

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

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R.H., Appellant)	
)	
and)	Docket No. 12-102
)	Issued: May 17, 2012
DEPARTMENT OF THE AIR FORCE,)	
KENTUCKY NATIONAL GUARD,)	
Louisville, KY, Employer)	
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Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

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

JURISDICTION

On October 24, 2011 appellant filed a timely appeal of a May 19, 2011 nonmerit decision of the Office of Workers' Compensation Programs (OWCP) denying his request for reconsideration because it was untimely and failed to establish clear evidence of error. Because more than 180 days has elapsed between the last merit decision dated May 3, 2010 and the filing of the appeal, the Board lacks jurisdiction to review the merits of his claim. Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over this nonmerit decision.²

¹ 5 U.S.C. § 8101 *et seq.*

² For final adverse OWCP decisions issued prior to November 19, 2008, a claimant had one year to file an appeal. 20 C.F.R. § 501.3(d)(2) (2007). An appeal of a final adverse OWCP decision issued on or after November 19, 2008 must be filed within 180 days of the decision. 20 C.F.R. § 501.3(e) (2008).

ISSUE

The issue is whether OWCP properly denied appellant's request for reconsideration on the grounds that it was not timely filed and failed to establish clear evidence of error.

FACTUAL HISTORY

On March 16, 2010 appellant, then a 59-year-old retired aircraft maintenance supervisor, filed an occupational disease claim alleging that he sustained bilateral hearing loss and tinnitus as a result of employment-related noise exposure. He stated that he had worked in and around running military aircraft and associated ground support equipment for the entirety of his 30-year career.

In a letter dated March 22, 2010, OWCP informed appellant that the information submitted was insufficient to establish his claim and requested additional factual and medical evidence, including reports of medical examinations and audiograms.

In a separate letter dated March 22, 2010, OWCP requested information from the employing establishment, including comments from knowledgeable supervisors regarding the accuracy of appellant's allegations regarding his work-related noise exposure and the extent and degree of said exposure. It also requested copies of all reports of medical examinations and audiograms performed during appellant's employment.

By decision dated May 3, 2010, OWCP denied appellant's claim on the grounds that he had not established that he had sustained a hearing loss in the performance of duty.

On May 11, 2011 appellant requested reconsideration. He noted that he had diligently endeavored to obtain the required documentation from the employing establishment and had only recently been able to do so.

Appellant submitted a May 11, 2011 memorandum from Commander James C. Bishop of the employing establishment. Commander Bishop stated that from 1972 to 2008 appellant was exposed to hazardous noise, five days a week, four to five hours a day in various positions, including operating jet aircraft, aircraft maintenance support and working on the flight line.

Commander Bishop provided results of noise surveys, personnel records and a summary of appellant's federal service. He also provided medical reports and reports of audiograms dated August 12, 1972 to February 11, 2008. Appellant's August 12, 1972 baseline audiogram revealed totally normal hearing in both ears.³ Reports of audiograms for the remaining period of his employment showed progressive bilateral hearing loss, particularly in the right ear. In a report dated February 11, 2008, testing at the frequency levels of 500, 1,000, 2,000 and 3,000 cycles per second revealed the following: right ear 10, 15, 70 and 90 decibels; left ear 10, 10, 5 and 15 decibels.

³ The August 12, 1972 baseline audiogram showed no hearing loss at all frequency levels bilaterally.

Appellant submitted a January 21, 2010 report from Dr. Jeffrey M. Bumpous, a Board-certified otolaryngologist, who diagnosed bilateral hearing loss and tinnitus. Dr. Bumpous described appellant's work-related exposure to aircraft noise and stated that his hearing had progressively worsened over the course of his career.

By decision dated May 19, 2011, OWCP denied appellant's request for reconsideration on the grounds that his request was untimely and he had not shown clear evidence of error.

LEGAL PRECEDENT

FECA provides that the Secretary of Labor may review an award for or against payment of compensation at anytime on his own motion or on application.⁴ OWCP, through its regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a). To be entitled to a merit review of an OWCP decision denying or terminating a benefit, a claimant must file her application for review within one year of the date of that decision.⁵ 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.⁶

OWCP, however, may not deny an application for review solely on the grounds that the application was not timely filed. When an application for review is not timely filed, it must nevertheless undertake a limited review to determine whether the application establishes clear evidence of error.⁷ OWCP regulations and procedure provide that it will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth in 20 C.F.R. § 10.607(a), if the claimant's application for review shows clear evidence of error on the part of OWCP.⁸

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by OWCP.⁹ The evidence must be positive, precise and explicit and must manifest on its face that OWCP committed an error.¹⁰ Evidence which does not raise a substantial question concerning the correctness of the decision is insufficient to establish clear evidence of error.¹¹ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹² This entails a limited review by OWCP of how the evidence

⁴ 5 U.S.C. § 8128(a).

⁵ 20 C.F.R. § 10.607(a).

⁶ *Supra* note 4; *Leon D. Faidley, Jr.*, 41 ECAB 104, 111 (1989).

