United States Department of Labor
Employees' Compensation Appeals Board

R.G., Appellant	)	
and	)	**Docket No. 06-1685**
	)	**Issued: January 5, 2007**
DEPARTMENT OF DEFENSE, SHARPE ARMY DEPOT, Lathrop, CA, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On July 18, 2006 appellant filed a timely appeal of the Office of Workers' Compensation Programs' nonmerit decisions dated February 23, 2006 which denied his request for an oral hearing and June 2, 2006 which denied his request for reconsideration on the grounds that it was not timely filed and failed to establish clear evidence of error. Because more than one year has elapsed from the last merit decision dated October 16, 1991 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.

ISSUES

The issues are: (1) whether the Branch of Hearings and Review properly denied appellant's request for an oral hearing; and (2) whether the Office properly declined to reopen appellant's request for reconsideration of the merits under section 8128(a) of the Federal Employees' Compensation Act, on the grounds that it was not timely filed and did not establish clear evidence of error.

FACTUAL HISTORY

Appellant, a 44-year-old wood worker, filed an occupational disease on May 20, 1989 alleging that he developed a high tone sensorineural hearing loss in his left ear due to acoustic trauma. He first became aware of his condition on April 6, 1989 and first related this condition to his employment on May 9, 1989. The Board reviewed appellant's claim in a decision dated March 12, 2002.[1] It found that he had filed an untimely request for reconsideration which did not establish clear evidence of error in the October 16, 1991 Office decision. The Board noted that the Office denied appellant's hearing loss claim on the grounds that the medical evidence did not establish that his loss of hearing was due to hazardous noise levels at the employing establishment. The Office based its decision on a June 27, 1990 report from Dr. B. Gilmore Dowd, a Board-certified otolaryngologist, and a September 18, 1989 report from Dr. Wayne K. Lowell, a Board-certified otolaryngologist. These physicians noted that appellant awoke with tinnitus in his left ear in April 1989 and opined that this condition was not due to his employment.

Appellant submitted an October 11, 1989 report from Dr. Kenneth Mak, a Board-certified otolaryngologist, a April 10, 1990 report from Dr. Douglas D. Harris, a Board-certified otolaryngologist, and a September 27, 1993 report from Dr. F. Blair Simmons, a Board-certified otolaryngologist, in support of his request for reconsideration. These physicians opined that his unilateral left sided hearing loss was likely due to noise exposure in the performance of his federal job duties. The Board found that appellant had submitted sufficient medical evidence to create a conflict of medical opinion evidence regarding the causal relationship between his loss of hearing and his employment. However, it noted that clear evidence of error was intended to be a difficult standard which he had not met. The Board affirmed the Office's April 3, 2000 decision. The facts and circumstances of the case as set out in the Board's prior decision are adopted herein by reference.

Following the Board's March 12, 2002 decision, appellant resubmitted Dr. Harris' April 10, 1990 report and Dr. Lowell's September 18, 1989 report. He also submitted a May 9, 1989 note from Dr. Harris not previously included in the record which contained the same findings and conclusions as the April 10, 1990 report. Specifically, Dr. Harris again stated that appellant had tinnitus and hearing loss in the left ear with a strong history of noise exposure at work. He again attributed his condition to acoustic trauma at work.

Appellant also submitted new evidence from Dr. Dowd. In a report dated October 20, 1995, Dr. Dowd noted that he experienced sudden hearing loss and loud tinnitus in his left ear while talking on the telephone to his mother. He noted: "[Appellant] does have a high frequency nerve loss which is probably attributed to his work environment when he was younger." Dr. Dowd attributed his onset of tinnitus and sudden hearing loss to a vascular event. On November 6, 1995 he stated that appellant had recovered from his sudden hearing loss in his left ear and stated: "[A]gain this does raise the question that this change in hearing may be on the basis of either embolic phenomenon or small vessel disease in the central nervous system." Dr. Dowd examined him on February 12, 1996 and stated that appellant had developed loud

[1] Docket No. 00-2218 (issued March 12, 2002).

tinnitus in his right ear. This symptom resolved and Dr. Dowd noted that he might have central nervous system pathology or multiple sclerosis. He recommended neurological evaluation.

In a report dated October 11, 1999, Dr. Mak noted that appellant's most recent audiogram was similar to that from 1989 with normal hearing in the right ear and moderate to profound high frequency sensory neural hearing loss and tinnitus in the left ear with no vertigo. He described his employment activities, including exposure to loud saws and loud explosive type noises associated with the saws. Dr. Mak stated: "In my opinion, [appellant] has suffered some sensory neural hearing loss due to the chronic exposure to his loud noise environment…."

Appellant requested an oral hearing on December 30, 2005. By decision dated February 23, 2006, the Branch of Hearings and Review denied his request for an oral hearing and stated that his claim could equally well be addressed by requesting reconsideration.

Appellant requested reconsideration on April 23, 2006. By decision dated June 2, 2006, the Office denied appellant's request for reconsideration on the grounds that the request was not timely filed and did not contain clear evidence of error.

LEGAL PRECEDENT -- ISSUE 1

The statutory right to a hearing under section 8124(b)(1)[2] follows an initial final decision of the Office.[3] Section 8124 of the Act sets forth the claimant's jurisdiction of the Office's Branch of Hearings and Review in holding hearings under the Act. This section states:

> "(a) The Secretary of Labor shall determine and make a finding of facts and make an award for or against the payment of compensation under this subchapter….
>
> "(b)(1) Before review under section 8128(a) of this title, a claimant for compensation not satisfied with a decision of the Secretary under subsection (a) of this section is entitled, on request made within 30 days after the date of issuance of the decision, to a hearing on his claim before a representative of the Secretary…."[4]

The Act provides the Office with original jurisdiction in the processing of compensation claims and section 8124(a) provides the Office with the duty and authority to issue an initial decision on an employee's claim for compensation. Once an initial decision is made in a compensation case, the claimant's rights arise by which the claimant may seek further review of his claim: the right to a hearing before the Office, the right to reconsideration before the Office or an appeal to the Board. The Board has clarified that the Office does not have the discretionary authority to grant a request for hearing immediately following a Board decision. The Branch of Hearings and Review may not assume jurisdiction in the claims process absent a final adverse decision by the Director. Following the Board's review of an Office decision, there is no final

[2] 5 U.S.C. §§ 8101-8193, 8124(b)(1).

