

FACTUAL HISTORY

On May 30, 2012 appellant, then a 66-year-old rigger, filed an occupational disease claim (Form CA-2) alleging that he sustained ringing in both ears and that it became hard to understand words in noisy work environments and normal conversations. He stopped work and retired on May 31, 2012.

By letter dated June 14, 2012, OWCP informed appellant of the type of evidence needed to support his claim and requested that he submit such evidence within 30 days.

OWCP received employing establishment audiograms and appellant's work history.

In a June 19, 2012 statement, Robert Richins, an employing establishment human resource specialist, concurred that appellant was in the hearing conservation program. He noted that a worksheet regarding appellant's occupational exposure to noise would be submitted to OWCP along with appellant's job sheet, copies of all medical examinations, appellant's employment record, and a Form SF-171.

In a letter dated July 25, 2012, OWCP advised appellant that additional evidence was needed, including clarification regarding his work history. No response was received.

By decision dated August 15, 2012, OWCP denied appellant's claim. It found that appellant had not identified his position or the source of work-related noise exposure, with inclusive dates, that he believed caused or contributed to the claimed condition of hearing loss. OWCP also advised that appellant had not provided his entire employment history and listing of noise exposure in other positions.

On August 17, 2012 OWCP received a July 30, 2012 letter from the employing establishment advising that since June 29, 1989 appellant was intermittently exposed to a sound level range of 100 to 110 decibels during tool use. Appellant also was exposed to sound level ranging from 75 to 89 decibels from background ship and shop noise.

In a letter dated January 3, 2013, Maddie Mason, an employing establishment human resource specialist, concurred that appellant participated in a hearing conservation program. She provided copies of his job sheet, employment record, and the Form SF-171. Additionally, Ms. Mason provided a summary of appellant's occupational exposure to noise. In a July 30, 2012 memorandum, the employing establishment provided a summary of appellant's occupational exposure to noise.

In a September 9, 2015 letter, received on September 21, 2015, appellant requested reconsideration. He stated that he filed a claim for hearing loss in 2012 and it was denied on August 15, 2012. Appellant explained that his claim was denied because he had not specifically stated that he was employed as a rigger at the employing establishment from 1989 to May 31, 2012. He noted that he submitted his claim in a timely manner and also sent copies of his hearing tests which showed that he was a rigger the entire time. Appellant also noted that the employing establishment had submitted the information to OWCP, confirming that he was employed as a rigger and exposed to levels of noise in the work environment. He advised that on September 21, 2009 he was evaluated at the employing establishment dispensary with the result

being sensorineural hearing loss most likely noise induced. Appellant resubmitted the employing establishment's January 3, 2013 letter.

By decision dated October 5, 2015, OWCP denied appellant's request for reconsideration finding that it was untimely filed and failed to demonstrate clear evidence of error.

LEGAL PRECEDENT

Section 8128(a) of FECA vests OWCP with discretionary authority to determine whether it will review an award for or against compensation:

“The Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application. The Secretary, in accordance with the facts found on review may --

- (1) end, decrease, or increase the compensation awarded; or
- (2) award compensation previously refused or discontinued.”²

OWCP, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a). As one such limitation, section 10.607(a) of the implementing regulations provide that an application for reconsideration must be received within one year of the date of OWCP's decision for which review is sought.³ However, OWCP will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation, if the claimant's application for review demonstrates clear evidence of error on the part of OWCP in its most recent merit decision. To demonstrate clear evidence of error, a claimant must submit evidence relevant to the issue that was decided by OWCP. The evidence must be positive, precise, and explicit and must be manifest on its face that OWCP committed an error.⁴

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.⁵ Evidence that does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to demonstrate clear evidence of error.⁶ It is not enough merely to establish that the evidence could be construed so as to produce a contrary conclusion.⁷ This entails a limited review by OWCP of the evidence previously of record and whether the new evidence demonstrates clear error on the

² 5 U.S.C. § 8128(a).

³ 20 C.F.R. § 10.607(a)

⁴ *Id.* at § 10.607(b); *Fidel E. Perez*, 48 ECAB 663 (1997).

⁵ *Annie L. Billingsley*, 50 ECAB 210 (1998).

⁶ *Jimmy L. Day*, 48 ECAB 652 (1997).

⁷ *Id.*

part of OWCP.⁸ The Board makes an independent determination of whether a claimant has submitted clear evidence of error on the part of OWCP.⁹

ANALYSIS

In its October 5, 2015 decision, OWCP properly determined that appellant failed to file a timely application for review. It rendered its last merit decision on August 15, 2012. Appellant's September 9, 2015 letter requesting reconsideration was received on September 21, 2015, more than one year after the August 15, 2012 merit decision and was, therefore, untimely filed.¹⁰

The Board has reviewed the record and finds that the evidence submitted in the untimely request for reconsideration does not raise a substantial question as to the correctness of OWCP's decision and is therefore insufficient to demonstrate clear evidence of error.

In its August 15, 2012 decision, OWCP found that appellant had not sufficiently identified his position or source of workplace noise exposure that he believed caused or contributed to the claimed condition of hearing loss. It also found that he had not sufficiently identified any nonworkplace sources of noise. Following OWCP's decision, it received a July 30, 2012 letter from the employing establishment noting appellant's noise exposure levels since June 29, 1989. The employing establishment provided a January 3, 2013 letter from Ms. Mason who indicated that appellant was in the hearing conservation program and provided copies of personnel records. In his September 9, 2015 letter, appellant noted that the documentation from the employing establishment confirmed his occupation as a rigger and his exposure to noise. The Board finds that this evidence does not establish clear evidence of error. The July 30, 2012 and January 3, 2013 letters do not show that appellant established work-related hearing loss. They merely confirm that he was in the hearing conservation program and summarized his workplace noise exposure. The Board finds that OWCP had already accepted the claim as timely filed and this evidence is insufficient raise a substantial question as to the correctness of OWCP's decision.¹¹

This evidence alone does not establish error in the denial of the claim. As noted, clear evidence of error is not demonstrated merely because that the evidence could be construed so as to produce a contrary conclusion.¹² The term "clear evidence of error" is intended to represent a difficult standard. The claimant must present evidence which on its face shows that OWCP made an error (for example, proof of a miscalculation in a schedule award). Evidence such as a detailed, well-rationalized report, which if submitted prior to OWCP's denial, would have

⁸ *Id.*

⁹ *Nancy Marcano*, 50 ECAB 110 (1998).

¹⁰ *See supra* note 5. The reconsideration request must be received by OWCP within one year of the date of OWCP's decision for which review is sought.

¹¹ *See supra* note 5.

¹² *See supra* note 7.

created a conflict in medical opinion requiring further development, is not clear evidence of error and would not require a review of a case.¹³

The Board finds that this evidence is insufficient to shift the weight of the evidence in favor of appellant's claim or raise a substantial question that OWCP erred in denying appellant's claim for hearing loss. Therefore, the Board finds that appellant has not demonstrated clear evidence of error.

On appeal, appellant argued that his claim was not given a merit review. However, for the above-noted reasons, he is not entitled to a merit review.

CONCLUSION

The Board finds that OWCP properly refused to reopen appellant's claim for reconsideration of the merits because his request was untimely filed and failed to demonstrate clear evidence of error.

ORDER

IT IS HEREBY ORDERED THAT the October 5, 2015 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 20, 2016
Washington, DC

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

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

¹³ *Annie L. Billingsley*, 50 ECAB 210 (1998).