

FACTUAL HISTORY

This case was previously before the Board.² Appellant, then a 75-year-old retired veterinary medical officer, has an accepted claim for bilateral/binaural noise-induced hearing loss.³ In a May 7, 2009 decision, the Board found that he failed to establish that he was disabled beginning May 27, 2006.⁴ Accordingly, the Board affirmed OWCP's August 26, 2008 decision denying wage-loss compensation. The facts of the claim as set forth in the Board's prior decision are incorporated herein by reference.

Under cover letter dated September 1, 2010, appellant provided OWCP with a copy of a May 30, 2009 petition for reconsideration he purportedly submitted to the Board in response to its May 7, 2009 decision. He also provided it with a June 23, 2009 medical report from Dr. Natee Poopat, a Board-certified otolaryngologist, who diagnosed noise-induced hearing loss. OWCP treated appellant's September 1, 2010 submission as a request for reconsideration.

By decision dated September 15, 2010, OWCP denied appellant's request for reconsideration. Appellant's September 1, 2010 submission post dated the last merit decision of May 7, 2009 by more than a year and as such his request was untimely. OWCP further found that he failed to establish clear evidence of error.

LEGAL PRECEDENT

Section 8128(a) of FECA does not entitle a claimant to review of OWCP's decision as a matter of right.⁵ OWCP has discretionary authority in this regard and it has imposed certain limitations in exercising its authority.⁶ One such limitation is that the application for reconsideration must be sent within one year of the date of the decision for which review is sought.⁷ When a request for reconsideration is untimely, OWCP will undertake a limited review to determine whether the application presents "clear evidence of error" on the part of it in its "most recent merit decision."⁸

² *D.R.*, Docket No. 08-2459 (issued May 7, 2009).

³ Appellant has two accepted hearing loss claims. His initial injury arose on or about June 27, 2000 (File No. xxxxxx018). Appellant continued to work thereafter and sustained further injury on or about April 4, 2003 (File No. xxxxxx137). OWCP combined his two hearing loss claims and designated claim File No. xxxxxx018 as the master file.

⁴ Appellant retired effective May 27, 2006. He claimed he retired because he could no longer perform his regular job duties around machinery noise.

⁵ This section provides in pertinent part: "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application." 5 U.S.C. § 8128(a).

⁶ 20 C.F.R. § 10.607.

⁷ *Id.* at § 10.607(a).

⁸ *Id.* at § 10.607(b).

ANALYSIS

The Board's May 7, 2009 merit decision is significant for purposes of determining whether appellant timely requested reconsideration. In this instance, appellant waited more than a year after the Board's May 7, 2009 decision before requesting that OWCP reconsider his claim. Consequently, his September 1, 2010 request for reconsideration was untimely. Because appellant's request was untimely he must establish clear evidence of error.⁹

The issue before OWCP was whether appellant submitted clear evidence of error on the part of OWCP in denying his claim for wage-loss compensation. The last time it addressed entitlement to wage-loss compensation was in its August 26, 2008 decision, which the Board subsequently affirmed. The only medical evidence submitted since then was Dr. Poopat's June 23, 2009 medical report. The relevant issue on reconsideration was whether appellant established that he was totally disabled on or after May 27, 2006. Dr. Poopat's report did not address the question of disability. As such, this evidence is not relevant to the issue on reconsideration or sufficient to establish clear evidence of error in OWCP's denial of his claim for disability.

The Board finds that appellant has not demonstrated clear evidence of error on the part of OWCP in denying his claim for wage-loss compensation beginning May 27, 2006. Accordingly, OWCP properly declined to reopen his case under 5 U.S.C. § 8128(a).

CONCLUSION

The Board finds that appellant's September 1, 2010 request for reconsideration was untimely and he failed to demonstrate clear evidence of error. Therefore, appellant is not entitled to further merit review.

⁹ *Id.* To establish clear evidence of error a claimant must submit evidence relevant to the issue that was decided by OWCP. See *Dean D. Beets*, 43 ECAB 1153 (1992). The evidence must be positive, precise and explicit and it must be apparent on its face that OWCP committed an error. See *Leona N. Travis*, 43 ECAB 227 (1991). It is not enough to merely show that the evidence could be construed to produce a contrary conclusion. *Id.* Evidence that does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to establish clear evidence of error. See *Jesus D. Sanchez*, 41 ECAB 964 (1990). 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 OWCP's decision. *Thankamma Mathews*, 44 ECAB 765, 770 (1993).

ORDER

IT IS HEREBY ORDERED THAT the September 15, 2010 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 9, 2011
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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