United States Department of Labor
Employees' Compensation Appeals Board

D.W., Appellant	)	
and	)	**Docket No. 08-2318**
	)	**Issued: May 20, 2009**
DEPARTMENT OF HOMELAND SECURITY, TRANSPORTATION SECURITY ADMINISTRATION, Greenfield, WI, 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
DAVID S. GERSON, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On August 22, 2008 appellant filed a timely appeal from the Office of Workers' Compensation Programs' May 28, 2008 nonmerit decision, denying his request for further review of the merits of his claim. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2), the Board has jurisdiction over this nonmerit decision. The last merit decision of record was the Office's February 22, 2007 decision finding that he did not sustain an injury in the performance of duty on December 2, 2006. Because more than one year has elapsed between the last merit decision and the filing of this appeal on August 22, 2008, the Board lacks jurisdiction to review the merits of this claim.[1]

ISSUE

The issue is whether the Office properly refused to reopen appellant's case for further review of the merits of his claim on the grounds that his request was untimely filed and failed to demonstrate clear evidence of error.

[1] *See* 20 C.F.R. §§ 501.2(c) and 501.3(d)(2).

FACTUAL HISTORY

On December 13, 2006 appellant, then a 59-year-old transportation security screener at General Mitchell International Airport (GMIA), filed a traumatic injury claim alleging that he sustained injury to his left shoulder and elbow due to a fall at work on December 2, 2006 at 8:28 p.m. Regarding the nature of the injury, he stated, "Slipped on the ice while walking to my car that was parked in the International parking lot."[2] Brian Stewart, a supervisor, asserted on the form that the claimed injury did not occur in the performance of duty because appellant was off duty when the injury occurred in the International parking lot.

In a January 25, 2007 statement, Nadine Eaton, a workers' compensation official for the employing establishment, stated that appellant was "off duty" en route to his motor vehicle parked within the international parking lot at the time of the claimed injury. The international parking lot was owned by the County of Milwaukee and leased to GMIA. Ms. Eaton indicated that the parking spaces were sold by GMIA to airport personnel on a first come first serve basis regardless of airline or occupation. Maintenance such as snow removal and salting was subcontracted out by the airport to Central Parking Services (CPS).

In a February 8, 2007 statement, Marvin Haynes, III, a supervisor, stated that appellant was "off duty" at the time of his fall,[3] that employees were required to pay $96.00 per year to park in the lot where he parked, that the parking lot was owned by the Federal Government and that the actual name of the lot was "Employee parking lot." He acknowledged that there were other places agency employees could park but asserted that they were impractical or too expensive. The maintenance services for the parking lot were subcontracted but were administered and inspected contractually by the airport, which sold parking passes to agency employees and leased checkpoints to the Federal Government.

In a February 22, 2007 decision, the Office determined that appellant did not meet his burden of proof to show that he sustained an injury in the performance of duty on December 2, 2006. It indicated that appellant's claimed injury occurred when he was off duty and not on the employing establishment premises.

On September 18, 2007 appellant requested reconsideration of his claim arguing that the area where he fell was so interrelated with the employing establishment that it could be treated as though it was the actual premises of the employing establishment. He asserted that the parking lot was called the employee parking lot rather than the international parking lot. In a December 13, 2007 decision, the Office denied appellant's request for further review of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

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[2] Appellant stopped work on December 3, 2006. In a January 30, 2007 statement, he stated, "On December 2, 2006 at 20:30, at the end of my shift, while walking to my vehicle that was parked in the International parking lot I slipped on the ice, fell and injured my left elbow and shoulder. This lot is an area of the main parking lot that we are assigned to park in and that we pay to park in."

[3] Mr. Haynes indicated that appellant left work on December 2, 2006 as usual between 5 and 10 minutes prior to the official end of his shift at 8:30 p.m.

In a form dated February 26, 2008, appellant requested reconsideration of his claim.[4] In a February 25, 2008 statement, he asserted that he was actually on duty at the time of the fall on December 2, 2006 because, as noted by Mr. Haynes, he left work as usual between 5 and 10 minutes prior to the official end of his shift at 8:30 p.m. Appellant claimed that, although the fall did not occur on federal property, the location of the injury still fell under the premises rule. He asserted that Office Safety and Health Administration (OSHA) guidelines provide that when an employee slips on ice in a parking lot the injury is considered to be employment related. Appellant indicated that agency employees are responsible for ensuring that the entire airport grounds are safe. He felt his situation was similar to that of mail carriers who did not work on official federal property. Appellant asserted therefore that all parts of the airport were part of the employing establishment premises. He claimed that all agency employees took the path to the employee parking lot and that the general public was not permitted to park there.

