

**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. 12-1059
Issued: October 5, 2012**

Appearances:

*Alan J. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director*

Case Submitted on the Record

DECISION AND ORDER

Before:

RICHARD J. DASCHBACH, Chief Judge
PATRICIA HOWARD FITZGERALD, Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On April 10, 2012 appellant, through counsel, filed a timely appeal from a March 16, 2012 decision of the Office of Workers' Compensation Programs (OWCP) denying his request for reconsideration as untimely filed and failing to demonstrate clear evidence of error. Because more than one year has elapsed from the last merit decision dated October 16, 1991 to the filing of this appeal,¹ the Board lacks jurisdiction to review the merits of his claim pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2 and 501.3. The only decision properly before the Board is the March 16, 2012 decision denying his request for reconsideration.

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

² 5 U.S.C. § 8101 *et seq.*

ISSUE

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

FACTUAL HISTORY

This case has previously been before the Board on appeal. Appellant filed a claim alleging that he developed hearing loss and tinnitus due to his employment which OWCP denied on October 16, 1991 finding that the medical evidence did not establish that his hearing loss was causally related to his federal employment. The Board affirmed this decision.³ Appellant has repeatedly requested reconsideration which OWCP denied as untimely and which decisions were affirmed by the Board.⁴ In a decision dated October 26, 2010, the Board affirmed OWCP's December 3, 2009 denial of his reconsideration request as untimely filed and failing to establish clear evidence of error as the medical evidence submitted was not sufficiently well reasoned to raise a substantial question as to the correctness of OWCP's October 16, 1991 denial of appellant's hearing loss claim.⁵ The facts and the circumstances of the case as set out in the Board's prior decisions are adopted herein by reference.

Appellant submitted a reconsideration request and narrative statement dated March 10, 2011 alleging that OWCP committed clear evidence of error as Dr. Dowd was not provided with pertinent information. He provided a list including the history of job titles, source of noise exposure, the noise protection provided and the number of hours of noise exposure. Appellant also alleged that OWCP failed to arrange for a physician of his choosing to participate in the examination. He stated that OWCP committed clear evidence of error by failing to advise him when his claim was reviewed by an OWCP medical adviser.

Counsel requested reconsideration on September 27, 2011 based on new medical evidence. In a report dated March 1, 2011, Dr. Aren Francis, a Board-certified otolaryngologist, noted that appellant had a history of tinnitus greater on the left than the right and worked at the employing establishment for approximately 10 years in loud environments with heavy machinery, tools and excessive loud noise. Appellant stated that he developed intermittent recurrent tinnitus which became louder, more persistent and bothersome in his left ear. Dr. Francis stated, "This is a 65-year-old gentleman with a history of having significant and prolonged occupational noise exposure with resultant sensorineural hearing loss which is worse in the left ear. Again, this is consistent with having a noise-related sensorineural hearing loss and is more than likely to be the etiology of the patient's current tinnitus."

By decision dated March 16, 2012, OWCP declined to reopen appellant's claim for consideration of the merits on the grounds that his requests for reconsideration were not timely filed within a year of the last merit decision. It further found that the medical evidence was not

³ Docket No. 00-2219 (issued March 12, 2002).

⁴ Docket No. 08-1304 (issued October 8, 2008); Docket No. 06-1685 (issued January 5, 2007).

⁵ Docket No. 10-676 (issued October 26, 2010).

sufficient to establish clear evidence of error and that appellant's legal arguments did not establish an error on the part of OWCP.

LEGAL PRECEDENT

Under section 8128(a) of FECA,⁶ OWCP has the discretion to reopen a case for review on the merits, on its own motion or on application by the claimant. It must exercise this discretion in accordance with section 10.607 of the implementing federal regulations. Section 10.607 provides that "An application for reconsideration must be sent within one year of the date of OWCP's decision for which review is sought."⁷ In *Leon D. Faidley, Jr.*,⁸ the Board held that the imposition of the one-year time limitation for filing an application for review was not an abuse of the discretionary authority granted OWCP under section 8128(a) of FECA. The one-year time limitation period set forth in 20 C.F.R. § 10.607 does not restrict OWCP from performing a limited review of any evidence submitted by a claimant with an untimely application for reconsideration. OWCP is required to perform a limited review of the evidence submitted with an untimely application for review to determine whether a claimant has submitted clear evidence of error on the part of OWCP thereby requiring merit review of the claimant's case.