⁷ *See* 20 C.F.R. § 10.607(b); *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

⁸ *Id.* at § 10.607(b); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3d (January 2004).

⁹ *See Dean D. Beets*, 43 ECAB 1153, 1157-58 (1992).

¹⁰ *See Leona N. Travis*, 43 ECAB 227, 240 (1991).

¹¹ *See Jesus D. Sanchez*, 41 ECAB 964, 968 (1990).

¹² *See supra* note 10.

submitted with the reconsideration request bears on the evidence previously of record and whether the new evidence demonstrates clear error on the part of OWCP.¹³ The Board makes an independent determination of whether a claimant has submitted clear evidence that OWCP abused its discretion in denying merit review in the face of such evidence.¹⁴

ANALYSIS

The Board finds that, as more than one year has elapsed from the date of issuance of the last merit decision in this case on May 3, 2010 and the May 19, 2011 nonmerit decision of OWCP, appellant's May 11, 2011 request for reconsideration was untimely filed. Consequently, appellant must demonstrate clear evidence of error by OWCP in denying his claim.¹⁵

Pursuant to its obligation to develop appellant's claim, on March 22, 2010 OWCP requested information from the employing establishment, including comments from knowledgeable supervisors regarding work-related noise exposure and the extent and degree of the stated exposure, as well as copies of all reports of medical examinations and audiograms performed during appellant's employment. When the employing establishment failed to respond to its request for additional information, OWCP denied appellant's claim on the grounds that he failed to submit sufficient evidence to establish his claim. The Board finds that OWCP's failure to obtain the medical evidence from the employing establishment after undertaking to develop the evidence in this case constituted error.¹⁶

Subsequent to the filing of his reconsideration request, appellant submitted numerous documents supporting his hearing loss claim, including audiograms covering the period of his employment, physician's reports and memoranda from the employing establishment verifying his exposure to hazardous noise in the workplace. This evidence, which was submitted after the filing of the reconsideration request, was not in the record previously but was clearly available prior to its submission by the employing establishment.

An employer's reluctance or refusal to submit requested evidence relating to an employee's hearing loss claim should not be an impediment to a successful prosecution of the claim.¹⁷ In the present case, the type of information that had been sought, namely employing establishment audiograms, is normally within the custody of the employing establishment and not readily available to appellant. Accordingly, appellant should not be penalized for the employing establishment's failure to submit such information.¹⁸ Had the audiograms and other evidence supporting his noise-induced hearing loss been received prior to the May 3, 2010

¹³ See *Nelson T. Thompson*, 43 ECAB 919, 922 (1992).

¹⁴ *Pete F. Dorso*, 52 ECAB 424 (2001).

¹⁵ 20 C.F.R. § 10.607(b).

¹⁶ *Melvin James*, 55 ECAB 406 (2004).

¹⁷ See *Jerome J. Kubin*, Docket No. 03-1830 (issued October 1, 2003).

¹⁸ See *id.*

decision, proper procedure would have compelled OWCP to further develop the case by obtaining a second opinion report from a medical specialist.¹⁹

While appellant has the responsibility to establish entitlement to compensation, OWCP shares responsibility in the development of the evidence and has the obligation to see that justice is done.²⁰ Accordingly, once OWCP undertakes to develop the medical evidence further, it has the responsibility to do so in the proper manner.²¹ As it undertook development of the evidence by requesting audiograms from the employing establishment, it had an obligation to secure the evidence if possible.²² Its failure to do so was error.

The Board also finds that the evidence submitted in support of the reconsideration request could shift the weight of the evidence in this case in favor of appellant, as it offers support of his claim and may raise a substantial question concerning the correctness of the decision.²³ OWCP's summary findings in rejecting the evidence appellant submitted with his request for reconsideration does not comply with the review requirements under FECA and its implementing regulations.²⁴ Despite the untimeliness of appellant's request for reconsideration, the case must be remanded for OWCP to describe the evidence appellant submitted and give detailed reasons for accepting or rejecting it.²⁵

CONCLUSION

The Board finds that OWCP improperly denied appellant's request for reconsideration on the grounds that it was not timely filed and failed to establish clear evidence of error.

¹⁹ The Board notes that the accuracy of the audiograms provided by the employing establishment was not certified by a physician. OWCP does not have to review every uncertified audiogram, which has not been prepared in connection with an examination by a medical specialist. *Robert E. Cullison*, 55 ECAB 570 (2004).

²⁰ *Richard E. Simpson*, 55 ECAB 490 (2004).

²¹ *Melvin James*, *supra* note 16.

²² *Peter C. Belkind*, 56 ECAB 580 (2005).

²³ *See W.D.*, Docket No. 07-2002 (issued January 14, 2008). *See also Nancy Marcano*, 50 ECAB 110 (1998).

²⁴ *See supra* notes 7 and 8 and accompanying text.

²⁵ *See M.L.*, Docket No. 09-956 (issued April 15, 2010).

ORDER

IT IS HEREBY ORDERED THAT the May 19, 2011 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded to OWCP for further action consistent with this decision.

Issued: May 17, 2012
Washington, DC

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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