In a May 28, 2008 decision, the Office denied appellant's request for further review of the merits of his claim on the grounds that his request was untimely filed and failed to demonstrate clear evidence of error.

LEGAL PRECEDENT

To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant must file his application for review within one year of the date of that decision.[5] The Board has found that the imposition of the one-year limitation does not constitute an abuse of the discretionary authority granted the Office under section 8128(a) of the Federal Employees' Compensation Act.[6]

The Office, however, may not deny an application for review solely on the grounds that the application was not timely filed. When an application for review is not timely filed, it must nevertheless undertake a limited review to determine whether the application establishes "clear evidence of error."[7] Office regulations and procedure provide that the Office will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth in 20 C.F.R. § 10.607(a), if the claimant's application for review shows "clear evidence of error" on the part of the Office.[8]

[4] The record contains an accompanying envelope postmarked February 26, 2008.

[5] 20 C.F.R. § 10.607(a).

[6] 5 U.S.C. § 8128(a); *Leon D. Faidley, Jr.*, 41 ECAB 104, 111 (1989).

[7] *See* 20 C.F.R. § 10.607(b); *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

[8] 20 C.F.R. § 10.607(b); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3d (January 2004). Office procedure further provides, "The term 'clear evidence of error' is intended to represent a difficult standard. The claimant must present evidence which on its face shows that the [Office] made an error (for example, proof that a schedule award was miscalculated). Evidence such as a detailed, well-rationalized medical report which, if submitted before the denial was issued, would have created a conflict in medical opinion requiring further development, is not clear evidence of error." *Id.* at Chapter 2.1602.3c.

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.[9] The evidence must be positive, precise and explicit and must manifest on its face that the Office committed an error.[10] Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.[11] It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.[12] This entails a limited review by the Office of how the evidence submitted with the reconsideration request bears on the evidence previously of record and whether the new evidence demonstrates clear error on the part of the Office.[13] To show clear evidence of error, the evidence submitted must not only be of sufficient probative value to create a conflict in medical opinion or establish a clear procedural error, but must be of sufficient probative value to *prima facie* shift the weight of the evidence in favor of the claimant and raise a substantial question as to the correctness of the Office decision.[14]

The Act provides for payment of compensation for disability or death of an employee resulting from personal injury sustained while in the performance of duty.[15] 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."[16] "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 when he may reasonably be expected to be in connection with her employment and while he was reasonably fulfilling the duties of his employment or engaged in doing something incidental thereto. As to the phrase "in the course of employment," the Board has accepted the general rule of workers' compensation law that, as to employees having fixed hours and places of work, injuries occurring on the premises of the employing establishment, while the employees are going to or from work, before or after working hours or at lunch time, are compensable.[17]

[9] *See Dean D. Beets*, 43 ECAB 1153, 1157-58 (1992).

[10] *See Leona N. Travis*, 43 ECAB 227, 240 (1991).

[11] *See Jesus D. Sanchez*, 41 ECAB 964, 968 (1990).

[12] *See Leona N. Travis*, *supra* note 10.

[13] *See Nelson T. Thompson*, 43 ECAB 919, 922 (1992).

[14] *Leon D. Faidley, Jr.*, *supra* note 6.

[15] 5 U.S.C. § 8102(a).

[16] This construction makes the statute effective in those situations generally recognized as properly within the scope of workers' compensation law. *Bernard D. Blum*, 1 ECAB 1 (1947).

[17] *Narbik A. Karamian*, 40 ECAB 617, 618 (1989). The Board has also applied this general rule of workers' compensation law in circumstances where the employee was on an authorized break. *See Eileen R. Gibbons*, 52 ECAB 209 (2001).

Regarding what constitutes the "premises" of an employing establishment, the Board has stated:

> "The term 'premises' as it is generally used in work[ers'] compensation law, is not synonymous with 'property.' The former does not depend on ownership, nor is it necessarily coextensive with the latter. In some cases 'premises' may include all the 'property' owned by the employer; in other cases even though the employer does not have ownership and control of the place where the injury occurred the place is nevertheless considered part of the 'premises.'"[18] (Emphasis in the original.)

