

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

G.A., Appellant)

and)

**DEPARTMENT OF THE ARMY, U.S. ARMY
INSTALLATION MANAGEMENT AGENCY,
Fort Drum, NY, Employer**)

**Docket No. 11-44
Issued: September 6, 2011**

Appearances:
Jeffrey P. Zeelander, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

RICHARD J. DASCHBACH, Chief Judge
ALEC J. KOROMILAS, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On October 5, 2010 appellant, through his attorney, filed a timely appeal from June 3 and September 30, 2010 nonmerit decisions of the Office of Workers' Compensation Programs (OWCP) denying his request for reconsideration on the grounds that it was untimely filed and failed to establish clear evidence of error.¹ The last merit decision in this case was OWCP's November 28, 2007 decision which granted the employee a schedule award. The Board lacks jurisdiction to review the merits of the case.² Pursuant to the Federal Employees' Compensation

¹ Appellant died on December 22, 2010 after the filing of this appeal. As he properly filed the appeal in his lifetime, all that is needed is a substitute appellant to carry the appeal forward as the Board's jurisdiction was invoked during his lifetime. *See Albert F. Kimbrell*, 4 ECAB 662, 666 (1952). Accordingly, the employee's widow, who is represented by counsel, is recognized by this Board as the substitute appellant for purposes of carrying the appeal forward.

² For final adverse OWCP's decisions issued prior to November 19, 2008, a claimant had up to one year to file an appeal. *See* 20 C.F.R. § 501.3(d)(2). An appeal of final adverse OWCP's decisions issued on or after November 19, 2008 must be filed within 180 days of the decision. 20 C.F.R. § 501.3(e).

Act (FECA)³ and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the nonmerits of this case.⁴

ISSUES

The issues are: (1) whether OWCP, by its June 3, 2010 decision, properly refused to reopen appellant's claim for reconsideration of the merits on the grounds that the request was untimely filed and failed to establish clear evidence of error; and (2) whether OWCP, by its September 30, 2010 decision, properly refused to reopen appellant's claim for reconsideration of the merits on the grounds that the request was untimely filed and failed to establish clear evidence of error.

On appeal, appellant's attorney contends that: (1) OWCP erred when it denied appellant's hearing request as untimely as it was postmarked December 31, 2007, which was 30 business days from a day after the November 28, 2007 decision; and (2) OWCP erred in calculating the impairment rating which was based on a medical report without an audiometer calibration date.

FACTUAL HISTORY

On July 8, 2004 appellant, then a 54-year-old ammunition surveillance inspector, filed an occupational disease claim (Form CA-2) alleging that he sustained hearing loss due to factors of his federal employment.

In a June 10, 2004 medical report, Dr. Braxton Hillerman, a Board-certified otolaryngologist, indicated that the employee had right sensorineural hearing loss and was medically cleared for amplification.

OWCP referred appellant to a second opinion examiner to determine the degree to which his hearing loss was employment related. In a November 23, 2004 medical report, Dr. Steven Metzger, a Board-certified otolaryngologist, found that the employee had a 0 percent hearing loss in the left ear and a 28 percent hearing loss in the right ear. He verified that the audiometer was calibrated on March 19, 2004.

By decision dated December 27, 2004, OWCP accepted appellant's claim for right-ear noise-induced hearing loss.

On January 18, 2005 appellant filed a schedule award claim.

In a January 29, 2005 letter, district medical adviser Dr. Ira D. Rothfeld, a Board-certified otolaryngologist, indicated that OWCP should not make any determinations of disability until a magnetic resonance imaging (MRI) scan was obtained to rule out a retrocochlear lesion.

³ 5 U.S.C. § 8101 *et seq.*

⁴ The Board notes that, following issuance of the September 30, 2010 OWCP's decision and on appeal, 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).

By letter dated March 1, 2006, OWCP informed appellant's former attorney that another second opinion examination had to be scheduled as the November 23, 2004 examination was conducted over a year ago.

