

employment. He submitted medical evidence in support of his claim from Dr. Laura L. Downey, a Board-certified otolaryngologist.

OWCP referred appellant for a second opinion evaluation with Dr. Chong S. Kim, a Board-certified otolaryngologist. In a report dated November 24, 2008, Dr. Kim reviewed the statement of accepted facts and diagnosed hearing loss. He noted that appellant had a currently nonfunctioning ear of the left and mild-to-moderate sensorineural hearing loss of the right. Dr. Kim opined that appellant's loss of hearing in his left ear was not employment related but due to his diabetes mellitus.

By decision dated December 11, 2008, OWCP accepted appellant's claim for sensorineural hearing loss on the right. It did not accept his hearing loss in the left ear.

In a letter dated December 5, 2009, counsel requested reconsideration of the December 11, 2008 decision and argued that appellant's claim should include hearing loss in the left ear. Appellant's physician continued to support that appellant's loss of hearing in his left ear was due, in part, to noise exposure.

By decision dated August 17, 2010, OWCP reviewed appellant's claim on the merits and found that Dr. Kim's report was entitled to the weight of the medical evidence and denied modification of its prior decision finding no employment-related loss of hearing in the left ear.

Appellant filed a Board appeal on September 20, 2010. The Board issued its decision on July 15, 2011,² finding a conflict of medical opinion evidence between Drs. Downey and Kim and remanded the case to OWCP to refer appellant, a statement of accepted facts, and a list of specific questions to a Board-certified otolaryngologist to determine if his loss of hearing in the left ear is related in any degree to his accepted employment-related noise exposure and if so, whether there was any permanent impairment. The facts and the circumstances of the case up to this point as set out in the Board's prior decision are adopted herein by reference.

Following the Board's decision, OWCP referred appellant for an impartial medical examination with Dr. Anthony DeGennaro, a Board-certified otolaryngologist. In a report dated October 25, 2011, Dr. DeGennaro reviewed appellant's history of noise exposure and his medical history. He diagnosed a mixed hearing loss in the left ear manifested by a 25-decibel air-bone gap, primarily in the lower mid-frequency range with absent stapedial reflexes. Dr. DeGennaro stated that the findings were consistent with bilateral hearing loss. He opined that appellant's left ear was affected to a greater degree due to a conductive overlay secondary to otosclerosis. Dr. DeGennaro concluded that, "there are no findings on the audiometric testing which would connote an indirect hearing loss, due to [appellant's] occupation specifically."

By decision dated November 17, 2011, OWCP denied appellant's claim for loss of hearing in the left ear. It found that Dr. DeGennaro established that appellant's left ear hearing loss was not work related.

² Docket No. 10-2363 (issued July 15, 2011).

Counsel requested an oral hearing before an OWCP hearing representative on November 22, 2011. Appellant testified at the oral hearing on February 14, 2012. He stated that he required a hearing aid for his left ear and that his physician would review Dr. DeGennaro's report.

Dr. Bruce A. Edelman, a Board-certified otolaryngologist, completed a report on February 27, 2012 and noted appellant's history of asymmetric sensorineural hearing loss and significant noise exposure at work. He noted appellant's significant asymmetric discrimination and the issues of whether appellant had conductive component in his left ear and otosclerosis. Dr. Edelman noted appellant's concurrent conditions of hypertension and diabetes. He found that both ears showed some sclerosis of the eardrums consistent with chronic inflammation of the eardrums over his lifetime. Dr. Edelman reviewed an audiogram which demonstrated an asymmetric hearing loss and diagnosed this condition. He noted that there was a no significant conductive component to appellant's hearing loss. Dr. Edelman stated, "There is no question that he might have a high frequency sensorineural hearing loss ... secondary to noise exposure. I do not have a good explanation for his left-sided hearing loss. Whether there is any noise-induced hearing loss cannot be determined if he had a severe asymmetric loss which was relatively sudden in nature."

Appellant's attending physician, Dr. Downey completed a report on March 4, 2012 and found deficiencies in Dr. DeGennaro's report. She noted that appellant had severe-to-profound sensorineural loss on the left ear. Dr. Downey reported, "It is impossible to determine if there is an air-bone gap as bone conduction is vibrotactile at that level." She noted that appellant had poor discrimination on the left ear. Dr. Downey opined that poor discrimination was not consistent with otosclerosis and therefore unlikely to be the primary cause of the neural loss on the left ear which was not congenital.

By decision dated April 30, 2012, the hearing representative found that Dr. DeGennaro's report was entitled to the weight of the medical opinion evidence and was sufficiently well rationalized to establish that appellant's left ear hearing loss was not causally related to his employment.

In a letter dated May 14, 2013, counsel stated that he had requested reconsideration on May 10, 2012. He included a copy of this request and submitted the reports from Dr. Edelman dated February 27, 2012 and Dr. Downey dated March 4, 2012. The initial request for reconsideration was dated May 10, 2012. On December 19, 2013 counsel asked when a decision on his reconsideration requests would be issued. On March 26, 2014 he again asked when his reconsideration requests would be addressed.

