

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

R.L., Appellant)
and) Docket No. 14-1342
DEPARTMENT OF AGRICULTURE, FARM) Issued: February 24, 2015
SERVICE AGENCY, St. Louis, MO, Employer)

)

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

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On May 27, 2014 appellant filed a timely appeal from a January 14, 2014 nonmerit decision of the Office of Workers' Compensation Programs (OWCP) denying her request for reconsideration as untimely and insufficient to establish clear evidence of error.¹ As more than 180 days elapsed from the last merit decision dated November 20, 2012 and the filing of this appeal, the Board lacks jurisdiction to review the merits of her claim pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3.

ISSUE

The issue is whether OWCP properly denied appellant's request for reconsideration as it was untimely filed and failed to demonstrate clear evidence of error.

¹ Appellant filed a timely request for oral argument. By order dated December 8, 2014, the Board denied her request on the grounds that her arguments could be adequately addressed in a decision based on a review of the case record. *Order Denying Request for Oral Argument*, Docket No. 14-1342 (issued December 8, 2014).

² 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On May 21, 2012 appellant, then a 53-year-old systems analyst tester, filed a traumatic injury claim alleging that on that date she injured her right leg, right ankle, and right side when she fell on green slime covering a sidewalk while walking around the campus at lunch. The employing establishment controverted the claim, arguing that she was not in the performance of duty as she was walking around the premises of the General Service Administration (GSA) on her lunch hour.

In a statement dated June 25, 2012, the employing establishment advised that appellant was not “on premises owned, operated, or controlled” by the employing establishment. It indicated that it leased space in Building 103 from the GSA. The employing establishment related that appellant was walking at lunch about 100 yards from Building 103 at the time of her fall. It further indicated that she was “on personal time during lunch period” not performing a work assignment.

On June 25, 2012 appellant related that she was within the GSA compound when she fell and noted that her employer leased property from the GSA. She indicated that she was walking at lunch when she fell.

By decision dated July 20, 2012, OWCP denied appellant’s claim on the grounds that she was not in the performance of duty at the time of her May 21, 2012 fall. It determined that she was not on the employing establishment’s premises at the time of her fall nor was she performing work reasonably incidental to her job duties. OWCP noted that her employer leased property from the GSA and that her fall was on the GSA campus but 100 yards away from the building in which she worked.

In an August 6, 2012 e-mail, appellant requested that Tara VanBibber, building manager with GSA, indicate whether there were any regulations identifying the boundaries of the property of the employing establishment. In an August 7, 2012 response, Ms. VanBibber related that she was “not aware of any regulations that limit boundaries.” She advised that each agency had an agreement about using the fitness center and that there were some “sidewalk markings for walking distances from the fitness center.”

On August 20, 2012 appellant related that neither she nor GSA were aware of regulations showing the boundaries of the employing establishment on the campus of the GSA. She related that she “engaged in normal business activity in locations throughout the GSA campus” that were farther from her building than the place where she was injured. Appellant indicated that it was common to walk during lunch and was encouraged by the employing establishment. She submitted a case issued under another workers’ compensation statute.

On August 22, 2012 appellant requested reconsideration. In a decision dated November 20, 2012, OWCP denied modification of its July 20, 2012 decision. It found that the fact that she did not know whether there were boundary limitations for the employing establishment on the GSA campus was not dispositive in determining whether she was on the property of the employing establishment at the time of the May 21, 2012 incident. OWCP determined that appellant was not on the premises of the employing establishment, that she was

exercising or performing recreational activities during an authorized lunch or break, and that she was not participating in a structured physical fitness program.

By letter dated August 16, 2013, received by OWCP on November 21, 2013, appellant, through her representative, requested reconsideration. He argued that the Federal Protection Service (FPS) filed an accident report regarding appellant's May 21, 2012 fall, and that it was thus "reasonable to assume that [she] was indeed on the premises of the employing [establishment]." Appellant's representative further contended that she was injured in the performance of duty as she was on the premises and engaged in exercise or a recreational activity on an authorized lunch break. He also noted that the employing establishment gave appellant 30 minutes of administrative leave to file the incident report by the FPS. Appellant's representative stated, "Not only does this new documentation present evidence of the location of the accident, but it also shows the intent of the [employing establishment] by putting [appellant] on administrative leave during the time the accident was recorded."

Appellant submitted a time sheet showing that she used 30 minutes of administrative leave on May 21, 2012. She also submitted a FPS form dated May 21, 2012, which indicated that on that date she fell and injured her right ankle, upper thigh and back leg, but did not require emergency medical services.

Appellant requested reconsideration on November 21, 2013.

By decision dated January 14, 2014, OWCP denied appellant's request for reconsideration on the grounds that it was not timely filed and the evidence was insufficient to establish clear evidence of error. It found that the fact that the employing establishment completed an accident report and allowed her to use administrative leave to complete the form did not establish that she was in the performance of duty at the time of her fall and thus did not show clear evidence of error.

