

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

N.L., Appellant)

and)

DEPARTMENT OF VETERANS AFFAIRS,)
VETERANS ADMINISTRATION MEDICAL)
CENTER, Louisville, KY, Employer)

Docket No. 17-1307
Issued: November 9, 2017

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

Case Submitted on the Record

DECISION AND ORDER

Before:

PATRICIA H. FITZGERALD, Deputy Chief Judge
COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On May 30, 2017 appellant filed a timely appeal from a December 2, 2016 nonmerit decision of the Office of Workers' Compensation Program (OWCP). As more than 180 days elapsed from OWCP's last merit decision, dated November 6, 2015, to the filing of this appeal, pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction over the merits of the claim.

ISSUE

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

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On February 25, 2015 appellant, then a 58-year-old supervisory program analyst, filed a traumatic injury claim (Form CA-1) alleging that at 6:00 p.m. on Thursday, February 19, 2015, she sustained injury to her head, jaw, neck, right wrist, right hand/fingers, and right hip due to a fall at work. She indicated that she was walking cautiously to her car after work due to frozen snow and, the next thing she knew, she was lying flat on her back on the pavement. Appellant noted that her head hurt and she was unable to get up. She stopped work on February 20, 2015 and returned to full-time, regular-duty work on February 24, 2015.²

On the same Form CA-1, appellant's immediate supervisor indicated that appellant's regular work hours were 9:00 a.m. to 5:30 p.m., Monday through Friday. She indicated that appellant was not in the performance of duty at the time of her claimed injury on February 19, 2015 because she was walking to her car after her shift was completed. In the section of the form regarding controversion of continuation of pay by the employing establishment, the supervisor asserted that the claimed disability was not caused by a traumatic injury and was not work related. She advised that the employing establishment controverted the claim because fact of injury, performance of duty, and causal relationship had not been established.

Appellant submitted a report of work status detailing her return to work and the first page of a form entitled Authorization for Examination and/or Treatment (Form CA-16).

In a March 4, 2015 letter, OWCP requested that appellant submit additional factual and medical evidence in support of her claim. It requested that she complete and return an enclosed development questionnaire which posed various questions about the factual circumstances of her February 19, 2015 fall, including whether she was performing assigned duties when the injury occurred, whether the fall occurred on the employing establishment premises, and whether the fall occurred at parking facilities that were owned, controlled, or managed by the employing establishment.

Appellant submitted a completed OWCP development questionnaire, which she signed on March 17, 2015. She indicated that on February 19, 2015 she fell in a parking lot which was owned, controlled, and managed by the employing establishment, and she asserted that she was required to park in the lot. Appellant noted that on February 19, 2015 she had completed her daily tasks and was walking to her car to go home when she slipped on ice and fell.³

In a March 19, 2015 letter, a human resources assistant for the employing establishment indicated that the parking lot where appellant fell on February 19, 2015 was owned and maintained by the employing establishment. She indicated that appellant's regular tour of duty

² On the Form CA-1 appellant requested continuation of pay for her time off work.

³ In a March 18, 2015 statement, a coworker, S.B., indicated that on February 19, 2015 appellant left work at approximately 5:30 p.m. to 5:45 p.m. and that at some point thereafter she saw appellant sitting on a piece of cardboard in the parking lot. Appellant advised S.B. that she had fallen on ice. In a March 13, 2015 statement, another coworker, R.P., noted that at approximately 6:30 p.m. on February 19, 2015 she saw an ambulance arriving at the employing establishment. R.P. indicated that she later learned that the ambulance came for appellant, who had fallen on ice.

was 8:30 a.m. to 5:00 p.m., Monday to Friday, and that appellant was not approved for overtime or compensatory time for any period after the end of her tour of duty at 5:00 p.m. on February 19, 2015.⁴ The assistant noted that appellant's fall occurred an hour after the end of her tour of duty and that the employing establishment found that her staying this amount of time past the end of her tour of duty was excessive. The employing establishment attached a February 19, 2015 report in which a Department of Veterans Affairs police officer indicated that he received a telephone call at 8:10 p.m. advising that appellant had fallen in a parking lot at the employing establishment.⁵

The record contains a memorandum memorializing an April 15, 2015 conference between a human resources specialist for the employing establishment and an OWCP claims examiner. The specialist indicated that appellant's shift ended every day at 5:00 p.m., and that this was the time her shift ended on February 19, 2015. She noted that appellant did work past 5:00 p.m. on February 19, 2015, but appellant did so of her own accord without approved overtime or compensatory time. The specialist advised that appellant's fall occurred at approximately 6:07 p.m. on February 19, 2015.

