

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

M.T., Appellant)
and) Docket No. 08-913
TENNESSEE VALLEY AUTHORITY,) Issued: August 25, 2008
BELLEFONTE NUCLEAR PLANT,)
Hollywood, AL, Employer)

)

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

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On February 6, 2008 appellant filed a timely appeal from a November 27, 2007 nonmerit decision of the Office of Workers' Compensation Programs denying his request for an oral hearing and a January 15, 2008 nonmerit decision denying his request for reconsideration as it was untimely filed and did not establish clear evidence of error. As there is no merit decision within one year of the filing date of this appeal, the Board lacks jurisdiction to review the merits of the case.¹ Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review the November 27, 2007 and January 15, 2008 nonmerit decisions.

ISSUES

The issues are: (1) whether the Office properly denied appellant's request for an oral hearing under 5 U.S.C. § 8124; and (2) whether the Office properly denied his request for reconsideration as it was untimely filed and did not demonstrate clear evidence of error.

¹ 20 C.F.R. §§ 501.2(c), 501.3.

FACTUAL HISTORY

On August 20, 2004 appellant, then a 56-year-old former pipefitter, filed an occupational disease claim alleging that he sustained hearing loss due to noise exposure during the course of his federal employment. He indicated that he was first aware of his condition and its relationship to his employment in 1981. Appellant explained that he delayed filing his claim because he feared reprisals. He did not report his hearing loss to his supervisor. Appellant was last exposed to the factors which he alleged caused his condition on April 19, 1982.

By decision dated March 7, 2005, the Office denied appellant's claim as it was untimely filed. It found that he had not filed his claim within three years of his awareness of the relationship between his hearing loss and his employment or notified his supervisor within 30 days of the injury. The Office further noted that audiograms showed hearing loss predating his federal employment and no significant increase in hearing loss during his employment such that the employing establishment should have been aware of his hearing loss.

On March 28, 2005 appellant requested an oral hearing. On May 2, 2005 he informed the Office that he no longer desired an oral hearing. On September 28, 2005 the hearing representative granted appellant's petition to withdraw his request for an oral hearing. He requested reconsideration on October 5, 2005. Appellant noted that his coworkers had received compensation from the Office for hearing loss and authorization for hearing aids. He contended that the medical evidence established that his hearing loss was employment related.

By decision dated December 7, 2005, the Office denied modification of its March 7, 2005 decision. It determined that he had not submitted evidence sufficient to show that his claim was timely filed.

On September 25, 2007 appellant indicated that he made a mistake when he had requested reconsideration instead of an oral hearing and requested advice from the Office. In another September 25, 2007 letter, he requested that the Branch of Hearings and Review approve his claim.² By decision dated November 27, 2007, the Office denied appellant's request for a hearing as he had previously received reconsideration. It found that the issue could be equally well addressed by appellant requesting reconsideration and submitting evidence showing that his claim was timely filed.

On December 19, 2007 appellant requested reconsideration. He asserted, "I filed my claim as soon as I was aware that I could file a claim. Therefore, I should not be denied because I did not file my claim in a timely manner." Appellant noted that his coworkers had received benefits.

By decision dated January 15, 2008, the Office denied appellant's request for reconsideration on the grounds that it was untimely filed and did not establish clear evidence of error.

² It is unclear whether appellant desired an oral hearing or a review of the written record.

LEGAL PRECEDENT -- ISSUE 1

Section 8124(b) of the Federal Employees' Compensation Act,³ concerning a claimant's entitlement to a hearing, states that: "Before review under section 8128(a) of this title, a claimant for compensation not satisfied with a decision of the Secretary ... is entitled, on request made within 30 days after the date of issuance of the decision, to a hearing on his claim before a representative of the Secretary."⁴ As section 8124(b)(1) is unequivocal in setting forth the time limitation for requesting a hearing, a claimant is not entitled to a hearing as a matter of right unless the request is made within the requisite 30 days.⁵

The Office, in its broad discretionary authority in the administration of the Act, has the power to hold hearings in certain circumstances where no legal provision was made for such hearings, and the Office must exercise this discretionary authority in deciding whether to grant a hearing. Specifically, the Board has held that the Office has the discretion to grant or deny a hearing request on a claim involving an injury sustained prior to the enactment of the 1966 amendments to the Act which provided the right to a hearing, when the request is made after the 30-day period established for requesting a hearing, or when the request is for a second hearing on the same issue.⁶ The Office's procedures, which require the Office to exercise its discretion to grant or deny a hearing when a hearing request is untimely or made after reconsideration under section 8128(a), are a proper interpretation of the Act and Board precedent.⁷

ANALYSIS -- ISSUE 1

The Board finds that the Office properly denied appellant's request for a hearing before the Branch of Hearings and Review. Section 8124(b) provides that, before review under section 8128(a), a claimant for compensation is entitled to a hearing on his claim on a request made within 30 days after the date of issuance of the decision.⁸ The Offices regulations provide that a claimant must not have previously submitted a reconsideration request on the same issue.⁹

By decision dated March 7, 2005, the Office denied appellant's hearing loss claim as untimely filed. On March 28, 2005 appellant requested a hearing but subsequently informed the Office that he desired reconsideration instead of a hearing. By decision dated December 7, 2005, the Office denied modification of its March 7, 2005 decision. On September 25, 2007 appellant requested that the Branch of Hearings and Review approve his claim. As he had previously

³ 5 U.S.C. §§ 8101-8193.

