

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

C.R., Appellant)

and)

TENNESSEE VALLEY AUTHORITY,)
Cumberland City, TN, Employer)

**Docket No. 07-1770
Issued: December 6, 2007**

Appearances:
Charles Hicks, Esq. for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On July 13, 2007 appellant timely filed an appeal from a February 26, 2007 nonmerit decision of the Office of Workers' Compensation Programs denying his request for reconsideration as it was untimely and did not establish clear evidence of error. Because more than one year has elapsed from the most recent merit decision dated June 8, 2004 to the filing of this appeal, the Board lacks jurisdiction to review the merits of appellant's claim pursuant to 20 C.F.R. §§ 501.2(c) and 501.3.

ISSUE

The issue is whether the Office properly refused to reopen appellant's case for further review of the merits of his claim on the grounds that his request for reconsideration was not timely filed and failed to demonstrate clear evidence of error.

FACTUAL HISTORY

On February 28, 2003 appellant, then a 55-year-old laborer, filed an occupational disease claim alleging that he sustained hearing loss in both ears in the performance of duty. The Office

informed appellant he would be sent for a second opinion with Dr. Phillip Klapper on March 24, 2004. In his report, Dr. Klapper found that appellant had bilateral high frequency hearing loss.

On April 21, 2004 the Office accepted appellant's claim for bilateral hearing loss. In a separate April 21, 2004 decision, the Office found that appellant's hearing loss was not ratable and denied a schedule award.

On May 29, 2004 appellant requested reconsideration and submitted a list of hearing examination results from examinations at his employing establishment.

In a June 8, 2004 nonmerit decision, the Office denied appellant's request for reconsideration finding that the evidence submitted was immaterial. On June 7, 2004 appellant submitted an additional hearing loss report from his employing establishment.

On February 2, 2007 appellant submitted a claim for occupational disease for hearing loss and requested reconsideration. Appellant also submitted a letter and audiologist report from an examination performed on December 27, 2006. The audiologist found that appellant's hearing loss had increased in the last five years.

In a nonmerit decision dated February 26, 2007, the Office denied appellant's request for reconsideration on the basis that it was untimely filed and failed to present clear evidence of error.

LEGAL PRECEDENT

A claimant may seek an increased schedule award if the evidence establishes that he sustained an increased impairment at a later date causally related to the employment injury.¹ Even if the term reconsideration is used, when a claimant is not attempting to show error in the prior schedule award decision and submits medical evidence regarding a permanent impairment at a date subsequent to the prior schedule award decision, it should be considered a claim for an increased schedule award which is not subject to time limitations.² A proper claim for increased hearing loss is not subject to time limitations and is not subject to the clear evidence of error standard.

ANALYSIS

Appellant disagreed with the denial of his claim for an increased schedule award and requested reconsideration on February 2, 2007. On February 26, 2007 the Office denied

¹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.7b (August 2002).

² See *Linda T. Brown*, 51 ECAB 115 (1999). The Office issued a 1995 decision denying entitlement to a schedule award as no ratable impairment was established. Appellant requested that the Office reconsider in 1997, submitting a current report with a medical opinion that he had a 25 percent permanent impairment to the arms and legs. The Office determined that appellant submitted an untimely request for reconsideration that did not show clear evidence of error. The Board remanded the case for a merit decision. See also *Paul R. Reedy*, 45 ECAB 488 (1994).

appellant's request for reconsideration for the reason that it was not timely filed and failed to present clear evidence of error.

The Board has long recognized that, if a claimant's employment-related hearing loss worsens in the future, he may apply for an additional schedule award for any increased permanent impairment.³ The Board has also recognized that a claimant may be entitled to an award for an increased hearing loss even after exposure to hazardous noise has ceased if causal relationship is established by the medical evidence of record.⁴ The Office's procedure manual addresses the different procedures to be followed in schedule award cases where an original award is modified and in cases where a claimant sustains increased impairment at a later date as follows:

“(1) If it is determined after payment of a schedule award that the claimant is entitled to a greater percentage of loss, an amended award should be issued. The pay rate will remain the same and the revised award will begin on the day following the end of the award issued previously.”

“(2) If, on the other hand, the claimant sustains increased impairment at a later date which is due to work-related factors, an additional award will be payable if supported by the medical evidence. In this case, the original award is undisturbed and the new award has its own date of maximum medical improvement, percent and period.”⁵

Although appellant submitted a form for reconsideration in his February 2, 2007 request, he provided new audiological evidence and wanted further review of the schedule award issue. He submitted audiogram results from his December 27, 2006 hearing test and a letter from his audiologist noting a decline in his overall hearing during the past five years. As the Office has not determined appellant's entitlement to an additional schedule award for his claimed increased hearing loss, this case will be remanded for further development consistent with the Office's procedures.

CONCLUSION

The Board finds that the case is not in posture for decision.

³ *Paul R. Reedy, id.*, 490 (1994).

⁴ *Adelbert E. Buzzell*, 34 ECAB 96 (1982).

⁵ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.7b(1)-(8) (March 1995).

ORDER

IT IS HEREBY ORDERED THAT the February 26, 2007 decision of the Office of Workers' Compensation Programs is set aside and the case remanded for further action consistent with this decision of the Board.

Issued: December 6, 2007
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

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