Thus, if the request for reconsideration is made after more than one year has elapsed from the issuance of the decision, the claimant may only obtain a merit review if the application for review demonstrates "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 be 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 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 To show clear evidence of error, the evidence submitted must not only be of sufficient probative value to create a

⁶ 5 U.S.C. § 8128(a).

⁷ 20 C.F.R. § 10.607.

⁸ 41 ECAB 104, 111 (1989).

⁹ 20 C.F.R. § 10.607; *Jesus D. Sanchez*, 41 ECAB 964, 968 (1990).

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

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

¹² *See Jesus D. Sanchez*, *supra* note 9.

¹³ *See Leona N. Travis*, *supra* note 11.

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

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 fundamental question as to the correctness of OWCP's decision.¹⁵ 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.¹⁶

ANALYSIS

The only decision before the Board on this appeal is that of OWCP dated March 16, 2012 in which it declined to reopen appellant's case on the merits because the request was not timely filed, and did not show clear evidence of error. Since more than one year has elapsed from the date of issuance of OWCP's October 16, 1991 merit decision to the date of the filing of appellant's appeal, on April 10, 2012 the Board lacks jurisdiction to review that decision.¹⁷

The Board finds that the March 16, 2011 refusal of OWCP to reopen appellant's claim for further consideration on the merits of the claim under 5 U.S.C. § 8128(a) on the basis that his request for reconsideration was not timely filed within the one-year time limitation period set forth in 20 C.F.R. § 10.607 and did not show clear evidence of error was proper and did not constitute abuse of discretion.

In support of his request, appellant submitted a new medical report from Dr. Francis opining that appellant's tinnitus and hearing loss were due to his employment-related noise exposure. He also submitted a list of his positions, the noise exposure in each position, the noise protection provided and the length of the exposure. Appellant also argued that OWCP failed to provide him with a physician during his impartial medical examination.

While Dr. Francis offered his opinion that appellant's current condition was due to his employment exposures, the Board finds that this report is not sufficient to shift the burden of proof and establish clear evidence of error on the part of OWCP. The Board notes that clear evidence of error is intended to represent a difficult standard. Evidence such as a detailed, well-rationalized report which, if submitted prior to OWCP's merit decision might require additional development of the claim, is insufficient to establish clear evidence of error.¹⁸

Appellant also submitted factual evidence of his noise exposure. The Board notes that appellant's claim was not denied because of a deficit of factual evidence of noise exposure. Instead, OWCP denied the merits of appellant's claim on the grounds that he did not submit sufficient medical opinion evidence establishing the causal relationship between his diagnosed

¹⁵ *Leon D. Faidley, Jr.*, 41 ECAB 104, 114 (1989).

¹⁶ *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon., denied*, 41 ECAB 458, 466 (1990).

¹⁷ *See supra* note 1.

¹⁸ *See E.R.*, Docket No. 09-599 (issued June 3, 2009).

condition and his employment. Therefore the factual evidence submitted cannot establish clear evidence of error on the part of OWCP.

Appellant argued that OWCP did not accord him his full rights under FECA as he was not provided a physician of his own during a second medical examination. FECA states in section 8123(a), “The employee may have a physician designated and paid by him present to participate in the examination.”¹⁹ There is no obligation that OWCP provide appellant with a physician, instead he must select and pay for any physician he wishes to have present.

Appellant did not submit any new medical evidence or legal arguments sufficient to raise a substantial question as to the correctness of OWCP’s decision. To establish clear evidence of error, the evidence submitted must be positive, precise and explicit and must manifest on its face that OWCP committed an error.²⁰ Appellant did not submit such evidence. Consequently, OWCP properly denied appellant’s reconsideration request as it does not establish clear evidence of error.

CONCLUSION

The Board finds that OWCP properly refused to reopen appellant’s claim for reconsideration of the merits on the grounds that it was untimely filed and failed to show clear evidence of error.

¹⁹ 5 U.S.C. § 8123(a).

²⁰ *L.C.*, Docket No. 12-504 (issued August 6, 2012).

ORDER

IT IS HEREBY ORDERED THAT the March 16, 2012 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 5, 2012
Washington, DC

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

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board