United States Department of Labor
Employees' Compensation Appeals Board

J.S., Appellant	)	
and	)	**Docket No. 15-510**
	)	**Issued: June 10, 2015**
DEPARTMENT OF JUSTICE, BUREAU OF PRISONS, Honolulu, HI, Employer	)	

Appearances:
Daniel M. Goodkin, Esq., for the appellant
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 January 6, 2015 appellant, through counsel, filed a timely appeal from a November 24, 2014 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 sustained an injury in the performance of duty on December 21, 2013.

On appeal, counsel asserts that, based on the Board holding in the case *E.S.*,[2] appellant was in the performance of duty when injured.

[1] 5 U.S.C. §§ 8101-8193.

[2] Docket No. 12-596 (issued April 11, 2013).

FACTUAL HISTORY

On January 2, 2014 appellant, then a 51-year-old psychologist, filed a traumatic injury claim alleging that, at 5:00 a.m. on Saturday, December 21, 2013, he injured his right knee while exercising on a treadmill in the fitness center of his hotel, while he was on travel status. He stopped work on December 30, 2013.

In a January 13, 2014 report, Dr. Sydney G. Smith, a Board-certified orthopedic surgeon, noted a history that appellant suddenly felt a sharp weakness, swelling, stiffness, and giving way in his right knee on December 21, 2013 while jogging on a treadmill. He noted January 9, 2014 magnetic resonance imaging (MRI) scan findings of a medial meniscus tear with mild patellofemoral chondromalacia. Dr. Smith recommended arthroscopic surgery.

By letter dated January 21, 2014, the employing establishment controverted the claim. Lilia Pascual-Cantu, environmental and safety compliance administrator, stated that appellant was in travel status from December 17 through 21, 2013. Appellant was attending crisis negotiation team training at the Bureau of Prisons Management and Specialty Training Center in Aurora, Colorado. He was authorized to travel on Friday, December 20 or Saturday, the 21st, 2013. At the time of the claimed injury, appellant was at his hotel exercising on a treadmill. Ms. Pascual-Cantu maintained that the injury did not occur in the performance of duty because he was not required to work out as part of his work assignment or duties while attending training, that personal recreational activity was not reasonably incidental to his work, that the employing establishment did not expressly or impliedly require participation or encourage participation through financial support for working out at the hotel gym, and the employing establishment did not receive any direct benefit beyond the improvement of health and morale. She attached a training opportunity announcement, a welcome letter to class participants, and appellant's training authorization. The letter advised that appellant would be lodged at Country Inn & Suites in Denver, Colorado.

In letters dated January 27, 2014, OWCP informed appellant of the type of evidence needed to support his claim and asked the employing establishment to respond.

In an undated statement, appellant noted that he was injured while running on a treadmill while in travel status. He stated that he was under a physician's order to get more exercise and maintained that the activity he was undertaking when injured was reasonably incidental to his employment and benefitted the employing establishment, that his job called for him to be able to defend himself against physical assaults from inmates and to assist fellow staff who could be subjected to physical assaults. Appellant submitted an attending physician's report, in which Patrick Katahara, a physician assistant, described a history that he injured his right knee while running on a treadmill. Mr. Katahara diagnosed right knee medial meniscal injury and ordered an MRI scan study and orthopedic evaluation.

On February 13, 2014 Ms. Pascual-Cantu additionally advised that the employing establishment did not expressly or impliedly require, or encourage, appellant's participation in physical fitness, nor did it require its employees to utilize gyms for physical fitness. Ms. Pascual-Cantu explained that the employing establishment did not have a physical fitness plan and maintained that the employing establishment did not receive direct benefit beyond the

improvement of health and morale, noting that the employing establishment did not provide leadership, equipment, or facilities to appellant for the activity. She noted that he was scheduled for annual leave from December 23 to 27, 2013.

In a duty status report dated January 13, 2014, Dr. Smith provided work restrictions.

