United States Department of Labor
Employees' Compensation Appeals Board

C.C., Appellant	)	
and	)	**Docket No. 13-2177**
	)	**Issued: April 2, 2014**
DEPARTMENT OF HOMELAND SECURITY, IMMIGRATION & CUSTOMS ENFORCEMENT, Rouses Point, NY, Employer	)	

Appearances:
Alan J. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Alternate Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On September 30, 2013 appellant, through his attorney, filed a timely appeal from a June 20, 2013 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 met his burden of proof to establish that he sustained an injury in the performance of duty on February 14, 2012.

FACTUAL HISTORY

On December 3, 2012 appellant, then a 49-year-old special agent/criminal investigator, filed a traumatic injury claim (Form CA-1) alleging that, on February 14, 2012, he sustained an

[1] 5 U.S.C. § 8101 *et seq.*

injury to the right shoulder while exercising at 8:00 a.m. He notified his supervisor on December 3, 2012, who checked a box indicating that the injury had occurred in the performance of duty. The supervisor indicated that appellant's regular work hours were from 8:30 a.m. to 5:00 p.m.

In a surgical report dated March 16, 2012, Dr. Luke S. Oh, a Board-certified orthopedic surgeon, diagnosed a right shoulder chronic subcapularis tear with medial retraction and fatty infiltration, a full-thickness supraspinatus tear with retraction and tear of the anterior one-third of the infraspinatus, bicep tendinopathy with medial subluxation and impingement syndrome. He described the repair of appellant's conditions. Dr. Oh stated that appellant slipped and fell onto his right shoulder in March 2010, which resulted in a partial rotator cuff tear and that appellant underwent nonoperative treatments. He noted that in September 2011, appellant injured his right shoulder in an altercation, which resulted in a full-thickness supraspinatus tear as well as a new acute subscapularis tear. Appellant did not see an orthopedic surgeon and performed exercises on his own for the conditions. Dr. Oh stated that in January 2012 appellant was weight lifting and performing dips at his home gym when he began to feel worsening pain as well as weakness. On visiting his office, appellant was noted to have significant pain, weakness and limited range of motion. Dr. Oh noted insufficiency of the supraspinatus and subscapularis.

In a report dated September 12, 2012, Dr. Oh observed that appellant's right shoulder was progressing well six months after surgery. He advised appellant to continue with physical therapy and exercise, but not to engage in lifting away from his body or push-ups.

Appellant submitted a voluntary physical fitness program (PFP) waiver of liability form from his employer dated September 1, 2011. The form read, in relevant part, "I understand that my participation in this program is strictly voluntary and I freely choose to participate." It also read, "This is a complete and irrevocable release and waiver of liability. This waiver will not affect any rights an employee may have under the Federal Employees' Compensation Act, 5 U.S.C. §§ 8101 *et seq*." This form was partly illegible and was not signed by appellant's supervisor.

By letter dated December 21, 2012, OWCP informed appellant that the evidence of record was insufficient to support his claim. It afforded him 30 days to submit additional evidence and respond to its inquiries.

By letter of the same date, OWCP requested that the employing establishment respond to its inquiries as to appellant's duties. It asked whether appellant was required to participate in a PFP at home prior to his regular starting time, whether the agency derived any benefit from his participation in the activity, whether his participation violated any rules or regulations, whether the agency provided leadership, equipment, or facilities and requested a copy of the Physical Fitness Plan. The employing establishment did not reply.

Appellant responded by letter on January 8, 2013. He stated that his claimed injury occurred on February 14, 2012 while performing exercises during an approved PFP, noting intense pain in his right shoulder while he was performing dips. Appellant experienced sharp pain in his right shoulder and treated the area with ice. He informed his supervisor and agency about the injury on the following day. Appellant explained that he had not filed a claim for

