United States Department of Labor
Employees' Compensation Appeals Board

H.L., Appellant	)	
and	)	**Docket No. 13-2077**
	)	**Issued: March 20, 2014**
DEPARTMENT OF AGRICULTURE, FOOD SAFETY & INSPECTION SERVICE, Geneseo, IL, Employer	)	

Appearances:
Steven C. Ames, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
PATRICIA HOWARD FITZGERALD, Judge
ALEC J. KOROMILAS, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On September 11, 2013 appellant, through her attorney, filed a timely appeal from the July 15, 2013 nonmerit decision of the Office of Workers' Compensation Programs (OWCP), which denied her reconsideration request. Pursuant to the Federal Employees' Compensation Act[1] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review this nonmerit decision.

ISSUE

The issue is whether OWCP properly denied appellant's June 18, 2013 reconsideration request pursuant to 5 U.S.C. § 8128(a).

[1] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On November 10, 2010 appellant, a 59-year-old meat inspector, filed a traumatic injury claim alleging that she sustained an injury on her way to work that morning after falling in a parking area outside of her workplace.

In a decision dated February 7, 2011, OWCP denied appellant's claim on the grounds that her injury did not arise in the performance of duty. Appellant parked her vehicle in a nondesignated parking area not owned, controlled or managed by the employing establishment. The employing establishment did not require her to park there. There was an officially designated parking area available to appellant that was well maintained and well lighted and monitored for unauthorized vehicles. Appellant was not required to pay for parking in the officially designated lot. Further, the employing establishment had issued a letter of warning to her for parking in the nondesignated area.

OWCP's hearing representative affirmed the denial of appellant's claim on September 6, 2011. The hearing representative described the many factors that help determine whether a parking lot used by employees may be considered a part of the employing establishment's premises. After a review of numerous decisions, the hearing representative found that the evidence did not support that the parking lot was part of the premises. The employing establishment did not own or lease the lot, did not maintain the lot in any manner and did not provide the badges or parking pass necessary to use the lot. The lot was not for the exclusive use of employing establishment employees. The employing establishment did not monitor the lot and had no control over who was allowed to park in that area. The hearing representative found that the fact that it allowed appellant to park in that area and was not charged for doing so was insufficient to make the parking area a part of the premises. Appellant's fall on November 10, 2010 thus constituted an off-premises injury while going to work, which was not compensable but rather arose out of ordinary nonemployment hazards of the journey itself shared by all travelers.

Appellant requested reconsideration on March 15, 2012, which was received by OWCP on March 22, 2012. She argued that OWCP's hearing representative erred in finding that she was not on the premises at the time of her fall. Appellant argued that the employing establishment assigned her to the parking lot; that other parking was unavailable due to her medical accommodation expressly issued by the employing establishment; that the parking lot was in sufficient proximity and relationship to the employing establishment; and that her injury arose out of an extraordinary employment hazard. Thus, she argued, the decision was substantially against the manifest weight of the evidence.

On June 20, 2012 OWCP reviewed the merits of appellant's case and denied modification of its prior decision.

Appellant requested reconsideration on June 18, 2013. OWCP received this request on June 21, 2013. Appellant submitted several medical notes and a notice of personnel action showing off-work hours. She also submitted several cases from the Fifth Circuit. Appellant argued that OWCP failed to consider and give proper weight to the evidence that she was in a "zone of special danger" incidental to her employment and also failed to take into account the

totality of the circumstances. She argued that the special hazard included the fact that she was unable to use the other parking lot and was ordered by her supervisor to use the lot in question. Appellant then offered a restatement of her previous request for reconsideration.

In a decision dated July 15, 2013, OWCP denied appellant's June 18, 2013 reconsideration request on the grounds that her letter neither raised substantive legal question nor included new and relevant evidence.

On appeal, counsel argues that the June 18, 2013 reconsideration request presented a new and relevant legal issue, namely, that OWCP failed to consider the totality of the circumstances and the existence of a zone of special danger.

LEGAL PRECEDENT

Section 8128(a) of FECA vests OWCP with discretionary authority to determine whether it will review an award for or against compensation:

> "The Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application. The Secretary, in accordance with the facts found on review may --
>
> (1) end, decrease or increase the compensation awarded; or
>
> (2) award compensation previously refused or discontinued."[2]

OWCP, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a). As one such limitation, 20 C.F.R. § 10.607(a) provides that an application for reconsideration must be received by OWCP within one year of the date of the OWCP decision for which review is sought.[3]

OWCP should review the file to determine whether the application for reconsideration was received within one year of a merit decision. "Timeliness is determined by the document receipt date of the reconsideration request [the 'received date' in the Integrated Federal Employees' Compensation System (iFECS)]." If the request for reconsideration has a document received date greater than one year, the request must be considered untimely.[4]

OWCP will consider an untimely application only if the application demonstrates clear evidence of error on the part of it in its most recent merit decision. The application must establish, on its face, that such decision was erroneous.[5]

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[2] *Id.* at § 8128(a).

[3] 20 C.F.R. § 10.607(a).

[4] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4.b (October 2011).

[5] 20 C.F.R. § 10.607.

The term "clear evidence of error" is intended to represent a difficult standard.[6] If clear evidence of error has not been presented, OWCP should deny the application by letter decision, which includes a brief evaluation of the evidence submitted and a finding made that clear evidence of error has not been shown.[7]

ANALYSIS

The most recent decision reviewing the merits of appellant's case was OWCP's June 20, 2012 decision. As the appeal rights attached to that decision explained, she had one calendar year from the date of that decision or until June 20, 2013, to ensure receipt by OWCP of any reconsideration request.

OWCP received appellant's June 18, 2013 reconsideration request on June 21, 2013. As the document received date was beyond one year, appellant's request must be considered untimely. The proper standard of review for an untimely reconsideration request is the "clear evidence of error" standard.

In denying appellant's reconsideration request, OWCP applied the wrong standard of review. Further, its generic decision failed to discuss or evaluate the particular evidence and argument appellant presented to support her request.[8] Accordingly, the Board will set aside OWCP's July 15, 2013 decision and remand the case for a proper exercise of its discretionary authority under 5 U.S.C. § 8128(a).

If the June 18, 2013 reconsideration request presented clear evidence of error, OWCP shall review the merits of appellant's case and issue an appropriate decision on her claim for compensation benefits. If the request did not present clear evidence of error, it will deny the application by letter decision, which must include an evaluation of the evidence and argument presented.

CONCLUSION

The Board finds that this case is not in posture for decision. OWCP not only applied the wrong standard of review, it failed to evaluate the evidence and argument appellant presented to support her request.

[6] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.5.a (October 2011).

[7] *Id*. at Chapter 2.1602.5.b.

[8] *See Robert M. Pace*, 46 ECAB 551 (1995) (in determining whether clear evidence of error is shown, a brief evaluation of the evidence should be included in the decision so that any subsequent reviewer will be able to address the issue of discretion); 20 C.F.R. § 10.126 (an OWCP decision shall contain findings of fact and a statement of reasons); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.7.b (October 2011) (if the evidence submitted to support an application for reconsideration is not sufficient to require a merit review, OWCP should issue a decision that discusses the evidence submitted or lack thereof, and explicitly states the basis for the finding of insufficiency).

ORDER

IT IS HEREBY ORDERED THAT the July 15, 2013 decision of the Office of Workers' Compensation Programs is set aside and the case remanded for further action.

Issued: March 20, 2014
Washington, DC

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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

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