United States Department of Labor
Employees' Compensation Appeals Board

J.H., Appellant	)	
and	)	**Docket No. 15-1952**
	)	**Issued: June 22, 2016**
DEPARTMENT OF VETERANS AFFAIRS, VETERANS BENEFITS ADMINISTRATION, St. Louis, MO, Employer	)	

Appearances:
Michael C. Seamands, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On September 25, 2015 appellant, through counsel, filed a timely application for review from a March 31, 2015 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). Because more than 180 days elapsed from April 1, 2013, the date of the most recent merit decision to the filing of this appeal, pursuant to the Federal Employees' Compensation Act[1] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction to review the merits of appellant's claim.

ISSUE

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

[1] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On June 11, 2012 appellant, then a 48-year-old program support assistant, filed a traumatic injury claim (Form CA-1) alleging that on June 3, 2012, she sustained an injury to her back and shoulders when two golf carts collided while she volunteered for an event outside of regular work hours. Her supervisor checked a box noting that appellant had not been injured in the performance of duty, as she was volunteering for the 2012 National Veterans Golden Age Games.

In an emergency department report dated June 8, 2012, Dr. Tammy Martin, a Board-certified internist, diagnosed appellant with whiplash. X-rays of appellant's thoracic spine and cervical spine revealed no fractures and mild degenerative changes.

In an undated statement received on June 12, 2012, appellant noted that the golf cart in which she had been sitting was struck by another cart from behind. She reported that she had been volunteering that day at a golf course, and that because her pain continued until June 8, 2012, she went to the emergency department.

By letter dated June 10, 2012, a coworker stated that the employing establishment held the event at a golf course. He noted that he witnessed a golf cart slam into the back of a parked golf cart, and appellant was ejected from the parked cart as a result of the collision.

In a report dated June 14, 2012, Dr. Athmaram Shetty, a Board-certified internist, diagnosed appellant with cervicalgia. He reported that appellant noted ongoing neck pain, limited range of motion, muscle spasm, and muscle stiffness.

On August 14, 2012 the employing establishment responded to appellant's claim. It noted that she was not required to participate in the activity; that the employing establishment did not derive any benefit from her participation in the activity; that all employees had the opportunity to volunteer; that the employing establishment did not provide leadership, equipment, or facilities for the activity; and that her participation did not violate any rules or regulations of the employing establishment. The employing establishment further noted that the claimed injury did not occur during appellant's regular work hours. It occurred at the 2012 National Veterans Golden Age Games on Sunday, June 3, 2012.

Appellant responded on August 17, 2012. She stated that the employing establishment benefitted from her participation in the activity as the event was in service to veterans. Appellant noted that the event was open for other employees to volunteer and that all equipment was provided by the golf course.

By decision dated September 12, 2012, OWCP denied appellant's claim. It found that her claimed injury had not occurred within the performance of duty.[2]

[2] The Board notes that this decision was not signed by a claims examiner, but instead by a "communications specialist." Given the disposition of this appeal, the Board need not consider whether the validity of this decision is affected because it was not signed by a member of OWCP's claims staff. 20 C.F.R. § 10.125(b); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Initial Claims Denials*, Chapter 2.1401.4(d) (November 2012).

On September 22, 2012 appellant requested an oral hearing before an OWCP hearing representative. The hearing request was converted on January 17, 2013 to a request for review of the written record.

With her request, appellant provided a narrative statement in which she stated that she volunteered to assist with the 2012 National Veterans Golden Age Games and was injured in the process. She noted that she had used her "vacation leave" to volunteer and that she had completed physical therapy for her claimed injury, but that her back and neck pain remained.

By decision dated April 1, 2013, a hearing representative affirmed OWCP's September 12, 2012 decision. She found that appellant had not established that her claimed injury occurred in the performance of duty.

In a letter dated March 31, 2014, received by OWCP on April 1, 2014, appellant, through counsel, requested reconsideration of the decision dated April 1, 2013. Counsel attached a legal brief, arguing that the golf tournament on the date of injury fell within appellant's scope of employment. He noted that the employing establishment strongly encouraged its employees to volunteer for the games and granted paid leave during employees' regular work schedules to volunteer at the games. Counsel argued, "This arrangement creates a situation where employees are incentivized to appear at the [g]ames instead of the workplace, an indicator that the employer is impliedly requiring participation, or has made the activity part of the services of the employee." He further noted that employees' participation in the games was discussed as part of the employing establishment's performance appraisal program, and that in appellant's case in particular, her assistance at the games was cited as an "element/achievement" factor of her "exceptional" rating in the [c]ustomer [s]ervice category. Counsel contended, "Such action by the [employing establishment] implies a requirement of participation in the games in order to receive the best possible review, and brings the activity within the scope of employment by making it one of the factors reviewed in the evaluation of an employee's performance." He further maintained that the employing establishment derived a substantial, direct benefit from the games, as the games were focused on veterans receiving care at the employing establishment's medical facilities, and they appeared on the employing establishment's official government website. Counsel stated that the employing establishment obtained employees' authorization, as a result of the application to volunteer, to use their likenesses to "publicize and give recognition" to the games. He concluded by stating that the main focus of the games was not an improvement of employee health and morale that is common to all kinds of recreation and social life, but instead that the main focus was an extension of the employing establishment's efforts to aid and improve the health and fitness of treated veterans, including advertising on behalf of the employing establishment.