Appellant submitted a February 19, 2015 report from Dr. Shawn McCarty, an attending Board-certified emergency medicine physician,⁶ who indicated that she reported falling on ice at work on that date and hitting the back of her head. Dr. McCarty noted that a February 19, 2015 computerized tomography (CT) scan of appellant's head contained normal findings and he provided a diagnosis of concussion.⁷

In a February 27, 2015 report, Dr. Susan Maderic, an attending Board-certified family practitioner, discussed the circumstances of appellant's February 19, 2015 fall and her reported symptoms after the fall, including headaches and dizziness. Dr. Maderic diagnosed closed head injury and vertigo due to a work-related fall on ice. The findings of a March 4, 2015 CT scan of appellant's head contained an impression of mild atrophy, but no acute intracranial abnormality.

Appellant also submitted disability certificates from attending physicians, laboratory results, informational sheets from her medical provider regarding the management of head injuries, and additional medical reports from her February 19, 2015 visit to the emergency room.

In an April 15, 2015 decision, OWCP denied appellant's claim for a February 19, 2015 work injury. It found that she established that she was a federal civilian employee who filed a timely claim, that an employment incident occurred as alleged, and that a medical condition had

⁴ The record contains a timesheet printout identifying appellant's "Scheduled Tour" on February 19, 2015 as being 8:30 a.m. to 5:00 p.m.

⁵ In a February 26, 2015 e-mail to the employing establishment, a deputy police chief for the Veterans Affairs police indicated that video surveillance showed an individual falling in a parking lot at the Louisville Veterans Affairs Medical Center at 6:07 p.m. on February 19, 2015.

⁶ The report was also signed by Eric Elder, an attending physician assistant.

⁷ The record contains a report of this CT scan which contains an impression of scalp hematoma in the left parietal region with symmetrical brain and ventricles, no focal area of decreased attenuation to suggest infarction/contusion, and no evidence of fracture, hemorrhage, hydrocephalus, or abnormal extra-axial fluid.

been diagnosed in connection with the incident. OWCP determined, however, that appellant's claim for a February 19, 2015 injury was denied because she failed to establish the basic element of performance of duty. The evidence of record was not sufficient to establish that the injury and/or medical condition arose during the course of employment and within the scope of compensable work factors. OWCP noted that appellant's injury happened after 6:00 p.m. on February 19, 2015, over an hour after her shift ended. It indicated that the employing establishment verified that her normal work hours were 8:30 a.m. to 5:00 p.m. and that she was not authorized to work overtime on February 19, 2015.

In a letter dated August 7, 2015 and received on August 12, 2015, appellant requested reconsideration of OWCP's April 15, 2015 decision. In her August 7, 2015 letter, she indicated that, even though her work shift technically ended at 5:00 p.m., she often stayed past that time to complete work assignments that need to be finished prior to her leaving for the day. Appellant noted that, in the week prior to February 19, 2015, she had been staying in the office later because she had been out of the office the previous week on government travel and the previous Monday had been a federal holiday. She asserted that, on February 19, 2015, she was attempting to reduce the backlog that she had incurred.⁸

In a July 10, 2015 letter, appellant's immediate supervisor indicated that appellant's tour of duty was listed as 8:30 a.m. to 5:00 p.m. She noted that it was not unusual for appellant to work later than her tour of duty as a personal choice, although she usually left within 30 minutes of the end of her tour of duty. The supervisor noted that appellant was found on the ground at approximately 6:00 p.m. on February 19, 2015, but that she did not know how long she was on the ground before help arrived because she had lost consciousness.

In a September 21, 2015 letter, a human resources specialist indicated that video surveillance documented that appellant's fall occurred at 6:07 p.m. on February 19, 2015. She indicated that appellant was not authorized to work overtime on February 19, 2015.

In an April 8, 2015 report, Dr. Maderic indicated that appellant reported still having headaches and experienced spinning and sharp pain/tenderness in the back top of her head when lying on her back or left side. Appellant advised that she was working on a full-time basis, but that she felt exhausted all the time. Dr. Maderic diagnosed closed head injury and vertigo due to a work-related fall on ice. In a July 17, 2015 report, she discussed appellant's plan of care for physical therapy. Appellant also submitted a number of medical reports which had previously been submitted to OWCP.

