

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

RUDY G. VILLARREAL, Appellant)
)
and) **Docket No. 04-698**
) **Issued: September 21, 2004**
DEPARTMENT OF THE AIR FORCE, KELLY)
AIR FORCE BASE, San Antonio, TX, Employer)

)

Appearances:
Rudy G. Villarreal, pro se
Office of the Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chairman
COLLEEN DUFFY KIKO, Member
DAVID S. GERSON, Alternate Member

JURISDICTION

On January 20, 2004 appellant filed a timely appeal from an Office of Workers' Compensation Programs' decision dated July 30, 2003, which denied appellant's reconsideration request on the grounds that it was untimely filed and failed to establish clear evidence of error. Because more than one year has elapsed between the last merit decision dated January 8, 2002 and the filing of this appeal on January 20, 2004, the Board lacks jurisdiction to review the merits of appellant's claim pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2).

ISSUE

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

FACTUAL HISTORY

On January 9, 2001 appellant a 66-year-old engineering data management supervisor, filed a claim for benefits, alleging that he sustained a bilateral hearing loss causally related to hazardous noise from aircraft engines, riveting guns and hydraulic equipment.

In March 2001, the Office referred appellant and a statement of accepted facts to Dr. Alan Dinesman, a Board-certified otolaryngologist, for an audiologic and otologic evaluation of appellant.

The audiologist performing the April 17, 2001 audiogram for Dr. Dinesman noted findings on audiological evaluation. At the frequencies of 500, 1,000, 2,000 and 3,000 hertz, the following thresholds were reported: right ear -- 35, 15, 35 and 85 decibels; left ear -- 25, 15, 35 and 65 decibels. In his April 17, 2001 report, Dr. Dinesman found that appellant had a 16.875 percent binaural hearing loss attributable to noise exposure at his federal employment in accordance with the standards contained in the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*¹ (A.M.A., *Guides*).

On January 8, 2002 the Office granted appellant a schedule award for a 16.9 percent permanent binaural hearing loss for the period from April 17 to December 10, 2001, for a total of 34 weeks of compensation.

On January 31, 2003 appellant requested reconsideration of his claim.² Appellant submitted a copy of the April 17, 2001 audiogram, which he claimed was interpreted by Dr. Marshal Nathan, a Board-certified otolaryngologist and an audiologist, as reflecting a 35 percent hearing loss in the right ear and a 40 percent impairment percent hearing loss in the left ear.³ Appellant also submitted a January 16, 2003 report from Dr. Nathan which diagnosed a bilateral mixed hearing loss and recommended him for a hearing aid, but did not contain an impairment rating calculated pursuant to the fifth edition of the A.M.A., *Guides*.

By decision dated July 30, 2003, the Office denied appellant's request for reconsideration without a merit review, finding that appellant had not timely requested reconsideration and had failed to submit factual or medical evidence sufficient to establish clear evidence of error. The Office stated that appellant was required to present evidence which showed that the Office made an error and that there was no evidence submitted that showed that its final merit decision was in error.

LEGAL PRECEDENT

Section 8128(a) of the Federal Employees' Compensation Act⁴ does not entitle an employee to a review of an Office decision as a matter of right.⁵ This section, vesting the Office

¹ A.M.A., *Guides* at 250 (5th ed. 2001).

² By letter dated July 16, 2003, appellant submitted a second request for reconsideration.

³ The audiogram to which appellant refers was actually a copy of a January 15, 2003 audiogram completed by an audiologist without approval by a physician. An unsigned note handwritten on the audiogram states, *inter alia*: "right loss 35 percent; left loss 40 percent."

⁴ 5 U.S.C. § 8128(a).

⁵ *Jesus D. Sanchez*, 41 ECAB 964 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

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, or increase the compensation awarded; or

(2) award compensation previously refused or discontinued.”

The Office, through its regulation, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a).⁶ 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.⁷ The Board has found that the imposition of this one-year time limitation does not constitute an abuse of the discretionary authority granted by the Office under 5 U.S.C. § 8128(a).⁸

In those cases where a request for reconsideration is not timely filed, the Board had 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.⁹ The Office procedures state that the Office will reopen an appellant’s case for merit review, notwithstanding the one-year filing limitation set forth in 20 C.F.R. § 10.607(b), if appellant’s application for review shows “clear evidence of error” on the part of the Office.¹⁰

To establish clear evidence of error, an appellant must submit evidence relevant to the issue which was decided by the Office.¹¹ The evidence must be positive, precise and explicit and must be manifested on its face that the Office committed an error.¹² Evidence which does not raise a substantial question concerning the correctness of the Office’s decision is insufficient to establish clear evidence of error.¹³ It is not enough merely to show that the evidence could be

⁶ Thus, although it is a matter of discretion on the part of the Office whether to review an award for or against payment of compensation, the Office has stated that a claimant may obtain review of the merits of a claim by: (1) showing that the Office erroneously applied or interpreted a point of law; (2) advancing a relevant legal argument not previously considered by the Office; or (3) submitting relevant and pertinent new evidence not previously considered by the Office. See 20 C.F.R. § 10.606(b).