In a February 15, 2014 statement, appellant repeated that he was in travel status and jogging on a treadmill when he heard his right knee pop several times before giving out. The immediate effects were severe pain, swelling, and difficulty ambulating. Appellant stated that he did not have time to seek medical treatment that day as he was scheduled to fly out later that morning. He was first examined by a physician assistant in Muskegon, Michigan, on December 22, 2013. Appellant noted severe pain, being unable to drive, being unable to walk without great difficulty, and that his knee was sore and swollen, with limited range of motion. He stated that his physician had directed him to regularly exercise, eat a balanced diet, and lose weight. Appellant had been referred to a weight loss clinic by his endocrinologist. He maintained that the employing establishment promoted employee physical fitness by having an on-site wellness coordinator and by providing a workout facility. Appellant stated that his job description provided that he must be prepared and trained to use physical control in situations where necessary, such as in fights among inmates, assaults on staff, and riots or escape attempts, while working within a prison environment. He indicated that essential duties of the position included restraining, apprehending, and physically controlling inmates in emergency situations, without hazard to self or others, and that all staff in the correctional facility, regardless of occupation, was expected to perform law enforcement functions.[3] Appellant disagreed with Ms. Pascual-Cantu's assertions, maintaining that the above description supported reasons for him to be physically and mentally fit and that, by participating in the activity when injured, his employing establishment benefitted by having a more physically fit employee who was better able to defend himself and fellow employees from a physical assault by an inmate. He attached a statement from Dan Langlois, who noted that when he met appellant at the airport in Muskegon, Michigan, on December 21, 2013, appellant could hardly walk and was in extreme pain.

On February 11, 2014 appellant submitted a claim for compensation for the period February 18 to 20, 2014. The employing establishment paid continuation of pay for the period December 30, 2013 to February 14, 2014, and that he had not returned to work.

On February 20, 2014 appellant provided information from the employing establishment website, reflecting it: "shall afford all employees an opportunity to develop, maintain, and enhance their physical and mental well-being by operating staff fitness centers," continuing that it "acknowledges the importance of healthy employees and the role of health and fitness programs in retaining staff, reducing absenteeism, and increasing employee productivity and morale." He attached a list of hotel amenities at the Country Inn & Suites, which included treadmills and other exercise equipment.

[3] A partial position description notes physical demands as: "The work is mostly sedentary, although there is some walking required in visiting the various units and other areas of the institution. Incumbent must be physically and mentally able to perform efficiently the essential duties of this position, including restraining, apprehending, and physically controlling inmates in emergency situations, without hazard to self or others."

By decision dated February 28, 2014, OWCP denied the claim, finding that appellant was not in the performance of duty when injured on December 21, 2013. It found that he had deviated from the normal incidents of the trip and engaged in activities which were not reasonably incidental to his employment or contemplated by his employing establishment.

Appellant timely requested a hearing. He submitted the January 9, 2014 MRI scan report of the right knee showing a medial meniscus tear and medial compartment chondromalacia. At the hearing, held on October 14, 2014, appellant testified that he had to maintain a level of physical fitness for his job, and that the hotel where the December 21, 2013 injury occurred was selected by the employing establishment. He described the injury and indicated that he had arthroscopic surgery on March 17, 2014 and returned to full duty on April 15, 2014. Appellant stated that the training ended on Friday, December 20, 2013, and that on Saturday, December 21, 2013, a permitted travel day, he flew to Michigan. Counsel argued that the *E.S.*, case[4] established that he was in the performance of duty when injured.

By decision dated November 28, 2014, an OWCP hearing representative affirmed the February 28, 2014 decision.

LEGAL PRECEDENT

An employee seeking benefits under FECA 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 was sustained in the performance of duty as alleged and that any disability and/or specific condition for which compensation is claimed are causally related to the employment injury. Regardless of whether the asserted claim involves traumatic injury or occupational disease, an employee must satisfy this burden of proof.[5]

Section 8102(a) of FECA provides for payment of compensation for disability or death of an employee resulting from personal injury sustained while in the performance of duty.[6] This phrase 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.[7] "Arising in the course of employment" relates to the elements of time, place, and work activity. 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 her master's business, at a place where he or she may reasonably be expected to be in connection with his or her employment and while he or she was reasonably fulfilling the duties of his or her employment or engaged in doing something incidental thereto. This alone, however, is not sufficient to establishment entitlement to compensation. The

[4] *Supra* note 2.

[5] *Gary J. Watling*, 52 ECAB 278 (2001).

[6] 5 U.S.C. § 8102(a).

