



beginning July 1, 2000 due to noise exposure at work from cranes, derricks, barges, trucks and machine engines.<sup>1</sup> He began working for the employing establishment in 1987. Appellant was also exposed to hazardous noise while serving as a military medic from 1961 to 1967. He retired on September 30, 2003.

In a May 17, 2004 report, Dr. Edgar R. Franklin, an otolaryngologist and an Office referral physician, reviewed the factual and medical evidence and provided findings on physical examination.<sup>2</sup> He noted that appellant refused to undergo audiometric testing. However, Dr. Franklin noted that audiometric data from 1987 to 2003 did not reveal any significant change in appellant's hearing during his federal employment. He diagnosed sensorineural hearing loss that was not related to appellant's federal employment.

By decision dated May 26, 2004, the Office denied appellant's claim on the grounds that the evidence failed to establish that he sustained a hearing loss causally related to his employment.<sup>3</sup>

On March 16, 2007 appellant provided a history of his noise exposure dating back to 1961 and a description of his noise exposure during his federal employment. A former supervisor provided a statement that hearing protection was available to employees beginning in 2000 when he became head of the revetment section. He did not know whether hearing protection was available prior to that time. Appellant provided clinical notes dated January 25, 2004 from Dr. David Armstrong, an otolaryngologist, who provided no factual or medical history. Dr. Armstrong opined that appellant's hearing loss and a tinnitus condition were secondary to noise exposure. Appellant provided a copy of an October 21, 2003 audiogram and notes from audiologists dated November 21, 2003 and January 8 and February 25, 2004.

On April 16, 2007 appellant requested a review of the written record.

By decision dated May 29, 2007, the Office denied appellant's request for a review of the written record because it was not timely filed within 30 days of the May 26, 2004 merit decision. The Office exercised its discretion and determined that the issue in the case, causal relationship, could be addressed equally well through a request for reconsideration and additional evidence.

On June 7, 2007 appellant requested reconsideration.

By decision dated August 22, 2007, the Office denied appellant's request for reconsideration on the grounds that it was not timely filed within one year of the last merit decision and the evidence failed to show clear evidence of error.

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<sup>1</sup> Appellant submitted a duplicate claim on February 26, 2007. The cases were combined.

<sup>2</sup> The statement of accepted facts provided to Dr. Franklin included a description of appellant's noise exposure at the employing establishment from 1987 to 2003, his military noise exposure from 1961 to 1967 and his noise exposure from 1967 to 1987 in private industry.

<sup>3</sup> As appellant did not seek an appeal of this decision to the Board within one year, the Board does not have jurisdiction over the merits of the case. 20 C.F.R. § 501.3.

### **LEGAL PRECEDENT -- ISSUE 1**

Section 8124(b)(1) of the Federal Employees' Compensation Act, concerning a claimant's entitlement to a hearing before an Office hearing representative, states: "Before review under section 8128(a) of this title, a claimant for compensation not satisfied with a decision of the Secretary under subsection (a) of this section is entitled, on request made within 30 days after the date of the issuance of the decision, to a hearing on his claim before a representative of the Secretary."<sup>4</sup> A hearing is a review of an adverse decision by a hearing representative. Initially, the claimant can choose between two formats: an oral hearing or a review of the written record. In addition to the evidence of record, the claimant may submit new evidence to the hearing representative.<sup>5</sup>

### **ANALYSIS -- ISSUE 1**

Appellant's request for a review of the written record was dated April 16, 2007, more than 30 days after the Office's May 26, 2004 decision. Therefore, he was not entitled to a review of the written record as a matter of right. The Office exercised its discretion and determined that the issue in the case, whether appellant's hearing loss was causally related to his federal employment, could be resolved through a request for reconsideration and the submission of additional evidence. The Board finds that the Office did not abuse its discretion in denying appellant's untimely request for a review of the written record in its May 29, 2007 decision.

### **LEGAL PRECEDENT -- ISSUE 2**

Section 8128(a) of the Act<sup>6</sup> does not entitle a claimant to a review of an Office decision as a matter of right.<sup>7</sup> This section vests the Office with discretionary authority to determine whether it will review an award for or against compensation.<sup>8</sup> 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.<sup>9</sup> 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).<sup>10</sup>

Section 10.607(b) states that the Office will consider an untimely application for reconsideration only if it demonstrates clear evidence of error by the Office in its most recent

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<sup>4</sup> 5 U.S.C. § 8124(b)(1).