In a November 6, 2015 decision, OWCP denied modification of its April 15, 2015 decision. It again found that she had not shown that the February 19, 2015 injury occurred in the performance of duty. OWCP noted that appellant's fall occurred more than an hour after her tour of duty officially ended and that her staying late was of her own personal choice as opposed to having been directed by or officially approved by management.

⁸ In an October 8, 2015 statement, appellant noted that she routinely worked beyond the official end of her tour of duty at 5:00 p.m., including occasions when she worked as late as 7:00 p.m.

In an appeal request form dated October 21, 2016 and received on November 8, 2016, appellant requested reconsideration of OWCP's November 6, 2015 decision.

Appellant submitted an October 21, 2016 e-mail, addressed to her immediate supervisor, in which she indicated that she was submitting a request for compensatory time for two hours at the end of her shift (5:00 to 7:00 p.m.) on February 17, 18, and 19, 2015. She noted that, due to being on travel status the prior week and the holiday on February 16, 2015, she needed to work extra hours each day to catch up on monthly processing tasks, new clinic requests, etc., for the Louisville, Kentucky facility. In an October 21, 2016 e-mail response, the supervisor noted, "Approve. Forward to time keeping."

Appellant also resubmitted medical reports, dated between February and July 2015, that had previously been considered by OWCP. These included treatment reports dated February 19, April 8, and July 17, 2015, and diagnostic testing reports dated February 19 and March 4, 2015.

In a December 2, 2016 decision, OWCP denied appellant's request for further review of the merits of her claim because her request was untimely filed and failed to demonstrate clear evidence of error. It found that her request for reconsideration of its November 6, 2015 decision was untimely because it was received on November 8, 2016, which was more than one year after the November 6, 2015 decision. OWCP further determined that the factual and medical evidence submitted by appellant in support of her reconsideration request did not demonstrate clear evidence of error in its November 6, 2015 decision.

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 or her own motion or on application. The Secretary, in accordance with the facts found on review, may end, decrease or increase the compensation awarded, or award compensation previously refused or discontinued.⁹

OWCP, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a). As one such limitation, section 10.607(a) of the implementing regulations provide that an application for reconsideration must be received within one year of the date of OWCP's decision for which review is sought.¹⁰ However, OWCP will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation, if the claimant's application for review demonstrates clear evidence of error on the part of OWCP in its most recent merit decision. To demonstrate clear evidence of error, a claimant must submit evidence relevant to the issue that was decided by OWCP. The evidence must be positive, precise, and explicit and must be manifest on its face that OWCP committed an error.¹¹

⁹ 5 U.S.C. § 8128(a).

¹⁰ 20 C.F.R. § 10.607(a).

¹¹ *Id.* at § 10.607(b); *Fidel E. Perez*, 48 ECAB 663, 665 (1997).

To demonstrate clear evidence of error, the evidence submitted must not only be of sufficient probative value to create a conflicting medical opinion or establish a clear procedural error, but must be of sufficient probative value to shift the weight of the evidence in favor of the claimant and raise a substantial question as to the correctness of OWCP's decision.¹² The Board notes that clear evidence of error is intended to represent a difficult standard.¹³ Evidence that does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to demonstrate clear evidence of error.¹⁴ It is not enough merely to establish that the evidence could be construed so as to produce a contrary conclusion.¹⁵ This entails a limited review by OWCP of the evidence previously of record and whether the new evidence demonstrates clear error on the part of OWCP.¹⁶ The Board makes an independent determination as to whether a claimant has demonstrated clear evidence of error on the part of OWCP.¹⁷

ANALYSIS

The Board finds that OWCP properly determined that appellant failed to file a timely request for reconsideration. An application for reconsideration must be received within one year of the date of OWCP's decision for which review is sought.¹⁸ As appellant's request for reconsideration was not received by OWCP until November 8, 2016, more than one year after issuance of its November 6, 2015 merit decision, it was untimely filed.¹⁹ Consequently, she must demonstrate clear evidence of error by OWCP in its November 6, 2015 decision.²⁰

The Board finds that appellant has not demonstrated clear evidence of error on the part of OWCP in issuing its November 6, 2015 decision.

Appellant did not submit the type of positive, precise, and explicit evidence which manifests on its face that OWCP committed an error in its November 6, 2015 decision.²¹ The evidence she submitted did not raise a substantial question concerning the correctness of

¹² *Annie L. Billingsley*, 50 ECAB 210 (1998).

