

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

J.T., Appellant)

and)

DEPARTMENT OF THE NAVY, NAVAL)
SUPPLY CENTER, Oakland, CA, Employer)
_____)

**Docket No. 13-1236
Issued: November 6, 2013**

Appearances:
Appellant, pro se
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 23, 2013 appellant filed a timely appeal of a March 20, 2013 decision of the Office of Workers' Compensation Programs (OWCP), finding that appellant's request for reconsideration was untimely and failed to show clear evidence of error. Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the March 20, 2013 decision. The Board does not have jurisdiction over a decision on the merits of the claim.²

ISSUE

The issue is whether OWCP properly determined appellant's application for reconsideration was untimely and failed to show clear evidence of error.

¹ 5 U.S.C. § 8101 *et seq.*

² The last merit decision was an OWCP decision dated January 12, 2012 finding appellant was entitled to a schedule award for a 40 percent binaural hearing loss. A claimant has 180 days to file an appeal with the Board for OWCP decisions issued on or after November 19, 2008. 20 C.F.R. § 501.3(e).

FACTUAL HISTORY

On February 18, 2010 appellant, then a 67-year-old retired mason, filed an occupational claim (Form CA-2) alleging that he sustained hearing loss as a result of his federal employment. He indicated that he first became aware of an employment-related hearing loss in February 1983. OWCP referred appellant for a second opinion examination by Dr. Barry Baron, a Board-certified otolaryngologist.

In a report dated August 8, 2010, Dr. Baron opined that appellant had bilateral sensorineural hearing loss causally related to noise exposure in federal employment. On August 16, 2010 OWCP accepted bilateral sensorineural hearing loss and bilateral tinnitus. In a report dated July 27, 2011, an OWCP medical adviser opined that appellant had a 40 percent binaural hearing loss based on a July 27, 2010 audiogram performed for Dr. Baron. The medical adviser noted that appellant had not worked at the employing establishment since 1991, and he requested additional employing establishment audiograms but none were available.³

By decision dated January 12, 2012, OWCP issued a schedule award for a 40 percent binaural hearing loss. The period of the award was 80 weeks from July 27, 2010.

In a letter dated August 27, 2012, addressed to both OWCP and appellant's congressional representative, appellant indicated that he was requesting copies of all medical records from his federal employment. Appellant stated that the date of injury was reported as February 1, 1983, but he had only been compensated from July 27, 2010. He stated that he was in the process of filing a reconsideration request to be compensated from "the date in which the current award was issued."

In a letter dated January 25, 2013 and received by OWCP on February 11, 2013, appellant requested reconsideration of his claim. He stated that hearing loss was first detected in employing establishment physical examinations in the 1980's and he had made several unsuccessful attempts to get these records.

By decision dated March 20, 2013, OWCP denied the reconsideration request on the grounds it was untimely filed and failed to show clear evidence of error.

LEGAL PRECEDENT

FECA provides that OWCP may review an award for or against compensation upon application by an employee (or his or her representative) who receives an adverse decision.⁴ The employee shall exercise this right through a request to the district Office. The request, along with the supporting statements and evidence, is called the "application for reconsideration."⁵

³ The record does contain audiograms dated November 15, 1982, August 18, 1983, June 19, 1984, July 24, 1985 and June 27, 1986.

⁴ 5 U.S.C. § 8128(a).

⁵ 20 C.F.R. § 10.605.

According to 5 U.S.C. § 8128(a), a claimant is not entitled to a review of an OWCP decision as a matter of right.⁶ This section vests OWCP with discretionary authority to determine whether it will review an award for or against compensation.⁷ OWCP, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a) of FECA.⁸ As one such limitation, 20 C.F.R. § 10.607 provides that an application for reconsideration must be received within one year of the date of OWCP's decision for which review is sought. OWCP will consider an untimely application only if the application demonstrates clear evidence of error on the part of OWCP in its most recent merit decision. The evidence must be positive, precise and explicit and must manifest on its face that OWCP committed an error.⁹

