

**United States Department of Labor  
Employees' Compensation Appeals Board**

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**JOE M. MARQUEZ, Appellant**

**And**

**DEPARTMENT OF THE AIR FORCE,  
KELLY AIR FORCE BASE, San Antonio, TX,  
Employer**

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**Docket No. 04-504  
Issued: July 15, 2004**

*Appearances:*  
*Joe M. Marquez, pro se*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

DAVID S. GERSON, Alternate Member  
WILLIE T.C. THOMAS, Alternate Member  
MICHAEL E. GROOM, Alternate Member

**JURISDICTION**

On December 9, 2003 appellant filed a timely appeal from an Office of Workers' Compensation Programs' decision dated September 2, 2003, which denied his request for a merit review on the grounds that his application was not timely filed and failed to establish clear evidence of error. More than one year has elapsed since the filing of appellant's appeal on December 9, 2003, and the Office's merit decision of October 23, 2001 and the Office's nonmerit decision dated September 19, 2002.<sup>1</sup> Accordingly, the Board lacks jurisdiction to review whether the Office's October 23, 2001 decision properly denied appellant's claim for an increased schedule award for work-related hearing loss. The Board also lacks jurisdiction to review whether the Office properly refused to reopen appellant's claim for a merit review on September 19, 2002. The Board's jurisdiction is limited to review of the Office's nonmerit decision dated September 2, 2003.

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<sup>1</sup> 20 C.F.R. §§ 501.2(c) and 501.3(d)(2).

## **ISSUE**

The issue is whether the Office properly denied appellant's request for a merit review on the grounds that his application was not timely filed and failed to establish clear evidence of error.

## **FACTUAL HISTORY**

On July 30, 1992 appellant, then a 63-year-old retired materials expeditor foreman, filed a notice of occupational disease alleging that he sustained hearing loss from exposure to hazardous levels of noise in the performance of duty.<sup>2</sup> In a decision dated June 15, 1993, the Office granted a schedule award for a 19 percent impairment due to the accepted binaural hearing loss.

Appellant filed a CA-7 claim for an additional schedule award on January 17, 2001. On October 23, 2001 the Office found that the medical evidence failed to establish that appellant's increased hearing loss was due to work factors since his employment ceased in November 1989 and he had no further exposure to hazardous noise.

On August 23, 2002 appellant requested reconsideration but did not provide any additional evidence. In a September 19, 2002 decision, the Office denied reconsideration of the claim.

On May 29, 2003 appellant again requested reconsideration and submitted reports from Dr. Wesley Krueger, an otologist, dated October 28, 2002 and January 6 and 20, 2003. On October 28, 2002 he stated that appellant's hearing loss had increased since his retirement and recommended that he wear a hearing aid. On January 6, 2003 Dr. Krueger stated that appellant had evidence of benign positional vertigo and progressive noise-induced hearing impairment, for which he had recommended binaural amplification. In a January 20, 2003 report, he stated that appellant had noise-induced hearing loss after working for the employing establishment, during which time appellant was exposed to high levels of hazardous noise. Dr. Krueger again recommended that appellant wear a hearing aid.

In a decision dated September 2, 2003, the Office found that appellant's request for reconsideration May 29, 2003 was untimely filed and that the evidence failed to establish clear evidence of error with respect to the Office's denial of his claim for compensation based on an increased schedule award for hearing loss.

## **LEGAL PRECEDENT**

The Board has long recognized that, if a claimant's employment-related hearing loss worsens in the future, he may apply for an additional schedule award for any increased

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<sup>2</sup> Appellant stated that he first realized his condition was caused or aggravated by his employment in March 1989, and that he retired from his job in November 1989.

permanent impairment.<sup>3</sup> The Board has also recognized that a claimant may be entitled to an award for an increased hearing loss, even after exposure to hazardous noise has ceased, if causal relationship is supported by the medical evidence of record.<sup>4</sup> In addition, the Board has held that, in cases where a claimant sustains increased impairment at a later date which is due to work-related factors, an additional award will be payable if supported by the medical evidence.<sup>5</sup>

### ANALYSIS

In its decision dated September 2, 2003, the Office treated appellant's claim that he had sustained increased hearing loss as a request for reconsideration of the Office's October 23, 2001 decision, which denied appellant's request for an additional schedule award. This was improper as appellant was not seeking reconsideration of the previous determination of his hearing loss, but rather was informing the Office that he had an increased hearing loss.

In this case, appellant used the term "reconsideration," but the evidence submitted clearly concerns appellant's condition after the original Office determination of his hearing impairment in 1992 and provides an opinion as to his impairment at a later time. The evidence does not attempt to show error in the prior decision.

A claimant may seek an increased schedule award if the evidence establishes that he sustained an increased impairment at a later date causally related to his employment injury.<sup>6</sup> In this case, appellant has submitted medical evidence regarding a permanent impairment at a date subsequent to the prior schedule award decision. Specifically, appellant submitted reports from Dr. Krueger, an otologist, dated October 28, 2002 and January 6 and 20, 2003 which concluded that appellant's hearing loss had increased since his retirement and recommended that he wear a hearing aid. He further advised in his report of January 6, 2003 that appellant had evidence of benign positional vertigo and progressive noise-induced hearing impairment, for which he had recommended binaural amplification. Therefore, appellant is entitled to a *de novo* decision on the medical evidence and the case will be remanded to the Office for appropriate action.<sup>7</sup>

As the Office has not determined appellant's entitlement to a schedule award for his claimed increased hearing loss, this case must be remanded to the Office for further development.

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<sup>3</sup> See *Paul R. Reedy*, 45 ECAB 488 (1994); see also Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.7(b) (August 2002). This section states that claims for increased schedule awards may be based on incorrect calculation of the original award or on additional exposure. To the extent that a claimant is asserting that the original award was erroneous based on his medical condition at that time, this would be a request for reconsideration. A claim for an increased schedule award may be based on additional exposure or on the situation presented here: medical evidence indicating the progression of an employment-related condition, without new exposure to employment.

<sup>4</sup> *Adelbert E. Buzzell*, 34 ECAB 96 (1982); see also *Paul R. Reedy*, *id.*

<sup>5</sup> See *Paul R. Reed*, *supra* note 3.

<sup>6</sup> See *Paul R. Reed*, *supra* note 3.

<sup>7</sup> See *Linda T. Brown*, Docket No. 98-498 (issued October 1, 1999).

**CONCLUSION**

The Board finds that the Office improperly refused to reopen appellant's claim of further consideration of the merits under 5 U.S.C. § 8128(a) on the grounds that his request for reconsideration was not timely filed within the one-year time limitation period set forth in 20 C.F.R. § 10.607(a).

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated September 2, 2003 is hereby set aside and the case is remanded to the Office for further development consistent with this opinion.

Issued: July 15, 2004  
Washington, DC

David S. Gerson  
Alternate Member

Willie T.C. Thomas  
Alternate Member

Michael E. Groom  
Alternate Member