

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

J.H., Appellant

and

**U.S. POSTAL SERVICE, VALLEY HI POST
OFFICE, San Antonio, TX, Employer**

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**Docket No. 20-1097
Issued: December 18, 2020**

Appearances:

*Victor O. Enriquez, Esq., for the appellant¹
Office of Solicitor, for the Director*

Case Submitted on the Record

DECISION AND ORDER

Before:

CHRISTOPHER J. GODFREY, Deputy Chief Judge
JANICE B. ASKIN, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On April 8, 2020 appellant, through counsel, filed a timely appeal from an October 15, 2019 nonmerit decision of the Office of Workers' Compensation Programs (OWCP).² As more than 180 days has elapsed from OWCP's last merit decision, dated August 4, 2015, to the filing of

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 Under the Board's *Rules of Procedure*, an appeal must be filed within 180 days from the date of issuance of an OWCP decision. An appeal is considered filed upon receipt by the Clerk of the Appellate Boards. *See* 20 C.F.R. § 501.3(e)-(f). One hundred and eighty days from October 15, 2019, the date of OWCP's last decision, was April 12, 2020. As this fell on a Sunday, appellant had until the following business day, Monday, April 13, 2020, to file the appeal. Since using April 14, 2020, the date the appeal was received by the Clerk of the Appellate Boards would result in the loss of appeal rights, the date of the postmark is considered the date of filing. The date of the U.S. Postal Service postmark is April 8, 2020, rendering the appeal timely filed. *See* 20 C.F.R. § 501.3(f)(1).

this appeal, pursuant to the Federal Employees' Compensation Act³ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction over the merits of this case.⁴

ISSUE

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

FACTUAL HISTORY

On May 27, 2005 appellant, then a 47-year-old mail carrier, filed a traumatic injury claim (Form CA-1) alleging that on May 26, 2005 he sustained hearing loss, pain, ringing in both ears, and a headache when lightning struck a tree that was 50 feet away from where he was delivering mail while in the performance of duty. He did not stop work. OWCP accepted appellant's claim for binaural hearing loss and tinnitus. It subsequently expanded acceptance of his claim to include abnormality of gait, bilateral peripheral vertigo, bilateral vertigo of central origin, and variants of migraine.

Appellant filed a claim for a schedule award (Form CA-7) on July 20, 2007. In support of the claim, he submitted an August 9, 2006 attending physician's report by Dr. Charles A. Syms, III, Board-certified in otolaryngology and neurotology, who provided diagnoses of sensorineural hearing loss and tinnitus.

Based on the examination of the second opinion physician, Dr. William Carl Smith, a Board-certified otolaryngologist, and concurred in by Dr. R. Meador, an OWCP district medical adviser (DMA), on March 3, 2008 OWCP granted appellant a schedule award for 10 percent binaural hearing loss. The period of the award ran for 20 weeks September 10, 2007 to January 27, 2008.

On July 23, 2014 appellant filed a claim for an increased schedule award (Form CA-7).

Appellant submitted an August 22, 2014 letter from Dr. Lance E. Jackson, a Board-certified otolaryngologist and neurologist, who reported that he had conducted a hearing evaluation on January 7, 2014, to determine appellant's level of impairment to both hearing and the whole body. Dr. Jackson indicated that, according to the American Medical Association, *Guides to the*

³ 5 U.S.C. § 8101 *et seq.*

⁴ The Board notes that, following the issuance of the October 15, 2019 decision, OWCP received additional evidence. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

Evaluation of Permanent Impairment (A.M.A., *Guides*),⁵ appellant had .63 percent permanent impairment due to binaural hearing loss and 0 percent whole person impairment.

In a September 30, 2014 memorandum of a telephone call (Form CA-110), appellant informed OWCP that he was trying to obtain a schedule award for his accepted conditions, other than hearing loss. In an October 28, 2014 Form CA-110, OWCP advised him that his remaining additional conditions were not ratable conditions for purposes of receiving another schedule award.

On May 29, 2015 OWCP referred appellant to Dr. John D. Edwards, a Board-certified otolaryngologist, for a second opinion evaluation. In a June 29, 2015 report, Dr. Edwards noted appellant's history of injury and medical treatment. An audiogram performed that day demonstrated that at the frequency levels of 500, 1,000, 2,000, and 3,000 Hertz (Hz), right ear decibel (dB) losses were 25, 20, 25, and 25, and left ear dB losses were 25, 20, 25, and 20, respectively. Dr. Edwards noted appellant's examination findings and diagnosed binaural hearing loss and tinnitus. He opined that appellant's conditions were due to appellant's federal employment. Dr. Edwards indicated that appellant's hearing loss had been stable since 2006. He applied the sixth edition of the A.M.A., *Guides* and calculated that appellant had no additional permanent impairment. Dr. Edwards reported that appellant had reached maximum medical improvement (MMI) as of the date of appellant's examination.

