

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

H.H., Appellant

and

**TENNESSEE VALLEY AUTHORITY, POWER
SVC SHOPS -- MUSCLE SHOALS,
Chattanooga, TN, Employer**

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**Docket No. 11-938
Issued: December 23, 2011**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

RICHARD J. DASCHBACH, Chief Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On March 4, 2011 appellant filed a timely appeal from a September 9, 2010 decision of the Office of Workers' Compensation Programs (OWCP) which denied his reconsideration request on the grounds that it was untimely filed and failed to present clear evidence of error. Because more than one year elapsed since the most recent merit decision dated November 16, 2006 to the filing of this appeal, the Board lacks jurisdiction to review the merits of his claim pursuant to the Federal Employees' Compensation Act¹ and 20 C.F.R. §§ 501.2(c) and 501.3.²

¹ 5 U.S.C. §§ 8101-8193.

² For final adverse OWCP 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 decisions issued on or after November 19, 2008, a claimant has 180 days to file an appeal with the Board. *See* 20 C.F.R. § 501.3(e).

ISSUE

The issue is whether OWCP properly determined that appellant was requesting reconsideration of a November 16, 2006 schedule award decision and that the request was untimely and failed to establish clear evidence of error.

On appeal, appellant contends that a hearing test administered in 1996 was incorrect as his hearing loss was greater than the test revealed.

FACTUAL HISTORY

On November 1, 2005 appellant, then a 72-year-old retired sheet metal worker, filed an occupational disease claim (Form CA-2) alleging that he sustained hearing loss due to noise exposure during the course of his federal employment. OWCP accepted the claim for noise-induced hearing loss.

By decision dated November 16, 2006, OWCP granted appellant a schedule award for 12 percent bilateral hearing loss. The date of maximum medical improvement was determined to be October 6, 2006. The period of the award was from October 6, 2006 through March 22, 2007.

On March 16, 2009 appellant requested an additional schedule award by telephone call and submitted additional evidence.

In a February 3, 2009 audiogram obtained for Dr. James L. Masdon, a Board-certified otolaryngologist, the air-conduction hearing thresholds at 500, 1,000, 2,000 and 3,000 hertz were 40, 40, 45 and 70 decibels respectively on the right and 50, 45, 35 and 65 decibels respectively on the left. Dr. Masdon reported that the audiometer was last calibrated on April 17, 2008 and that appellant's American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) impairment rating was 12.47 percent.

In a February 3, 2009 medical report, Dr. Masdon diagnosed eustachean tube dysfunction, noise-induced hearing loss, tinnitus and noted a significant change in appellant's low frequency hearing. He indicated that appellant's hearing was still symmetrical and that he was a good candidate for hearing aids.

In a March 19, 2009 letter, OWCP acknowledged appellant's claim for an additional schedule award. It stated that a claim for an additional schedule award would be based on an additional period of work exposure which constituted a new claim and advised him to file a new claim for hearing loss.

In a January 13, 2010 statement, appellant's attorney indicated that appellant had not been exposed to any excessive noises since the date of his schedule award. He submitted a February 3, 2009 audiogram with a note by Dr. Masdon indicating that appellant had 40 to 50 percent bilateral hearing loss.

In a February 9, 2010 letter, OWCP conducted a review of the case. It found that OWCP accepted appellant's claim for noise-induced hearing loss and awarded him a 12 percent schedule award on November 16, 2006. OWCP stated that noise-induced hearing loss did not progress

after exposure to noise ceases and reiterated that an additional schedule award would be based upon an additional period of exposure to noise at work. It indicated that the attorney's January 13, 2010 letter established that appellant had no exposure to noise at work since November 2006, the date of his schedule award and thus he was not entitled to an additional schedule award. OWCP noted that Dr. Masdon's report indicated that appellant had a 40 to 50 percent hearing loss, but indicated that his A.M.A., *Guides* impairment rating was 12.47 percent.

In an April 15, 2010 report, Dr. Masdon reiterated his diagnosis of noise-induced hearing loss and indicated that appellant's hearing had decreased since 2006. He stated that the last hearing evaluation he performed was on February 3, 2009 at which time he estimated a 40 to 50 percent loss of overall hearing. Dr. Masdon indicated that the long-term effects of noise-induced hearing loss are unknown and opined that it was possible that appellant's continued hearing loss could be associated with his previous noise exposure. He disagreed with OWCP's statement that noise-induced hearing loss does not progress after exposure to noise ceases as opinion and not fact.

