

FACTUAL HISTORY

On May 16, 2012 appellant filed a claim for survivor benefits (Form CA-5) due to the death of her husband on February 7, 2012. She provided copies of a marriage license and funeral costs.²

On February 7, 2012 the employing establishment had filed an Official Superior's Report of Employee's Death (Form CA-6) regarding the death of the employee on February 7, 2012.³ The employee's supervisor noted that the employee was found in a storm drain located in the employing establishment's parking lot on February 7, 2012.⁴ The employee had clocked out at 10:54 p.m. on February 6, 2012 and he had removed the grate from a storm drain in the parking lot in an apparent attempt to retrieve a cellular phone which had fallen into the drain. The supervisor indicated that the employee was not in the performance of duty at the time of his death due to the time that had passed since he stopped work and the fact that he had removed a storm drain cover.

Several witness statements were submitted as well as an incident report from the plant manager for the employing establishment. The incident report revealed that the employee had clocked out at 10:54 p.m. on February 6, 2012. At approximately 11:45 p.m. on February 6, 2012, the employee had approached a coworker asking for assistance in retrieving a phone he had dropped into the storm drain. The coworker indicated that he was unable to immediately provide assistance but advised the employee that he would return after performing a scheduled task. At approximately 12:18 a.m. on February 7, 2012, two coworkers noted two legs extending up from an open storm drain and emergency medical services were summoned. The coworkers pulled the employee from the drain, noting that he appeared to be dead, and they attempted resuscitation. At 12:29 a.m., an ambulance arrived and emergency medical workers attempted to revive the employee. The employee was pronounced dead at the scene at approximately 1:00 a.m. It was noted that a dock handle had been used to remove the drain cover and a small broom was found in the sewer.

An employing establishment official also had filed a letter of challenge on behalf of the employing establishment on February 8, 2012, indicating that the employee was outside the performance of his duties at the time of his death on February 7, 2012. The investigation revealed that he had been off the clock for approximately one hour when his accident occurred. The official noted that the employee removed the cover to the storm sewer drain and either intentionally or accidentally entered the confined space, ultimately leading to his death by drowning in the accumulated water in the bottom of the drain. The employee had moved his vehicle, intentionally blocking use of the parking aisle, in order to protect himself while attempting to retrieve the phone.

² The marriage license indicated that appellant married the employee on February 18, 1984. OWCP has acknowledged that appellant was married to the employee at the time of his death on February 7, 2012.

³ The employee was 70 years old and worked as a mail handler for the employing establishment. A February 8, 2012 autopsy report lists the employee's cause of death as drowning.

⁴ The supervisor listed the time of death as 12:28 a.m. on February 7, 2012. It was acknowledged that the parking lot was on the premises of the employing establishment.

In a statement dated June 11, 2012, appellant argued that the employee's death occurred within a reasonable time after his work shift ended and therefore occurred within the performance of duty.

In a July 26, 2012 decision, OWCP denied appellant's claim for survivor benefits as it was determined that the employee's death on February 7, 2012 did not occur in the performance of duty. Regarding the reasons for denying the claim, it stated:

“At the time of death, [the employee] was in the process of trying to retrieve his cell phone from a storm drain. [The employee] was not in the performance of his duties as a mail handler, and he had been off work at least an hour and a half past the time he clocked out. Although [the employee] was on the premises at the time of his death his efforts to retrieve his cell phone from the storm drain were not part of his employers business or an activity that could be considered incidental to his employment.”

OWCP's July 26, 2012 decision was returned by the U.S. Postal Service as undeliverable and it was determined that appellant's mailing address was incorrect. In order to preserve appellate rights, it corrected the address and reissued the decision effective August 10, 2012.

Appellant disagreed with OWCP's August 10, 2012 decision and requested a telephonic hearing before an OWCP hearing representative. During the December 12, 2012 hearing, appellant's representative stated that it was his belief that the employee actually worked until 11:30 p.m. on February 7, 2012 and he indicated that he intended to produce evidence to support this assertion. The employee's daughter testified that the employee's shift usually ended at 10:30 p.m., but that he had called appellant on February 6, 2012 and told her that he had to work 45 to 60 minutes of overtime. Appellant's representative indicated that he hoped to obtain the report of the employee's actual clock rings on February 7, 2012, as well as any video surveillance footage of the parking lot, to support his argument that the employee was on the clock on or around the time of his death.

In a March 7, 2013 decision, OWCP's hearing representative affirmed OWCP's August 10, 2012 decision. He found that appellant's claim for survivor benefits was properly denied as it had not been established that the employee was in the performance of duty at the time of his death on February 7, 2012.

In a February 26, 2014 letter, appellant, through her representative, requested reconsideration of her claim. The representative stated:

“In the decision, the hearing officer relates to the fact that the [employee] was on the premise[s] at the time of the accident but that the [employing establishment] stated that the accident happened one hour after time the [employee's] end [of] tour. However the wife said that the [employee] called her to tell her that he had to work overtime on that day. Enclosed please find the letter written to the [employing establishment] under the Freedom of Information Act asking the [employing establishment] for the [employee's] clock ring for the day in question as well as the video of the parking lot for the hour in question. The [employing establishment] refuse[d] to answer this request so the weight of best evidence

would be that the [employee] worked overtime on the day in question and that since he was on the premise[s] this case needs to be accepted.”⁵

By decision dated March 27, 2014, OWCP denied appellant’s request for further review of the merits of her claim pursuant to 5 U.S.C. § 8128(a). It indicated that the argument and evidence submitted by appellant was not relevant as it did not have probative value with respect to the question of whether the employee was in the performance of duty at the time of his death.

