

**United States Department of Labor
Employees' Compensation Appeals Board**

)	
N.B., Appellant)	
)	
and)	Docket No. 20-1446
)	Issued: March 19, 2021
DEPARTMENT OF THE ARMY, ARMY)	
INTELLIGENCE & SECURITY COMMAND,)	
Fort Huachuca, AZ, Employer)	
)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
JANICE B. ASKIN, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On July 28, 2020 appellant filed a timely appeal from a May 18, 2020 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (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 has met her burden of proof to establish a traumatic injury occurred in the performance of duty on April 17, 2019, as alleged.

FACTUAL HISTORY

On April 22, 2019 appellant, then a 44-year-old intelligence specialist, filed a traumatic injury claim (Form CA-1) alleging that on April 17, 2019 she tore her left knee meniscus when

¹ 5 U.S.C. § 8101 *et seq.*

she slipped and twisted her left knee while in the performance of duty. She indicated that after exercising at the gym she slipped on standing water in the shower. Appellant stopped work on April 17, 2019. The record reveals that appellant was stationed in Germany at the time of the incident.

OWCP received a position description for an intelligence specialist and a medical report.²

In a letter dated May 7, 2019, W.P., an injury compensation specialist for the employing establishment, controverted appellant's claim alleging that the incident did not occur in the performance of duty. He noted that the alleged injury occurred 45 minutes after the start of her scheduled work shift while she was in the locker room. W.P. indicated that appellant was participating in an informal personal fitness activity that did not coincide with a lunch or break period.

In a May 7, 2019 development letter, OWCP informed appellant that of the deficiencies of her claim, requested additional factual and medical evidence, and provided a questionnaire for her completion. It afforded her 30 days to respond. No response was received within the allotted time.

By decision dated June 7, 2019, OWCP denied appellant's claim finding that she had not established that the April 17, 2019 employment incident occurred as alleged. It concluded, therefore, that the requirements had not been met to establish an injury as defined by FECA.

On April 2, 2020 appellant requested reconsideration. In an April 8, 2020 statement, she asserted that the injury occurred during working hours, on the employing establishment premises, while in the shower after participating in an informal physical fitness program. Appellant indicated that she was conducting physical fitness to prepare for either a civilian or Army Reserves potential deployment. She noted that deployment was a job requirement and that she was required to maintain a minimal level of physical fitness in order to pass a health physical.

Appellant submitted a completed questionnaire signed on April 8, 2020. She described that on the morning of April 17, 2019 she tore her left knee meniscus when she slipped in the shower due to standing water from a clogged drain. Appellant reported that nobody was in the locker room at the time and she managed to hop out of the shower on her right leg. She noted that a colleague then assisted her to a chair. Appellant recounted that she was taken to the emergency room where she underwent emergency surgery to repair a torn meniscus in her left knee. She indicated that she was showering after exercising in a gym maintained by the employing establishment. Appellant noted that both the gym and locker room were on the employing establishment premises. She explained that she was participating in an informal workout program to prepare for potential deployment. Appellant reported that she was not required to use the gym and did not pay a membership to use the gym facilities. She explained that, although exercise was not part of her job, she was required to maintain a baseline level of fitness in order to deploy, which was a job requirement. Appellant noted that she was not participating in a formal agency physical fitness plan (PFP). She reported that the accident occurred at 9:45 a.m. and that she had quickly

² The medical report is in the German language.

checked her e-mail before she went to the gym. Appellant indicated that her shift normally began at 9:00 a.m., but she was allowed flexibility during the day in order to exercise.

In a September 16, 2019 witness statement, Specialist (SPC) K.V. recounted that when she walked into the restroom she saw appellant leaning against the wall unable to move. She noted that appellant appeared to have just showered. K.V. indicated that she helped appellant get into a rolling chair and called the clinic to see if appellant could get an appointment. She reported that another civilian helped her push the rolling chair to appellant's car and helped appellant get into the car. K.V. noted that appellant had informed her that she had to go to the hospital for emergency knee surgery.

OWCP also received medical evidence, including a June 5, 2019 report by Dr. K. Diener, an orthopedic specialist; an August 20, 2019 report by Dr. Joseph M. Layug, a Board-certified orthopedic surgeon; a September 17, 2019 report by Dr. L. Eckhard, a specialist in orthopedic and trauma surgery; a September 20, 2019 report by Dr. Oliver C. Singer, a neurologist; and an October 28, 2019 report by Dr. A. Kiekenbeck, a specialist in orthopedic and trauma surgery³

In an April 10, 2020 letter, OWCP informed the employing establishment that appellant had submitted a reconsideration request and requested additional factual information about the circumstances surrounding the alleged April 17, 2019 employment incident.