Attached to counsel's legal brief in favor of reconsideration was a performance evaluation dated March 31, 2014, which noted that she volunteered for the games as an element of her "exceptional" rating for customer service. Also attached was a May 21, 2012 volunteer application, printed on employing establishment letterhead and signed by appellant. It stated:

> "I hereby waive all claims to monetary benefits for services rendered as a volunteer worker on a 'without compensation basis' for an indefinite period. I understand that this waiver applies only to remuneration (compensation) for

specific services rendered in the Voluntary Service … Program and is not related to any other VA services or benefits to which I may be entitled....

"I further understand that I will be granted authorized absence during my regular work schedule…. Hours worked beyond the normal workday or on weekends will be considered strictly volunteer hours and I understand that I will not be paid overtime, compensatory time, premium pay or differential pay.

"I voluntarily and without compensation authorize pictures and/or voice recording to be made of me or on my behalf ... while I am a volunteer in the National Veterans Golden Age Games. I authorize any or all of the above to publicize and/or display such photographs ... without notice or payment of any royalty, fee, or other compensation of any character to me for the use of my pictures and/or voice. I understand that the said pictures and/or voice recordings are intended to publicize and give recognition to the National Veterans Golden Age Games."

Finally, counsel also attached a March 31, 2014 print-out of the employing establishment web page describing the National Veterans Golden Age Games. It noted that the games were an outgrowth of the employing establishment's historic involvement in geriatric programs. The employing establishment also noted that the games provided a multi-event sports and therapeutic recreation program for eligible veterans receiving care at any employing establishment medical facility.

By decision dated March 31, 2015, OWCP denied appellant's request for reconsideration as it was untimely filed and failed to demonstrate clear evidence of error. It stated that the request for reconsideration was received by OWCP on April 1, 2014 and that the decision for which reconsideration was requested was dated April 1, 2013.

LEGAL PRECEDENT

To be entitled to a merit review of an OWCP decision denying or terminating a benefit, an application for reconsideration must be received by OWCP within one year of the date of OWCP's decision for which review is sought.[3] The Board has found that the imposition of the one-year limitation does not constitute an abuse of the discretionary authority granted OWCP under section 8128(a) of FECA.[4]

To require OWCP to reopen a case for merit review under section 8128(a), OWCP's regulations provide that the evidence or argument submitted by a claimant must: (1) show that OWCP erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by OWCP; or (3) constitute relevant and pertinent new evidence not previously considered by OWCP.[5] Section 10.608(b) of OWCP's regulations provide that when an application for reconsideration does not meet at least one of the three

[3] 20 C.F.R. § 10.607(a).

[4] 5 U.S.C. § 8128(a); *Leon D. Faidley, Jr.*, 41 ECAB 104, 111 (1989).

[5] 20 C.F.R. § 10.606(b)(3); *D.K.*, 59 ECAB 141, 146 (2007).

requirements enumerated under section 10.606(b)(3), OWCP will deny the application for reconsideration without reopening the case for a review on the merits.[6]

ANALYSIS

The Board finds that OWCP improperly determined that appellant's request for reconsideration was untimely filed. The decision dated March 31, 2015 stated that appellant's reconsideration request was received on April 1, 2014 and that the decision for which reconsideration was requested was dated April 1, 2013. The case record confirms that these dates are correct. As such, OWCP's determination that appellant's request had not been received within one year of the date of April 1, 2013 is incorrect.

The one-year time limitation begins to run on the date following the date of the original decision.[7] Therefore appellant had until April 1, 2014 to file a request for reconsideration. Because the reconsideration request was received by OWCP exactly one year after the date of the decision, the proper standard of review for appellant's request for reconsideration is the standard applied to timely reconsideration requests.[8]

As such, the issue presented on appeal of the March 31, 2015 decision is whether appellant met any of the requirements of 20 C.F.R. § 10.606(b)(3), requiring OWCP to reopen the case for review of the merits of her claim. OWCP reviewed the evidence under the clear evidence of error standard, which is appropriate only for untimely applications for reconsideration.[9] The case will accordingly be remanded to OWCP for proper review of the timely request for reconsideration and issuance of an appropriate decision.[10]

CONCLUSION

The Board finds that OWCP improperly determined that appellant's request for reconsideration was untimely filed and failed to demonstrate clear evidence of error.

[6] 20 C.F.R. § 10.608(b); *see K.H.*, 59 ECAB 495, 499 (2008).

[7] *See S.T.*, Docket No. 15-382 (issued April 3, 2015); *J.J.*, Docket No. 14-746 (issued October 17, 2014); *C.B.*, Docket No. 13-1732 (issued January 28, 2014).

[8] 5 U.S.C. § 8128(a); 20 C.F.R. § 10.606 (2011).

[9] *See J.P.*, Docket No. 12-1596 (issued March 27, 2013); 20 C.F.R. § 10.607(b).

[10] *See E.B.*, Docket No. 12-0084 (issued May 15, 2012).

ORDER

IT IS HEREBY ORDERED THAT the March 31, 2015 decision of the Office of Workers' Compensation Programs is set aside and this case is remanded for further proceedings consistent with this opinion, to be followed by an appropriate decision.

Issued: June 22, 2016
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