

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

R.G., Appellant

and

**DEPARTMENT OF DEFENSE, SHARPE
ARMY DEPOT, Lathrop, CA, Employer**

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**Docket No. 10-676
Issued: October 26, 2010**

Appearances:

*Alan J. Shapiro, Esq., for the appellant
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 January 11, 2010 appellant, through his attorney, filed a timely appeal from a December 3, 2009 decision of the Office of Workers' Compensation Programs denying his request for reconsideration as untimely filed and failing to demonstrate clear evidence of error. Because more than one year elapsed from the last merit decision dated October 16, 1991 to the filing of this appeal, the Board lacks jurisdiction to review the merits of his case pursuant to 20 C.F.R. §§ 501.2(c) and 501.3.¹ The only decision properly before the Board is the nonmerit December 3, 2009 decision denying appellant's request for reconsideration.

ISSUE

The issue is whether the Office properly denied appellant's request for reconsideration on the grounds that it was untimely filed and failed to establish clear evidence of error.

¹ For final adverse Office decisions issued prior to November 19, 2008, a claimant had up to one year to appeal to the Board. *See* 20 C.F.R. § 501.3(d)(2). For final adverse Office decisions issued on and after November 19, 2008, a claimant has 180 days to file an appeal with the Board. *See* 20 C.F.R. § 501.3(e).

FACTUAL HISTORY

This case has previously been before the Board. Appellant filed an occupational disease claim alleging that he developed a loss of hearing and tinnitus due to his employment duties. The Office denied his claim on October 16, 1991 on the basis that the evidence did not establish that his hearing loss was causally related to his exposure to hazardous noise levels in the performance of duty. It declined to reopen appellant's claim on April 3, 2000 on the grounds that he failed to establish clear evidence of error and his request for reconsideration was not timely. The Board affirmed this decision on March 12, 2002.² Appellant requested an oral hearing and the Branch of Hearings and Review denied this request on February 23, 2006. He again requested reconsideration and, by decision dated June 2, 2006, the Office denied his request as untimely. The Board reviewed these decisions on January 5, 2007 and affirmed the Office's determinations.³ Appellant again requested reconsideration. The Office again denied his request as untimely with no clear evidence of error on June 21, 2007. The Board reviewed this decision on October 8, 2008 and affirmed the Office's decision.⁴ The facts and circumstances of the case as set forth in the Board's prior decisions are incorporated herein by reference.

Appellant, through his attorney, requested reconsideration on October 7, 2009. In a note dated August 10, 2009, Dr. Kenneth Mak, a Board-certified otolaryngologist, examined appellant and diagnosed subjective tinnitus and sensorineural hearing loss. He stated that appellant had a long history of sensorineural hearing loss and tinnitus. Dr. Mak opined, "This is likely from his long employment working in a loud environment."

Dr. Aren Francis, an otolaryngologist, examined appellant on October 6, 2009 and stated that appellant had a 20-year history of tinnitus and was exposed to heavy machinery, woodworking tools and saws while employed. Appellant worked without full benefit of hearing protection on occasion. Dr. Francis found an asymmetric sensorineural hearing loss at high frequencies. He stated that this finding was consistent with noise-induced hearing loss and that appellant's noise exposure was likely the etiology of appellant's current tinnitus.

By decision dated December 3, 2009, the Office declined to reopen appellant's claim for consideration of the merits on the grounds that his request for reconsideration was untimely and did not establish clear evidence of error in the Office's last merit decision.

LEGAL PRECEDENT

To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant must file his or her application for review within one year of the date of that decision.⁵ The Board has found that the imposition of the one-year limitation does not constitute an abuse

² Docket No. 00-2219 (issued March 12, 2002).

³ Docket No. 06-1685 (issued January 5, 2007).

⁴ Docket No. 08-1304 (issued October 8, 2008).

