

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 argues the merits of his claim.

FACTUAL HISTORY

On June 11, 2008 appellant, then a 60-year-old mechanic supervisor, filed an occupational disease claim (Form CA-2) alleging that he sustained hearing loss due to factors of his federal employment, including exposure to hazardous noise secondary to pneudraulic equipment, grinders, sand blasting equipment, aircraft engines and quarterly firearms testing. He retired on March 31, 2007.

By decision dated November 7, 2008, OWCP accepted the claim for bilateral hearing loss due to noise. Hearing aids were not authorized.

On December 9, 2008 appellant filed a claim for a schedule award.

OWCP referred appellant to an audiologist to determine the nature and extent of his employment-related hearing loss. On September 30, 2008 an OWCP audiologist found that he had no ratable hearing loss and a date of maximum medical improvement of September 30, 2008.

By decision dated March 3, 2009, OWCP indicated that it had applied the standards of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (6th ed. 2009) to the medical evidence of record and found that appellant's hearing loss was not severe enough to be considered ratable. Thus, it found that he was not entitled to a schedule award.

On March 20, 2009 appellant requested an oral hearing before an OWCP hearing representative, which was held *via* telephone on August 10, 2009.

Subsequently, appellant submitted a March 11, 2009 audiometric evaluation from Dr. Jon A. Winston, an audiologist.

By decision dated October 1, 2009, the hearing representative affirmed the March 3, 2009 decision finding that the medical evidence failed to establish a ratable hearing loss. The hearing representative further found that there was no basis for additional impairment for tinnitus.

On September 13, 2010 appellant requested reconsideration and submitted an audiogram dated August 30, 2010.

By decision dated September 24, 2010, OWCP denied modification of the October 1, 2009 decision on the basis that the August 30, 2010 audiogram did not constitute probative medical evidence as it lacked speech testing and bone conduction scores and was not prepared or certified as accurate by a physician as defined by FECA.

On December 14, 2010 appellant requested reconsideration.

By decision dated January 18, 2011, OWCP denied modification of its September 24, 2010 decision.

Appellant requested reconsideration on May 12, 2011 and submitted additional medical evidence.

By decision dated July 8, 2011, OWCP denied modification of the January 18, 2011 decision.

On November 8, 2011 appellant requested reconsideration and submitted reports from Dr. John W. Ellis, a Board-certified family practitioner and a an audiologic evaluation dated October 4, 2011.

In a November 25, 2011 report an OWCP medical adviser reviewed a statement of accepted facts and the medical evidence of record. He noted that OWCP regulations require all schedule award hearing loss evaluations to be performed by a physician who specializes in disease of the ear and found that Dr. Ellis' qualifications did not meet this criterion.

Subsequently, OWCP referred appellant to Dr. Gregg S. Govett, a Board-certified otolaryngologist, for a second opinion examination to determine the nature and extent of his employment-related hearing loss. On December 30, 2011 Dr. Govett found that appellant had a 27 percent binaural hearing loss and a date of maximum medical improvement of December 30, 2011.

On January 10, 2012 the medical adviser reviewed the medical evidence of record and found that Dr. Govett reported that it was unknown whether or not appellant's hearing loss was employment related and requested an earlier pure-tone average. The medical adviser instructed OWCP to send Dr. Govett a copy of appellant's previous audiograms and request a supplementary report.

In a January 17, 2012 addendum report, Dr. Govett found no significant difference between audiograms dated September 30, 2008 and October 10, 2010 and concluded that appellant's hearing loss was not due to his federal employment.

By decision dated February 2, 2012, OWCP denied modification of its July 8, 2011 decision on the basis that appellant failed to establish a ratable employment-related hearing loss.

On an appeal request form dated January 29, 2013 and received by OWCP on February 4, 2013, appellant requested reconsideration and resubmitted a March 11, 2009 audiogram from Dr. Winston. In a February 5, 2013 narrative statement, he argued that as he had been evaluated by Dr. Winston for reports by Dr. Ellis and Dr. Govett, the decision was no longer impartial and lacked probative value due to his previous association with Dr. Winston.

By decision dated February 28, 2013, OWCP denied appellant's request for reconsideration on the basis that it was untimely filed and failed to present clear evidence of

error. It noted that it did not have jurisdiction over the merits, but reviewed the evidence submitted to determine whether the February 2, 2012 decision was incorrect.³

LEGAL PRECEDENT

Section 8128(a) of FECA does not entitle a claimant to review of an OWCP decision as a matter of right.⁴ OWCP, through its regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a).⁵ One such limitation provides that an application for reconsideration must be submitted within one year of the date of OWCP's decision for which review is sought.⁶ The Board has found that the imposition of this one-year time limitation does not constitute an abuse of the discretionary authority granted OWCP under 5 U.S.C. § 8128(a).⁷

Section 10.607(b) states that OWCP will consider an untimely application for reconsideration only if it demonstrates clear evidence of error by OWCP in its most recent merit decision. The reconsideration request must establish that OWCP's decision was, on its face, erroneous.⁸

To establish clear evidence of error, a claimant must submit evidence relevant to the issue, which was decided by OWCP.⁹ The evidence must be positive, precise and explicit and must be manifest on its face that OWCP committed an error.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 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.¹³

To establish 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

³ In its February 28, 2013 decision, OWCP incorrectly referred to the last merit decision as January 2, 2012. The correct date of the last merit decision is February 2, 2012. The Board finds that OWCP committed harmless error.

