

U.S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of BENJAMIN BUTLER and DEPARTMENT OF AGRICULTURE, MEAT &
POULTRY INSPECTION PROGRAM, Des Moines, Iowa

*Docket No. 97-448; Submitted on the Record;
Issued September 10, 1998*

DECISION and ORDER

Before WILLIE T.C. THOMAS, MICHAEL E. GROOM
BRADLEY T. KNOTT

The issue is whether the Office of Workers' Compensation Programs abused its discretion in refusing to reopen appellant's case for merit review under 5 U.S.C. § 8128(a) on the grounds that appellant's request for reconsideration was untimely filed and failed to present clear evidence of error.

The Board has duly reviewed the case record in the present appeal and finds that the Office of Workers' Compensation Programs did not abuse its discretion in refusing to reopen appellant's case for merit review under 5 U.S.C. § 8128(a) on the grounds that appellant's request for reconsideration was untimely filed and failed to present clear evidence of error.

On September 25, 1990 appellant, a food inspector, filed a claim for an occupational disease (Form CA-2) alleging that on January 1, 1980 he realized that his possible hearing loss was caused or aggravated by his employment. Appellant did not stop work.

By letter dated April 9, 1991, the Office accepted appellant's claim for binaural hearing loss and determined that appellant was entitled to a schedule award. On June 5, 1991, the Office granted appellant a schedule award for a 10 percent binaural hearing loss for the period March 11 through July 28, 1991.

In a July 3, 1996 letter, appellant requested reconsideration of the Office's decision accompanied by medical evidence. By decision dated October 3, 1996, the Office denied appellant's request for reconsideration on the grounds that it was untimely filed and that it did not establish clear evidence of error.

The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a) of the Federal Employees' Compensation Act.¹

¹ 5 U.S.C. § 8128(a).

The Office will not review a decision denying or terminating a benefit unless the application for review is filed within one year of the date of that decision.² When an application for review is not timely filed, the Office must undertake a limited review to determine whether the application presents clear evidence of error that the Office's final merit decision was erroneous.³

Since more than one year elapsed between the Office's June 5, 1991 decision and appellant's July 3, 1996 request for reconsideration, the Board finds that the request was untimely filed.⁴ Further, the evidence submitted by appellant does not raise a substantial question as to the correctness of the Office's last merit decision and is of insufficient probative value to *prima facie* shift the weight of the evidence in favor of appellant's claim.⁵

In support of his request for reconsideration, appellant submitted a May 2, 1996 report of Paul D. Sanderson, an audiologist, revealing that appellant had a 22.79 percent binaural hearing loss and an eight percent disability of the whole body. This evidence is of no probative medical value because an audiologist is not a physician under the Act.⁶ The Board also notes that the Office has set forth specific requirements for medical evidence in hearing loss cases which includes an examination by an otolaryngologist.⁷

In further support of his request for reconsideration, appellant submitted the results of an August 24, 1990 audiogram. Audiometric testing of the right ear at the frequency levels of 250, 500, 1,000, 2,000, 4,000, 6,000 and 8,000 revealed decibel losses of 15, 15, 20, 20, 90, 95 and 85 respectively, and that testing of the left ear at the above frequency levels revealed decibel losses of 15, 15, 25, 35, 90, 95 and 80 respectively.

Additionally, appellant submitted a September 22, 1990 medical report of Dr. James L. Flood, an abdominal surgeon, indicating that appellant had a marked hearing loss that was about 70 percent of normal and that appellant's hearing loss was caused by his long continued high decibel level noise exposure while working for the employing establishment. The Board notes that the American Medical Association, *Guides to the Evaluation of Permanent Impairment* has been adopted by the Office, and the Board has concurred, as an appropriate standard for

² See *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990); 20 C.F.R. § 10.138(b)(2);

³ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsideration*, Chapter 2.1602, para. 3b (January 1990) (the Office will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth in 20 C.F.R. § 10.138(b)(2), if the claimant's application for review shows "clear evidence of error" on the part of the Office); *Thankamma Mathews*, 44 ECAB 765 (1993); *Jesus D. Sanchez*, 41 ECAB 964 (1990).

⁴ The Board notes that the Office's last merit decision dated June 5, 1991 was issued more than one year prior to the date that appellant filed his appeal with the Board on November 1, 1996. Therefore, the Board lacks jurisdiction to consider the merits of appellant's claim; see 20 C.F.R. § 501.3(d).

⁵ See *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

⁶ See *Irwin J. Schumaker*, 39 ECAB 798 (1988); 5 U.S.C. § 8101(2).

⁷ Federal (FECA) Procedure Manual, Part 3 -- Medical, *Requirements for Medical Reports*, Chapter 3.600.8(a) (September 1994).

evaluating schedule losses.⁸ Dr. Flood's report, however, failed to indicate whether and how he applied the A.M.A., *Guides* in reaching his conclusion on the nature and extent of appellant's hearing loss. For this reason, it is of diminished probative value and does not establish clear error.

Accordingly, the Board finds that the evidence submitted by appellant is not sufficient to show clear evidence of error in the Office's June 5, 1991 determination that appellant was entitled to a schedule award for a 10 percent binaural hearing loss. Therefore, the Office properly denied review in this case.

The October 3, 1996 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, D.C.
September 10, 1998

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

Bradley T. Knott
Alternate Member

⁸ See *James J. Hjort*, 45 ECAB 595 (1994); *Luis Chapa, Jr.*, 41 ECAB 159 (1989); *Leisa D. Vassar*, 40 ECAB 1287 (1989); *Francis John Kilcoyne*, 38 ECAB 168 (1986).