

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

H.L., Appellant)
)
)
and) **Docket No. 15-0172**
) **Issued: September 9, 2015**
)
DEPARTMENT OF AGRICULTURE,)
FOOD SAFETY & INSPECTION SERVICE,)
Geneseo, IL, Employer)

Appearances:
Eugenia Waltos, for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
ALEC J. KOROMILAS, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On November 3, 2014 appellant, through her representative, filed a timely appeal from the July 31, 2014 nonmerit decision of the Office of Workers' Compensation Programs (OWCP).¹ As more than 180 days has elapsed between the last OWCP merit decision, dated June 20, 2012, and the filing of this appeal, pursuant to the Federal Employees' Compensation

¹ On November 23, 2014 appellant submitted a timely request for oral argument in connection with OWCP's July 31, 2014 decision. After exercising its discretion, the Board, in an order issued on July 24, 2015, denied her request for oral argument, finding that the arguments on appeal could be adequately addressed in a decision based on a review of the case record. *Order Denying Request for Oral Argument*, Docket No. 15-0172 (issued July 24, 2015).

Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction to review the merits of this claim.³

ISSUE

The issue is whether OWCP properly denied appellant's request for reconsideration as it was untimely filed and did not demonstrate clear evidence of error June 18, 2013 reconsideration request pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

This case has previously been before the Board.⁴ The relevant facts follow. 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 lot outside her workplace. OWCP denied her claim on February 7, 2011 as that her injury did not arise in the performance of duty. An OWCP hearing representative affirmed the denial on September 6, 2011, finding that the evidence did not support that the parking lot was part of the premises. Appellant's fall was thus considered 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. On June 20, 2012 OWCP reviewed the merits of her claim and denied modification of its prior decision.

On June 21, 2013 OWCP received appellant's reconsideration request. Appellant argued, in particular, 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, including the fact that she was unable to use the other parking lot and was ordered by her supervisor to use the lot in question, 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. She stated, "Indeed, the 'special hazard' incidental to employment was the fact that the employee was ordered by her supervisor to use the Tyson parking lot if she was going to honor her own medical work restrictions of climbing no stairs, as would have been required if she were to use the [United States Department of Agriculture] lot." (Emphasis deleted). Appellant then argued that her previous request for reconsideration demonstrated a special hazard incidental to employment. The employing establishment's mandate to park "outside the Truck Gate" subjected her to a

² 5 U.S.C. § 8101 *et seq.*

³ Appellant also attempted to appeal two other decisions over which the Board has no jurisdiction: OWCP's February 7, 2011 initial denial of her claim and its July 15, 2013 nonmerit decision, both of which were issued more than 180 days prior to the filing of the current appeal on November 3, 2014. *See* 20 C.F.R. § 10.501.3(e) (any notice of appeal must be filed within 180 days from the date of issuance of a decision of OWCP).

⁴ The Board affirmed OWCP decisions denying an alleged December 29, 1993 employment injury in Docket No. 95-2907 (issued February 3, 1998); it affirmed a denial of an alleged April 1, 1997 employment injury in Docket No. 97-2272 (issued May 6, 1999); it reversed OWCP's denials and found that appellant was on the premises on October 12, 2005 when she injured herself and remanded for further medical development in Docket No. 06-933 (issued July 25, 2006); it affirmed OWCP's decisions denying an alleged June 2, 2004 employment injury in Docket No. 07-54 (issued March 8, 2007); and affirmed a denial of an alleged January 11, 2005 employment injury in Docket No. 07-880 (issued August 16, 2007).

hazard that none of her coworkers faced, the road construction on the subject parking lot. “It is uncontroverted that [appellant] arrived in close proximity to the start of her work shift, it was still dark outside, and she stumbled and fell over the lip of the newly constructed pavement of the subject parking lot, where there was both inadequate lighting and no visible warning posted.” Appellant argued that the hearing representative did not comment on or consider the significance of this extraordinary hazard.

Appellant’s representative also submitted medical notes, which included treatment notes by Dr. Thomas L. Von Gillern, a Board-certified orthopedic surgeon, and results of diagnostic tests, a notice of personnel action showing off-work hours, and several cases from the 5th Circuit, Federal Courts.

OWCP denied appellant’s reconsideration request on July 15, 2013, as her letter neither raised a substantive legal question, nor included new and relevant evidence. Appellant appealed to the Board.

By a March 20, 2014 decision,⁵ the Board set aside the July 15, 2013 decision, finding that OWCP applied the wrong standard of review and failed to evaluate the evidence and argument appellant presented to support her request. The facts of this case, as set forth in the Board’s prior opinion, are hereby incorporated by reference.

Following the Boards’s remand dated March 20, 2014, in a decision dated July 31, 2014, OWCP denied appellant’s reconsideration request. It found the request untimely. OWCP also found that the request did not present clear evidence of error. It considered in some detail the evidence and argument appellant offered to support her request but determined that the untimely request did not establish clear evidence of error.

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.”⁶

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 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. It will consider an untimely application only if the

⁵ Docket No. 13-2077 (issued March 20, 2014).

⁶ 5 U.S.C. § 8128(a).

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.⁷

The term “clear evidence of error” is intended to represent a difficult standard.⁸ 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.⁹

ANALYSIS

As the Board previously found, appellant’s June 18, 2013 reconsideration request was untimely. The question is whether her untimely request demonstrated clear evidence of error by OWCP when it denied her claim for compensation.

The medical documents from Dr. Von Gillern do not establish clear evidence of error. They are irrelevant to the issue of whether appellant’s injury was sustained in the performance of duty. They do not prove that she was on the employing establishment premises when it occurred. For the same reason, the notice of personnel action is also irrelevant.

Appellant argued that she was injured as a result of a “zone of special danger” incidental to her employment. The “special hazard,” she explained, included the fact that she physically could not use the other parking lot, which was controlled by the employing establishment and was directed by her supervisor to use the Tyson parking lot because of her work restrictions. Appellant added that the employing establishment’s mandate to park “outside the Truck Gate” subjected her to the hazard of road construction on the parking lot. Counsel then noted, “It is uncontroverted that [appellant] arrived in close proximity to the start of her work shift, it was still dark outside, and she stumbled and fell over the lip of the newly constructed pavement of the subject parking lot, where there was both inadequate lighting and no visible warning posted.” Appellant argued that OWCP did not consider the significance of this extraordinary hazard.

The Board finds that appellant’s untimely request does not establish clear evidence of error in OWCP’s decision. Appellant has made an arguable case for a different result, but did not establish that OWCP made a clear error when it denied her claim. OWCP need not grant an untimely reconsideration request. The issue appellant raised is whether the conditions giving rise to the injury were sufficiently connected to the employment such that the premises should be constructively extended to include those conditions. Although it did not use the label “special hazard” or “zone of special danger,” OWCP considered the circumstances of appellant’s case, including whether her medical limitation had grown stale, whether the employing establishment required or simply allowed her to park outside the truck gate, and whether the area was in fact protected by lighting, barricades, and visible warning signs.

⁷ 20 C.F.R. § 10.607.

⁸ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.5.a (October 2011).

⁹ *Id.* at Chapter 2.1602.5.b.

Accordingly, the Board finds that OWCP properly denied appellant's untimely reconsideration request. The Board will affirm OWCP's July 31, 2014 decision denying that request.

CONCLUSION

The Board finds that OWCP properly denied appellant's request for reconsideration as it was untimely filed and did not demonstrate clear evidence of error, pursuant to 5 U.S.C. § 8128(a).

ORDER

IT IS HEREBY ORDERED THAT the July 31, 2014 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 9, 2015
Washington, DC

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

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

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