[7] *See Bernard E. Blum*, 1 ECAB 1 (1947).

employee must also establish the concurrent requirement of an injury "arising out of the employment." This requires that a factor of employment caused the injury.[8]

In order to determine whether an employee actually sustained an injury in the performance of duty, OWCP begins with an analysis of whether fact of injury has been established. Generally, fact of injury consists of two components which must be considered in conjunction with one another. The first component to be established is that the employee actually experienced the employment incident or exposure, which is alleged to have occurred.[9] In order to meet his or her burden of proof to establish the fact that he or she sustained an injury in the performance of duty, an employee must submit sufficient evidence to establish that he or she actually experienced the employment injury or exposure at the time, place, and in the manner alleged.[10] The second component is whether the employment incident caused a personal injury and generally can be established only by medical evidence.[11]

Under FECA, an employee on travel status or a temporary-duty assignment or special mission for his or her employing establishment is in the performance of duty and, therefore, under the protection of FECA 24 hours a day with respect to any injury that results from activities essential or incidental to his or her special duties.[12] Examples of such activities are eating,[13] returning to a hotel after eating dinner, and engaging in reasonable activities within a short distance of the hotel where the employee is staying.[14] However, when a claimant voluntarily deviates from such activities and engages in matters, personal or otherwise, which are not incidental to the duties of his or her temporary assignment, they cease to be under the protection of FECA. Any injury occurring during these deviations is not compensable.[15] Examples of such deviations are visits to relatives or friends while in official travel status,[16] visiting nightclubs and bars,[17] skiing at a location 60 miles from where an employee is

[8] *R.S.*, 58 ECAB 660 (2007).

[9] *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Fact of Injury*, Chapter 2.803(2)(a) (August 2012 and June 1995).

[10] *Linda S. Jackson*, 49 ECAB 486 (1998).

[11] *John J. Carlone*, 41 ECAB 354 (1989); *see* 5 U.S.C. § 8101(5) (injury defined); 20 C.F.R. §§ 10.5(ee); 10.5(q) (traumatic injury and occupational disease defined, respectively).

[12] *Donald R. Ford*, 56 ECAB 577 (2005).

[13] *Michael J. Koll, Jr.*, 37 ECAB 340 (1986).

[14] *Donald R. Ford*, *supra* note 12.

[15] *C.J.*, Docket No. 11-413 (issued October 21, 2011).

[16] *Ethyl L. Evans*, 17 ECAB 346 (1966).

[17] *Conchita A. Elefano*, 15 ECAB 373 (1964).

undergoing training,[18] and taking a boat trip during nonworking hours to view a private construction site.[19]

In determining whether an injury occurs in a place where the employee may reasonably be or constitutes a deviation from the course of employment, the Board will focus on the nature of the activity in which the employee was engaged and whether it is reasonably incidental to the employee's work assignment or represented such a departure from the work assignment that the employee becomes engaged in personal activities unrelated to his or her employment.[20]

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 substantial direct benefit from the activity beyond the intangible value of improvement in employee health and morale is common to all kinds of recreation and social life.[21]

ANALYSIS

At 5:00 a.m. on December 21, 2013 appellant injured his right knee while running on a treadmill at his hotel while he was on travel status attending work-related training in Colorado. The incident occurred at the time, place, and in the manner alleged. The Board, however, finds that appellant has not established that he sustained an injury in the performance of duty.

The factual circumstances of this case do not satisfy the criteria set forth above for when recreational activities full within the course of employment. The incident did not take place on the premises of the employing establishment during a lunch or recreation period as a regular incident of employment; the employing establishment did not expressly or impliedly require participation, and the activity was not part of the service of the employee; and the employing establishment derived no substantial direct benefit from the activity.[22]

In this case, appellant's hotel merely offered an exercise room with a treadmill as an amenity. While the employing establishment had a gym on its premises in Hawaii, this is not sufficient to show that his exercise on December 21, 2013 was a job requirement or directed by the employing establishment. There is no evidence that appellant sustained an injury while engaged in an activity that was reasonably incidental to the duties contemplated by his

[18] *Karl Kuykendall*, 31 ECAB 163 (1979).

[19] *Mattie A. Watson*, 31 ECAB 183 (1979).

[20] *Phyllis A. Sjoberg*, 57 ECAB 409 (2006).

[21] *S.B.*, Docket No. 11-1637 (issued April 12, 2012); *R.P.*, Docket No. 10-1173 (issued January 19, 2011); *Ricky A. Paylor*, 57 ECAB 568 (2006); *Lawrence J. Kolodzi*, 44 ECAB 818, 822 (1993); *Kenneth B. Wright*, *supra* note 10; *see also* Arthur Larson, *The Law of Workers' Compensation* § 22.00 (2012).