The Board has also pointed out that factors which determine whether a parking lot used by employees may be considered a part of the employing establishment's "premises" include whether the employing establishment contracted for the exclusive use by its employees of the parking area, whether parking spaces on the lot were assigned by the employing establishment to its employees, whether the parking areas were checked to see that no unauthorized cars were parked in the lot, whether parking was provided without cost to the employees, whether the public was permitted to use the lot and whether other parking was available to the employees. Mere use of a parking facility, alone, is not sufficient to bring the parking lot within the "premises" of the employing establishment. The premises doctrine is applied to those cases where it is affirmatively demonstrated that the employer owned, maintained or controlled the parking facility, used the facility with the owner's special permission or provided parking for its employees.[19]

ANALYSIS

In its May 28, 2008 decision, the Office properly determined that appellant filed an untimely request for reconsideration. Appellant's reconsideration request was filed on February 26, 2008, more than one year after the Office's February 22, 2007 decision and therefore he must demonstrate clear evidence of error on the part of the Office in issuing this decision.

Appellant has not demonstrated clear evidence of error on the part of the Office in issuing its February 22, 2007 decision. He did not submit the type of positive, precise and explicit evidence which manifests on its face that the Office committed an error.

In connection with his untimely reconsideration request, appellant asserted that he was actually on duty at the time of the fall on December 2, 2006 because, as noted by Mr. Haynes, he left work as usual between 5 and 10 minutes prior to the official end of his shift at 8:30 p.m.

[18] *Wilmar Lewis Prescott*, 22 ECAB 318, 321 (1971). Another exception to the rule is the proximity rule which the Board has defined by stating that under special circumstances the industrial premises are constructively extended to hazardous conditions which are proximately located to the premises and may therefore be considered as hazards of the employing establishment. The main consideration in applying the rule is whether the conditions giving rise to the injury are causally connected to the employment. *See William L. McKenney*, 31 ECAB 861 (1980).

[19] *Diane Bensmiller,* 48 ECAB 675 (1997); *Edythe Erdman*, 36 ECAB 597 (1985); *Karen A. Patton*, 33 ECAB 487 (1982).

This assertion would not tend to support his claim as Mr. Haynes and all the other agency officials of record explicitly indicated that appellant was officially off duty at the time of his fall. Appellant claimed that, although the fall did not occur on federal property, the location of the injury still fell under the premises rule.[20] His mere assertion that the premises extended to the parking lot where he fell would not show clear error in the Office's finding that his injury did not occur in the performance of duty.

Appellant asserted that OSHA guidelines provide that when an employee slips on ice in a parking lot the injury is considered to be employment related. However, the standards of other agencies would not be relevant to whether appellant's fall occurred within the performance of duty under the Act.[21] Appellant indicated that agency employees were responsible for ensuring that the entire airport grounds are safe and hence suggested that he was carrying out work duties at the time of his fall.[22] This assertion would not tend to show clear evidence of error in the Office's denial of his claim because there is no indication in the case record that appellant was given any special work duties after he was officially off work on December 2, 2006.[23]

For these reasons, the evidence submitted by appellant does not raise a substantial question concerning the correctness of the Office's February 22, 2007 decision and the Office properly determined that appellant did not show clear evidence of error in that decision.

CONCLUSION

The Board finds that the Office properly refused to reopen appellant's case for further review of the merits of his claim on the grounds that his request was untimely filed and failed to demonstrate clear evidence of error.

[20] *See supra* note 18 and accompanying text.

[21] The Board has long held that entitlement to benefits under statutes administered by other federal agencies does not establish entitlement to benefits under the Act. *See Donald Johnson*, 44 ECAB 540, 551 (1993).

[22] *See supra* note 17 and accompanying text.

[23] Appellant claimed that all agency employees took the path to the parking lot where the fall occurred and that the general public was not permitted to park there. These claims would not tend to support appellant's claim as agency officials indicated that employees had more than one option for parking and that many nonagency individuals parked in the parking lot in question, including airport and airline employees. The fact that the agency did not own, control or maintain the parking lot, that agency employees could park elsewhere and that nonagency employees could park in the lot militated against a finding that the premises extended to the lot. *See supra* note 19 and accompanying text.

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' May 28, 2008 decision is affirmed.

Issued: May 20, 2009
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

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