

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of RAYMOND GONZALES and DEPARTMENT OF DEFENSE,
DEFENSE LOGISTICS AGENCY, New Cumberland, PA

*Docket No. 00-2218; Submitted on the Record;
Issued March 12, 2002*

DECISION and ORDER

Before ALEC J. KOROMILAS, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs properly determined that appellant's request for reconsideration was untimely filed and did not demonstrate clear evidence of error.

On January 21, 2000 appellant notified the Office that he wanted to "reopen [my] hearing loss claim."

By letter dated March 2, 2000, the Office advised appellant that he had been given one year from the October 16, 1991 decision to appeal and that since no actions were taken in eight years of that decision his record had been destroyed. However, appellant was advised that if he could show clear evidence of error in the prior Office decision, his claim would be reopened despite the time limitation provision. Appellant was further advised to submit a copy of the prior decision.

On March 13, 2000 appellant advised the Office that the June 27, 1990 report from Dr. B. Gilmore Dowd showed clear evidence of error. He also submitted a medical report from Dr. F. Blair Simmons, Board-certified in otolaryngology. Dr. Simmons noted that appellant's hearing test showed a mild high-frequency hearing loss that was likely due to episodes of loud sound exposure in the past. He also noted that appellant's hearing level would likely remain the same indefinitely. Dr. Simmons attached a copy of the audiogram test. Appellant also submitted an October 11, 1999 medical report from Dr. Kenneth Mak, a Board-certified ear, nose and throat specialist, who opined:

"[Appellant] has suffered some sensory neural hearing loss due to the chronic exposure to his loud noise environment and it is very possible that the tinnitus is also caused from the loud work environment experienced for nine years. [Appellant] has been evaluated by multiple otolaryngologists and has had multiple audiograms which show the stable sensory neural hearing loss."

He also attached a copy of the audiogram test.

By letter dated March 14, 2000, the Office informed the employing establishment that additional information was needed to pursue appellant's claim. However, no response was received.

By decision dated April 3, 2000, the Office denied review of the prior decision on the grounds that the application for review was not timely filed and did not demonstrate clear evidence of error.

The Board's jurisdiction to consider and decide appeals from final decisions of the Office extends only to those final decisions issued within one year prior to the filing of the appeal.¹ As appellant filed his appeal with the Board on June 26, 2000, the only decision properly before the Board is the April 3, 2000 decision.

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

Section 8128(a) of the Federal Employees' Compensation Act² does not entitle a claimant to a review of an Office decision as a matter of right.³ This section, vesting the Office with discretionary authority to determine whether it will review an award for or against compensation, provides:

“The Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application. The Secretary, in accordance with the facts found on review may --

(1) end, decrease, or increase the compensation awarded; or

(2) award compensation previously refused or discontinued.”

The Office, through its regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a). As one such limitation, the Office has stated that it 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.⁴ The Board has found that the imposition of this one-year time limitation does not constitute an abuse of the discretionary authority granted the Office under 5 U.S.C. § 8128(a).⁵

¹ 20 C.F.R. § 501.2(c), 501.3(d)(2).

² 5 U.S.C. § 8128(a).

³ *Jesus D. Sanchez*, 41 ECAB 964 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

⁴ 20 C.F.R. § 10.607(a).

⁵ See cases cited *supra* note 3.

The Office properly determined in this case that appellant failed to file a timely application for review. The Office issued its last merit decision in this case on October 16, 1991 wherein it denied appellant's claim on the grounds that his hearing loss was not causally related to his exposure to hazardous noise levels. Appellant requested reconsideration on March 13, 2000. As appellant's reconsideration request was well outside the one-year time limit which began the October 16, 1991 decision. Appellant's request for reconsideration was untimely. The Board notes that on appeal appellant states that the Office claims examiner agreed with his allegation of clear evidence of error and quotes her as stating "finds that he has established a clear case of error in the original decision." However, upon careful review the Board notes that the Office claims examiner erroneously omitted the word "not" in the wording of her decision.

In those cases where a request for reconsideration is not timely filed, the Board has held however that the Office must nevertheless undertake a limited review of the case to determine whether there is clear evidence of error pursuant to the untimely request.⁶ Office procedures state that the Office will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation, if the claimant's application for review shows clear evidence of error" on the part of the Office.⁷

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.⁸ The evidence must be positive, precise and explicit and must be manifested on its face that the Office committed an error.⁹ Evidence which does not raise a substantial question concerning the correctness of the Office'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 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.¹² To show clear evidence of error, the evidence submitted must not only be of sufficient probative value to create

⁶ 20 C.F.R. § 10.607(b).

⁷ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(b) (May 1991). The Office therein states:

"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 an error (for example, proof of a miscalculation in a schedule award). Evidence such as a detailed, well-rationalized medical report which, if submitted prior to the Office's denial, would have created a conflict in medical opinion requiring further development, is not clear evidence of error and would not require a review of the case on the Director's own motion.

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

⁹ See *Leona N. Travis*, 43 ECAB 227 (1991).

¹⁰ See *Jesus D. Sanchez*, *supra* note 3.

¹¹ See *Leona N. Travis*, *supra* note 10.

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

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.¹³ 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 merit review in the face of such evidence.¹⁴

The Board finds that appellant's March 13, 2000 request for reconsideration fails to show clear evidence of error. In its October 16, 1991 decision, the Office denied appellant's claim on the grounds that appellant's hearing loss was not causally related to exposure to hazardous noise levels at his employing establishment. The issue, therefore, for purposes of establishing clear evidence of error, is whether appellant has submitted medical evidence establishing that he sustained a compensable hearing loss/tinnitus causally related to his employment environment.

The Board finds that the medical evidence submitted by appellant does not establish that he has a compensable hearing loss/tinnitus causally related to his employment environment. Appellant's allegation that he has sustained a hearing loss is not sufficient to raise a substantial question as to the correctness of the Office decision. Both Drs. Mak and Simmons' medical reports repeated earlier findings of previous audiograms performed on appellant and offered no new evidence to establish that he sustained a compensable hearing loss/tinnitus causally related to factors of his employment. As appellant did not submit evidence substantiating clear evidence of error, the Office did not abuse its discretion in denying merit review of the case.

Drs. Mak's and Simmons' newly submitted reports conflict with Dr. Dowd's June 27, 1990 opinion regarding causal relationship of appellant's hearing loss. As the Board has explained, clear evidence of error is a difficult standard to meet. The new evidence must not only establish a conflict of medical evidence, but must on its face raise a substantial question as to the correctness of the Office's decision. The medical reports from Drs. Mak and Simmons do not meet this burden of proof.

¹³ *Leon D. Faidley, Jr., supra* note 3.

¹⁴ *Gregory Griffin*, 41 ECAB 458 (1990).

The April 3, 2000 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC
March 12, 2002

Alec J. Koromilas
Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member