On appeal appellant argued that she attempted to request reconsideration by e-mail on November 18, 2013 but her exhibits would not upload. She then tried to overnight a reconsideration request but could not get an overnight delivery to a business. Appellant sent the reconsideration request through the mail and it arrived one day late. She notes that the postmark date of November 18, 2013 was timely. Appellant also maintains that OWCP erred in its interpretation of the accident report prepared by the FPS. She notes that the report was prepared while she was in a nurses' station on government grounds.

LEGAL PRECEDENT

OWCP, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a) of FECA.³ As one such limitations, 20 C.F.R. § 10.607 provides that an application for reconsideration must be sent within one year of the date of OWCP's decision for which review is sought. OWCP will consider an untimely application only

³ 5 U.S.C. § 8101 *et seq.*

if the application demonstrates clear evidence of error on the part of OWCP in its most recent merit decision. The application must establish, on its face, that such decision was erroneous.⁴

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 an error (for example, proof of a miscalculation in a schedule award). Evidence such as a detailed, well-rationalized medical report which, if submitted prior to the denial, would have created a conflict in medical opinion requiring further development, is not sufficient to establish clear evidence of error and would not require a review of the case on the Director’s own motion.⁵ To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by OWCP. The evidence must be positive, precise and explicit and must manifest on its face that it committed an error.⁶

As noted, OWCP’s regulations at 20 C.F.R. § 10.607(a) establish a one-year time limit for requesting reconsideration. The one-year period begins on the date of the original decision and an application for reconsideration must be received by OWCP within one year of the date of OWCP’s decision for which review is sought for merit decisions issued on or after August 29, 2011.⁷

ANALYSIS

OWCP properly determined that appellant failed to file a timely application for review. Its procedures provide that the one-year time limitation period for requesting reconsideration begins on the date of the original OWCP decision.⁸ A right to reconsideration within one year also accompanies any subsequent merit decision on the issues.⁹ As appellant’s request for reconsideration was not received until November 21, 2013, more than one year after the last merit decision of record dated November 20, 2012, it was untimely. Consequently, she must demonstrate clear evidence of error by OWCP in denying her claim for compensation.¹⁰

On appeal appellant argues that she unsuccessfully attempted to request reconsideration by e-mail and overnight delivery. She noted that her request was only one day late and asserted that OWCP should have considered the postmark date. As discussed, however, OWCP’s new procedures as of August 19, 2011 require that for all merit decisions issued on and after August 29, 2011, the timeliness of a reconsideration request is determined by the date the request

⁴ 20 C.F.R. § 10.607.

⁵ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.5(a) (October 2011).

⁶ *Robert F. Stone*, 57 ECAB 292 (2005); *Leon D. Modrowski*, 55 ECAB 196 (2004); *Darletha Coleman*, 55 ECAB 143 (2003).

⁷ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4 (October 2011).

⁸ 20 C.F.R. § 10.607(a).

⁹ *Robert F. Stone*, *supra* note 6.

¹⁰ 20 C.F.R. § 10.607(b); *see Debra McDavid*, 57 ECAB 149 (2005).

is received by OWCP.¹¹ As appellant's request for reconsideration was received by OWCP on November 21, 2013, more than one year after the last merit decision of November 20, 2012, it was untimely.

OWCP denied appellant's traumatic injury claim after finding that she was not in the performance of duty on May 21, 2012 when she fell on the sidewalk. It determined that she was not on the premises of the employing establishment or engaged in activities reasonably incidental to her employment. With her request for reconsideration, appellant argued that as the federal protective service prepared an accident report after her May 21, 2012 fall, this establishes that she was on the premises of the employing establishment. The underlying issue in this case is whether appellant was in the performance of duty when she was injured. Without more, the fact that a federal official completed the accident report is not dispositive to the underlying issue and thus could not establish error.

Appellant further maintained that the fact that her employer gave her 30 minutes of administrative leave showed that she was on the premises at the time of her fall. The employing establishment, however, denied that she was on the premises at the time of her fall, though she remained on property owned by the Federal Government. The fact that the employing establishment, within its discretion, granted her administrative leave is not dispositive of whether she was on the premises at the time of her fall and is thus insufficient to show clear evidence of error.¹²

To establish clear evidence of error, it is not sufficient merely to show that the evidence could be construed so as to produce a contrary conclusion. The term clear evidence of error is intended to represent a difficult standard. None of the evidence submitted manifests on its face that OWCP committed an error in denying appellant's claim. She has not provided evidence of sufficient probative value or raised a substantial question as to the correctness of OWCP's decision. Thus, the evidence is insufficient to establish clear evidence of error.

CONCLUSION

The Board finds that OWCP properly denied appellant's request for reconsideration as it was not timely filed and failed to demonstrate clear evidence of error.

¹¹ See *supra* note 7; see also A.S., Docket No. 13-1793 (issued January 2, 2014).

¹² *Sondra J. Mills*, 33 ECAB 1092, 1094 (1982).

ORDER

IT IS HEREBY ORDERED THAT the January 14, 2014 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: February 24, 2015
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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