traumatic injury until November 2012 because his supervisor did not instruct him to do so, and that he only became informed that he could file a claim in November. He delayed seeking medical treatment for two weeks, noting that his condition might resolve on its own and he contacted a physician when the pain became too intense. Appellant asserted that he did not sustain any other injury between February 14, 2012 and the dates of notice to his supervisor or a physician. He was unable to sleep or move his arm in a normal rotation, and attempted massage treatments, rest, ice and over-the-counter pain medication on a daily basis to treat his right shoulder. Appellant had previously injured his right shoulder, but had been able to perform normal fitness activities without issue. As to his regular start time of 8:30 a.m. and the fact that he had claimed his injury occurred at 8:00 a.m., appellant stated that his regular workout period was from 7:30 a.m. to 9:00 a.m., and that he had begun working out at 8:00 a.m. on February 14, 2012. Appellant was not required to participate in the PFP, but that he had been performing the same routine since October 2000 and had written approval from the employing establishment. In response to a query requesting copies of appellant's Physical Fitness Plan agreement and a medical examination providing him clearance to participate in such activity, appellant stated that he was a certified fitness instructor and that there was no medical examination that provided clearance. He stated that his employer derived the benefit of a high level of employee fitness in order to aid in arrests and any other activities requiring strength, cardiovascular health and stamina from his exercise. Appellant noted that he did not know how other employees conducted their PFPs, if at all, and that he did not violate any rules or regulations of the employing establishment by exercising at home prior to his regular starting time. He stated that the employing establishment had not provided leadership, equipment, or facilities to him for the activity.

By decision dated January 24, 2013, OWCP denied appellant's claim. It found that he had not established that the alleged traumatic event had occurred as described. OWCP further found that appellant had not established a medical diagnosis in connection with the incident or that he was in the performance of duty at the time of the traumatic event.

In a letter dated February 1, 2013, Dr. Oh stated that he had seen appellant on March 15, 2012 for an injury that had occurred in January of that year. He noted that appellant had been weightlifting and performed several sets of dips, and that the next morning appellant awoke with right shoulder pain and restricted movement. Dr. Oh stated that appellant underwent right shoulder surgery on March 16, 2012.

On February 14, 2013 appellant, through his attorney, requested a telephonic hearing before an OWCP hearing representative.

The hearing was held on May 13, 2013. Appellant testified that his position as a special agent/criminal investigator required that he remain in a certain physical condition, and that the employing establishment allowed three hours per week of on-duty time to exercise. On the date of injury, he was exercising during his paid time on duty. Appellant noted that he was exercising between 8:00 a.m. and 9:00 a.m. on that day, and estimated that the time of injury was closer to 9:00 a.m. than to 8:00 a.m. He stated that the employing establishment did not require him to participate in the PFP, but that his physical condition directly related to his duties and that he was being paid for the time spent exercising.

In a letter dated May 14, 2013, Dr. Oh reiterated the statements made in his letter of February 1, 2013. He also stated that appellant's right shoulder surgery of March 16, 2012 was directly caused by the incident of February 14, 2012.

By decision dated June 20, 2013, OWCP's hearing representative affirmed the decision of January 24, 2013. She found that although appellant testified that he was injured during his work shift, the CA-1 claim form listed a time of injury of 8:00 a.m.; that he was not injured on the employer's premises, but in his own home; and that the PFP was voluntary, not required by the employing establishment. The hearing representative found that due to these factors, he was not injured within the performance of duty. She also noted that the medical evidence did not sufficiently explain the causal relationship between the traumatic incident and appellant's injury.

LEGAL PRECEDENT

An employee seeking benefits under FECA[2] has the burden of establishing 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 period of FECA, that an injury[3] 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.[4]

FECA provides for the payment of compensation for the disability or death of an employee resulting from personal injury sustained while in the performance of duty.[5] 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.[6] 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. To arise in the course of employment, an injury must occur at a time when the employee may reasonably be said to be engaged in the employer's business, at a place where he may reasonably be expected to be in connection with the employment and while he was reasonably fulfilling the duties of his employment or engaged in doing something incidental thereto.[7]

[2] 5 U.S.C. §§ 8101-8193.

[3] OWCP's regulations define a traumatic injury as a condition of the body caused by a specific event or incident, or series of events of incidents, within a single workday or shift. Such condition must be caused by external force, including stress or strain, which is identifiable as to time and place of occurrence and member or function of the body affected. 20 C.F.R. § 10.5(ee).

[4] *T.H.*, 59 ECAB 388, 393 (2008); *see Steven S. Saleh*, 55 ECAB 169, 171-72 (2003); *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

[5] 5 U.S.C. § 8102(a).