In a July 29, 2015 report, Dr. Michael M. Katz, a Board-certified orthopedic surgeon serving as a DMA, opined that appellant sustained binaural hearing loss due to federal noise exposure. He noted that appellant had previously received a schedule award for 10 percent binaural hearing loss. The DMA utilized the June 29, 2015 audiogram and determined that, according to the A.M.A., *Guides*, appellant was not entitled to an additional schedule award due to his binaural hearing loss.

By decision dated August 4, 2015, OWCP denied appellant's claim for an increased schedule award. It found that he had not submitted evidence demonstrating greater permanent impairment than the 10 percent previously awarded for binaural hearing loss.

Appellant continued to receive medical treatment for his accepted conditions and submitted medical reports, including referral forms, physical therapy treatment records and audiological testing dated July 31, August 31, and December 12, 2018.

On August 27, 2019 appellant requested reconsideration and submitted additional medical evidence. In an August 21, 2019 letter, he alleged that he was requesting reconsideration because his hearing loss and tinnitus had increased considerably over the past three years.

In a June 21, 2018 letter, Dr. Syms indicated that appellant was a patient in his office and was diagnosed with mild-to-moderate sensorineural hearing loss in the right ear and mild sensorineural hearing loss in the left ear. He reported that appellant also had tinnitus in both ears and was medically cleared for hearing aids.

⁵ A.M.A., *Guides* (6th ed. 2009).

OWCP also received a March 8, 2019 impairment rating evaluation report by Dr. Kesturkoppal Muralidhara, who specializes in pediatric medicine. Dr. Muralidhara reviewed appellant's history of injury and noted that he had previously received a schedule award for 10 percent binaural hearing loss. He noted physical examination findings and diagnosed bilateral tinnitus, binaural sensorineural hearing loss, abnormal gait, bilateral peripheral vertigo, bilateral origin vertigo, and other migraine. Dr. Muralidhara indicated that appellant was referred to their office for a repeat examination in order to determine whether appellant had developed worsening of his hearing. He reported that an audiogram performed on March 11, 2019 demonstrated that at the frequency levels of 500, 1,000, 2,000, and 3,000 Hz, appellant had a right ear dB loss of 275 and a left ear dB loss of 300. Dr. Muralidhara utilized Table 11-2 of the sixth edition of the A.M.A., *Guides* and calculated that appellant had 67.2 percent permanent impairment due to binaural hearing loss, which converted to 24 percent whole person impairment for hearing loss. He also noted that appellant had additional five percent permanent impairment for bilateral tinnitus, which was not awarded on his initial schedule award. Dr. Muralidhara concluded that, because appellant was previously awarded 10 percent permanent impairment, he was entitled to an additional 19 percent permanent impairment for his binaural hearing loss.

In a March 11, 2019 report, Dr. Pedro S. Montano, a Board-certified otolaryngologist, recounted that appellant was evaluated for complaints of progressing hearing loss and dizziness. He conducted an examination and diagnosed vertigo, airway obstruction, nose septum deviation, tinnitus of both ears, noise-induced hearing loss of both ears, and intractable migraine without aura. Dr. Montano reported that according to the sixth edition of the A.M.A., *Guides* appellant had 24 percent whole person impairment for hearing loss and an additional 5 percent permanent impairment for bilateral tinnitus.

By an October 15, 2019 decision, OWCP denied appellant's reconsideration request, finding that it was untimely filed and failed to demonstrate clear evidence of error.

LEGAL PRECEDENT

To be entitled to a merit review of an OWCP decision denying or terminating a benefit, a request for reconsideration must be received by OWCP within one year of the date of OWCP's 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 (iFECS).⁷ The Board has found that the imposition of the one-year time limitation does not constitute an abuse of the discretionary authority granted OWCP under section 8128(a) of FECA.⁸

OWCP may not deny a request for reconsideration solely because it was untimely filed. When a request for reconsideration is untimely filed, it must nevertheless undertake a limited

⁶ 20 C.F.R. § 10.607(a).

⁷ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4(b) (February 2016).

⁸ *G.L.*, Docket No. 18-0852 (issued January 14, 2020).

review to determine whether the request demonstrates clear evidence of error.⁹ OWCP's regulations and procedures provide that OWCP will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth in 20 C.F.R. § 10.607(a), if the claimant's request demonstrates clear evidence of error on the part of OWCP.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 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 evidence of error on the part of OWCP.¹³ 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.¹⁴

In schedule award cases, a distinction is made between an application for a schedule award and a request for reconsideration of the denial of a schedule award. When a claimant is asserting that the original award was erroneous based on his or her medical condition at that time, this is a request for reconsideration.¹⁵ OWCP's procedures provide that, if a claimant is seeking an increased schedule award due to increased impairment and/or additional exposure, but not contesting the decision or prior award, this should not be treated as a reconsideration request.¹⁶

ANALYSIS

The Board finds that OWCP improperly denied appellant's request for reconsideration by adjudicating his schedule award claim under the standard for untimely reconsideration requests.

