

FACTUAL HISTORY

On June 19, 2012 appellant, then a 54-year-old automotive technician, filed a traumatic injury claim (Form CA-1) alleging that on June 12, 2012, he sustained hearing loss of the left ear after the backfire of an air compressor. Appellant's supervisor noted that his knowledge of the facts about appellant's claimed injury did not agree with appellant's statements, writing that there was reason to believe that he had preexisting hearing loss because he had applied to the Veteran's Administration (VA) for hearing loss.

In a statement dated June 18, 2012, appellant described the incident alleged to have caused his hearing loss. On June 12, 2012 he was sent on a road call to replace a flat tire. When appellant had finished replacing the tire, he prepared to turn off an air compressor, which backfired at close range, causing a loud ringing in his left ear. He reported it to his supervisor, who asked him to wait a few days to see if his condition would change. Appellant stated that the ringing continued, causing some discomfort.

By letter dated June 29, 2012, OWCP advised appellant that the evidence was insufficient to establish his claim. It requested that he respond to a questionnaire and address the employing establishment's concerns about the circumstances of his injury. OWCP also requested medical evidence. Appellant was afforded 30 days to submit the requested evidence.

In a report dated June 19, 2012, Dr. Theresa H. Blanco, an osteopath, noted that appellant stated an air compressor backfired at close range to his left ear.² Appellant denied any previous injury to his left ear, but stated that his left ear had a prior history of decreased hearing. Dr. Blanco stated, "There is no direct trauma or injury that is directly related to this injury." She diagnosed appellant with tinnitus. In subsequent progress notes, Dr. Blanco observed that his tinnitus was improving.

In an August 6, 2012 decision, OWCP denied appellant's claim. It found that the evidence was insufficient to establish that the June 12, 2012 incident occurred as alleged because he had failed to respond to OWCP's questionnaire, raising doubt as to the validity of the claim.

Appellant submitted a witness statement with an illegible signature dated June 26, 2012. He wrote at the top of the statement that it was from "the mailman himself." The statement read, "On [June 12, 2012], the compressor made a loud noise when the mechanic turn[ed] it off. It sound[ed] like a loud explosion."

In a medical report dated July 11, 2012, Dr. Adrien A. Eshraghi, a Board-certified otolaryngologist, noted that appellant had previously experienced intermittent tinnitus on the right side, but not the left side, until the alleged incident of June 12, 2012. He recommended tinnitus cognitive therapy and to avoid coffee, stress, silence or thinking about the noise. In a review of an audiological test of that date, an audiologist noted that appellant had normal hearing sensitivity at all frequencies in both ears, except for mild sensorineural hearing loss at 4000 hertz in the right ear.

² Dr. Blanco's certification as a osteopath could not be confirmed by the American Board of Medical Specialties or the American Osteopathic Association.

On August 14, 2012 appellant responded to OWCP's inquiries. He stated that the air compressor backfired when he turned it off. Appellant asserted that he had no prior history of hearing problems before the filing of this claim, adding "not with constant ringing in my left ear." He stated that he had never applied for hearing loss through the VA.

In a record of a telephone conversation dated January 3, 2014, appellant informed a claims examiner that he had submitted a request for reconsideration in June 2013. The claims examiner told him that she could not locate the form in the case record, but that she would see if she could get his telephone call treated as a reconsideration request. On January 8, 2014 a claims examiner left a message for appellant to inform him that the request had to be in writing.

On January 27, 2014 appellant requested reconsideration of his claim. He did not submit additional evidence.

By decision dated January 29, 2014, OWCP denied appellant's request for reconsideration. It found that his request was not timely filed and failed to present clear evidence of error.

LEGAL PRECEDENT

To be entitled to a merit review of an OWCP decision denying or terminating a benefit, an application for reconsideration must be received by OWCP within one year of the date of OWCP's decision for which review is sought.³ 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.⁴ When review is sought for merit decisions issued on or after August 29, 2011, timeliness is determined by the document receipt date of the reconsideration. If the request for reconsideration is received more than one year after the last decision, the request must be considered untimely.⁵

OWCP 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.⁶ OWCP regulations and procedures provide that OWCP 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.⁷

³ 20 C.F.R. § 10.607(a).

⁴ 5 U.S.C. § 8128(a); *Leon D. Faidley, Jr.*, 41 ECAB 104, 111 (1989).

⁵ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4 (October 2011).

⁶ *See* 20 C.F.R. § 10.607(b); *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

⁷ 20 C.F.R. § 10.607(b); Federal (FECA) Procedure Manual, *see supra* note 5 at Chapter 2.1602.5(a) (October 2011). OWCP's 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 OWCP made a mistake. For example, a claimant provides proof that a schedule award was miscalculated, such as a marriage certificate showing that the claimant had a dependent but the award was not paid at the augmented rate."