OWCP received an April 21, 2020 memorandum from T.G., a site information officer for the employing establishment, in response to its letter of inquiry. T.G. noted that appellant was not participating in an agency-approved PFP. He also indicated that appellant was not required but encouraged to participate in the physical fitness activity, but that the employing establishment encouraged all civilian employees to participate in physical fitness. T.G. cited to Army Regulation 600-63, Chapter 5 Physical Health, 5-2 Fitness Program; CPOL -- Employee Wellness Program; and INSCOM Policy #33, INSCOM Fitness Options. He further reported that the employing establishment would have benefited from appellant's participation in an agency-approved PFP. T.G. explained that being physically fit would enable appellant to meet all job requirements, including deployments and prolonged tours of duty (TOD). He clarified that employees were permitted and encouraged to participate in a regular program of exercise and that appellant was not violating any rules or regulations. T.G. indicated that there was a "verbal agreement" between the employees and previous supervisor to participate in the physical fitness activity. He reported that the alleged April 17, 2019 injury occurred on an employing establishment fitness facility during regular working hours.

In an April 22, 2020 letter, W.P., an injury compensation specialist for the employing establishment, indicated that a cardiovascular physical fitness program and periodic medical examination were not required for appellant's position as an intelligence specialist, operations.

By decision dated May 18, 2020, OWCP modified the June 7, 2019 decision. It accepted that the April 17, 2019 employment incident occurred as alleged and that appellant was diagnosed

³ The reports appears to have been translated from the German language to the English language.

with a left knee meniscus tear. However, OWCP denied appellant's claim finding that she was not in the performance of duty at the time of the alleged April 17, 2019 employment incident.

LEGAL PRECEDENT

An employee seeking benefits under FECA⁴ 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,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 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

In providing for a compensation program for federal employees, Congress did not contemplate an insurance program against any and every injury, illness, or mishap that might befall an employee contemporaneous or coincidental with his or her employment. Liability does not attach merely upon the existence for an employee-employer relation. Instead, Congress provided for the payment of compensation for disability or death of an employee resulting from personal injury sustained while in the performance of duty.⁸

The Board has interpreted the phrase "sustained while in the performance of duty" to be the equivalent of the commonly found prerequisite in workers' compensation law of "arising out of and in the course of employment."⁹ The phrase "in the course of employment" encompasses the work setting, the locale, and time of injury. The phrase "arising out of the employment" encompasses not only the work setting, but also a causal concept with the requirement being that an employment factor caused the injury.¹⁰ In addressing the issue, the Board has held that in the compensation field, to occur in the course of employment, in general, an injury must occur: (1) at a time when the employee may reasonably be said to be engaged in his or her 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

⁴ *Supra* note 1.

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

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 *R.R.*, Docket No. 19-0048 (issued April 25, 2019); *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* 5 U.S.C. § 8102(a); *see J.N.*, Docket No. 19-0045 (issued June 3, 2019).

⁹ *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).

¹⁰ *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).

or engaged in doing something incidental thereto.¹¹ In deciding whether an injury is covered by FECA, the test is whether, under all circumstances, a causal relationship exists between the employment itself, or the conditions under which it is required to be performed and the resultant injury.¹²

Injuries arising on the employing establishment's premises may be approved if the claimant is engaged in activity reasonably incidental to his or her employment, such as: (a) personal acts for the employee's comfort, convenience, and relaxation; (b) eating meals and snacks on-premises; or (c) taking authorized coffee breaks.¹³

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.¹⁴

OWCP procedures provide 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 have the coverage of FECA whether or not the exercise or recreation was part of a structured PFP. Injuries which 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.¹⁵

ANALYSIS

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

Appellant filed a traumatic injury claim alleging that on April 17, 2019 she injured her left knee when she slipped and fell in the shower after exercising in a gym maintained by the employing establishment. OWCP denied her claim finding that she was not in the performance of

¹¹ 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).

¹² J.C., Docket No. 17-0095 (issued November 3, 2017); *Mark Love*, 52 ECAB 490 (2001).

¹³ A.G., Docket No. 18-1560 (issued July 22, 2020); A.P., Docket No. 18-0886 (issued November 16, 2018); J.O., Docket No. 16-0636 (issued October 18, 2016). See also Federal (FECA) Procedure Manual, Part 2 -- Claims, *Performance of Duty*, Chapter 2.804.4(a)(2) (August 1992).

¹⁴ 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); see also A. Larson, *The Law of Workers' Compensation* § 22.00 (2015).

¹⁵ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Performance of Duty*, Chapter 2.804.18(b) (March 1994).

duty at the time of the April 17, 2019 incident. It determined that appellant was not engaged in activities that were incidental to her employment or related in any way to the employing establishment's business. OWCP noted that the employing establishment had confirmed that appellant was not enrolled in a formal PFP and that it did not require participation in a physical fitness program.