[3] 5 U.S.C. § 8124(a)(1).

[4] 5 U.S.C. § 8124.

decision of the Office left unreviewed over which the Office's Branch of Hearings and Review can assume jurisdiction to exercise its discretionary appellate authority.[5]

ANALYSIS -- ISSUE 1

The Board issued its final decision on this claim on March 12, 2002. Following this decision of the Board, there was no final decision of the Office left unreviewed over which the Office's Branch of Hearings and Review could assume jurisdiction to exercise its discretionary appellate authority. The Office, therefore, properly denied appellant's request for a hearing on February 23, 2006.

LEGAL PRECEDENT -- ISSUE 2

To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant must file his application for review within one year of the date of that decision.[6] The Board has found that the imposition of the one-year limitation does not constitute an abuse of the discretionary authority granted the Office under section 8128(a) of the Act.[7]

The Office, 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, the Office must nevertheless undertake a limited review to determine whether the application establishes "clear evidence of error."[8] Office regulations and procedure provide that the Office will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation sets 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 the Office.[9]

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.[10] The evidence must be positive, precise and explicit and must manifest on its face that the Office committed an error.[11] Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish

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[5] *Robert N. Thomas*, 51 ECAB 180, 180-81 (1999).

[6] 20 C.F.R. § 10.607(a).

[7] 5 U.S.C. §§ 8101-8193, § 8128(a); *Leon D. Faidley, Jr.*, 41 ECAB 104, 111 (1989).

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

[9] 20 C.F.R. § 10.607(b); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3d (January 2004). Office procedure further provides, "The term 'clear evidence of error' is intended to represent a difficult standard. The claimant must present evidence which on its face shows that the [Office] made a error (for example, proof that a schedule award was miscalculated). Evidence such as a detailed, well-rationalized medical report which, if submitted before the denial was issued, would have created a conflict in medical opinion requiring further development, is not clear evidence of error." Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3c (January 2004).

[10] *See Dean D. Beats*, 43 ECAB 1153, 1157-58 (1992).

[11] *See Leona N. Travis*, 43 ECAB 227, 240 (1991).

clear evidence of error.[12] It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.[13] 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.[14] 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.[15]

ANALYSIS -- ISSUE 2

In its June 2, 2006 decision, the Office properly determined that appellant filed an untimely request for reconsideration. Appellant's reconsideration request was filed on April 23, 2006 more than one year after the Office's merit decision of October 16, 1991. Therefore, he must demonstrate clear evidence of error on the part of the Office in issuing this decision.

In support of his request for reconsideration, appellant resubmitted evidence which was already considered by the Board in its March 12, 2002 decision. The Board already considered Dr. Harris' April 10, 1990 report and Dr. Lowell's September 18, 1989 report and determined that these reports were not sufficient to establish clear evidence of error on the part of the Office. It is not necessary for the Board to reconsider this evidence on this second appeal.[16] The May 9, 1989 report from Dr. Harris contains similar findings and conclusions to the April 10, 1990 report. The Board finds that this report does not establish clear evidence of error on the part of the Office. While this note might be sufficient to create a conflict with the reports of Dr. Dowd and Dr. Lowell, a conflict of medical opinion evidence is not sufficient to reach the high standard of clear evidence of error.[17] The Board further notes that the October 11, 1999 report from Dr. Mak is a restatement of his previous conclusions that appellant had an employment-related hearing loss. As with Dr. Harris' May 9, 1989 report, this report does not raise a substantial question as to the correctness of the Office's decision.[18]

Appellant alleged that the statement by Dr. Dowd in his October 20, 1995 report that he did have a high frequency nerve loss which was probably attributable to his work environment when he was younger was sufficient to establish clear evidence of error on the part of the Office in denying his claim. The Board finds that this statement does not raise a substantial question concerning the correctness of the Office's decision as Dr. Dowd's opinion is couched in

[12] *See Jesus D. Sanchez*, 41 ECAB 964, 968 (1990).

[13] *See Leona N. Travis*, *supra* note 11.

[14] *See Nelson T. Thompson*, 43 ECAB 919, 922 (1992).

[15] *Leon D. Faidley, Jr.*, *supra* note 7

[16] 20 C.F.R. § 501.6(d).

[17] *Leon D. Faidley, Jr.*, *supra* note 7.

[18] *Id.*

speculative terms and does not discuss any history of noise exposure which he felt caused or contributed to appellant's claim.[19] The report also fails to adequately distinguish between appellant's sudden onsets of hearing loss and tinnitus in April 1989 and 1995 and the employment-related hearing loss. As appellant did not submit clear and convincing evidence of error on the part of the Office in denying his claim for employment-related hearing loss. Therefore, he failed to establish clear evidence of error and the Office properly declined to reopen his claim for consideration of the merits.

CONCLUSION

The Board finds that appellant did not submit clear evidence of error of the part of the Office and the Office was not required to reopen his claim for merit review.

ORDER

IT IS HEREBY ORDERED THAT the June 2 and February 23, 2006 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: January 5, 2007
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

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

[19] *Kathy A. Kelly*, 55 ECAB 206, 211-12 (2004).