In a November 18, 2014 letter received on December 11, 2104, appellant, through her representative, again requested reconsideration of her claim. The representative stated:

“In the decision of the hearing officer it relates to the fact that the [employee] was on the premise[s] at the time of the accident. The [employing establishment] stated that the accident happened one hour after time the [employee’s] end of tour. However the wife said he called her to tell her that he was working overtime on that day. The request under the Freedom of Information Act (FOIA) that the [employing establishment] provide the [employee’s] clock rings for the day in question, any video of the parking lot for the hours in question, and any incident reports that pertain to the incident. The [employing establishment] has refused to provide the information requested sighting FOIA Exemption 6. As a result of the [employing establishment]’s refusal the weight of the best evidence is the [employee] worked overtime on the day in question and he was still on the premise[s], this case needs to be accepted.”⁶

In a March 11, 2015 decision, OWCP denied appellant’s request for further review of the merits of her claim finding her request was untimely filed and failed to demonstrate clear evidence of error. It noted that appellant’s reconsideration request was untimely as it was filed on December 11, 2014, more than one year after OWCP’s last merit decision dated March 7, 2013. OWCP indicated that appellant’s unsupported claim that the employee was working overtime at the time of his February 7, 2012 death did not show clear evidence of error in the March 7, 2013 decision.

LEGAL PRECEDENT

To be entitled to a merit review of an OWCP decision denying or terminating a benefit, a claimant must file his or her application for review within one year of the date of that decision.⁷ The Board has found that the imposition of the one-year time limitation does not constitute an abuse of the discretionary authority granted OWCP under section 8128(a) of FECA.⁸

OWCP, however, may not deny an application for review solely because the application was untimely filed. When an application for review is untimely filed, it must nevertheless

⁵ Appellant submitted additional documents concerning attempts to obtain information under the FOIA.

⁶ Appellant submitted various documents concerning attempts to obtain information under the FOIA.

⁷ 20 C.F.R. § 10.607(a).

⁸ 5 U.S.C. § 2128(a); *Leon D. Faidley, Jr.*, 41 ECAB 104, 111 (1989).

undertake a limited review to determine whether the application establishes “clear evidence of error.”⁹ OWCP regulations and procedures provide that OWCP 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 OWCP.¹⁰

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by OWCP.¹¹ The evidence must be positive, precise, and explicit and must manifest on its face that OWCP committed an error.¹² Evidence which does not raise a substantial question concerning the correctness of OWCP’s decision is insufficient to establish clear evidence of error.¹³ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹⁴ This entails a limited review by OWCP 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 OWCP.¹⁵

ANALYSIS

In its March 11, 2015 decision, OWCP properly determined that appellant filed an untimely request for reconsideration. Appellant’s reconsideration request was filed on December 11, 2014, more than one year after OWCP’s March 7, 2013 decision, and therefore she must demonstrate clear evidence of error on the part of OWCP in issuing this decision. In its March 7, 2013 decision, OWCP denied appellant’s survivor benefits claim as it had not been shown that the employee was in the performance of duty at the time of his February 7, 2012 death.

In the request for reconsideration, appellant’s representative indicated that appellant had unsuccessfully attempted to obtain additional evidence concerning the events of February 7, 2012, including the employee’s clock rings and video surveillance evidence, and asserted that, therefore, it must be accepted that the employee was working overtime at the time of his death

⁹ See 20 C.F.R. § 10.607(b); *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

¹⁰ 20 C.F.R. § 10.607(b); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.5a (October 2011). OWCP 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 OWCP made a mistake. For example, a claimant provides proof that a schedule award was miscalculated, such as a marriage certificate showing that the claimant had a dependent but the award was not paid at the augmented rate. 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.”

¹¹ See *Dean D. Beets*, 43 ECAB 1153, 1157-58 (1992).

¹² 20 C.F.R. § 10.607(b); *Leona N. Travis*, 43 ECAB 227, 240 (1991).

¹³ See *Jesus D. Sanchez*, 41 ECAB 964, 968 (1990).

¹⁴ See *Leona N. Travis*, *supra* note 12.

¹⁵ See *Nelson T. Thompson*, 43 ECAB 919, 922 (1992).

and was in the performance of duty.¹⁶ The submission of this argument does not show clear evidence of error in OWCP's March 7, 2013 decision. Appellant did not submit any support for her argument that "the best evidence" showed that the employee was working overtime at the time of his death.¹⁷ Her unsupported claim that the employee was working overtime at the time of his February 7, 2012 death is not the type of positive, precise, and explicit evidence which would manifest on its face that OWCP committed error in its March 7, 2013 decision.

For these reasons, the evidence and argument submitted by appellant does not raise a substantial question concerning the correctness of OWCP's March 7, 2013 decision and OWCP properly determined that appellant did not show clear evidence of error in that decision.

CONCLUSION

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

¹⁶ Appellant submitted documents regarding her attempt to obtain information under the FOIA. Appellant's daughter had indicated that the employee called appellant on February 6, 2012 and told her that he was working overtime.

¹⁷ On appeal, appellant's representative provided a similar argument regarding the claim that the employee was working overtime.

ORDER

IT IS HEREBY ORDERED THAT the March 11, 2015 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 19, 2015
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

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