In an April 20, 2010 letter, appellant's counsel indicated that based on Dr. Masdon's findings appellant believed that he had an additional 28 to 38 percent hearing loss over and above his original loss and requested an additional schedule award.

By decision dated September 9, 2010, OWCP denied appellant's request for reconsideration of the November 16, 2009 OWCP schedule award decision on the grounds that the April 20, 2010 request was untimely filed and failed to present clear evidence of error.³

LEGAL PRECEDENT

As the Board explained in *Linda T. Brown*,⁴ a claimant may seek a schedule award if the evidence establishes that she sustained an impairment causally related to the employment injury. 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, the claim should be considered a claim for an increased schedule award. It should issue a merit decision on the schedule award claim, rather than adjudicate an application for reconsideration.⁵

³ The Board notes that, following the issuance of the September 9, 2010 OWCP decision, appellant submitted new evidence. The Board is precluded from reviewing evidence which was not before OWCP at the time it issued its final decision. See 20 C.F.R. § 501.2(c)(1).

⁴ 51 ECAB 115 (1999). In *Linda T. Brown*, OWCP issued a 1995 decision denying entitlement to a schedule award as no ratable impairment was established. Appellant requested that it reconsider in 1997, submitting a current report with an opinion that she had a 25 percent permanent impairment to the arms and legs. OWCP determined that he submitted an untimely request for reconsideration that did not show clear evidence of error. The Board remanded the case for a merit decision on appellant's request for an increased schedule award.

⁵ *Id.*; see also *Paul R. Reedy*, 45 ECAB 488 (1994).

ANALYSIS

The Board finds that OWCP improperly evaluated the April 20, 2010 letter as a request for reconsideration of the November 16, 2006 schedule award decision, rather than as a request for an increased schedule award. Accordingly, the case must be remanded for consideration of the evidence of record as it bears on appellant's request.

On March 16, 2009 appellant requested an additional schedule award which OWCP acknowledged by letter dated March 19, 2009. On February 9, 2010 OWCP indicated that it conducted a review of his case. Appellant submitted medical reports subsequent to the November 16, 2006 decision, including reports from Dr. Masdon, who provided a revised impairment rating and documented appellant's noise-induced hearing loss, which he opined had decreased. Appellant's attorney did not use the term reconsideration in his April 20, 2010 letter and it is evident that appellant was not seeking reconsideration of the November 16, 2006 decision, but was seeking an increased schedule award based on new and current medical evidence.⁶

Accordingly, the Board finds that OWCP should have issued a merit decision with respect to the claim for an additional schedule award, rather than a decision applying the clear evidence of error standard for an untimely application for reconsideration. The case will be remanded to OWCP for a merit decision with respect to an additional schedule award.

CONCLUSION

OWCP improperly treated appellant's request for an increased schedule award as an untimely reconsideration request.

⁶ See *T.M.*, Docket No. 10-405 (issued August 18, 2010).

ORDER

IT IS HEREBY ORDERED THAT the September 9, 2010 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further action consistent with this decision of the Board.

Issued: December 23, 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, concurring:

Appellant requested that OWCP adjudicate his claim for an additional schedule award for an increase in hearing loss beyond the 12 percent binaural finding made in the November 16, 2006 decision.

Appellant was advised by OWCP in a February 9, 2010 letter that a claim for an additional award must be based on an additional period of work exposure as noise-induced hearing loss did not progress after exposure to noise ceased. This was error.

In *Adelbert E. Buzzell*,¹ an OWCP medical adviser was under the mistaken belief that in *Kenneth W. Morgan*,² the Board generally held that a noise-induced sensorineural hearing loss does not progress after exposure to hazardous occupational noise ceases. But in *Morgan*, the Board did not enunciate a general rule or policy statement. In *Joseph J. Delfino*,³ the Board

¹ 34 ECAB 96 (1982).

² 28 ECAB 569 (1977).

³ 33 ECAB 929 (1982).

emphasized that it did not take positions on medical questions of general application, but instead relied upon the medical evidence submitted in each case.⁴

Here, appellant submitted medical evidence from Dr. Masdon in support of his claim that his hearing acuity deteriorated since 2006; but the claims examiner misstated the principle enunciated in *Morgan* and made a blanket pronouncement pertaining to the progression of noise-induced hearing loss after removal from exposure to hazardous occupational noise. Again, this is fundamentally a medical question to be resolved by the medical evidence in the case. I join in the determination of the majority that OWCP abused its discretion in this case.

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

⁴ *Id.* at footnote 3, page 931.