By decision dated April 8, 2014, OWCP denied appellant's requests for reconsideration as untimely filed and failing to establish clear evidence of error.

LEGAL PRECEDENT

Section 8128(a) of FECA³ does not entitle a claimant to a review of an OWCP decision as a matter of right.⁴ This section vests OWCP with discretionary authority to determine whether it will review an award for or against compensation.⁵ OWCP, through regulations, has imposed limitations on the exercise of its discretionary authority. One such limitation is that OWCP will not review a decision denying or terminating a benefit unless the application for review is timely. In order to be timely, a request for reconsideration must be received by OWCP within one year of the date of its merit 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

In those cases where requests for reconsideration are untimely filed, the Board has held that OWCP must nevertheless undertake a limited review of the case to determine whether there is clear evidence of error pursuant to the untimely request.⁸ OWCP's procedures state that it will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth in OWCP's regulations, if the claimant's request for reconsideration shows "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

³ 5 U.S.C. § 8128(a).

⁴ *Thankamma Mathews*, 44 ECAB 765, 768 (1993).

⁵ *Id.* at 768; *see also Jesus D. Sanchez*, 41 ECAB 964, 966 (1990).

⁶ 20 C.F.R. § 10.607; Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4 (October 2011).

⁷ *Supra* note 4 at 769; *Jesus D. Sanchez*, *supra* note 5 at 967.

⁸ *Supra* note 4 at 770.

⁹ *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, *supra* note 6.

¹⁰ *Supra* note 4.

¹¹ *Leona N. Travis*, 43 ECAB 227, 241 (1991).

¹² *Jesus D. Sanchez*, *supra* note 5 at 968.

¹³ *Supra* note 11.

¹⁴ *Nelson T. Thompson*, 43 ECAB 919, 922 (1992).

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.¹⁵ The Board must make 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.

ANALYSIS

The Board finds that OWCP properly declined to reopen appellant's claim for consideration of the merits as the request was untimely filed and did not establish clear evidence of error.

On prior appeal, the Board remanded this case for OWCP to develop whether appellant's loss of hearing in his left ear was due to his employment by referral to an impartial medical examiner. OWCP undertook this development and found that the weight of the medical evidence did not establish an employment-related loss of hearing in the left ear. Appellant requested an oral hearing and the hearing representative agreed with this conclusion in a merit decision dated April 30, 2012. Accordingly, he had one year from April 30, 2012 to make a timely request for reconsideration. A right to reconsideration within one year accompanies any merit decision on the issues.¹⁶

Appellant, through counsel, requested reconsideration by letter dated and received by OWCP on May 14, 2013. The Board finds that the copy of a May 10, 2012 document labeled "reconsideration" is not evidence that the document was received by OWCP. The record, at most, establishes that the document was prepared on that date. Thus, it is insufficient evidence to establish that a reconsideration request in this case was timely filed. As the request for reconsideration, dated May 14, 2013, was received more than one year after the April 30, 2012 decision, the Board finds that OWCP properly found that this request for reconsideration was untimely on its face. Consequentially, appellant must demonstrate clear evidence of error by OWCP in denying his claim for compensation.¹⁷

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

¹⁶ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4a (October 2011).

¹⁷ 20 C.F.R. § 10.607(b).

In support of the reconsideration request, counsel resubmitted the March 4, 2012 report from Dr. Downey and the February 27, 2012 report from Dr. Edelman. Both of these reports were already of record and had been reviewed by OWCP.¹⁸

In resubmitting this evidence, appellant failed to explain how it manifested on its face that OWCP committed an error in denying his claim for compensation. Resubmission of this evidence is insufficient to raise a substantial question as to the correctness of OWCP's decision and thus is insufficient to show clear evidence of error.

The Board finds that appellant has not submitted any evidence of sufficient probative value to shift the weight of the evidence in his favor and raise a substantial question as to the correctness of OWCP's decision. Consequently, OWCP properly denied his reconsideration request as it did not establish clear evidence of error.¹⁹

CONCLUSION

The Board finds that OWCP properly determined that appellant's request for reconsideration was not timely filed and failed to establish clear evidence of error.

¹⁸ *Z.T.*, Docket No. 15-0250 (issued July 16, 2015) (where the Board found that in a clear evidence of error case an appellant must explain how a repetitious medical report manifested on its face that OWCP committed an error in denying the claim for compensation because mere resubmission of the medical evidence only is not sufficient to raise a substantial question as to the correctness of OWCP's decision and thus is insufficient to show clear evidence of error). *See also A.C.*, Docket No. 14-1883 (issued January 26, 2015) (appellant did not explain how the resubmission of a medical report showed clear evidence of error).

¹⁹ *See A.C., id.*

ORDER

IT IS HEREBY ORDERED THAT the April 8, 2014 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 16, 2015
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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