⁴ See *Jesus D. Sanchez*, 41 ECAB 964 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

⁵ See *Annette Louise*, 54 ECAB 783, 789-90 (2003).

⁶ 20 C.F.R. § 10.607(a).

⁷ *F.R.*, Docket No. 09-575 (issued January 4, 2010); see *Jesus D. Sanchez*, *supra* note 4.

⁸ 20 C.F.R. § 10.607(b).

⁹ See *Nancy Marcano*, 50 ECAB 110, 114 (1998); *Dean D. Beets*, 43 ECAB 1153, 157-58 (1992).

¹⁰ *M.L.*, Docket No. 09-956 (issued April 15, 2010); see *Fidel E. Perez*, 48 ECAB 663, 665 (1997).

¹¹ See *Richard L. Rhodes*, 50 ECAB 259, 264 (1999).

¹² See *Leona N. Travis*, 43 ECAB 227, 241 (1991).

¹³ See *Jimmy L. Day*, 48 ECAB 652 (1997); *Nelson T. Thompson*, 43 ECAB 919, 922 (1992).

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.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

The Board finds that OWCP properly determined that appellant failed to file a timely request for reconsideration. OWCP regulations¹⁶ and procedures¹⁷ establish a one-year time limit for requesting reconsideration, which begins on the date of the original OWCP decision. A right to reconsideration within one year also accompanies any subsequent merit decision on the issues,¹⁸ including any merit decision by the Board and any merit decision following action by the Board.¹⁹ The most recent merit decision was OWCP's February 2, 2012 decision. Appellant had one year from the date of this decision to make a timely request for reconsideration. Although the appeal request form was dated January 29, 2013, the record shows that it was received by OWCP on February 4, 2013. Since appellant did not file his request until February 4, 2013, it was filed outside the one-year time period. As his February 4, 2013 request for reconsideration was submitted more than one year after the February 2, 2012 merit decision, it was untimely filed. Consequently, appellant must demonstrate clear evidence of error by OWCP in the denial of his claim.²⁰

OWCP denied appellant's claim because the medical evidence was not sufficient to establish that he had a ratable hearing loss entitling him to a schedule award. Along with his request for reconsideration, appellant resubmitted a March 11, 2009 audiogram from Dr. Winston. In his February 5, 2013 narrative statement, he argued that as he had been evaluated by Dr. Winston for reports by Dr. Ellis and Dr. Govett, the opinion was not impartial and lacked probative value due to his previous association with Dr. Winston. The March 11, 2009 audiogram was reviewed by an OWCP hearing representative in a decision dated October 1, 2009 and does not establish clear evidence of error as it does not show that OWCP committed an error in denying appellant's claim on the basis that the medical evidence did not establish a ratable hearing loss, nor does it raise a substantial question as to the correctness of OWCP's decision. Moreover, appellant has not established a prior connection to Dr. Govett. There is no evidence that Dr. Govett's second opinion evaluation lacked impartiality. Thus, the

¹⁴ See *Velvetta C. Coleman*, 48 ECAB 367, 370 (1997).

¹⁵ See *Pete F. Dorso*, 52 ECAB 424 (2001); *Thankamma Matthews*, 44 ECAB 765, 770 (1993).

¹⁶ 20 C.F.R. § 10.607(a); see *Alberta Dukes*, 56 ECAB 247 (2005).

¹⁷ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4 (October 2011); see *supra* note 14.

¹⁸ See *Robert F. Stone*, 57 ECAB 292 (2005).

¹⁹ See *supra* note 17 at Chapter 2.1602.3.b (January 2004).

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

Board finds that the evidence submitted by appellant is not sufficient to establish clear error by OWCP in denying his claim.²¹

To establish clear evidence of error, it is not sufficient merely to show that the evidence could be construed so as to produce a contrary conclusion. The term clear evidence of error is intended to represent a difficult standard.²² None of the evidence submitted manifests on its face that OWCP committed an error in denying appellant's claim. Appellant has not otherwise submitted evidence of sufficient probative value to raise a substantial question as to the correctness of OWCP's decision. Thus, the evidence is insufficient to establish clear evidence of error.²³

On appeal, appellant argues the merits of his claim. As noted above, the Board does not have jurisdiction over the merits of this case.²⁴ Therefore, appellant's arguments are not substantiated.

CONCLUSION

The Board finds that 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.

²¹ See *J.R.*, Docket No. 10-2137 (issued July 12, 2011).

²² *Supra* note 17 at Chapter 2.1602.5 (October 2011); see *Dean D. Beets*, *supra* note 9.

²³ *Cf. B.K.*, 59 ECAB 228 (2007) (where the clamant submitted a request for a schedule award based on new and current medical evidence, OWCP would be required to issue a decision on the schedule award claim rather than adjudicate an application for reconsideration).

²⁴ See *supra* note 2.

ORDER

IT IS HEREBY ORDERED THAT the February 28, 2013 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: February 12, 2014
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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