

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

L.H., Appellant)	
)	
and)	Docket No. 18-1277
)	Issued: February 22, 2019
DEPARTMENT OF THE ARMY,)	
RICHARDSON TRAINING AREA, JOINT)	
BASE ELMENDORF-RICHARSON, AK,)	
Employer)	

Appearances: *Case Submitted on the Record*
Jeffrey P. Zeelander, Esq., for the appellant¹
Office of Solicitor, for the Director

DECISION AND ORDER

Before:
PATRICIA H. FITZGERALD, Deputy Chief Judge
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On June 11, 2018 appellant, through counsel, filed a timely appeal from a May 29, 2018 nonmerit decision of the Office of Workers’ Compensation Programs (OWCP). As more than 180 days elapsed from the last merit decision, dated October 1, 2015, to the filing of this appeal, pursuant to the Federal Employees’ Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction over the merits of this claim.

¹ In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative’s collection of a fee without the Board’s approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; see also 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

² 5 U.S.C. § 8101 *et seq.*

ISSUE

The issue is whether OWCP properly denied appellant's request for reconsideration, finding that it was untimely filed and failed to demonstrate clear evidence of error.

FACTUAL HISTORY

On April 30, 2015 appellant, then a 61-year-old range control maintenance worker, filed an occupational disease claim (Form CA-2) alleging bilateral hearing loss and tinnitus, which he attributed to work-related noise exposure. He alleged that he was exposed to higher than normal noise levels working at shooting ranges during training, operating heavy equipment, working in power plants, and while using power tools. Appellant identified April 20, 2015 as the date he first became aware of his condition and its relation to his federal employment.

After obtaining additional information regarding appellant's occupational noise exposure, as well as employing establishment hearing conservation audiograms dating back to January 8, 2007, OWCP prepared a statement of accepted facts (SOAF) and referred him for additional audiometric testing and an evaluation by Dr. Creed Mamikunian, a Board-certified otolaryngologist.

In a July 24, 2015 report, Dr. Mamikunian noted that appellant had worked for the employing establishment since 2009 and had been exposed to loud noises in his role as a range maintenance worker. He reviewed the results of appellant's previous audiograms and obtained a current audiogram.³ Dr. Mamikunian related that according to appellant's baseline audiogram from January 8, 2007, appellant had hearing loss in the left ear at 2,000, 3,000, and 4,000 Hertz (Hz), of 15, 35, and 50 decibels (dBs) and in the right ear of 5, 40, and 50 dBs. Upon physical examination of appellant's ears, he observed that both external ear canals, tympanic membranes, and drum mobility were normal.

In response to OWCP's questions, Dr. Mamikunian reported that at the time of appellant's employment, he had already exhibited fairly significant hearing losses in both ears at 3,000 and 4,000 Hz, which was consistent with significant loud noise exposure prior to his federal employment. He answered "No" that appellant's current hearing loss was not in excess of what would be normally predicated on the basis of presbycusis. Dr. Mamikunian explained that appellant's drop in hearing at 2,000 Hz is predicted and anticipated with the passage of eight years based on his previous loud noise exposure. He also responded "No," indicating that appellant's workplace exposure as provided was insufficient in intensity and duration to have caused (or materially impacted) his hearing loss. Dr. Mamikunian opined that appellant's hearing loss was most likely a progression of a preexisting hearing loss caused by decades-long noise exposure prior to his federal employment.

By decision dated October 1, 2015, OWCP denied appellant's occupational disease claim. It accepted his employment factors as alleged and that he was diagnosed with hearing loss, but

³ Dr. Mamikunian did not rely on appellant's most recent audiogram dated September 3, 2015. He noted that the current results showed fairly significant differences from a previous audiogram dated April 7, 2015. Dr. Mamikunian requested that appellant undergo a new audiogram.

denied his claim because the medical evidence submitted was insufficient to establish causal relationship between his diagnosed hearing loss and the accepted factors of his federal employment.

On March 30, 2018 appellant, through counsel, requested reconsideration. Counsel acknowledged that appellant's request was untimely. He argued that there was clear evidence of error because OWCP failed to advise the second opinion examiner of the appropriate causation standard. Counsel further argued that Dr. Mamikunian did not provide adequate medical rationale in attributing appellant's current hearing loss to a preexisting hearing condition/loss.

By decision dated May 29, 2018, OWCP denied appellant's reconsideration request finding that it was untimely filed and failed to demonstrate that OWCP's October 1, 2015 decision was issued in 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 has discretionary authority in this regard and has imposed certain limitations in exercising its authority.⁵ One such limitation is that the request for reconsideration must be received by OWCP within one year of the date of the decision for which review is sought.⁶ Timeliness is determined by the document receipt date of the request for reconsideration as is indicated by the "received date" in the integrated Federal Employees' Compensation System.⁷ OWCP will consider an untimely request for reconsideration only if the request demonstrates clear evidence of error on the part of OWCP in its most recent merit decision.⁸ The request must establish on its face that such decision was erroneous.⁹ Where a request is untimely and fails to demonstrate clear evidence of error, OWCP will deny the request for reconsideration without reopening the case for a review of the merits.¹⁰

To demonstrate clear evidence of error, a claimant must submit evidence relevant to the issue decided by OWCP. The evidence must be positive, precise, and explicit, and it must manifest on its face that OWCP committed an error.¹¹ It is not enough merely to show that the evidence

⁴ This section provides in pertinent part: the Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application. 5 U.S.C. § 8128(a).