In an April 28, 2006 second opinion examination report, Dr. Lawrence Kriger, a Board-certified otolaryngologist, reviewed a statement of accepted facts and employee's medical history. Dr. Kriger diagnosed 35.6 percent hearing loss in the right ear, 0 percent hearing loss in the left ear, indicating that an April 28, 2006 audiogram revealed a pattern of progressive hearing loss in the right ear only. He opined that employee's hearing loss was permanent and employment related. Dr. Kriger did not provide verification of audiometric testing and left the date of audiometer calibration blank.

In a June 10, 2004 medical report, Dr. Hillerman reported that the MRI scan was negative for any sign of vestibular schwannoma, some nonspecific findings related to his white matter and possible subclinical or compensated hydrocephalus.

On January 8, 2007 the employee filed a schedule award claim and reported that he retired effective December 1, 2002.

In an October 20, 2006 radiological report, Dr. David P. Wesolowski, a Board-certified neuroradiologist, diagnosed degenerative changes appropriate for employee's age group based on a brain MRI scan and opined that the appearance of the brain appeared stable.

In an August 4, 2007 medical report, district medical adviser Dr. Morley Slutsky, an occupational medicine specialist, reported 35.6 percent hearing loss in the right ear, no ratable impairment in the left ear and 5.9 percent binaural hearing loss. He indicated that additional information was needed from the second opinion examiner, Dr. Kriger, as he did not provide the calibration date of the audiometer used in the April 28, 2006 testing. Dr. Slutsky stated that if the calibration was not conducted within 1 year prior to the testing, then the April 28, 2006 testing was not valid.

By decision dated November 28, 2007, OWCP granted the employee a schedule award for six percent binaural hearing loss for the period December 1, 2002, the date of employee's retirement, to February 22, 2003.

By letter postmarked December 31, 2007, employee's former attorney requested an oral hearing. He contended that the district medical adviser relied on an uncertified/noncalibrated audiometer and OWCP failed to account for left ear hearing loss.

By decision dated February 11, 2008, OWCP denied employee's hearing request on the grounds that it was untimely filed.

On April 16, 2010 appellant's attorney requested reconsideration on the grounds of clear evidence of error. He argued that OWCP erred when it denied appellant's hearing request as untimely as it was postmarked within 30 business days of the November 28, 2007 decision and also erred in calculating the impairment rating without a date of calibration.

By decision dated June 3, 2010, OWCP denied appellant's request for reconsideration as untimely filed and failing to establish clear evidence of error.

On June 10, 2010 counsel requested reconsideration and argued that OWCP did not address his argument that OWCP erred in calculating the impairment rating without an audiometer calibration date.

By decision dated September 30, 2010, OWCP denied appellant's reconsideration request as untimely filed and failing to establish clear evidence of error. It agreed with appellant's attorney that its June 3, 2010 decision failed to issue a decision regarding the calibration portion of his arguments and found that a calibration date of an audiometer is not mandated in order to issue a schedule award for hearing loss.

LEGAL PRECEDENT -- ISSUES 1&2

FECA 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.⁵ OWCP, 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 OWCP's decision denying or terminating a benefit, a claimant must file her application for review within one year of the date of that decision.⁶ The Board has found that the imposition of the one-year limitation does not constitute an abuse of the discretionary authority granted OWCP under section 8128(a) of FECA.⁷ OWCP, 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.⁸ OWCP regulations and procedure provide that OWCP 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 OWCP.⁹

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

⁵ 5 U.S.C. § 8128(a).

⁶ 20 C.F.R. § 10.607(a).

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

⁸ *See* 20 C.F.R. § 10.607(b); *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

⁹ *Id.*; Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(d) (March 2011).

¹⁰ *See Dean D. Beets*, 43 ECAB 1153, 1157-58 (1992).

¹¹ *See Leona N. Travis*, 43 ECAB 227, 240 (1991).

