United States Department of Labor
Employees' Compensation Appeals Board

C.B., Appellant	)	
and	)	**Docket No. 08-1153**
	)	**Issued: October 8, 2008**
TENNESSEE VALLEY AUTHORITY, BROWNS FERRY NUCLEAR PLANT, Decatur, AL, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

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

JURISDICTION

On March 11, 2008 appellant filed a timely appeal from the nonmerit decision of the Office of Workers' Compensation Programs dated February 7, 2008 denying his request for reconsideration on the grounds that it was untimely filed and failed to establish clear evidence of error. His appeal is also timely with regard to the October 18, 2007 decision denying his request for review of the written record. Because more than one year has elapsed between the last merit decision dated June 12, 2002 and appellant's appeal filed on March 11, 2008, the Board lacks jurisdiction to review the merits of his claim pursuant to 20 C.F.R. §§ 501.2(c) and 501.3.

ISSUES

The issues are: (1) whether the Office properly denied appellant's request for review of the written record under 5 U.S.C. § 8124(b) as untimely filed; and (2) whether the Office properly refused to reopen appellant's claim for reconsideration of the merits on the grounds that his request for reconsideration was not timely filed and failed to demonstrate clear evidence of error.

FACTUAL HISTORY

On December 7, 2001 appellant, then a 49-year-old former carpenter for the employing establishment, filed an occupational disease claim alleging that he sustained a hearing loss as a result of working for the employing establishment from 1977 until 1986. He noted that he was exposed to a noisy work environment while working in a reactor building. By letter dated February 11, 2002, the employing establishment controverted appellant's claim, noting that he worked for the employing establishment for a total of less than 5 years almost 18 years ago. The employing establishment also noted that hearing protection was mandatory in all areas worked by appellant.

In a memorandum dated April 2, 2002, the Office medical adviser noted after reviewing appellant's record that his initial audiogram for the employing establishment of April 2, 1976 was consistent with moderate high frequency hearing loss on the left and severe high frequency hearing loss on the right. He further noted that the initial hearing loss did not appear to worsen significantly through appellant's last audiogram of August 2, 1982.

By letter dated April 19, 2002, the Office referred appellant to Dr. George Godwin, an otolaryngologist, for a second opinion. In a report dated May 10, 2002, Dr. Godwin found bilateral neurosensory loss but he found that it was not due to his federal employment. He noted that the audio data does not show a hearing loss greater than would be expected by presbycusis and further noted that most of his present loss occurred after his federal employment.

By decision dated June 12, 2002, the Office denied appellant's claim for a hearing loss as the evidence did not establish that his hearing loss was caused by his federal employment.

On August 14, 2007 appellant requested review of the written record before an Office hearing representative. In support thereof, he submitted a graph showing results of an audiogram taken on August 8, 2007. This audiogram was not interpreted by a physician nor does it contain a notation as to the name of an audiologist who conducted the audiogram. By decision dated October 18, 2007, the Office denied appellant's request as it was not filed within 30 days for the final decision by the Office. It further denied appellant's request as it found that the issue in the case could equally well be addressed by requesting reconsideration from the Office and submitting evidence not previously considered with the Office.

On January 7, 2008 appellant requested reconsideration. On reconsideration he contended that he had not been associated with noise since he retired and that his medical records show hearing loss. Appellant submitted an audiogram dated August 3, 2007.

By decision dated February 7, 2008, the Office denied appellant's request as untimely filed and failing to establish clear evidence of error.

