

On November 15, 1996 appellant, then a 37-year-old special agent, filed a claim for an occupational disease alleging that he developed a hearing loss in the performance of duty.

Appellant became aware of his condition on August 27, 1996. The Office accepted the claim for bilateral sensorineural hearing loss. Appellant retired on December 31, 2003.

Appellant submitted employing establishment audiograms from a hearing loss conservation program from August 27, 1996 to December 23, 1997. The audiograms revealed high frequency hearing loss and tinnitus. In a November 29, 1996 statement, appellant addressed his employment history with the employing establishment since 1975. He was required to carry a firearm and to participate in quarterly firearms qualifications and monthly ammunitions practice. Appellant advised that he was not provided with hearing protection; however, he placed empty shell casings into his ear to prevent hearing loss.

By letter dated November 4, 1997, the Office referred appellant to Dr. Gary Feinberg, a Board-certified otolaryngologist, for an otologic examination and an audiological evaluation. In a report dated January 22, 1998, Dr. Feinberg noted performing an otologic evaluation of appellant on December 23, 1997 and audiometric testing was conducted on his behalf on the same date. Testing at the frequency levels of 500, 1,000, 2,000 and 3,000 cycles per second revealed the following: right ear 5, 5, 10 and 20 decibels; left ear 40, 40, 45 and 65 decibels. Dr. Feinberg determined that appellant sustained a bilateral sensorineural hearing loss secondary to high noise exposure, left ear greater than right ear.

On February 15, 1998 an Office medical adviser reviewed Dr. Feinberg's report and the audiometric test of December 23, 1997. The medical adviser concluded that, in accordance with the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*), appellant had a 34 percent monaural hearing loss of the left ear.

In a decision dated October 16, 1998, the Office granted appellant a schedule award for a 34 percent monaural hearing loss. The period of the award was from February 23, 1997 to April 25, 1998.

On January 31, 2003 appellant filed a Form CA-2a, notice of recurrence of disability noting that on January 24, 2003 he experienced additional hearing loss which was causally related to his accepted condition. Appellant stopped work on May 5, 2003 and used sick leave until December 15, 2003 and retired on December 31, 2003. The employing establishment noted that earmuffs were provided.¹

On July 25, 2003 appellant filed a claim for an additional schedule award.

On July 25, 2003 appellant filed two CA-7 claims for compensation for the period August 2 to 15 and August 16 to 30, 2003.

By letter dated August 6, 2003, the Office notified appellant that his claim for compensation was not payable. The Office advised that, because hearing loss rarely causes total

¹ In a letter dated March 12, 2003, the Office advised appellant that his claim would not be developed as a recurrence because he had not lost any time from work and the treated condition was the same as the accepted condition. The Office further indicated that appellant was permitted to undergo authorized medical treatment for his accepted condition of bilateral sensorineural hearing loss.

disability, he must provide a factual and medical explanation for why he did not work during this period.

By letter dated December 16, 2003, appellant advised that he did not return to work because his agency did not have light-duty positions for law enforcement officers. Appellant submitted a report from Dr. Hamilton P. Collins, II, a Board-certified otolaryngologist, who noted on July 1, 2003, that he reviewed audiograms which revealed mild high frequency sensorineural hearing loss in the right ear and moderately severe loss in the left ear. He advised that appellant's hearing loss was permanent and would worsen over the years. Dr. Collins recommended hearing aids; however, appellant was intolerant to using a hearing aid. He indicated that it was not safe to place appellant in an environment where hearing was critical to safety.

By letter dated January 7, 2004, appellant indicated that his attending physician determined on May 5, 2003 that continued exposure to noise from required handgun qualifications would further damage his ear and recommended that he be placed on light duty. Appellant advised that the employing establishment did not have light duty so he used sick leave until December 15, 2003. He submitted a report from Dr. Collins dated December 30, 2003, who noted reviewing an audiogram dated December 19, 2003 which revealed mixed loss in both ears. Dr. Collins recommended surgical correction or amplification.

On February 10, 2004 an Office medical adviser reviewed Dr. Collin's report and the audiometric test of December 19, 2003. The medical adviser concluded that, in accordance with the A.M.A., *Guides*, appellant had a 9.4 percent monaural hearing loss in the right ear and a 76.9 percent monaural hearing loss in the left ear. He noted that, since appellant was previously granted 34 percent monaural hearing loss, he would be entitled to an additional award of 42.9 percent monaural hearing loss in the left ear.

By decision dated February 11, 2004, the Office denied disability compensation for the period beginning August 2, 2003 on the grounds that the medical evidence did not establish that appellant was totally disabled due to his work-related condition during the claimed period.

In a February 13, 2004 letter, appellant noted that his claim for disability compensation for the period beginning August 2, 2003 was an attempt to relieve him from using sick leave during this period. Appellant indicated that Dr. Collins determined that his hearing impairment was 100 percent and he therefore requested an additional schedule award.

On May 12, 2004 appellant filed a claim for an occupational disease claim noting that this was a continuation of the hearing loss claim in file number 13-1122284. Appellant advised that he became aware of his condition on June 27, 1996 and did not lose any time from work. On June 15, 2004 the Office accepted that appellant developed hearing loss of the left ear.

