United States Department of Labor
Employees' Compensation Appeals Board

E.W., Appellant	)	
and	)	**Docket No. 08-979**
	)	**Issued: September 2, 2008**
DEPARTMENT OF THE ARMY, CORPS OF ENGINEERS, Memphis, TN, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On February 19, 2008 appellant filed a timely appeal of a January 10, 2008 decision of the Office of Workers' Compensation Programs, denying his request for reconsideration. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the January 10, 2008 decision. The Board does not have jurisdiction over the merits of the claim.

ISSUE

The issue is whether the Office properly denied appellant's request for reconsideration as untimely filed and lacking clear evidence of error.

FACTUAL HISTORY

On April 2, 2002 appellant, a 51-year-old grading equipment operator, filed an occupational disease claim alleging work-related hearing loss. He retired on March 1, 2002. The Office accepted appellant's claim for noise-induced hearing loss. On January 16, 2003 appellant filed a claim for a schedule award.

By decision dated April 22, 2004, the Office denied appellant's claim on the grounds that the medical evidence did not establish that he had a ratable hearing loss. A December 13, 2002 narrative report and audiometric test results from Dr. Edgar R. Franklin, an otolaryngologist and an Office referral physician, revealed a mild high frequency sensorineural hearing loss in appellant's ears. However, based on the test results and the standardized Office procedures for determining hearing loss using the American Medical Association, *Guides to the Evaluation of Permanent Impairment*, appellant had no ratable loss of hearing in either ear. By decision dated January 28, 2004, the Office affirmed the April 22, 2002 decision.

On December 9, 2004 appellant requested reconsideration and submitted a report previously of record. By decision dated December 21, 2004, the Office denied appellant's request for reconsideration on the grounds that the evidence was insufficient to warrant further merit review.

By letter received by the Office on January 4, 2008, appellant requested reconsideration and submitted additional evidence. An August 10, 2007 report from a hearing testing facility indicated that testing on July 23, 2007 revealed moderate hearing loss in both ears. Appellant also submitted audiograms dated July 23 and December 4, 2007. The audiograms were not certified by a physician.

By decision dated January 10, 2008, 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 on January 28, 2004 and failed to show clear evidence of error.[1]

LEGAL PRECEDENT

Section 8128(a) of the Federal Employees' Compensation Act[2] does not entitle a claimant to a review of an Office decision as a matter of right.[3] This section vests the Office with discretionary authority to determine whether it will review an award for or against compensation.[4] 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.[5] 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).[6]

[1] Subsequent to the January 10, 2008 Office decision, appellant submitted additional evidence. The Board's jurisdiction is limited to the evidence that was before the Office at the time it issued its final decision. *See* 20 C.F.R. § 501.2(c). The Board may not consider this evidence for the first time on appeal

[2] 5 U.S.C. § 8128(a).

[3] *Thankamma Mathews*, 44 ECAB 765 (1993).

[4] *Id.* at 768.

[5] 20 C.F.R. § 10.607; *see also Alberta Dukes*, 56 ECAB 247 (2005).

[6] *Thankamma Mathews*, *supra* note 3 at 769.

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 merit decision. The reconsideration request must establish that the Office's decision was, on its face, erroneous.[7] To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.[8] The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.[9] Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.[10] It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.[11] 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.[12] 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.[13]

ANALYSIS

The merits of appellant's case are not before the Board. His request for reconsideration was received by the Office on January 4, 2008. As this request was filed more than one year after the Office's January 28, 2004 merit decision, it is not timely.[14] The next issue to be determined is whether appellant demonstrated clear evidence of error in his untimely request for reconsideration.

The Board finds that the Office properly denied appellant's untimely request for reconsideration on the grounds that the evidence failed to demonstrate clear evidence of error in the January 28, 2004 merit decision.

Appellant submitted an August 10, 2007 report from a hearing testing facility indicating that testing on July 23, 2007 revealed moderate hearing loss in both ears. He also submitted

[7] 20 C.F.R. § 10.607(b); *see also Donna M. Campbell*, 55 ECAB 241 (2004).

[8] *Dean D. Beets*, 43 ECAB 1153 (1992).

[9] *Leona N. Travis*, 43 ECAB 227 (1991).

[10] *Darletha Coleman*, 55 ECAB 143 (2003).

[11] *Leona N. Travis*, *supra* note 9.

[12] *Darletha Coleman*, *supra* note 10.

[13] *Pete F. Dorso*, 52 ECAB 424 (2001).

[14] Pursuant to *Paul R. Reddy*, 45 ECAB 488 (1991), a valid request for an increased schedule award, rather than a request for reconsideration, is not subject to the one-year time limitation. To establish a claim for increased schedule award appellant must submit probative medical evidence in support of such claim. Appellant did not submit valid medical evidence and his request for review was properly treated as a request for reconsideration.

audiograms dated July 23 and December 4, 2007. The audiometric test results do not meet the Office's criteria to establish an employment-related loss of hearing. The test results were not certified by a physician as being accurate. The Office does not have to review every uncertified audiogram which has not been prepared in connection with an examination by a medical specialist.[15] Additionally, none of the evidence explained how the 2007 hearing test results were related to appellant's federal job from which he had retired five years earlier on March 1, 2002. For these reasons, the evidence submitted does not constitute probative medical evidence on the issue of appellant's entitlement to a schedule award for his hearing loss. It does not raise a substantial question concerning the correctness of the Office's January 28, 2004 decision and is insufficient to establish clear evidence of error.

For these reasons, the Office properly denied appellant's request for reconsideration.

On appeal, appellant asserts that he did not submit a timely request for reconsideration of the January 28, 2004 merit decision because the Office hearing representative did not contact him when he submitted additional evidence. The record shows that he left a June 30, 2004 voicemail message for the hearing representative, stating that he had submitted additional evidence and had not heard from the hearing representative. However, in a July 2, 2004 letter sent to appellant's address of record, the Office hearing representative advised him that, as explained in the list of appeal rights attached to the January 28, 2004 decision, any additional evidence had to be submitted to the district Office, along with a request for reconsideration.

CONCLUSION

The Board finds that the Office properly denied appellant's request for reconsideration on the grounds that his request was untimely and failed to demonstrate clear evidence of error.

[15] *See Robert E. Cullison*, 55 ECAB 570 (2004).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated January 10, 2008 is affirmed.

Issued: September 2, 2008
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