

FACTUAL HISTORY

On July 3, 2007 appellant, then a 61-year-old quality control inspector, filed an occupational disease claim alleging that he sustained hearing loss and damage to his eardrums due to work-related noise exposure. He first realized that his condition was related to his employment on June 10, 1980.² Appellant retired on disability in 1997.

In a June 27, 2007 statement, appellant alleged that, in June 1968, an air hose ruptured near his ear while he was working in the glass shop, causing pain and ringing in his ears. For the next 20 years, he was exposed to deafening noise from high-torque drills and other tools, which diminished his hearing.

In a July 16, 2007 letter, the Office informed appellant that the evidence was insufficient to establish that he had filed a timely claim for benefits under the Federal Employees' Compensation Act. It advised him to provide additional information, including details of his work history, noise exposure and when he became aware that his hearing loss condition was related to his employment.

Appellant submitted personnel records from June 14, 1971 through September 30, 1997, the effective date of his disability retirement. On August 23, 2007 the employing establishment controverted appellant's claim on the grounds that it was untimely, noting that he had been receiving workers' compensation benefits since 1981 and had retired on disability on August 15, 1997.

In a decision dated October 15, 2007, the Office denied appellant's claim on the grounds that it was untimely. Stating that the date of injury was June 18, 1968, it found that appellant should have been aware of a relationship between his hearing loss condition and his employment by June 18, 1971. The Office further found that the evidence did not support that appellant's immediate supervisor had actual knowledge of the injury within 30 days.

On November 30, 2009 appellant requested reconsideration. He asserted that he had been poorly guided during the initial filing of his claim and that he had been unfairly denied access to copies of forms and other documents in his file. Appellant also submitted a copy of his June 27, 2007 letter to the Office.

Appellant submitted three narrative statements in support of his request for reconsideration. On August 15, 2007 he noted that it was difficult to determine when he first noticed his hearing loss. Appellant indicated that he was exposed to excessive noise for 8 to 12 hours a day, 7 days a week while he was in Viet Nam. On December 10, 2009 he alleged that he was misguided and misinformed by Office personnel and was unfairly treated as a medically-retired civil service employee. On January 6, 2010 appellant reiterated his request that his claim be reconsidered and that he receive copies of his file.

² The Office accepted appellant's January 18, 1972 claim (File No. xxxxxx409) for lumbar intervertebral disc.

By decision dated March 9, 2010, the Office denied appellant's request for reconsideration on the grounds that it was untimely and failed to establish clear evidence of error.

LEGAL PRECEDENT

The Act provides that the Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application.³ The Office, through its regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a). To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant must file her application for review within one year of the date of that decision.⁴ The Board has found that the imposition of the one-year limitation does not constitute an abuse of the discretionary authority granted the Office under section 8128(a) of the Act.⁵

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, it must nevertheless undertake a limited review to determine whether the application establishes clear evidence of error.⁶ 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.⁷

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.⁸ The evidence must be positive, precise and explicit and must manifest on its face that the Office committed an error.⁹ Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.¹⁰ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹¹ 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.¹² The Board

³ 5 U.S.C. § 8128(a).

⁴ 20 C.F.R. § 10.607(a).

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

⁶ *See* 20 C.F.R. § 10.607(b); *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

⁷ 20 C.F.R. § 10.607(b); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3d (January 2004).

⁸ *See Dean D. Beets*, 43 ECAB 1153, 1157-58 (1992).

⁹ *See Leona N. Travis*, 43 ECAB 227, 240 (1991).

¹⁰ *See Jesus D. Sanchez*, 41 ECAB 964, 968 (1990).

¹¹ *See M.L.*, 60 ECAB __ (Docket No. 09-956, issued April 15, 2010). *See Leona N. Travis*, *supra* note 9.

¹² *See Nelson T. Thompson*, 43 ECAB 919, 922 (1992).

makes an independent determination of whether a claimant has submitted clear evidence of error on the part of the Office such that it abused its discretion in denying merit review in the face of such evidence.¹³

ANALYSIS

The Board finds that the Office properly refused to reopen appellant's claim for reconsideration of the merits on the grounds that it was untimely and failed to establish clear evidence of error.

The Office properly determined that appellant failed to file a timely application for review. Its procedures provide that the one-year time limitation period for requesting reconsideration begins on the date of the original Office decision.¹⁴ A right to reconsideration within one year also accompanies any subsequent merit decision on the issues.¹⁵ As appellant's November 30, 2009 request for reconsideration was submitted more than one year after the date of the most recent merit decision of record on October 15, 2007, it was untimely. Consequently, he must demonstrate clear evidence of error by the Office in denying his claim.¹⁶

In support of his reconsideration request, appellant asserted that he had been poorly guided during the initial filing of his claim and that he had been unfairly denied access to copies of forms and other documents in his file. On August 15, 2007 he stated that it was difficult to determine when he first noticed his hearing loss. He alleged that he was exposed to excessive noise for 8 to 12 hours a day, 7 days a week while in Viet Nam. On December 10, 2009 he alleged that he was misguided and misinformed by the Office, and was unfairly treated as a medically-retired civil service employee. On January 6, 2010 appellant again requested that his claim be reconsidered. His letters do not establish error on the part of the Office. Appellant's claims that he was treated unfairly and that he was denied access to records are unsubstantiated. Moreover, these contentions are not relevant to the issue decided by the Office, namely the timeliness of his claim for occupational hearing loss. Therefore, they are insufficient to raise a substantial question concerning the correctness of the Office's decision.¹⁷

Appellant also submitted a copy of his June 27, 2007 letter to the Office. The letter duplicates that previously received and considered by the Office which addressed appellant's claimed work-related noise exposure. As it does not address the timeliness issue, it is irrelevant and does not establish error on the part of the Office.

On appeal, appellant reiterated his claims that he was treated unfairly, that he was denied access to records and that the process for filing a reconsideration request was confusing and

¹³ *Pete F. Dorso*, 52 ECAB 424 (2001).

¹⁴ 20 C.F.R. § 10.607(a).

¹⁵ *Robert F. Stone*, 57 ECAB 292 (2005).

¹⁶ 20 C.F.R. § 10.607(b); see *Debra McDavid*, 57 ECAB 149 (2005).

¹⁷ See *supra* note 8 and accompanying text.

unclear. For the reasons stated, appellant's arguments are insufficient to establish that the Office erred in its October 15, 2007 decision.

The Board finds that the evidence submitted by appellant in support of his untimely request for reconsideration does not constitute positive, precise and explicit evidence, which manifests on its face that the Office committed an error. Therefore, he has failed to meet his burden of proof to show clear evidence of error on the part of the Office.

CONCLUSION

The Board finds that the Office properly refused to reopen appellant's claim for reconsideration of the merits on the grounds that his request was untimely and failed to demonstrate clear evidence of error.

ORDER

IT IS HEREBY ORDERED THAT the March 9, 2010 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 1, 2011
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