

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.

FACTUAL HISTORY

On July 27, 2010 appellant, then a 65-year-old supervisory distribution facilities specialist, filed an occupational disease claim (Form CA-2) alleging that he sustained hearing loss due to working around and in high-level noise areas during the course of his federal employment. He first became aware of his hearing loss on May 22, 1985 and first related it to his federal employment on March 31, 2009. Appellant continued to work at the employing establishment in the same position until he retired on September 3, 2010. He had previously received a schedule award for a seven percent binaural (both ears) hearing loss under OWCP File No. xxxxxx587.

In a December 8, 2010 report, Dr. Daryl Bodner, a Board-certified otolaryngologist, diagnosed high frequency sensorineural hearing loss of long-standing duration. He advised that audiometric testing had been conducted, repeated and compared to the best hearing test available to them, which were two tests from 2004. Dr. Bodner determined that appellant's hearing test from December 8, 2010 was very similar to what it was in 2004. He found a slight drop around the frequency level of 500 cycles per second, but appellant's higher frequencies were otherwise fairly stable. Dr. Bodner determined that appellant's discriminations were better on the December 8, 2010 testing than it was in the past.

OWCP referred appellant to Dr. Clifford Steinig, a Board-certified otolaryngologist, for a second opinion examination. In a February 16, 2011 report, Dr. Steinig diagnosed binaural sensorineural hearing loss causally related to noise exposure in appellant's federal employment. He noted that appellant was having significant problems with tinnitus and recommended hearing aids.

By decision dated March 8, 2011, OWCP accepted bilateral hearing loss due to noise.

On March 16, 2011 Dr. Arnold T. Berman, an OWCP medical adviser, opined that appellant had a 42.51 percent binaural hearing loss based on a February 16, 2011 audiogram performed for Dr. Steinig. He found that appellant had reached maximum medical improvement on February 16, 2011 and noted that hearing aids were not authorized.

By decision dated June 30, 2011, OWCP granted a schedule award for 42.51 percent binaural hearing loss, less the 7 percent previously paid under File No. xxxxxx587, resulting in 35.51 percent rounded up to a 36 percent binaural hearing loss. The period of the award was 72 weeks from February 16, 2011, the date of the most recent audiogram and date of maximum medical improvement.

In a May 17, 2012 letter to OWCP, appellant requested continued compensation payments for an additional 72-week period on the basis that he had extreme ringing in both ears. He submitted audiometric testing dated December 8, 2010.

In an appeal request form dated September 29, 2012 and received by OWCP on October 2, 2012, appellant requested reconsideration of his claim. He submitted a letter dated September 28, 2012 requesting 200 weeks of compensation on the basis that he had a 95 percent binaural hearing loss. In an October 22, 2013 letter, appellant reiterated his request for a total of 200 weeks of compensation for his hearing loss and tinnitus. He also submitted pages from the Federal Personnel Manual indicating that 200 weeks was the total number payable for a loss of binaural hearing.

By decision dated November 12, 2013, OWCP denied appellant's request for reconsideration on the basis that it was untimely filed and failed to present clear evidence of error.

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

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

⁸ 20 C.F.R. § 10.607(b).

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

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

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

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

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 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 June 30, 2011 schedule award decision. Appellant had one year from the date of this decision to make a timely request for reconsideration. The appeal request form was dated September 29, 2012 and the record shows that it was received by OWCP on October 2, 2012. There is no evidence, in the form of a postmark, *e.g.*, to establish that appellant requested reconsideration earlier than September 29, 2012. His May 17, 2012 letter to OWCP sought continued compensation based on tinnitus. Appellant did not specify that he sought reconsideration of the June 30, 2011 schedule award. He did not follow the instructions in the schedule award decision regarding reconsideration.²⁰ Since appellant did not file his request until September 29, 2012, it was reviewed outside the one-year time period. As his September 29, 2012 request for reconsideration was submitted more than one year after the June 30, 2011 merit decision, it was untimely filed. Consequently, appellant must demonstrate clear evidence of error by OWCP in the denial of his claim.²¹

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

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 *Velvetta C. Coleman*, *supra* note 14.

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

¹⁹ See Federal (FECA) Procedure Manual *supra* note 17 at Chapter 2.1602.3.b (January 2004).

²⁰ See *Thomas Burns*, 53 ECAB 351 (2002).

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

In his letters, appellant requested an additional 72 weeks of compensation or a total of 200 weeks of compensation. He submitted pages from the Federal Personnel Manual indicating that 200 weeks was the total number payable for a loss of binaural hearing. To the extent that appellant is arguing that the period of schedule award did not reflect the period of his actual hearing loss there is no clear evidence of error.²² It is well established that a schedule award begins at the date of maximum medical improvement.²³ The medical evidence determines the date of maximum medical improvement, the extent of impairment,²⁴ and the number of weeks of compensation under 5 U.S.C. § 8107(c). Complete or 100 percent binaural hearing loss is the equivalent of 200 weeks of compensation. OWCP paid appellant for 72 weeks (36 percent of 200) from February 16, 2011, the date of the most recent audiogram and date of maximum medical improvement. The Board finds that this was proper as neither OWCP nor the Board has the authority to enlarge the terms of FECA or to make an award of benefits under any terms other than those specified in the statute.²⁵

Appellant further argued that he had a 95 percent binaural hearing loss. In support of his claim, he submitted audiometric testing dated December 8, 2010. This evidence is not new, relevant or pertinent as it was interpreted by Dr. Bodner in his December 8, 2010 report, which was previously considered by OWCP in its June 30, 2011 schedule award decision. The medical evidence is not sufficient to raise a substantial question as to the correctness of OWCP's decision. If appellant believes his employment-related hearing loss has worsened, he may at any time seek an increased schedule award based on new relevant and pertinent medical evidence.

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.²⁶ The evidence does not manifest on its face that OWCP committed an error in granting an award of 36 percent on June 30, 2011. Appellant has not otherwise submitted evidence of sufficient probative value to raise a substantial question as to the correctness of OWCP's decision. Accordingly, the Board finds that the evidence he submitted is insufficient to establish clear evidence of error.

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.

²² See *J.T.*, Docket No. 13-1236 (issued November 6, 2013).

²³ See *Adela Hernandez-Piris*, 35 ECAB 839 (1984); *James T. Rogers*, 33 ECAB 347 (1981).

²⁴ 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*.

²⁵ See *E.S.*, Docket No. 10-2096 (issued June 7, 2011); see also *Helen A. Pryor*, 32 ECAB 1313 (1981).

²⁶ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.5 (October 2011); see *Dean D. Beets*, *supra* note 9.

ORDER

IT IS HEREBY ORDERED THAT the November 12, 2013 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 24, 2014
Washington, DC

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

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

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