United States Department of Labor
Employees' Compensation Appeals Board

J.F., Appellant	)	
and	)	**Docket No. 13-112**
	)	**Issued: November 6, 2013**
DEPARTMENT OF THE ARMY, INSTALLATION MANAGEMENT COMMAND, Warren, MI, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
PATRICIA HOWARD FITZGERALD, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On October 19, 2012 appellant filed a timely appeal from a September 20, 2012 decision of the Office of Workers' Compensation Programs (OWCP) denying his reconsideration request on the basis that it was untimely filed and failed to present clear evidence of error. Because more than 180 days elapsed since the most recent merit decision dated October 2, 2009 to the filing of this appeal, the Board lacks jurisdiction to review the merits of his case but has jurisdiction over the nonmerits pursuant to the Federal Employees' Compensation Act[1] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3.

ISSUE

The issue is whether OWCP properly denied appellant's request for reconsideration on the basis that it was not timely filed and did not establish clear evidence of error.

On appeal, appellant argued the merits of his claim.

[1] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On October 11, 2007 appellant, then a 54-year-old police officer, 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. He resigned from the employing establishment effective May 12, 2007.

By decision dated April 20, 2009, OWCP accepted the claim for sensorineural hearing loss, left ear.

OWCP referred appellant to an audiologist to determine the nature and extent of his employment-related hearing loss. In a September 12, 2009 report, its audiologist found that he had no ratable hearing loss and listed a date of maximum medical improvement of May 17, 2001.

By decision dated October 2, 2009, OWCP found that appellant's hearing loss was not severe enough to be considered ratable and he was not entitled to a schedule award.

On January 23, 2012 appellant's Senator forwarded correspondence pertaining to appellant's hearing loss claim. The Senator noted that appellant had undergone recent hearing loss tests. On February 2, 2012 OWCP responded that appellant should submit any current medical reports to the district office for consideration of a schedule award. By letter dated June 11, 2012, a senior claims examiner requested that appellant submit all audiometric testing he had received in past years. The record reflects that appellant submitted materials pertaining to audiometric testing obtained at the Department of Veterans Affairs on December 10, 2011 and treatment on January 11, 2012. He also submitted previous audiometric tests from the employing establishment. In an August 28, 2012 letter, appellant advised the district office that he had submitted 28 pages to OWCP in response to the June 11, 2012 correspondence but had not received a decision.

By decision dated September 20, 2012, OWCP denied appellant's reconsideration request on the basis that it was untimely filed and failed to present clear evidence of error.

LEGAL PRECEDENT

The Board has long recognized that if a claimant's employment-related hearing loss worsens in the future, he or she may apply for an additional schedule award for any increased permanent impairment.[2] The Board has also recognized that a claimant may be entitled to a schedule award for increased hearing loss, even after exposure to hazardous noise has ceased, if causal relationship is supported by the medical evidence of record.[3]

In *Kenneth W. Morgan*,[4] the Board noted that, in general, a noise-induced sensorineural hearing loss does not progress after exposure to hazardous occupational noise ceases. However,

[2] *See Paul R. Reedy*, 45 ECAB 488 (1994).

[3] *See Adelbert E. Buzzell*, 34 ECAB 96 (1982); *see also supra* note 2.

[4] 28 ECAB 569 (1977).

the Board did not enunciate this principle as a general rule but based the particular decision on the opinions of the medical specialists of record. In *Adelbert E. Buzzell*,[5] the Board cautioned against an OWCP medical adviser providing a blanket unrationalized statement that hearing loss does not progress following the cessation of hazardous noise exposure.[6]

ANALYSIS

The Board finds that OWCP improperly refused to reopen appellant's claim for further consideration of the merits under 5 U.S.C. § 8128(a) on the basis that it was not timely filed within the one-year time limitation period set forth in 20 C.F.R. § 10.607(a) and did not establish clear evidence of error.[7]

OWCP accepted that appellant sustained sensorineural hearing loss in the left ear causally related to his history of noise exposure at the employing establishment. By decision dated October 2, 2009, it found that he was not entitled to a schedule award on the basis that his hearing loss was nonratable. Subsequently, appellant submitted a November 4, 2009 appeal request form and audiograms from the employing establishment dated January 10, 1997 through December 10, 2011.

As in *Paul R. Reedy*, the September 20, 2012 decision, treated appellant's claim as a request for reconsideration. The Board finds, however, that he was not seeking reconsideration of the previous determination that his hearing loss was nonratable, but submitted new evidence contending an increased hearing loss. OWCP's procedure manual states that if a claimant is seeking an increased schedule award due to increased impairment and/or additional exposure, but not contesting the decision or prior award, this should not be treated as a reconsideration request and OWCP should develop the issue of entitlement to an additional award.[8] The Board has long recognized that if a claimant's employment-related hearing loss worsens in the future, he or she may apply for an additional schedule award for any increased permanent impairment.[9] The Board has also recognized that a claimant may be entitled to an award for an increased hearing loss, even after exposure to hazardous noise has ceased, if causal relationship is supported by the medical evidence of record.[10]

OWCP did not adjudicate appellant's entitlement to a schedule award for his claimed increased hearing loss. The Board finds that the case is not in posture for decision. On remand,

[5] *Supra* note 3. *See also Armando Bello*, 34 ECAB 1739 (1983) (the Board does not take positions on medical questions of general application, but relies on the medical evidence in each case).

[6] *See J.R.*, Docket No. 08-1008 (issued September 11, 2008). The Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.4(b)(3) notes that if the progression of a noise-induced hearing loss is to be denied, OWCP's medical adviser must provide a well-rationalized opinion.

[7] *See supra* note 2.

[8] The Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(b).

[9] *Supra* note 2.

[10] *Supra* note 3.

OWCP should obtain a rationalized medical opinion on the issue of causal relationship and issue a *de novo* decision on appellant's entitlement to a schedule award.

CONCLUSION

The Board finds that the case is not in posture for decision.

ORDER

IT IS HEREBY ORDERED THAT the September 20, 2012 decision of the Office of Workers' Compensation Programs is set aside and the case remanded for further development consistent with this decision of the Board.

Issued: November 6, 2013
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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