In a decision dated June 18, 2004, the Office granted appellant a schedule award for a 42.9 percent hearing loss for the left ear. The period of the award was from December 19, 2003 to May 23, 2004.

By a letter dated May 27, 2005, appellant requested reconsideration of the decision dated February 11, 2004. He submitted duplicate copies of reports from Dr. Collins dated July 1 and December 30, 2003.

On June 27, 2005 the Office referred appellant to Dr. Henry Bikhazi, a Board-certified otolaryngologist, for a second opinion evaluation. In a report dated July 22, 2005, Dr. Bikhazi, discussed appellant's work history and diagnosed asymmetrical sensorineural hearing loss, severe on the left across all frequencies and right sloping high frequency hearing loss. He opined that appellant's hearing loss was causally related to his federal employment. Dr. Bikhazi indicated that appellant's hearing loss on the left deteriorated from previous audiograms and advised that his disability was permanent secondary to noise exposure. He opined that appellant did not have a recurrence of disability or periods of total disability due to his hearing loss. Dr. Bikhazi indicated that there was no reason why appellant could not perform his normal duties as a supervisory criminal investigator; however, he noted that appellant should not be exposed to firearm noise and recommended hearing protection.

By decision dated August 5, 2005, the Office denied appellant's request for reconsideration on the grounds that the request was not timely and that appellant did not present clear evidence of error by the Office.

LEGAL PRECEDENT

Section 8128(a) of the Federal Employees' Compensation Act vests the Office with discretionary authority to determine whether it will review an award for or against compensation:

"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."²

The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a). As one such limitation, 20 C.F.R. § 10.607(a) provides that the Office will not review a decision unless the application for review is filed within one year of the date of that decision.³

However, 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 in its most recent merit decision. To establish clear evidence of error, a claimant must submit evidence relevant to the issue that was decided by the Office. The

² 5 U.S.C. § 8128(a).

³ 20 C.F.R. § 10.607(b); *Annie L. Billingsley*, 50 ECAB 210 (1998).

evidence must be positive, precise and explicit and must be manifested on its face that the Office committed an error.⁴

To show clear evidence of error, the evidence submitted must not only be of sufficient probative value to create a conflicting 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.⁵

Evidence that does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.⁶ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.⁷ This entails a limited review by the Office of the evidence previously of record and whether the new evidence demonstrates clear error on the part of the Office.⁸ The Board makes an independent determination as to whether a claimant has submitted clear evidence of error on the part of the Office.⁹

ANALYSIS

On February 11, 2004 the Office denied compensation beginning August 2, 2003 on the grounds that appellant did not establish that he was totally disabled due to his work-related condition during this period. However, following issuance of the February 11, 2004 decision and after appellant's May 27, 2005 reconsideration request, the Office received additional medical evidence into the record and conducted further development on the merits of appellant's claim by referring him to Dr. Bikhazi, for a second opinion examination on the issue of disability due to his work-related hearing loss. In so doing, the Office proceeded to exercise its discretionary authority under 5 U.S.C. § 8128. This case is similar to *David F. Garner*,¹⁰ in which the Board found that after reopening the merits of the employee's claim for further development, the Office abused its discretion in denying reconsideration under the clear evidence of error standard. Rather, the Board noted that the Office should have conducted a merit review of the claim.

Following receipt of the February 11, 2004 decision, appellant was notified as of June 27, 2005 that the Office was further developing his claim by his referral to Dr. Bikhazi for examination and opinion on the relevant issue in question, *i.e.*, whether he was disabled for work due to residuals of his accepted bilateral sensorineural hearing loss. As the record currently

⁴ 20 C.F.R. § 10.607(b); *Fidel E. Perez*, 48 ECAB 663, 665 (1997).

⁵ *Annie L. Billingsley*, *supra* note 3.

⁶ *Jimmy L. Day*, 48 ECAB 652 (1997).

⁷ *Id.*

⁸ *Id.*

⁹ *Cresenciano Martinez*, 51 ECAB 322 (2000); *Thankamma Mathews*, 44 ECAB 765, 770 (1993).

¹⁰ 43 ECAB 459 (1992); *see also Joyce A. Fasanello*, 49 ECAB 490 (1998).

stands, the Office has not issued a merit decision evaluating the evidence it obtained from Dr. Bikhazi, the second opinion physician, or reviewed the additional medical evidence submitted by appellant during the development of his claim after February 11, 2004.

Exercising its discretionary authority, the Office solicited and received relevant pertinent evidence not previously considered. Therefore, the Office must conduct an appropriate review of the evidence under section 8128(a). Following such a review and any development which the Office deems necessary, the Office shall issue an appropriate merit decision.

CONCLUSION

The Board finds that the Office improperly found that appellant's reconsideration request was untimely and did not present clear evidence of error.

ORDER

IT IS HEREBY ORDERED THAT the August 5, 2005 decision of the Office of Workers' Compensation Programs is reversed and the case remanded for further proceedings consistent with this decision.

Issued: February 9, 2006
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

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