

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

A.F., Appellant)

and)

DEPARTMENT OF THE TREASURY,)
U.S. CUSTOMS SERVICE, Houston, TX,)
Employer)

Docket No. 08-1228
Issued: September 16, 2008

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

Case Submitted on the Record

DECISION AND ORDER

Before:

COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On March 18, 2008 appellant filed a timely appeal of a February 22, 2008 nonmerit decision of the Office of Workers' Compensation Programs denying his request for reconsideration because it was not timely filed and failed to establish clear evidence of error. Because more than one year has elapsed between the last merit decision dated December 14, 1994 and the filing of the appeal, the Board lacks jurisdiction to review the merits of his claim pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2).

ISSUE

The issue is whether the Office properly denied appellant's request for reconsideration on the grounds that it was not timely filed and failed to establish clear evidence of error.

FACTUAL HISTORY

On March 11, 1994 appellant, then a 48-year-old special agent, filed an occupational disease claim (Form CA-2), alleging constant ringing in his ears and a partial hearing loss caused by his exposure to noise from firearms and explosives during 25 years of federal employment.

On March 11, 1994 he also filed a claim for a schedule award. By letter dated October 5, 1994, the Office accepted the claim for bilateral sensorineural hearing loss.

On October 25, 1994 Dr. R. Meador, an Office medical adviser, reviewed the case record. He determined that, in accordance with the American Medical Association, *Guides to the Evaluation of Permanent Impairment*, (3rd ed. 1991), appellant had no permanent impairment due to his accepted employment-related hearing loss. Dr. Meador determined that his hearing loss was not severe enough to be ratable for schedule award purposes based on a September 22, 1994 audiogram. He checked the box “no” in response to whether hearing aids were authorized.

By decision dated December 14, 1994, the Office denied appellant’s schedule award claim on the grounds that his accepted bilateral hearing loss was not ratable. It found that the medical evidence of record did not establish that he would benefit from hearing aids.

In a letter dated June 22, 2006, appellant requested that the Office reopen his hearing loss claim contending that, since the initial filing of his claim, his hearing loss and the constant ringing in his ears had progressively worsened.

By letter dated July 17, 2006, the Office advised appellant that, if he disagreed with its December 14, 1994 decision, he should follow the appeal rights afforded to him by that decision. It further advised him to file a CA-2 form if he believed that his hearing loss had worsened as stated.

By letter dated February 10, 2008, appellant requested reconsideration of the Office’s December 14, 1994 decision. He submitted a February 6, 2008 audiogram performed on behalf of Dr. Charles J. Ballay, III, a Board-certified otolaryngologist. Testing at 250, 500, 1,000, 2,000, 4,000 and 8,000 cycles per second, revealed hearing thresholds of 10, 15, 15, 20, 50, 75 and 60 decibels in the right ear and 10, 10, 10, 20, 70 and 60 decibels in the left ear, respectively. The audiologist stated that appellant had long-standing tinnitus and hearing loss. He also had a history of atrial fibrillation, noise exposure while working in law enforcement and basal cell nevus. Appellant submitted a claim (Form CA-2a) dated February 10, 2008 alleging that he sustained a recurrence of disability causally related to his employment-related bilateral hearing loss.¹ He stated that his progressive hearing loss was due to his exposure to firearms and explosives training while working at the employing establishment.

By decision dated February 22, 2008, the Office found that appellant’s reconsideration request was dated February 10, 2008, more than one year after the December 19, 1994 decision and was untimely. It also found that he did not submit evidence to establish clear evidence of error in the prior decision denying his schedule award claim for hearing loss.

¹ Appellant stated that he had retired from the employing establishment.

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

ANALYSIS

Appellant disagreed with the Office's December 14, 1994 decision, denying his claim for a schedule award and requested "reconsideration" on February 10, 2008 contending that he experienced an increase in his hearing loss "directly related to his extended exposure to firearm qualification requirements and explosives training over the course of a 30-year career in federal law enforcement." He submitted a February 6, 2008 audiogram in support of his request. On February 22, 2008 the Office denied his reconsideration request on the grounds that it was not timely filed and failed to present clear evidence of error.

A similar factual background was presented in the case of *Paul R. Reedy*.⁴ In *Reedy*, the Office found that the claimant did not have a ratable hearing loss. The claimant submitted letters stating that his hearing loss had deteriorated and requesting reconsideration. He also submitted new medical evidence regarding his current condition. Although the Office determined that the claimant had submitted an untimely reconsideration request, the Board found that he was not seeking reconsideration of the prior decision, but was claiming an increased hearing loss and was seeking a new award. The Board remanded the case to the Office for a determination as to entitlement to a schedule award.

As in *Reedy*, although appellant used the term "reconsideration" in his February 10, 2008 request, he clearly indicated that he was providing new medical evidence and wanted further review of his claim of an increased hearing loss resulting from his occupational noise exposure. He submitted audiogram results from a February 8, 2008 hearing test. Dr. Ballay stated that he suffered from long-standing tinnitus and hearing loss and he had a history of, among other things, noise exposure while working in law enforcement. As the Office has not adjusted appellant's claimed increased hearing loss, the case will be remanded for further development consistent with the Office's procedures.

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

³ *Paul R. Reedy*, 45 ECAB 488 (1994); see also *Linda T. Brown*, 51 ECAB 115 (1999).

⁴ *Paul R. Reddy*, *supra* note 3.

CONCLUSION

The Board finds that the Office improperly determined that appellant filed an untimely request for reconsideration which did not show clear evidence of error. The case is remanded to the Office to adjudicate appellant's claim of an increased hearing loss.

ORDER

IT IS HEREBY ORDERED THAT the February 22, 2008 decision of the Office of Workers' Compensation Programs be set aside and the case remanded for further proceedings consistent with this decision of the Board.

Issued: September 16, 2008
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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