⁵ 20 C.F.R. § 10.607.

⁶ *Id.* at § 10.607(a). For merit decisions issued on or after August 29, 2011, a request for reconsideration must be received by OWCP within one year of OWCP's decision for which review is sought. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4 (February 2016).

⁷ *Id.* at Chapter 2.1602.4(b).

⁸ 20 C.F.R. § 10.607(b).

⁹ *Id.*

¹⁰ *Id.* at § 10.608(b).

¹¹ *Id.* at § 10.607(b); *Fidel E. Perez*, 48 ECAB 663 (1997).

could be construed so as to produce a contrary conclusion.¹² The evidence submitted must not only be of sufficient probative value to create a conflict in medical opinion or demonstrate 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.¹³ The Board has held that even a report such as a detailed, well-rationalized medical report which, if submitted before the denial was issued, would have created a conflict in medical evidence requiring further development is insufficient to demonstrate clear evidence of error.¹⁴ OWCP procedures further provide that the term clear evidence of error is intended to represent a difficult standard.¹⁵

The Board makes an independent determination of whether a claimant has demonstrated clear evidence of error on the part of OWCP such that it abused its discretion in denying merit review in the face of such evidence.¹⁶

ANALYSIS

The Board finds that OWCP properly denied appellant's request for reconsideration as it was untimely filed and failed to demonstrate clear evidence of error.

OWCP's latest merit decision was dated October 1, 2015. It received appellant's request for reconsideration on March 30, 2018, which counsel acknowledged was untimely filed. Because OWCP received his request for reconsideration more than a year after its last merit decision, the request was untimely filed and he must demonstrate clear evidence of error on the part of OWCP in its October 1, 2015 decision.¹⁷

The Board has reviewed the record and finds that appellant's arguments on reconsideration do not raise a substantial question as to the correctness of OWCP's October 1, 2015 merit decision or shift the weight of the evidence of record in his favor.

In its most recent merit decision, OWCP denied appellant's claim for hearing loss finding that the weight of the medical evidence rested with the July 24, 2015 second opinion report of Dr. Mamikunian, which noted that appellant's bilateral hearing loss and tinnitus was not causally related to his federal employment. On reconsideration, counsel argued that OWCP provided Dr. Mamikunian an incorrect standard of causation under FECA and that the second opinion examiner failed to adequately explain his opinion on causal relationship. First, Federal (FECA) Procedure Manual does not mandate that OWCP provide definitions of causation to its referral physicians. However, it does require that a SOAF be prepared and that questions should be as

¹² See *Leona N. Travis*, 43 ECAB 227, 240 (1991).

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

¹⁴ *A.R.*, Docket No. 15-1598 (issued December 7, 2015).

¹⁵ *Supra* note 6 at Chapter 2.1602.5a (October 2011).

¹⁶ *Cresenciano Martinez*, 51 ECAB 322 (2000); *Thankamma Matthews*, 44 ECAB 765, 770 (1993).

¹⁷ *Supra* notes 6 and 8.

precise as possible and tailored to the particular case at hand.¹⁸ Second, the Board finds that Dr. Mamikunian provided a well-rationalized opinion on causal relationship, which was based on a complete factual background, a SOAF, a review of the medical record, and physical examination findings.¹⁹ On reconsideration, appellant did not submit any medical evidence to show that his hearing loss was causally related to his federal employment or otherwise raise a substantial question as to the correctness of OWCP's decision.²⁰

The term clear evidence of error is intended to represent a difficult standard.²¹ Even a detailed, well-rationalized medical report which would have created a conflict in medical opinion requiring further development if submitted prior to issuance of the denial decision, does not constitute clear evidence of error.²² It is not enough to show that evidence could be construed so as to produce a contrary conclusion. Instead, the evidence must shift the weight in appellant's favor.²³

The Board finds that appellant and his counsel have failed to support his reconsideration request with evidence or argument demonstrating that OWCP's October 1, 2015 decision was clearly erroneous. Appellant's request was insufficient to *prima facie* shift the weight of the evidence in his favor or raise a substantial question that OWCP erred in its October 1, 2015 decision. Thus, OWCP properly denied his request for reconsideration as it was untimely filed and failed to demonstrate clear evidence of error.

CONCLUSION

OWCP properly denied appellant's request for reconsideration, finding that it was untimely filed and failed to demonstrate clear evidence of error.

¹⁸ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Causal Relationship*, Chapter 2.805.5(d) (January 2013); *see also id.* Part 3 -- Medical, *OWCP Directed Medical Examinations*, Chapter 3.500.3(c) (July 2011).

¹⁹ *See M.D.*, 59 ECAB 211 (2007).

²⁰ *See T.W.*, Docket No. 13-0594 (issued August 5, 2013).

²¹ *Supra* note 14.

²² *Supra* note 13.

²³ *Supra* note 12.

ORDER

IT IS HEREBY ORDERED THAT the May 29, 2018 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: February 22, 2019
Washington, DC

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

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

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board