United States Department of Labor
Employees' Compensation Appeals Board

JERRY L. SPRAGGS, Appellant	)	
and	)	**Docket No. 04-1784**
	)	**Issued: October 21, 2004**
TENNESSEE VALLEY AUTHORITY,	)	
SHAWNEE POWER PLANT,	)	
West Paducah, KY, Employer	)	

Appearances:
Jerry L. Spraggs, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Alternate Member
WILLIE T.C. THOMAS, Alternate Member
A. PETER KANJORSKI, Alternate Member

JURISDICTION

On July 8, 2004 appellant timely filed an appeal from a February 12, 2004 decision by the Office of Workers' Compensation Programs, finding that appellant's request for reconsideration was untimely and did not show clear evidence of error in the Office's April 4, 2001 decision which found that appellant did not have a ratable hearing loss. As more than one year has elapsed between the filing of the current appeal on July 8, 2004 and the issuance of the Office's April 4, 2001 merit decision, the Board does not have jurisdiction over the merits of this case pursuant to 20 C.F.R. §§ 501.2(c) and 501.3.

ISSUE

The issue is whether the Office properly determined that appellant's request for reconsideration was untimely and did not demonstrate clear evidence of error in the Office's decision.

FACTUAL HISTORY

On April 29, 1999 appellant, then a 52-year-old shift supervisor, filed an occupational disease claim for a hearing loss. Appellant stated that he was exposed to high levels of noise from equipment throughout the employing establishment including boiler feed pumps forced draft fans. He stated that he did not have hearing protection for the first 13 years of his employment and had inadequate hearing protection for the next 17 years.

The Office referred appellant to Dr. Shawn C. Jones, a Board-certified otolaryngologist, for an examination. In a December 8, 2000 report, Dr. Jones diagnosed bilateral high frequency sensorineural hearing loss. He stated that appellant's hearing loss had increased since he had started work at the employing establishment. He indicated that the level of appellant's hearing loss was in excess of what would normally be predicated on the basis of presbycusis. Dr. Jones concluded that appellant's hearing loss was in whole or in part due to noise exposure he encountered at work.

In a February 28, 2001 memorandum, an Office medical adviser reviewed Dr. Jones' report and accompanying audiogram and collaborative tests and after applying the Office's standardized procedures as adopted from the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) (5th ed. 2001) in determining the extent and degree of hearing loss,[1] concluded that appellant had no ratable hearing loss.

By decision dated April 4, 2001, the Office accepted that appellant had sustained a loss of hearing due to exposure to employment-related noise but denied a schedule award on the grounds that the hearing loss was not of a sufficient degree to be ratable.

The case lay dormant until in an undated letter, received by the Office on January 28, 2004 appellant requested reconsideration. Appellant contended that the Office did not consider that forced draft fans were placed in a separate room due to high decibel levels. He indicated that he was expected in his job to enter the room routinely to start and check the fans. Appellant submitted an October 8, 1997 report, from a person with an illegible signature with the employing establishment. The report stated that appellant's hearing test of October 8, 1997, showed that he had a mild loss for speech sounds in his left ear, essentially normal hearing for speech sounds in his right ear, a moderate loss of high pitch sounds in his left ear and a mild loss for high pitch sounds in his right ear.

In a February 12, 2004 decision, the Office denied appellant's request for reconsideration as untimely. The Office further found that appellant had not submitted clear evidence of error sufficient to require a merit reconsideration of the Office's April 4, 2001 decision.

[1] A.M.A., *Guides* at 250 (5th ed. 2001); *see also Donald E. Stockstad*, 53 ECAB ___ (Docket No. 01-1570, issued January 23, 2002); *petition for recon. granted* (*modifying prior decision*), Docket No. 01-1570 (issued August 13, 2002).

LEGAL PRECEDENT

The Office through regulation has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a). The Office will not review a decision denying or terminating a benefit unless the application is filed within one year of the date of that decision.[2] When an application is untimely, the Office undertakes a limited review to determine whether there is clear evidence of error pursuant to the untimely request.[3]

To establish clear evidence of error, a claimant must submit evidence relevant to the issue that was decided by the Office. The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error. Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error. It is not enough to show that the evidence could be construed so as to produce a contrary conclusion. To show clear evidence of error, however, the evidence submitted must not only be of sufficient probative value to create a conflict in medical opinion or establish a clear procedural error, but must be of sufficient probative value to *prima facie* shift the weight of the evidence in favor of the claimant and raise a fundamental question as to the correctness of the Office decision. The Board makes an independent determination of whether a claimant has submitted clear evidence of error on the part of the Office such that the Office abused its discretion in denying merit review in the face of such evidence.[4]

ANALYSIS

The Office issued its last merit decision on April 4, 2001. As the Office did not receive the most recent application for review until January 28, 2004, the application was not timely filed. The Office properly found that appellant had failed to timely file the application for review.

Appellant, in his request, discussed in detail his exposure to high noise while working with forced draft fans. Dr. Jones, however, concluded that appellant's hearing loss was causally related to his exposure to noise at work. Appellant has not shown that his hearing loss at the time of the April 4, 2001 decision, was sufficiently severe to be ratable to the point that appellant would receive a schedule award. Appellant's contention, therefore, does not address the essential issue of the severity of his hearing loss.

Appellant also submitted a report that described the results of an October 8, 1997 hearing test. But there is no indication that the report was given by a physician. The report, therefore, cannot be considered as medical evidence. As the signature cannot be identified as that of a physician, the report does not have any probative value[5] and does not show clear evidence of error in the Office's April 4, 2001 decision.

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[2] 20 C.F.R. § 10.607.

[3] *Thankamma Mathews*, 44 ECAB 765, 769 (1993).

[4] *Cresenciano Martinez*, 51 ECAB 322 (2000).

[5] *See Merton J. Sills*, 39 ECAB 572 (1988).

CONCLUSION

The Office properly found that appellant's request for reconsideration was untimely and the evidence submitted did not show clear evidence of error in the Office's April 4, 2001 decision.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated February 12, 2004 is affirmed.

Issued: October 21, 2004
Washington, DC

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member