¹² *See Jesus D. Sanchez*, 41 ECAB 964, 968 (1990).

so as to produce a contrary conclusion.¹³ This entails a limited review by OWCP 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 OWCP.¹⁴ The Board makes an independent determination of whether a claimant has submitted clear evidence of error on the part of OWCP such that OWCP abused its discretion in denying merit review in the face of such evidence.¹⁵

ANALYSIS -- ISSUES 1&2

OWCP correctly 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 OWCP decision.¹⁶ A right to reconsideration within one year also accompanies any subsequent merit decision on the issues.¹⁷ As appellant's April 16, 2010 request for reconsideration was submitted more than one year after the date of the last merit decision of record on November 28, 2007, it was untimely. Consequently, she must demonstrate clear evidence of error by OWCP in denying her claim.¹⁸ 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 *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.¹⁹

Appellant's attorney contends that OWCP erred when it denied appellant's hearing request as untimely as it was postmarked December 31, 2007, which was 30 business days from a day after the November 28, 2007 decision. The Board has consistently held that appellant has 30 calendar days from OWCP's decision to request an oral hearing before OWCP's hearing representative.²⁰ Appellant had 30 calendar, not business, days from November 29, 2007 to request an oral hearing.²¹ Thus, appellant had until December 29, 2007 to file a hearing request

¹³ See *M.L.*, Docket No. 09-956 (issued April 15, 2010). See also *Leona N. Travis*, *supra* note 11.

¹⁴ See *Nelson T. Thompson*, 43 ECAB 919, 922 (1992).

¹⁵ See *Pete F. Dorso*, 52 ECAB 424 (2001).

¹⁶ 20 C.F.R. § 10.607(a).

¹⁷ See *Robert F. Stone*, 57 ECAB 292 (2005).

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

¹⁹ See *Leon D. Faidley, Jr.*, *supra* note 7.

²⁰ See *G.W.*, Docket No. 10-782 (issued April 23, 2010).

²¹ The Board notes that neither the date of the decision (November 28, 2009) nor the 30th day following the issuance of the decision (December 29, 2009), fell on a weekend or a federal holiday. See *John B. Montoya*, *supra* note 6 (If the last date of the relevant time period is a Saturday, Sunday or legal holiday, it is not included in determining timeliness); see also *Marguerite J. Dvorak*, 33 ECAB 1682 (1982) (in computing a time period, the date of the event from which the designated period of time begins to run shall not be included, while the last day of the period so computed shall be included unless it is a Saturday, a Sunday or a legal holiday).

and the December 31, 2007 postmark rendered it untimely. The Board finds that appellant therefore did not establish a clear procedural error.

Appellant's attorney also contends that OWCP erred in calculating the impairment rating as it was based on a medical report without an audiometer calibration date. In an April 28, 2006 second opinion examination report, Dr. Kriger diagnosed 35.6 percent hearing loss in the right ear, 0 percent hearing loss in the left ear and indicated that an April 28, 2006 audiogram revealed hearing loss in the right ear only. Dr. Kriger did not provide verification of audiometric testing or a date of audiometer calibration. In an August 4, 2007 medical report, district medical adviser Dr. Slutsky indicated that OWCP needed to obtain the calibration date from Dr. Kriger because if the calibration was not conducted within one year prior to the testing, then the April 28, 2006 testing was not valid. Appellant has shown that the impairment rating was calculated based on a medical report and audiogram that were not verified with a date of calibration and therefore she has shown that OWCP's determination in this regard was improper.²² Thus, appellant has demonstrated clear evidence of error on the part of OWCP in issuing its November 28 2007 decision.

Because appellant has shown clear evidence of error, a merit review of the hearing loss claim is warranted. The case will be remanded to OWCP in order to conduct a merit review under the relevant standards of FECA regarding the establishment of employment-related hearing loss.²³

CONCLUSION

The Board finds that OWCP improperly refused to reopen appellant's case for further review of the merits of his case. The case will be remanded to OWCP in order to conduct a merit review under the relevant standards of FECA and, after such development as it deems necessary, OWCP will issue a *de novo* decision.

²² In *Vernon Brown*, 54 ECAB 376 (2003), the Board found that an audiometric test, upon which OWCP relied, was not a proper basis for computation of appellant's hearing loss as no calibration information was provided.

²³ See *James R. Mirra*, 56 ECAB 738 (2005).

ORDER

IT IS HEREBY ORDERED THAT the September 30 and June 3, 2010 decisions of the Office of Workers' Compensation Programs are reversed and the case remanded to OWCP for further proceedings consistent with this decision of the Board.

Issued: September 6, 2011
Washington, DC

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

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board