¹³ *R.K.*, Docket No. 16-0355 (issued June 27, 2016).

¹⁴ *Jimmy L. Day*, 48 ECAB 652 (1997).

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Cresenciano Martinez*, 51 ECAB 322 (2000); *Thankamma Mathews*, 44 ECAB 765, 770 (1993).

¹⁸ *See supra* note 11.

¹⁹ The last day of the one-year filing period fell on a weekend; therefore, appellant had until Monday, November 7, 2016 to timely request reconsideration. *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4 (February 2016).

²⁰ *See supra* note 12.

²¹ *See id.*

OWCP's decision.²² Appellant submitted an October 21, 2016 e-mail in which she retroactively requested compensatory time between 5:00 p.m. and 7:00 p.m. on the workdays February 17, 18, and 19, 2015 and another October 21, 2016 e-mail in which her supervisor responded that the request was approved. However, she did not explain how this evidence raised a substantial question as to the correctness of OWCP's November 6, 2015 decision. The granting of compensatory time more than one and a half years after the fact would have no bearing on the appellant's work status at the actual time of her fall on February 19, 2015. OWCP explained in its decisions denying her claim for a February 19, 2015 injury that she failed to establish an injury in the performance of duty because, at the time of her fall, she had been off the clock for more than an hour and was not engaged in her assigned work duties or incidental tasks at the direction of the employing establishment.²³ The Board notes that the retroactive granting of compensatory time, without any explanation for such granting, does not provide any further evidence that appellant was engaged in specific regular or specially assigned work duties, or tasks incidental to those duties at the time of her fall on February 19, 2015 such that she was in the performance of duty at that time.²⁴ Therefore, the submission of this evidence, in and of itself, would not raise a substantial question regarding the correctness of OWCP's determination, in its November 6, 2015 decision, that she failed to establish a February 19, 2015 injury occurring in the performance of duty.

Appellant also submitted medical reports dated between February and July 2015 that had previously been submitted and considered by OWCP.²⁵ These documents would not tend to show clear evidence of error in OWCP's November 6, 2015 decision because her claim for a February 19, 2015 injury was denied on a factual basis, rather than a medical basis.

The Board finds that appellant's application for review does not show on its face that OWCP committed error when it found in its November 6, 2015 decision that she did not establish an injury in the performance of duty on February 19, 2015.²⁶ As noted, clear evidence

²² See *supra* note 15.

²³ See generally *supra* notes 19 through 28 describing the standards for establishing that an injury occurred in the performance of duty.

²⁴ As noted above, an injury occurring on the premises while an employee is coming from work after working hours may be compensable and this includes a reasonable interval after official working hours while the employee is on the premises engaging in acts incidental to work. What constitutes a reasonable interval depends not only on the length of time involved, but also on the circumstances occasioning the interval and nature of the employment activity. The mere fact that an injury occurs on an industrial premises following a reasonable interval after working hours is not sufficient to bring the injury within the performance of duty. The claimant must show substantial employer benefit or an employer requirement in order for the activity to be considered as arising out of employment. See *supra* notes 22 through 28.

²⁵ Appellant resubmitted treatment reports dated February 19, April 8, and July 17, 2015 and diagnostic testing reports dated February 19 and March 4, 2015.

²⁶ See *S.F.*, Docket No. 09-0270 (issued August 26, 2009) (find that an untimely application for review must show on its face that OWCP committed error in a prior merit decision).

of error is intended to represent a difficult standard.²⁷ Appellant has not met this standard in this case.²⁸

For these reasons, the evidence submitted by appellant does not raise a substantial question concerning the correctness of OWCP's November 6, 2015 decision and OWCP properly determined that she did not demonstrate clear evidence of error in that decision.

CONCLUSION

The Board finds that OWCP properly denied appellant's request for reconsideration because it was untimely filed and failed to demonstrate clear evidence of error.

ORDER

IT IS HEREBY ORDERED THAT the December 2, 2016 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 9, 2017
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

²⁷ See *supra* note 14.

²⁸ On appeal, appellant argues that her February 19, 2015 injury occurred in the performance of duty because she had been working past the end of her tour of duty every day that week due to having been away on travel duty and the due to the prior Monday having been a holiday. However, she did not explain how the particular evidence she submitted in connection with her untimely reconsideration request showed clear evidence of error in OWCP's November 6, 2015 decision.