011 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 12, 2012
Washington, DC

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board