[22] *Id.*

employing establishment.[23] His voluntary, personal activity of exercising on the treadmill does not bring the injury within the course of employment under the criteria establish for recreational and social activities, no matter that he was in travel status.[24]

A. Larson, in his treatise, *The Law of Workers' Compensation*, sets forth the general criteria for performance of duty as it relates to traveling employees or employees on temporary-duty assignments as follows:

> "Employees whose work entails travel away from the [employing establishment's] premises are held in the majority of jurisdictions to be within the course of their employment continuously during the trip, except when a distinct departure on a personal errand is shown. Thus, injuries arising out of the necessity of sleeping in hotels or eating in restaurants away from home are usually held compensable."[25]

The Board has recognized this rule, finding that FECA covers an employee 24 hours a day when he or she is on travel status or on a temporary-duty assignment or a special mission and engaged in activities essential or reasonably incidental to such duties.[26] However, when the employee deviates from the normal incidents of his or her trip and engages in activities, personal or otherwise, which are not reasonably incidental to the duties of the temporary assignment contemplated by the employing establishment, the employee ceases to be under the protection of FECA, and any injury occurring during these deviations is not compensable.[27] The focus is on the nature of the activity.[28]

In *Mohsen S. Payombari*,[29] the employee, who was a Deportation Officer at the Department of Justice, Immigration and Naturalized Service claimed while in travel status sustained a right shoulder injury while lifting weights. He argued as in the case at bar, that due to the potential physical contact and possible restraint of a detained subject he needed to be physically fit. The employee claimed that this weightlifting was pursuant to an employee establishment exercise program. The Board found that he was not in the performance of duty because he deviated from the normal incidents of his travel status by lifting weights in the hotel gym, thereby placing himself outside the scope of coverage under FECA.[30] The Board found that the employee's decision to use the weightlifting equipment at the hotel was not incidental to his employment, but was a personal decision to engage in recreational activity while on travel

[23] *See Donald R. Ford*, *supra* note 12.

[24] *See Lawrence J. Kolodzi*, *supra* note 22.

[25] A. Larson, *The Law of Workers' Compensation* § 15.01 (2009); *see Susan A. Filkins*, 57 ECAB 630 (2006).

[26] *Donald R. Ford*, *supra* note 12.

[27] *Id*.

[28] *See Kenneth B. Briggs*, 54 ECAB 411 (2003).

[29] 53 ECAB 788 (2002).

[30] *Id*.

status.[31] Further, the Board concluded that weightlifting was not an authorized activity under the employment exercise program.

Similarly, in this case, appellant was in travel status when he was injured at a hotel gym while running on a treadmill. Ms. Pascual-Cantu advised that he was not required to work out as part of his assigned duties while attending training, that the employing establishment did not expressly or impliedly require his participation or encourage participation in physical fitness or require its employees to utilize gyms for physical fitness. She further indicated that the employing establishment did not have a physical fitness plan or provide financial support for working out, and maintained that the employing establishment did not receive direct benefit beyond the improvement of health and morale, noting that the employing establishment did not provide leadership, equipment, or facilities to appellant for the activity.

On appeal, counsel asserts that the *E.S.*, case[32] is dispositive. *E.S.*, however, does not involve recreational activities. Rather, in *E.S.*, the employee was injured while on temporary duty travelling from his apartment to his work site.[33]

There is no evidence that appellant sustained an injury while engaged in an activity that was reasonably incidental to the duties contemplated by his employing establishment.[34] He engaged in a voluntary deviation in going to the gym, which was not pursuant to an activity directed by his employing establishment and did not arise out of the necessity of his employment. Appellant, therefore, was not in the performance of duty when he was injured on December 21, 2013.[35]

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 his burden of proof to establish an injury in the performance of duty on December 21, 2013.

[31] *Id*.

[32] *Supra* note 2.

[33] *Id*.

[34] *See Donald R. Ford*, *supra* note 12.

[35] *See H.S.*, 58 ECAB 554 (2007). In light of the Board's finding, it is not necessary to address the medical evidence regarding appellant's right knee injury.

ORDER

IT IS HEREBY ORDERED THAT the November 24, 2014 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 10, 2015
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