United States Department of Labor
Employees' Compensation Appeals Board

J.G., Appellant	)	
and	)	**Docket No. 08-2189**
	)	**Issued: May 1, 2009**
TENNESEE VALLEY AUTHORITY, BROWNS FERRY NUCLEAR POWER PLANT, Decatur, 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 August 8, 2008 appellant filed a timely appeal from the Office of Workers' Compensation Programs nonmerit decision dated November 7, 2007 that denied her request for reconsideration. Because more than one year has elapsed between the most recent merit decision of June 22, 2006 and the filing of this appeal, the Board lacks jurisdiction to review the merits of appellant's claim pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2).

ISSUE

The issue is whether the Office properly utilized the proper standard of review when it 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 December 22, 2005 appellant, a 53-year-old laborer filed an occupational disease claim (Form CA-2) for hearing loss. She reported having to ask people to repeat words during

conversations and speaking in loud tones. Appellant became aware of her hearing loss and its connection to her employment on November 20, 2005. In support of her claim, she submitted medical evidence consisting of the results from an audiogram performed October 20, 2005.

On March 29, 2006 the Office referred appellant to Dr. Benjamin Light, Board-certified otolaryngologist, for a second opinion evaluation. By report dated May 24, 2006, Dr. Light asserted that appellant had normal hearing. He further opined that if appellant had sustained any measurable hearing loss, it was not likely to be consistent with a work-related injury.

By decision dated June 22, 2006, the Office denied appellant's hearing loss claim because the evidence submitted was insufficient to establish that she sustained an injury as defined by the Federal Employees' Compensation Act.

By letter dated October 18, 2006, appellant requested reconsideration.

In support of her request, appellant submitted two medical reports dated September 20 and 25, 2006, from Dr. Jason P. Lockette, a Board-certified otolaryngist, diagnosing appellant with sensorineural hearing loss. Dr. Lockette's medical history reported that appellant's hearing problem first began as chronic and was best described as both ears affected. Moreover, in a September 16, 2006 medical report he reported that appellant's hearing loss is consistent with presbycusis and/or noise-induced hearing loss.

Appellant also submitted a September 25, 2006 audiogram performed by H. Gregory Adams, an audiologist, who noted that the test results did not indicate a large hearing loss.

By decision dated November 7, 2007, the Office denied appellant's request for reconsideration of the June 22, 2006 decision, finding the request untimely and that she had not established clear evidence of error by the Office.

LEGAL PRECEDENT

The Act provides that the Office may review an award for or against compensation upon application by an employee (or his or her representative) who receives an adverse decision. The employee shall exercise this right through a request to it. The request, along with the supporting statements and evidence, is called the application for reconsideration.[1]

An employee (or representative) seeking reconsideration should send the application for reconsideration to the address as instructed by the Office in the final decision. The application for reconsideration, including all supporting documents, must be in writing and must set forth arguments and contain evidence that either: (1) shows that the Office erroneously applied or interpreted a specific point of law; (2) advances a relevant legal argument not previously considered by the Office; or (3) constitutes relevant and pertinent new evidence not previously considered by the Office.[2]

[1] 20 C.F.R. § 10.605 (1999).

[2] *Id.* at § 10.606.

An application for reconsideration must be sent within one year of the date of the Office decision for which review is sought.[3] A timely request for reconsideration may be granted if it determines that the employee has presented evidence or argument that meets at least one of these three standards. If reconsideration is granted, the case is reopened and the case is reviewed on its merits. Where the request is timely but fails to meet at least one of these standards, the Office will deny the application for reconsideration without reopening the case for a review on the merits.[4]

The Office will consider an untimely application only if the application demonstrates clear evidence of error on the part of the Office in its most recent merit decision. The application must establish, on its face, that such decision was erroneous.[5]

ANALYSIS

Appellant's October 18, 2006 request for reconsideration was timely. She made this request on October 18, 2006, only 17 weeks after the Office's June 22, 2006 decision to deny compensation for her hearing loss claim. It, therefore, should have determined whether appellant presented evidence or argument that meets at least one of the three standards noted above. The Office instead applied the standard reserved for untimely requests, namely, whether appellant's application presented clear evidence of error in the Office's June 22, 2006 decision. This is a higher standard of review not warranted by the circumstances of the case.

The Board will, therefore, set aside the Office's November 17, 2007 decision denying reconsideration and will remand the case to it for application of the proper standard of review and for an appropriate final decision on appellant's October 18, 2006 request for reconsideration.

CONCLUSION

The Board finds that the Office applied the wrong standard of review in denying appellant's October 18, 2006 request for reconsideration.

[3] *Id.* at § 10.607(a).

[4] *Id.* at § 10.608.

[5] *Id.* at § 10.607.

ORDER

IT IS HEREBY ORDERED THAT November 7, 2007 decision of the Office of Workers' Compensation Programs is set aside and the case remanded for further action consistent with this opinion.

Issued: May 1, 2009
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