⁹ 20 C.F.R. § 10.607(b); *R.S.*, Docket No. 19-0180 (issued December 5, 2019).

¹⁰ *Id.*; *supra* note 7 at Chapter 2.1602.5(a).

¹¹ 20 C.F.R. § 10.607(b); *B.W.*, Docket No. 19-0626 (issued March 4, 2020); *Fidel E. Perez*, 48 ECAB 663, 665 (1997).

¹² *See G.B.*, Docket No. 19-1762 (issued March 10, 2020); *Leona N. Travis*, 43 ECAB 227, 240 (1991).

¹³ *B.W.*, *supra* note 11.

¹⁴ *Id.*; *Cresenciano Martinez*, 51 ECAB 322 (2000); *Thankamma Matthews*, 44 ECAB 765, 770 (1993).

¹⁵ *L.D.*, Docket No. 17-1946 (issued August 23, 2018); *C.M.*, Docket No. 17-0310 (issued February 15, 2017); *J.F.*, Docket No. 13-0112 (issued November 6, 2013); *see also B.K.*, 59 ECAB 228 (2007) (where it was evident that the claimant was seeking a schedule award based on new and current medical evidence, OWCP should have issued a merit decision on the schedule award claim rather than adjudicate an application for reconsideration).

¹⁶ *Supra* note 7 at Chapter 2.1602.3(b) (February 2016).

On August 27, 2019 appellant requested reconsideration of the August 4, 2015 decision denying additional schedule award. He alleged that his hearing loss and tinnitus had increased considerably over the past three years and provided new medical evidence.

Appellant submitted a March 8, 2019 impairment rating evaluation report by Dr. Muralidhara, who reviewed appellant's history of injury and provided physical examination findings. Dr. Muralidhara referred to a March 11, 2019 audiogram and indicated that appellant had a right ear dB loss of 275 and a left ear dB loss of 300. He utilized Table 11-2 of the sixth edition of the A.M.A., *Guides* and calculated that appellant was entitled to an additional 19 percent permanent impairment for his binaural hearing loss. Dr. Muralidhara also reported that appellant had an additional five percent permanent impairment for bilateral tinnitus, which was not awarded on appellant's initial schedule award.

Similarly, Dr. Montano reported on March 11, 2019 that based on the sixth edition of the A.M.A., *Guides* appellant had an additional five percent permanent impairment for bilateral tinnitus.

As in *Paul R. Reedy*,¹⁷ OWCP's October 15, 2019 decision treated appellant's claim as a request for reconsideration. The Board finds, however, that he was not seeking reconsideration of the previous August 4, 2015 schedule award determination, but submitted new evidence and argument showing increased hearing loss for schedule award purposes.¹⁸ As noted, OWCP's procedures provide that if a claimant is seeking an increased schedule award due to increased impairment and/or additional exposure, but not contesting the decision or prior award, this should not be treated as a reconsideration request.¹⁹ Herein, appellant submitted a more recent March 8, 2019 impairment rating report, which referenced a more recent audiogram, showing an increase in both right and left ear hearing loss levels.²⁰ The record, therefore, has clearly established that he was not seeking reconsideration of OWCP's decision, but was seeking a schedule award based on new medical evidence.²¹

Thus, the Board finds that OWCP improperly denied appellant's reconsideration request and failed to issue an appropriate decision regarding his claim for an increased schedule award. On remand, OWCP shall review and develop the medical evidence as is necessary and thereafter issue a *de novo* decision regarding his claim for an increased schedule award.²²

¹⁷ 45 ECAB 488 (1994).

¹⁸ See *E.G.*, Docket No. 17-1710 (issued January 4, 2018); *R.B.*, Docket No. 16-1863 (issued April 3, 2017).

¹⁹ *Supra* note 16.

²⁰ *W.H.*, Docket No 15-1167 (issued November 10, 2015).

²¹ *T.C.*, Docket No. 17-0800 (issued May 2, 2018); *K.D.*, Docket No. 15-0524 (issued August 3, 2015).

²² *D.S.*, Docket No. 17-0407 (issued May 24, 2017).

CONCLUSION

The Board finds that OWCP improperly denied appellant's request for reconsideration by adjudicating his schedule award claim under the standard for untimely reconsideration requests.

ORDER

IT IS HEREBY ORDERED THAT the October 15, 2019 decision of the Office of Workers' Compensation Programs is set aside, and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: December 18, 2020
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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