To show clear evidence of error, the evidence submitted must not only be of sufficient probative value to create a conflicting medical opinion or establish a clear procedural error, but must be of sufficient probative value to shift the weight of the evidence in favor of the claimant and raise a substantial question as to the correctness of OWCP's decision.¹⁰ Evidence that does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to establish clear evidence of error.¹¹ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹² The Board makes an independent determination as to whether a claimant has submitted clear evidence of error on the part of OWCP.¹³

ANALYSIS

In the present case, OWCP issued a schedule award decision dated January 12, 2012. By letter dated August 27, 2012, appellant indicated that he was seeking additional medical reports from the employing establishment during the period he worked, and he intended to file a reconsideration request. He did not, however, request reconsideration until a letter received by

⁶ *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

⁷ Under section 8128 of FECA, “[t]he Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application.”

⁸ 5 U.S.C. §§ 8101-8193.

⁹ *D.O.*, Docket No. 08-1057 (issued June 23, 2009); *Robert F. Stone*, 57 ECAB 292 (2005).

¹⁰ *Annie L. Billingsley*, 50 ECAB 210 (1998).

¹¹ *Jimmy L. Day*, 48 ECAB 652 (1997).

¹² *Id.*

¹³ *Thankamma Mathews*, 44 ECAB 765 (1993).

OWCP on February 11, 2013.¹⁴ Since this is more than one year after the January 12, 2012 decision, it is untimely filed.¹⁵

As an untimely reconsideration request, the issue is whether appellant has demonstrated clear evidence of error. In his January 25, 2013 letter, appellant did not provide a specific argument as to error on the January 12, 2012 OWCP decision. He noted only that he was seeking employing establishment medical reports from the 1980's with respect to hearing loss. To the extent that appellant is arguing that the period of schedule award did not reflect the period of his actual hearing loss, there was no clear evidence of error. It is well established that a schedule award begins at the date of maximum medical improvement.¹⁶ The medical evidence determines the date of maximum medical improvement and the degree of impairment,¹⁷ and the number of weeks of compensation is determined by 5 U.S.C. § 8107(c). Complete binaural hearing loss is 200 weeks of compensation, and appellant was paid 80 weeks (40 percent of 200) from July 27, 2010, the date of the most recent audiogram.

The evidence is not sufficient to raise a substantial question as to the correctness of OWCP's decision. As appellant did not establish clear evidence of error, OWCP properly denied merit review.

On appeal, appellant indicated that he was submitting medical evidence that documented his hearing loss, stating that it shows his hearing loss began in 1982. The Board notes that the medical evidence submitted appeared to be copies of the employing establishment audiograms previously of record. To the extent that any new evidence was submitted, the Board cannot review new evidence on appeal.¹⁸ As noted above, the period of the schedule award is not determined by the date an impairment began, but by the date of maximum medical improvement. If appellant believes his employment-related hearing loss has worsened, he may at any time seek an increased schedule award based on new and relevant medical evidence.

CONCLUSION

The Board finds that appellant's application for reconsideration was untimely and failed to show clear evidence of error.

¹⁴ According to 20 C.F.R. § 10.607, the application for reconsideration must be received within one year of OWCP's decision. OWCP procedures provide that, for decisions after August 28, 2011, the date received is the received date in the Integrated Federal Employees' Compensation System (iFECS). Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4 (October 2011).

¹⁵ While a claimant may at any time seek an increased schedule award based on new and relevant evidence regarding a worsening of his condition, (*see Linda T. Brown*, 51 ECAB 115 (1999)), in this case appellant did not submit evidence as to a current impairment but sought reconsideration of the January 12, 2012 OWCP decision.

¹⁶ *Adela Hernandez-Piris*, 35 ECAB 839 (1984); *James T. Rogers*, 33 ECAB 347 (1981).

¹⁷ Under FECA the degree of permanent impairment is determined by application of the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*.

¹⁸ 20 C.F.R. § 501.2(c)(1) provides the Board's review of a case is limited to evidence that was before OWCP at the time of its final decision.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated March 20, 2013 is affirmed.

Issued: November 6, 2013
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