<sup>5</sup> 20 C.F.R. § 10.615.

<sup>6</sup> 5 U.S.C. § 8128(a).

<sup>7</sup> *Thankamma Mathews*, 44 ECAB 765 (1993).

<sup>8</sup> *Id.* at 768.

<sup>9</sup> 20 C.F.R. § 10.607; *see also Alberta Dukes*, 56 ECAB 247 (2005).

<sup>10</sup> *Thankamma Mathews*, *supra* note 7 at 769.

merit decision. The reconsideration request must establish that the Office's decision was, on its face, erroneous.<sup>11</sup> To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.<sup>12</sup> The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.<sup>13</sup> Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.<sup>14</sup> It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.<sup>15</sup> 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.<sup>16</sup> 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.<sup>17</sup>

### ANALYSIS -- ISSUE 2

The merits of appellant's case are not before the Board. His request for reconsideration was dated June 7, 2007. As this request was filed more than one year after the Office's May 26, 2004 merit decision, it is not timely.<sup>18</sup> The issue is whether appellant demonstrated clear evidence of error in the May 26, 2004 Office decision, which denied his claim for hearing loss.

In support of appellant's untimely request for reconsideration of the May 26, 2004 merit decision, he submitted a written history of his noise exposure dating back to 1961 and a description of his noise exposure during his federal employment. This information was already of record, as contained in the statement of accepted facts prepared by the Office on April 16, 2004. Therefore, it does not demonstrate clear evidence of error in the May 26, 2004 merit decision denying appellant's claim for hearing loss. A former supervisor provided a statement that hearing protection was available to employees beginning in 2000 when he became head of the revetment section. This statement is not relevant to the issue of causal relationship. Therefore, it does not demonstrate clear evidence of error in the May 26, 2004 decision. Appellant submitted notes from an otolaryngologist who opined that his hearing loss and a tinnitus condition were secondary to noise exposure. However, he did not address the issue of

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<sup>11</sup> 20 C.F.R. § 10.607(b); *see also Donna M. Campbell*, 55 ECAB 241 (2004).

<sup>12</sup> *Dean D. Beets*, 43 ECAB 1153 (1992).

<sup>13</sup> *Leona N. Travis*, 43 ECAB 227 (1991).

<sup>14</sup> *Darletha Coleman*, 55 ECAB 143 (2003).

<sup>15</sup> *Leona N. Travis*, *supra* note 13.

<sup>16</sup> *Darletha Coleman*, *supra* note 14.

<sup>17</sup> *Pete F. Dorso*, 52 ECAB 424 (2001).

<sup>18</sup> *Howard Y. Miyashiro*, 51 ECAB 253 (1999).

whether appellant's condition was causally related to noise exposure at his federal job as opposed to noise exposure from some other source. Additionally, the physician did not provide any audiometric test results. Therefore, this evidence does not show clear evidence of error in the May 26, 2004 merit decision. Appellant provided a copy of a 2003 audiogram and notes from audiologists which do not address the issue of causal relationship. The Board finds that the evidence submitted by appellant in support of his reconsideration request does not demonstrate clear evidence of error. It does not raise a substantial question as to the correctness of the Office's May 26, 2004 merit decision denying his hearing loss claim. Consequently, the Office properly found, in its August 22, 2007 decision, that appellant's untimely request for reconsideration failed to establish clear evidence of error in the May 26, 2004 merit decision.

On appeal, appellant asserts that he was not able to timely file his request for reconsideration because he had a nervous breakdown. The Office's regulations provide that the one-year time period for filing a reconsideration request does not include any period subsequent to an Office decision for which a claimant can establish, through probative medical evidence, that he was unable to communicate in any way and that his testimony is necessary in order to obtain modification of the decision.<sup>19</sup> Appellant has provided no such medical evidence.

### **CONCLUSION**

The Board finds that the Office did not abuse its discretion in denying appellant's request for a review of the written record. The Board further finds that appellant has failed to demonstrate clear evidence of error in the Office's May 26, 2004 merit decision denying his claim for hearing loss.

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<sup>19</sup> 20 C.F.R. § 10.607(c).

**ORDER**

**IT IS HEREBY ORDERED THAT** the decisions of the Office of Workers' Compensation Programs dated August 22 and May 29, 2007 are affirmed.

Issued: April 11, 2008  
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