⁷ 20 C.F.R. § 10.607(b).

⁸ See cases cited *supra* note 5.

⁹ *Rex L. Weaver*, 44 ECAB 535 (1993).

¹⁰ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(b) (May 1991).

¹¹ See *Dean D. Beets*, 43 ECAB 1153 (1992).

¹² See *Leona N. Travis*, 43 ECAB 227 (1991).

¹³ See *Jesus D. Sanchez*, *supra* note 5.

construed so as to produce a contrary conclusion.¹⁴ 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.¹⁵ 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's decision.¹⁶ The Board makes an independent determination of whether an appellant 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.¹⁷

ANALYSIS

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 January 8, 2002. Appellant requested reconsideration on January 31, 2003; thus, appellant's reconsideration request is untimely as it was outside the one-year time limit.

The Board finds that appellant's untimely request for reconsideration failed to show clear evidence of error. Appellant submitted the copy of a January 15, 2003 audiogram completed by an audiologist -- without approval by a physician -- and an unsigned note which states, *inter alia*: "right loss 35 percent; left loss 40 percent." This note is irrelevant as it does not constitute medical evidence pursuant to section 8101(2).¹⁸ The January 16, 2003 report from Dr. Nathan is not relevant on the ground that it did not contain an impairment rating calculated pursuant to the fifth edition of the A.M.A., *Guides*. The Board, therefore, finds that appellant has failed to establish clear evidence of error based on these contentions. Upon limited review, appellant has failed to submit medical evidence sufficient to warrant reopening the case for a merit review. Thus, appellant failed to present probative medical evidence establishing error on the part of the Office.¹⁹ Further, the Board rejects the argument made by appellant in his January 27 and July 16, 2003 letters that he was entitled to a greater schedule award based on a 35 percent hearing loss in his right ear and a 40 percent hearing loss in his left ear, based on Dr. Nathan's opinion; the Board also rejects appellant's argument in his January 27, 2003 letter that he was entitled to a schedule award based on a higher percentage of hearing loss than that calibrated by Dr. Dinesman because "several hearing loss clinics" recommended he obtain a larger or behind-

¹⁴ See *Leona N. Travis*, *supra* note 12.

¹⁵ See *Nelson T. Thompson*, 43 ECAB 919 (1992).

¹⁶ *Leon D. Faidley, Jr.*, *supra* note 5.

¹⁷ *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

¹⁸ 5 U.S.C. § 8101(2).

¹⁹ On appeal, appellant has submitted new evidence. However, the Board cannot consider evidence that was not before the Office at the time of the final decision. See *Dennis E. Maddy*, 47 ECAB 259 (1995); *James C. Campbell*, 5 ECAB 35 (1952); 20 C.F.R. § 501(c)(1). Appellant may resubmit this evidence and legal contentions to the Office accompanied by a request for reconsideration pursuant to 5 U.S.C. § 8128(a). 20 C.F.R. § 501(c).

the-ear hearing aid. Thus, appellant did not present any evidence of error in his request letters. Consequently, the evidence submitted by appellant on reconsideration is insufficient to establish clear evidence of error on the part of the Office such that the Office abused its discretion in denying merit review.

The Board finds, however, that the Office did not consider appellant's request for hearing aids or the additional medical evidence submitted by appellant in support of his request, *i.e.*, the January 16, 2003 report from Dr. Nathan which recommended him for a hearing aid. A request for additional medical services for an accepted claim is not subject to the clear evidence of error standard. While this medical evidence submitted by appellant is not sufficient to warrant a schedule award based on hearing loss, it is sufficient to require consideration of appellant's request for hearing aids by the Office. The Board therefore finds that the case be remanded for consideration of appellant's entitlement to hearing aids based on Dr. Nathan's January 16, 2003 report.

CONCLUSION

The Board finds that appellant has failed to submit evidence establishing clear error on the part of the Office in his untimely reconsideration request. Inasmuch as appellant's reconsideration request was untimely filed and failed to establish clear evidence of error, the Office properly denied further review on July 30, 2003. The Board finds that the case should be remanded for consideration of appellant's request for hearing aids.

ORDER

IT IS HEREBY ORDERED THAT the July 30, 2003 decision of the Office of Workers' Compensation Programs is hereby affirmed in part and remanded in part.

Issued: September 21, 2004
Washington, DC

Alec J. Koromilas
Chairman

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member