⁴ 5 U.S.C. § 8124(b)(1).

⁵ *Leona B. Jacobs*, 55 ECAB 753 (2004).

⁶ See *André Thyratron*, 54 ECAB 257 (2002).

⁷ *Sandra F. Powell*, 45 ECAB 877 (1994).

⁸ 5 U.S.C. § 8124(b).

⁹ 20 C.F.R. § 10.616(a).

requested reconsideration, he was not entitled to a hearing as a matter of right.¹⁰ The Office advised appellant that it had considered his request and denied the hearing as he could address the issue by requesting reconsideration and submitting evidence showing that he had timely filed his claim. An abuse of discretion is generally shown through proof of manifest error, a clearly unreasonable exercise of judgment or actions taken which are contrary to both logic and probable deduction from established facts.¹¹ There is no evidence that the Office abused its discretion in denying his request for a hearing.

LEGAL PRECEDENT -- ISSUE 2

The Office, through regulation, has imposed limitations on the exercise of its discretionary authority under section 8128(a) of the Act. 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.¹² When an application for review is untimely, the Office undertakes a limited review to determine whether the application presents clear evidence that the Office's final merit decision was in error.¹³ Its procedures 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.¹⁴ 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.¹⁵

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

¹⁰ *Id.*; see also *Martha A. McConnell*, 50 ECAB 129 (1998).

¹¹ See *Lon E. Grinage*, 57 ECAB 177 (2005).

¹² 20 C.F.R. § 10.607; see also *Alan G. Williams*, 52 ECAB 180 (2000).

¹³ *Velella C. Coleman*, 48 ECAB 367 (1997).

¹⁴ See *Gladys Mercado*, 52 ECAB 255 (2001). Section 10.607(b) provides: "[The Office] will consider an untimely application for reconsideration only if the application demonstrates clear evidence of error on the part of [it] in its most recent decision. The application must establish, on its face, that such decision was erroneous." 20 C.F.R. § 10.607(b).

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

¹⁶ *Leon J. Modrowski*, 55 ECAB 196 (2004); *Dorletha Coleman*, 55 ECAB 143 (2003).

a substantial question as to the correctness of the Office's decision.¹⁷ 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.¹⁸

ANALYSIS -- ISSUE 2

The Office properly determined that appellant failed to file a timely application for review. Its procedures provide that the one-year time limitation period for requesting reconsideration begins on the date of the original Office decision.¹⁹ A right to reconsideration within one year also accompanies any subsequent merit decision on the issues.²⁰ As appellant's December 19, 2007 request for reconsideration was submitted more than one year after the last merit decision of record dated December 7, 2005, it was untimely. Consequently, he must demonstrate clear evidence of error by the Office in denying his claim for compensation.²¹

Appellant contended that he filed his claim as soon as he knew that he could file a claim. The Board has held, however, that unawareness of possible entitlement, lack of access to information and ignorance of the law or one's obligations under it do not constitute exceptional circumstances that excuse the failure to timely file a claim.²² Appellant further noted that his coworkers received benefits. The issue, however, is whether he has shown that his claim is timely under the applicable time limitation provisions and not whether his coworkers' claims were accepted.

Appellant has not submitted evidence or raised arguments sufficient to establish clear evidence of error. In order to establish clear evidence of error, the evidence submitted must be of sufficient probative value to *prima facie* shift the weight of evidence in favor of the claimant and raise a substantial question as to the correctness of the Office's decision.²³ Appellant has not met this standard and thus has failed to establish clear evidence of error.

CONCLUSION

The Board finds that the Office properly denied appellant's request for an oral hearing under section 8124 and properly denied his request for reconsideration as it was untimely filed and did not establish clear evidence of error.

¹⁷ *Id.*

¹⁸ *Pete F. Dorso*, 52 ECAB 424 (2001); *John Crawford*, 52 ECAB 395 (2001).

¹⁹ 20 C.F.R. § 10.607(a).

²⁰ *Robert F. Stone*, 57 ECAB 292 (2005).

²¹ 20 C.F.R. § 10.607(b); see *Debra McDavid*, 57 ECAB 149 (2005).

²² See *E.B.*, 58 ECAB ____ (Docket No. 07-629, issued July 18, 2007).

²³ See *Velella C. Coleman*, *supra* note 13.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated January 15, 2008 and November 27, 2007 are affirmed.

Issued: August 25, 2008
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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