

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

J.G., Appellant

and

**TENNESSEE VALLEY AUTHORITY,
Chattanooga, TN, Employer**

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**Docket No. 07-1015
Issued: September 13, 2007**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On March 5, 2007 appellant filed a timely appeal from a nonmerit decision of the Office of Workers' Compensation Programs dated February 8, 2007 denying his request for reconsideration as it was untimely and did not establish clear evidence of error. Because more than one year has elapsed from the most recent merit decision dated December 19, 2003 to the filing of this appeal, the Board lacks jurisdiction to review the merits of appellant's claim pursuant to 20 C.F.R. §§ 501.2(c) and 501.3.

ISSUE

The issue is whether the Office properly refused to reopen appellant's case for further review of the merits of his claim on the grounds that his request for reconsideration was not timely filed and failed to demonstrate clear evidence of error.

FACTUAL HISTORY

This case was previously before the Board. By decision dated December 19, 2003, the Board affirmed the Office's finding that appellant had not established more than a six percent binaural hearing loss, for which he received a schedule award on January 18, 2002.¹ The facts and the history as stated in the Board's December 19, 2003 decision are hereby incorporated by reference.

On September 20, 2006 appellant filed a Form CA-7, claim for an additional schedule award. He submitted a September 20, 2006 audiogram along with a September 10, 1991 operative and discharge report, previously of record.

In a letter dated October 11, 2006, the Office advised appellant that he would not be entitled to an additional schedule award. It noted that he was last exposed to work-related noise exposure in 1989 and that noise-induced hearing loss did not progress after the source of hazardous noise was removed. The Office advised appellant that, to establish an increase in an impairment rating, he would have to file a new Form CA-2, occupational disease claim, which established that he had additional noise exposure at work after the schedule award of January 18, 2002 and that an additional loss occurred due to this additional noise exposure.

On January 29, 2007 appellant submitted a reconsideration form regarding the Office's decisions which found that he had a six percent binaural hearing loss. In a July 15, 2006 letter, Sheila Elliott, an audiologist, stated that, between the years 2002 and 2006, appellant did not have any hearing at 6,000 hertz or at 8,000 hertz in both ears. She further stated that appellant's overall hearing had declined in the past five years.

In a nonmerit decision dated February 8, 2007, the Office denied appellant's request for reconsideration on the basis that it was untimely filed and failed to present clear evidence of error.

LEGAL PRECEDENT

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 the employment injury.² Even if the term reconsideration is used, when a claimant is not attempting to show error in the prior schedule award decision and submits medical evidence regarding a permanent impairment at a date subsequent to the prior schedule award decision, it should be considered a claim for an increased schedule award which is not subject to time limitations.³ A proper claim for increased

¹ Docket No. 03-2048 (December 19, 2003).

² Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.7b (August 2002).

³ See *Linda T. Brown*, 51 ECAB 115 (1999). The Office issued a 1995 decision denying entitlement to a schedule award as no ratable impairment was established. Appellant requested that the Office reconsider in 1997, submitting a current report with a medical opinion that he had a 25 percent permanent impairment to the arms and legs. The Office determined that appellant submitted an untimely request for reconsideration that did not show clear evidence of error. The Board remanded the case for a merit decision. See also *Paul R. Reedy*, 45 ECAB 488 (1994).

hearing loss is not subject to time limitations and is not subject to the clear evidence of error standard.

ANALYSIS

Appellant disagreed with the denial of his claim for an increased schedule award and requested reconsideration on January 29, 2007. On February 8, 2007 the Office denied his request for reconsideration for the reason that it was not timely filed and failed to present clear evidence of error.

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 impairment.⁴ 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.⁵ The Office's procedure manual addresses the different procedures to be followed in schedule award cases where an original award is modified and in cases where a claimant sustains increased impairment at a later date as follows:

“(1) If it is determined after payment of a schedule award that the claimant is entitled to a greater percentage of loss, an amended award should be issued. The pay rate will remain the same and the revised award will begin on the day following the end of the award issued previously.

(2) If, on the other hand, the 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. In this case, the original award is undisturbed and the new award has its own date of maximum medical improvement, percent and period.”⁶

Although appellant submitted a form for reconsideration in his January 29, 2007 request, he clearly indicated that he was providing new audiological evidence and wanted further review of the schedule award issue. He submitted audiogram results from his September 20, 2006 hearing test and a July 15, 2006 letter from his audiologist noting a decline in his overall hearing during the past five years. As the Office has not determined appellant's entitlement to an additional schedule award for his claimed increased hearing loss, this case will be remanded for further development consistent with the Office's procedures.

⁴ *Paul R. Reedy*, 45 ECAB 488, 490 (1994).

⁵ *Adelbert E. Buzzell*, 34 ECAB 96 (1982).

⁶ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.7b(1)-(2) (March 1995).

CONCLUSION

The Board finds that the case is not in posture for decision.

ORDER

IT IS HEREBY ORDERED THAT the February 8, 2007 decision is set aside and the case remanded for further action consistent with this decision of the Board.

Issued: September 13, 2007
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

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

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board