

FACTUAL HISTORY

This is the third appeal in this case.¹ By decision dated June 13, 2001, the Board affirmed an August 21, 2000 decision, denying modification of an October 16, 1985 decision which denied appellant's claim for hearing loss in the left ear as causally related to his federal employment. The decisions also denied his claim for a schedule award for his accepted right ear hearing loss.² The Board's June 13, 2001 decision is incorporated herein by reference.

On November 17, 2004 appellant requested reconsideration and submitted additional evidence.³

By decision dated February 7, 2005, the Office denied appellant's request for reconsideration on the grounds that the request was untimely and failed to demonstrate clear evidence of error.

LEGAL PRECEDENT

Section 8128(a) of the Federal Employees' Compensation Act⁴ does not entitle a claimant to a review of an Office decision as a matter of right.⁵ This section vests the Office with discretionary authority to determine whether it will review an award for or against compensation.⁶ The Office, through its regulations, has imposed limitations on the exercise of its discretionary authority. One such limitation is that the Office will not review a decision denying or terminating a benefit unless the request for reconsideration 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 the Office under 5 U.S.C. § 8128(a).⁸

In those cases where requests for reconsideration are not timely filed, the Office must nevertheless undertake a limited review of the application for reconsideration to determine whether there is clear evidence of error pursuant to the untimely request in accordance with

¹ See Docket No. 00-2261 (issued June 13, 2001). On May 19, 1972 appellant, then a 32-year-old electronics mechanic, filed a claim for employment-related hearing loss. The Office accepted his claim for hearing loss in the right ear but determined that the hearing loss was not of sufficient severity to warrant a schedule award for permanent impairment. The Office found that appellant's left ear hearing loss was not causally related to his employment.

² In its June 13, 2001 decision, the Board also affirmed an April 11, 2000 Office nonmerit decision.

³ Following the August 21, 2000 decision, appellant submitted evidence previously considered by the Office.

⁴ 5 U.S.C. § 8128(a).

⁵ *Thankamma Mathews*, 44 ECAB 765 (1993).

⁶ *Id.* at 768.

⁷ 20 C.F.R. § 10.607; see also *Alberta Dukes*, 56 ECAB ____ (Docket No. 04-2028, issued January 11, 2005).

⁸ *Thankamma Mathews*, *supra* note 5 at 769.

section 10.607(b) of its regulations.⁹ The Office's regulations state that the Office will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth in 20 C.F.R. § 10.607, if the claimant's application for review shows "clear evidence of error" on the part of the Office.¹⁰ In this regard, the Office will limit its focus to a review of how the newly submitted evidence bears on the prior evidence of record.¹¹

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.¹² The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.¹³ Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.¹⁴ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.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 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.¹⁷

ANALYSIS

Since more than one year elapsed between the August 21, 2000 Office decision and appellant's November 17, 2004 reconsideration request, the request for reconsideration of the Office's denial of his claim for hearing loss in the left ear was untimely. Consequently, he must demonstrate "clear evidence of error" by the Office in denying his claim for compensation.¹⁸

The Board finds that the evidence submitted by appellant in his untimely request for reconsideration does not raise a substantial question as to the correctness of the Office's last

⁹ *Alberta Dukes*, *supra* note 7.

¹⁰ *See Gladys Mercado*, 52 ECAB 255 (2001).

¹¹ *See Nelson T. Thompson*, 43 ECAB 919 (1992).

¹² *Dean D. Beets*, 43 ECAB 1153 (1992).

¹³ *Leona N. Travis*, 43 ECAB 227 (1991).

¹⁴ *Darletha Coleman*, 55 ECAB ____ (Docket No. 03-868, issued November 10, 2003).

¹⁵ *Leona N. Travis*, *supra* note 13.

¹⁶ *Darletha Coleman*, *supra* note 14.

¹⁷ *Pete F. Dorso*, 52 ECAB 424 (2001).

¹⁸ *Howard Y. Miyashiro*, 51 ECAB 253 (1999).

merit decision regarding his left ear hearing loss and is of insufficient probative value to *prima facie* shift the weight of the evidence in his favor.

A 1976 disability certificate from a former attending otolaryngologist indicated that appellant was scheduled for surgery. Copies of legal documents indicated that in 1977 two individuals filed lawsuits against one of appellant's previous treating physicians. In a report dated August 2, 1977, Dr. R.C. Barnes, an employing establishment physician, noted that appellant had been disqualified for his job due to left ear hearing loss and was applying for disability retirement. Appellant submitted copies of an undated audiogram and a 1981 audiogram. In a November 3, 1986 letter, Dr. Barnes provided a history of appellant's clinic visits regarding his hearing problems. These documents do not address the issue of whether appellant's left ear hearing loss was causally related to factors of his employment. Therefore, this evidence does not show clear evidence of error in the Office's last merit decision.

In an August 15, 2002 report, Dr. Sanford G. Duke, an otolaryngologist, provided audiometric results and opined that appellant had complete hearing loss in his left ear. However, Dr. Duke did not address the issue of the cause of appellant's left ear hearing loss. Therefore, this report does not demonstrate clear evidence of error in the Office's August 21, 2000 decision.

In a November 6, 2003 report, Dr. Michael J. Holiday, an otolaryngologist, stated that he did not know the cause of appellant's bilateral hearing loss. As he did not opine that appellant's left ear hearing loss was causally related to his employment, this report is not relevant to the issue of appellant's claim for left ear hearing loss. Therefore, this report does not show clear evidence of error in the Office's August 21, 2000 decision.

Appellant also submitted copies of medical reports concerning his claim for a back condition.¹⁹ These documents have no relevance to appellant's hearing loss claim and are, therefore, not sufficient to show clear evidence of error in the Office's last merit decision.

The Board finds that the Office properly denied appellant's request for reconsideration regarding its denial of his left ear hearing loss claim.

The Board further finds that the Office, in its February 7, 2005 decision, applied the wrong standard of proof regarding appellant's right ear hearing loss claim.²⁰ Following the August 21, 2000 Office decision, appellant submitted evidence which he believed indicated a worsening of his accepted right ear hearing loss which would entitle him to a schedule award. 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 permanent

¹⁹ On appeal, appellant states that he is seeking compensation for a back injury. However, the case record before the Board concerns his hearing loss claim. Appellant's claim for a back condition is not before the Board in the appeal docketed as No. 05-980.

²⁰ Although the Office, in its February 7, 2005 decision, applied the wrong standard of proof regarding appellant's claim for compensation for his right ear hearing loss, this constituted harmless error as the evidence does not support a ratable hearing loss in the right ear.

impairment.²¹ Therefore, with regard to his right ear, appellant is requesting an additional schedule award rather than a request for reconsideration of the Office's August 21, 2000 decision. For this reason, the case will be remanded to the Office for review of the evidence submitted by appellant pertaining to his right ear hearing loss.

CONCLUSION

The Board finds that the Office properly denied appellant's request for reconsideration of its denial of his claim for hearing loss in his left ear. With regard to his accepted right ear, the case is remanded for review of the evidence submitted.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated February 7, 2005 is affirmed, in part, and set aside in part.

Issued: October 13, 2005
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

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

²¹ *Paul Fierstein*, 51 ECAB 381 (2000); *Paul R. Reedy*, 45 ECAB 488 (1994).