While OWCP focused on whether appellant's physical fitness routine was incidental to her employment, the Board initially notes that appellant's April 17, 2019 slip and fall incident did not occur while she was exercising, but after she had finished exercising and was taking a shower in the locker room. The Board has found that activities encompassing personal acts for the employee's comfort, convenience and relaxation; eating meals and snacks on the premises, including established coffee breaks; and the employee's presence on the premises for a reasonable time before or after specific working hours, are reasonably incidental to employment and are, therefore, in the course of employment.¹⁶ The Board notes that the personal comfort doctrine is intended to provide coverage to employees while injured on the employing establishment premises when ministering to their personal comfort.¹⁷ This doctrine holds that acts of personal comfort, such as eating a snack, using the bathroom, or drinking water or other beverage, are considered to be in the performance of duty.¹⁸ In this case, the evidence establishes that appellant was injured on the employing establishment premises at approximately 9:45 a.m. during her regular work hours. At the time of the injury, she was using the locker room in the employing establishment's fitness facility in order to take a shower after exercising. The Board finds that such action would fall under the personal comfort doctrine.¹⁹

The Board has held that recreational activities can 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 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.²⁰ Furthermore, OWCP procedures provide 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 have the coverage of FECA whether or not the exercise or recreation was part of a structured PFP.²¹

With regard to the first criterion, there is no factual dispute that appellant's injury took place on the employing establishment premises during the course of her employment. OWCP has

¹⁶ *Supra* note 13.

¹⁷ *J.O.*, Docket No. 16-0636 (issued October 18, 2016); *Sari A. Shapiroholland*, 47 ECAB 682 (1996).

¹⁸ *A.P.*, Docket No. 18-0886 (issued November 16, 2018); *James P. Schilling*, 54 ECAB 641 (2003).

¹⁹ *See V.O.*, 59 ECAB 500 (2008) (the Board found that an employee's injury occurred in the performance of duty when he slipped and fell on the bathroom floor of the employing establishment).

²⁰ *Supra* note 14.

²¹ *Supra* note 15.

acknowledged that the April 17, 2019 incident occurred on the premises and during regular work hours. Appellant explained that both the gym and locker room were maintained by the employing establishment and that the injury occurred at 9:45 a.m. during her regular work hours. In an April 21, 2020 memorandum, the employing establishment also reported that the alleged April 17, 2019 injury occurred in an employing establishment fitness facility during regular working hours.

With regard to the second criterion, the Board finds that the employing establishment implicitly required participation in physical fitness such that it made the activity part of the service of the employee. In his response to the OWCP letter of inquiry dated April 21, 2020, T.G., the site information officer indicated that appellant was not required but encouraged to participate in the physical fitness activity.

In *T.L.*,²² the Board determined that the claimant was injured in the performance of duty while playing basketball as he waited for a session to start during an annual training course. The evidence of record indicated that the employing establishment encouraged “networking” during its training and that the agenda specifically scheduled “Lunch/Networking.” Similarly, in this case the employing establishment indicated that all civilian employees were encouraged to participate in physical fitness. The employing establishment also indicated that there was a “verbal agreement” between the employee and a previous supervisor, which provided appellant flexibility during her workday to exercise. Therefore, the Board finds that the appellant has satisfied the second criterion.

The Board further finds that appellant has satisfied the third criterion that the employing establishment derived a substantial direct benefit from appellant exercising at the fitness facility. Appellant explained that although exercise was not required of her job, she was expected to maintain a baseline level of fitness in order to deploy as part of her job. In an April 21, 2020 memorandum, the employing establishment also indicated that being physically fit would enable appellant to meet all job requirements, including deployments and TOD. Thus, the Board finds that the third criterion has been met in determining whether a recreational activity has occurred. As such the Board finds that appellant was within the performance of duty on April 17, 2019 as alleged.

The case will be remanded to determine whether appellant has sustained an injury casually related to the accepted April 17, 2019 employment incident.

After such further development as it deems necessary, OWCP shall issue an appropriate *de novo* decision on this matter.

CONCLUSION

The Board finds that appellant has met her burden of proof to establish that she was in the performance of duty on April 17, 2019, as alleged. The Board further finds, however, that the case is not in posture for decision regarding whether appellant’s injury resulted from the accepted April 17, 2019 employment incident.

²² Docket No. 19-0805 (issued November 18, 2019).

ORDER

IT IS HEREBY ORDERED THAT the May 18, 2020 decision of the Office of Workers' Compensation Programs is reversed, and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: March 19, 2021
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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