LEGAL PRECEDENT -- ISSUE 1

Any claimant dissatisfied with a decision of the Office shall be afforded an opportunity for an oral hearing or a review of the written record.[1] A request for either an oral hearing or a

[1] 5 U.S.C. § 8124(b) (2000); 20 C.F.R. §10.616(a).

review of the written record must be submitted, in writing, within 30 days of the date of the decision, for which a hearing or review of the written record is sought.[2] If the request is not made within 30 days, a claimant is not entitled to a hearing or a review of the written record as a matter of right. Although a claimant may not be entitled to a hearing as a matter of right, the Office has discretionary authority to either grant or deny a hearing request and the Office must exercise its discretion.[3]

ANALYSIS -- ISSUE 1

Appellant filed his request for review of the written record on August 14, 2007, over five years after the issuance of the final June 12, 2002 decision on the merits. Because he failed to meet the 30-day filing requirement, he is not entitled to a review of the written record as a matter of right. In its October 18, 2007 decision denying appellant's request for review of the written record as it was not timely filed, the Office also denied his request because the pertinent issue could alternatively be addressed by requesting reconsideration before the Office and submitting additional relevant evidence. This particular basis for denying appellant's request is considered a proper exercise of the Office's discretionary authority.[4] There is no evidence of record establishing that the Branch of Hearings and Review abused its discretion. Accordingly, the Board finds that the denial of appellant's untimely hearing request was proper.

LEGAL PRECEDENT -- ISSUE 2

Section 8128(a) of the Federal Employees' Compensation Act vests the Office 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 or 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."[5]

[2] 20 C.F.R. § 10.616(a).

[3] *See Herbert C. Holley*, 33 ECAB 140 (1981).

[4] *Mary B. Moss*, 40 ECAB 640, 647 (1989).

[5] 5 U.S.C. § 8128(a).

The Office, 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(a) provides that the Office will not review a decision unless the application for review is filed within one year of the date of that decision.[6]

However, the Office will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation, if the claimant's application for review shows clear evidence of error on the part of the Office in its most recent decision. 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 manifested on its face that the Office committed an error.[7]

To show 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 if sufficient probative value to *prima facie* shift the weight of the evidence in favor of the claimant and raise a substantial question as to the correctness of the Office's decision.[8]

Evidence that does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.[9] It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.[10] This entails a limited review by the Office of the evidence previously of record and whether the new evidence demonstrates clear error on the part of the Office.[11] The Board makes an independent determination as to whether a claimant has submitted clear evidence of error on the part of the Office.[12]

ANALYSIS -- ISSUE 2

In its decision dated February 7, 2008, the Office found that appellant failed to file a timely application for review. As previously noted, the most recent merit decision of record is the June 12, 2002 decision denying appellant's claim for compensation for a hearing loss. Appellant requested reconsideration on January 7, 2008, over five years after the last merit decision. The Board finds that the Office properly found that appellant's January 7, 2008 request for reconsideration was not timely filed.

[6] 20 C.F.R. § 10.607(b); *Annie L. Billingsley*, 50 ECAB 210 (1998).

[7] *Id*. at § 20.607(b); *Fidel E. Perez*, 48 ECAB 662, 665 (1997).

[8] *Annie L. Billingsley*, *supra* note 6.

[9] *Jimmy L. Day*, 48 ECAB 652 (1997).

[10] *Id.*

[11] *Id*.

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

The Board further finds that appellant did not submit any evidence with his reconsideration request sufficient to *prima facie* shift the weight of the evidence in his favor. Appellant stated that his request for reconsideration was considered and rejected by the Office in its prior decision. The only new evidence submitted by appellant was a copy of a graph from an audiogram taken on August 3, 2007. This graph was not interpreted by a physician nor does it contain the name of the audiologist who conducted the examination. More importantly, it does not address the issue at hand, whether appellant's hearing loss was causally related to his federal employment. There is no dispute that appellant had a hearing loss. However, his claim was denied as the evidence failed to establish that this hearing loss was causally related to his federal employment. Accordingly, appellant has not established clear evidence of error and the Office properly denied his reconsideration request.[13]

CONCLUSION

The Board finds that the Office properly denied appellant's request for review of the written record under 5 U.S.C. § 8124(b) as untimely filed. The Board further finds that the Office properly refused to reopen appellant's claim for reconsideration of the merits on the grounds that his request for reconsideration was not timely filed and failed to demonstrate clear evidence of error.

[13] *Robert G. Burns*, 57 ECAB 657 (2006).

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated February 7, 2008 and October 18, 2007 are affirmed.

Issued: October 8, 2008
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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