

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of CHARLES G. JOHNSON and U.S. POSTAL SERVICE,
POST OFFICE, Omaha, NE

*Docket No. 01-1297; Submitted on the Record;
Issued July 1, 2002*

DECISION and ORDER

Before ALEC J. KOROMILAS, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly determined that appellant's request for reconsideration was not timely filed and failed to present clear evidence of error.

The Office accepted appellant's claim for a mild binaural hearing loss on November 18, 1993. He retired from the employing establishment on November 20, 1992. On December 30, 1992 appellant filed an occupational claim for tinnitus. By decision dated December 20, 1993, the Office denied his claim, stating that appellant's hearing loss was not severe enough to be ratable but he was entitled to medical benefits. Appellant requested a review of the written record by an Office hearing representative. By decision dated April 5, 1994, the Office hearing representative found that he was not entitled to a schedule award for hearing loss and he made no showing that he sustained a loss in wage-earning capacity due to his tinnitus and, therefore, he did not establish that he was entitled to compensation. The Office hearing representative modified the Office's decision, stating that appellant was not entitled to medical benefits, but otherwise affirmed the Office's December 20, 1993 decision. He appealed to the Board.

By decision dated July 2, 1996, the Board adopted the findings of the Office hearing representative and affirmed the Office's April 5, 1994 decision.¹ The Board stated that the Office properly determined that the medical evidence of record did not establish that appellant's tinnitus prevented him from performing his job of a tour superintendent and, therefore, appellant did not establish that he was entitled to compensation for disability or loss of wage-earning capacity.

¹ Docket No. 94-2115 (issued July 2, 1996). The facts and history surrounding the prior appeal are set forth in the initial decision and are hereby incorporated by reference.

By letter dated April 4, 2000, appellant requested reconsideration of the Office's decision and submitted evidence including medical reports from his treating physician, Dr. Peter R. DeMarco, an otolaryngologist, dated from December 1, 1992 through January 31, 2000, from Dr. Lee F. McNamara, a family practitioner, dated November 17, 1992 and December 7, 1999 and from Dr. Albert P. Olson, a Board-certified otolaryngologist, dated November 5, 1993. Appellant also submitted litigation documents related to his complaint of discrimination filed with the District Court of Nebraska, the court's ruling in its memorandum and order dated April 18, 1997 dismissing appellant's complaint with prejudice and the court's subsequent order dated June 2, 1997 denying appellant's motion to alter or amend the judgment.

In his request for reconsideration, appellant stated that his tinnitus prevented him from performing his work when he retired in 1992 but he did not know that at the time. He stated that, due to the constant ringing in his ears, he had difficulty accomplishing his duties at work and was not able to "reasonably" respond and react in "given situations." Appellant stated that since his retirement he supplemented his income with cleaning offices and was unable to concentrate on more detailed work and even writing the letter requesting reconsideration was "very difficult" for him.

The Board has duly reviewed the case record in the present appeal and finds that the Office properly determined that appellant's request for reconsideration was not timely filed and failed to present clear evidence of error.

The Board's jurisdiction to consider and decide appeals from a final decision of the Office extends only to those final decisions issued within one year prior to the filing of the appeal.² As appellant filed the appeal with the Board on April 20, 2001, the only decision before the Board is the Office's April 4, 2000 decision, denying appellant's request for reconsideration.

The Office, through its regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a).³ The Office will not review a decision denying or terminating benefits unless the application for review is filed within one year of the date of that decision.⁴ The Office will consider an untimely application for reconsideration only if the application demonstrates clear evidence of error by the Office in its most recent merit decision. The evidence must be positive, precise and explicit and must be manifested on its face that the Office committed an error.⁵

To establish clear evidence of error, a claimant must submit evidence relevant to the issue that was decided by the Office.⁶ Evidence that does not raise a substantial question concerning

² *Oel Noel Lovell*, 42 ECAB 537 (1991); 20 C.F.R. §§ 501.2(c), 501.3(d)(2).

³ 5 U.S.C. § 8128(a).

⁴ 20 C.F.R. § 10.607(a); *see also Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

⁵ 20 C.F.R. § 10.607(b); *see Ronald Q. Pearce*, 53 ECAB ____ (Docket No. 01-1007, issued February 7, 2002); *Thankamma Mathews*, 44 ECAB 765 (1993).

⁶ *See Cresenciano Martinez*, 51 ECAB ____ (Docket No. 98-1743, issued February 2, 2000).

the correctness of the Office's decision is insufficient to establish clear evidence of error.⁷ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.⁸ This entails a limited review by the Office of how the evidence submitted with the reconsideration request bears on the evidence previously of record and whether the new evidence demonstrates clear error on the part of the Office.⁹ To show clear evidence of error, 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 substantial question as to the correctness of the Office decision.¹⁰ 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 a merit review in the face of such evidence.¹¹

In this case, the evidence appellant submitted in his request for reconsideration allegedly establishing that his tinnitus prevented him from working was duplicative of previously submitted evidence. The arguments appellant raised in support of his request -- that the Office erred in finding that appellant was capable of working -- were previously raised. Appellant did not show that the Office committed clear evidence of error. He, therefore, has failed to establish his claim.

⁷ See *Jesus D. Sanchez*, 41 ECAB 964 (1990).

⁸ See *Cresenciano*, *supra* note 6.

⁹ *Nelson T. Thompson*, 43 ECAB 919 (1992).

¹⁰ *Leon D. Faidley, Jr.*, 41 ECA B 104 (1989).

¹¹ *Thankamma Matthews*, *supra* note 5.

The April 4, 2000 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC
July 1, 2002

Alec J. Koromilas
Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member