[6] *Charles Crawford*, 40 ECAB 474, 476-77 (1989).

[7] *Mary Keszler*, 38 ECAB 735, 739 (1987).

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 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]

OWCP's procedures address employing establishment PFPs and 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. Under Part 2.804.18(c), Forms CA-1 that attribute an injury to PFP activity 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 PFP.[9]

ANALYSIS

Appellant alleged that on February 14, 2012 he sustained a work-related right shoulder injury while exercising by performing dips at his home during paid, on-duty time. OWCP's hearing representative denied his claim on the grounds that his injury was not sustained in the performance of duty. The Board finds that he has not established that he sustained an injury in the performance of duty on February 14, 2012.

Applying the time, place and work activity criteria to this case, there is no evidence to establish that appellant was in the performance of duty on February 14, 2012. His alleged injury did not occur during his regular work hours, as he reported his injury at 8:00 a.m., while his regular shift did not start until 8:30 a.m. Appellant's injury did not occur on the premises of the employing establishment, but at his own home. Thus, two important criteria of course of employment, time and place of the alleged injury, have not been met.

While appellant alleged that he was enrolled in a voluntary PFP, he did not provide a statement from the employing establishment that he was enrolled in an employing establishment PFP or that he was injured while participating in a PFP. In *J.L.*[10] the Board found that the employee had established that a right knee injury, sustained in the course of participation in an employing establishment PFP and during official time, was within the performance of duty. The Board noted that the record established that he had completed necessary paperwork requesting approval for participation in the PFP and that his supervisor had approved his participation. In this case, appellant did not submitted a statement from the employing establishment to establish that he was enrolled in a PFP and that the injury was sustained while he was performing

[8] *See Lawrence J. Kolodzi*, 44 ECAB 818, 822 (1993); A. Larson, *The Law of Workers' Compensation* § 22.00 (2012).

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

[10] Docket No. 12-947 (issued March 11, 2013).

authorized exercises under the PFP. The waiver of liability form dated September 1, 2011 does not suffice to establish either that appellant was actually enrolled in a PFP or that his right shoulder injury occurred in the course of participation in a PFP. Without the required documentation from the employing establishment, the evidence does not support his claim for a work-related injury.[11]

With respect to an express or implied requirement to participate in home exercise, the evidence reveals that appellant's physical fitness routine was voluntary. It was not an express or implied requirement of his employment, but instead, it was part of a general encouragement by the employing establishment to maintain good health. 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.[12]

With regard to the characterization of appellant's home exercise as a recreational or social activity of his employer, the alleged injury does not fall within the performance of duty. The activity of performing dips occurred outside of appellant's regular shift hours and outside the premises of the employing establishment. Furthermore, the employing establishment did not expressly or impliedly require him to engage in home exercise. The employing establishment did not derive any substantial direct benefit from his home exercise except for the intangible value of improvement in employee health and morale that is common to all kinds of recreation and social life.[13]

The Board notes that the facts of appellant's case are similar to those of *Z.C.*[14] In that case, a police officer filed a traumatic injury claim alleging that he sustained an injury to the right Achilles tendon on his day off during a self-defense tactics class at a private fitness club. The claimant asserted that maintaining physical fitness and defense skills by taking this class were related to his employment, because he was being taught skills similar to those required by the employing establishment for his position. The Board found in *Z.C.* that the employee did not sustain an injury within the performance of duty because his participation in the self-defense class was voluntary and was not an express or implied requirement of employment. The Board noted that the intangible value of improved health or morale, in and of itself, does not bring a recreational activity within the orbit of employment.

For these reasons, appellant did not establish that he sustained an injury in the performance of duty on February 14, 2012.

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.

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[11] *See supra* note 9.

[12] *Kenneth B. Wright*, 44 ECAB 176, 183 (1992).

[13] *See supra* note 8.

[14] Docket No. 12-330 (issued June 19, 2012).

CONCLUSION

The Board finds that appellant did not meet his burden of proof to establish that he sustained an injury in the performance of duty on February 14, 2012.

ORDER

IT IS HEREBY ORDERED THAT the June 20, 2013 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 2, 2014
Washington, DC

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

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

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board