⁵ 20 C.F.R. § 10.607(a).

of the discretionary authority granted the Office under section 8128(a) of the Federal Employees' Compensation Act.⁶

The Office, however, may not deny an application for review solely on the grounds that the application was not timely filed. When an application for review is not timely filed, the Office must nevertheless undertake a limited review to determine whether the application establishes clear evidence of error.⁷ Office regulations and procedure provide 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(a), if the claimant's application for review shows clear evidence of error on the part of the Office.⁸

To establish clear evidence of error, a claimant must submit evidence relevant to the issue, which was decided by the Office.⁹ The evidence must be positive, precise and explicit and must manifest on its face that the Office committed an error.¹⁰ Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.¹¹ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹² 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.¹³ 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 shift the weight of the evidence in favor of the claimant and raise a substantial question as to the correctness of the Office decision.¹⁴

ANALYSIS

The Office's last merit decision of October 16, 1991 denied appellant's claim for occupational hearing loss on the basis that the medical evidence did not establish a causal

⁶ 5 U.S.C. § 8128(a); *Leon D. Faidley, Jr.*, 41 ECAB 104, 111 (1989).

⁷ See 20 C.F.R. § 10.607(b); *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

⁸ *Id.* at § 10.607(b); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3d (January 2004). Office procedure further provides that the term clear evidence of error is intended to represent a difficult standard. The claimant must present evidence which on its face shows that the Office made an error (for example, proof that a schedule award was miscalculated). Evidence such as a detailed, well-rationalized medical report which, if submitted before the denial was issued, would have created a conflict in medical opinion requiring further development, is not clear evidence of error. *Id.* at Chapter 2.1602.3c.

⁹ See *Dean D. Beets*, 43 ECAB 1153, 1157-58 (1992).

¹⁰ See *Leona N. Travis*, 43 ECAB 227, 240 (1991).

¹¹ See *Jesus D. Sanchez*, 41 ECAB 964, 968 (1990).

¹² See *Leona N. Travis*, *supra* note 10.

¹³ See *Nelson T. Thompson*, 43 ECAB 919, 922 (1992).

¹⁴ *Leon D. Faidley, Jr.*, *supra* note 6.

relationship between his diagnosed loss of hearing or tinnitus and his employment-related noise exposure. In support of his request for reconsideration dated October 7, 2009, appellant submitted a report dated August 10, 2009 from Dr. Mak. As appellant's request for reconsideration was not filed within one year of the 1991 decision, the Board finds that the Office properly determined that it was untimely and evaluated the evidence submitted under the standard of clear evidence of error.

Dr. Mak's August 10, 2009 report is not sufficient to establish that the Office erred in issuing the 1991 merit decision. He diagnosed sensorineural hearing loss and tinnitus and stated that these conditions were "likely" from appellant's employment-related noise exposure. While this evidence is generally supportive of appellant's claim, Dr. Mak's report does not establish clear error on the part of the Office in the denial of appellant's claim. The opinion provided by Dr. Mak is speculative. It is not enough to show that evidence could be construed so as to produce a contrary result.¹⁵ The submission of a well-rationalized medical report which, if submitted before the denial of the claim was issued, would have created a conflict in medical opinion is not clear evidence of error.¹⁶ The report does not establish any error by the Office and is not sufficient to raise a substantial question as to the correctness of the Office's 1991 denial of the claim. Therefore this report does not establish clear evidence of error.

Appellant also submitted an October 6, 2009 report from Dr. Francis, which listed appellant's alleged employment-related noise exposures and failure to consistently use noise protection. Dr. Francis diagnosed asymmetric sensorineural hearing loss at high frequencies and concluded that this finding was consistent with noise-induced hearing loss. He opined that appellant's employment-related noise exposure caused his tinnitus. As noted, this report is not sufficient to establish clear evidence of error in the Office's 1991 merit decision. The mere fact that Dr. Francis attributed appellant's condition to his employment in 2009 is not sufficient to raise a substantial question concerning the denial of the hearing loss claim in 1991. This report does not establish any error on the part of the Office and does not shift the weight of the evidence in favor of appellant. For these reasons, this report is not sufficient to establish clear evidence of error in the 1991 decision.

CONCLUSION

The Board finds that the Office properly determined that appellant's request for reconsideration was untimely and failed to establish clear evidence of error such that review of the merits was warranted.

¹⁵ *D.E.*, 59 ECAB 438 (2008).

¹⁶ *See A.F.*, 59 ECAB 714 (2008).

ORDER

IT IS HEREBY ORDERED THAT the December 3, 2009 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 26, 2010
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