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by OWCP.⁸ The evidence must be positive, precise and explicit and must manifest on its face that OWCP committed an error.⁹ Evidence which does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to establish clear evidence of error.¹⁰ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹¹ This entails a limited review by OWCP 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 OWCP.¹²

In order to establish 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 OWCP's decision.¹³ The Board makes an independent determination of whether a claimant has submitted clear evidence of error on the part of OWCP such that it abused its discretion in denying merit review in the face of such evidence.¹⁴

ANALYSIS

The Board finds that OWCP properly determined that appellant failed to file a timely application for review. OWCP's procedures provide that the one-year time limitation period for requesting reconsideration begins on the date of the original OWCP decision.¹⁵ A right to reconsideration within one year also accompanies any subsequent merit decision on the issues.¹⁶ When review is sought for merit decisions issued on or after August 29, 2011, timeliness is determined by the document receipt date of the reconsideration. If the request for reconsideration is received more than one year after the last decision, the request must be considered untimely.¹⁷ As OWCP received appellant's request for reconsideration on January 27, 2014, more than one year after August 6, 2012, his request for reconsideration was

⁸ See *Dean D. Beets*, 43 ECAB 1153, 1157-58 (1992).

⁹ 20 C.F.R. § 10.607(b); *Leona N. Travis*, 43 ECAB 227, 240 (1991).

¹⁰ See *Jesus D. Sanchez*, 41 ECAB 964, 968 (1990).

¹¹ See *Leona N. Travis*, *supra* note 9.

¹² See *Nelson T. Thompson*, 43 ECAB 919, 922 (1992).

¹³ See *Velvetta C. Coleman*, 48 ECAB 367, 370 (1997).

¹⁴ See *Pete F. Dorso*, 52 ECAB 424, 427 (2001); *Thankamma Matthews*, 44 ECAB 765, 770 (1993).

¹⁵ 20 C.F.R. § 10.607(a).

¹⁶ *Robert F. Stone*, 57 ECAB 292, 295 (2005).

¹⁷ *Supra* note 5.

untimely.¹⁸ Consequently, he must demonstrate clear evidence of error by OWCP in denying his claim for compensation.¹⁹

The underlying claim for compensation was denied on the grounds that appellant had not established a factual basis for his claim. On reconsideration, he provided a witness statement and responses to OWCP's inquiries. The only factual evidence received by OWCP regarding appellant's injury prior to the denial of his claim on August 6, 2012 was his statement dated June 18, 2012 and the Form CA-1. In OWCP's June 29, 2012 development letter, appellant was informed of the information required to establish his claim and provided a questionnaire to complete describing the factual circumstances surrounding his claim. In requesting reconsideration, he contended that the additional evidence, *i.e.*, the witness statement and his response to the development letter established his claim. The Board finds however that appellant did not submit sufficient evidence to establish clear evidence of error in OWCP's denial of his claim. While these statements are generally supportive of his claim to establish that injury occurred on June 12, 2012 at the time, place and in the manner alleged, they do not establish clear evidence of error on the part of OWCP.²⁰ As noted, it is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion. The evidence, on its face, must be positive, precise and explicit that the injury occurred as alleged. Appellant did not show clear evidence of error in OWCP's finding as to the occurrence of an employment incident on June 12, 2012 and that this incident caused his tinnitus.

While appellant submitted various medical reports documenting tinnitus in his left ear, this evidence is insufficient to establish that OWCP erred in its denial of his claim, as it does not establish, on its face, that his tinnitus was caused by the incident of June 12, 2012. Thus, the factual and medical evidence of record does not raise a substantial question as to the correctness of OWCP's denial of his claim.²¹

As none of the evidence raises a substantial question as to the correctness of OWCP's decision, appellant has failed to establish clear evidence of error on the part of OWCP in denying further merit review.²²

CONCLUSION

The Board finds that appellant's request for reconsideration was untimely filed and did not demonstrate clear evidence of error.

¹⁸ The Board notes that appellant stated that he submitted a request for reconsideration in June 2013. While new evidence was received at that time, there is no evidence of record indicating that appellant requested reconsideration until January 27, 2014.

¹⁹ *Supra* note 7; *see D.G.*, 59 ECAB 455, 458 (2008).

²⁰ *See V.W.*, Docket No. 12-1901 (issued March 5, 2013).

²¹ *See G.B.*, Docket No. 13-1260 (issued December 2, 2013); *J.V.*, Docket No. 12-90 (issued July 2, 2012).

²² *A.S.*, Docket No. 11-356 (issued September 16, 2011).

ORDER

IT IS HEREBY ORDERED THAT the January 29, 2014 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 8, 2014
Washington, DC

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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

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