

in a loud noise environment without safety devices. He last worked for the employing establishment in December 1991. Appellant first realized his condition on June 23, 2006.

On January 17, 2007 the Office referred appellant with a statement of accepted facts to Dr. Jeffrey Robertson, a Board-certified otolaryngologist, for a second opinion evaluation. In a February 8, 2007 report, Dr. Robertson concluded that appellant's hearing loss was not due to his federal employment as his hearing loss at the end of his federal employment was still within normal limits and his present hearing loss was consistent with normal presbycusis. On February 15, 2007 an Office medical adviser reviewed Dr. Robertson's findings and agreed with his findings.

In a February 22, 2007 decision, the Office denied appellant's claim on the grounds that the medical evidence did not establish that his claimed hearing loss resulted from noise exposure in the workplace.

On March 21, 2007 appellant requested reconsideration. The Office received the request on March 28, 2007. Appellant noted reasons he disagreed with the Office's denial of his claim.

Appellant subsequently submitted a December 27, 2007 report of Dr. F. Allen Long, a Board-certified otolaryngologist, who noted gradual hearing loss over the past several years with a history of noise exposure for several years using heavy equipment. Dr. Long indicated that appellant's audiogram showed sensorineural hearing loss in both ears, which appeared to be related in some degree to his noise exposure.

On February 27, 2008 appellant again requested reconsideration of the February 22, 2007 decision.

By decision dated March 18, 2008, the Office denied appellant's reconsideration request. It determined that appellant's February 27, 2008 request was untimely and Dr. Long's report did not establish clear evidence of error.

In a May 12, 2007 letter, received by the Office on May 14, 2008, appellant requested review of the Office's decision. The Office treated this as a reconsideration request.

In a decision dated May 20, 2008, the Office denied appellant's reconsideration request as untimely and not establishing clear evidence of error.

LEGAL PRECEDENT

Section 8128(a) of the Federal Employees' Compensation Act does not entitle a claimant to a review of an Office decision as a matter of right. This section vests the Office with discretionary authority to determine whether it will review an award for or against payment of compensation. The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a).¹ One such limitation is that the application for reconsideration must be sent within one year of the date of the Office decision for which review

¹ 5 U.S.C. § 8128.

is sought.² In those instances when a request for reconsideration is not timely filed, the Office will undertake a limited review to determine whether the application presents “clear evidence of error” on the part of the Office.³ This entails a limited review by the Office of how the evidence appellant has submitted with his reconsideration request bears on the evidence previously of record, and whether this evidence demonstrates that the Office committed an error.⁴

ANALYSIS

The Office issued a merit decision on February 22, 2007 denying appellant’s hearing loss claim. Appellant requested reconsideration on March 21, 2007 and submitted additional evidence. This reconsideration request was received by the Office on March 28, 2007 and is clearly a timely request for reconsideration from the February 22, 2007 Office decision. The Office’s decision denying appellant’s subsequent reconsideration requests as untimely did not address his March 21, 2007 request. The Board finds that the Office improperly determined that appellant failed to file a timely reconsideration request in its March 18 and May 20, 2008 decisions.

According to Office procedures, the one-year period for requesting reconsideration begins on the date of the original decision or a subsequent merit decision.⁵ The most recent merit decision of record is the Office’s February 22, 2007 decision. Appellant’s March 21, 2007 request for reconsideration, received by the Office on March 28, 2007, was clearly made within one year of the February 22, 2007 merit decision. As appellant’s request for reconsideration was timely filed, the Board will set aside the Office decisions dated March 18 and May 20, 2008 and remand the case for the Office to properly consider appellant’s request under the standard of review that applies to timely requests for reconsideration.⁶

CONCLUSION

The Board finds that the Office improperly found that appellant’s request for reconsideration was untimely filed.

² 20 C.F.R. § 10.607(a).

³ *Id.* at § 10.607(b).

⁴ *Nelson T. Thompson*, 43 ECAB 919 (1992).

⁵ *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsideration*, Chapter 2.1602.3(b) (June 2002); *see also Robbin Bills*, 45 ECAB 784 (1994); 20 C.F.R. § 10.607(a).

⁶ *See* 20 C.F.R. § 10.606(b).

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' decisions dated May 20 and March 18, 2008 are set aside and the case remanded to the Office for further proceedings consistent with this opinion.

Issued: May 1, 2009
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