

FACTUAL HISTORY

On August 20, 2018 appellant, then a 58-year-old materials expediter, filed an occupational disease claim (Form CA-2) alleging that she developed bilateral hearing loss due to factors of her federal employment, including exposure to excessive noise in the engine cleaning shop. She noted that she first became aware of her condition on October 25, 2015 and first realized that it was caused or aggravated by factors of her federal employment on July 11, 2018. Appellant alleged that she had been advised that since she was not in the hearing conservation area she “was not getting a hearing test.” She did not stop work.

In an August 20, 2018 development letter, OWCP informed appellant that it had received no evidence in support of her claim. It advised her of the type of factual and medical evidence necessary to establish her claim and provided a questionnaire for her completion. In a separate development letter of even date, OWCP requested that the employing establishment provide additional information, including comments from a knowledgeable supervisor, regarding her occupational disease claim. It afforded both parties 30 days to respond.

OWCP received a “non-hearing conservation hearing test” audiogram performed on December 7, 2007 for the right ear, at the frequency levels of 500, 1,000, 2,000, 3,000, 4,000, and 6,000 Hertz (Hz), revealed decibel (dB) losses of 0, 5, 10, 10, 15, and 30 respectively. Testing for the left ear, at the same frequency levels, revealed losses of 5, 0, 10, 15, 5, and 15 dB, respectively.

In a July 11, 2018 report, Dr. Paul W. Loeffler, an otolaryngologist, noted that appellant reported a history of decreased hearing in both ears and intermittent pain in the right ear for several years. On examination, he documented decreased clinical speech reception. Dr. Loeffler conducted audiometric testing and found mild hearing loss in the left ear between 250 Hz and 6,000 Hz and mild-to-moderate loss at 8,000 Hz, and in the right ear, mild-to-moderate loss that began at 500 Hz. He further noted that appellant’s speech reception threshold was 30 dB in the right ear and 25 dB in the left ear, her pure tone average was 35 in the right ear and 28 in the left ear, and she displayed intact discrimination and impedance bilaterally. Dr. Loeffler diagnosed sensorineural hearing loss of both ears.

OWCP also received a position description outlining the duties and responsibilities for a materials expediter.

In an undated response to OWCP’s development questionnaire, appellant indicated that while working in production control from March 2006 until March 2008, and then as a material expediter/production coordinator from March 2008 to the present, she worked in various shops for eight to ten hours per day, five to seven days per week, where she was exposed to loud noises from impact tool machines, pneumatic tools and testing equipment, a deburring machine, power washers, forklifts, and grinding tools. In October 2015, while working in the engine cleaning shop, she indicated that she first noticed a problem with her hearing.

In an August 23, 2018 response to OWCP’s development questionnaire, an unidentified representative from the employing establishment confirmed that appellant’s current position was in an area where noise was present and hearing protection was required.

P.H., a supervisor for the employing establishment, indicated in a September 12, 2018 response to OWCP's questionnaire, that appellant's current position was in the cleaning shop incoming area, where she worked six hours per day, five to six days per week, and was required to wear hearing protection.

On September 20, 2018 OWCP referred appellant, along with a statement of accepted facts (SOAF) and a copy of the medical record, to Dr. Matthew Steehler, a Board-certified otolaryngologist, for a second opinion evaluation to determine the nature and extent of appellant's employment-related conditions.

In his October 10, 2018 medical report, Dr. Steehler reviewed the SOAF, history of injury and the medical evidence of record. He noted that appellant related that she had been experiencing hearing loss for several years, which she attributed to occupational noise exposure at the employing establishment. Dr. Steehler further noted that she wore hearing protection throughout the day. He reviewed recent audiometric testing and diagnosed sensorineural hearing loss without tinnitus. Dr. Steehler opined that at the time of his evaluation appellant had good hearing, and any losses were consistent with her age. He concluded that her workplace environment was not a factor in her hearing loss.

By decision dated December 13, 2018, OWCP denied appellant's claim, finding that the medical evidence of record was insufficient to establish a causal relationship between her diagnosed hearing loss and the accepted factors of her federal employment.

OWCP continued to receive medical evidence. In a January 28, 2019 narrative report, Dr. Thomas Martens, an occupational medicine specialist, noted that appellant related a history of bilateral hearing loss/ringing in her ears which she attributed to exposure to constant loud sounds from deburring machines, steam machines, hand/pneumatic tools, air compressors, and prolonged use of rivet guns. He opined that appellant's bilateral hearing loss was the direct result of exposure to loud sounds at work.

On February 20, 2020 appellant requested reconsideration of OWCP's December 3, 2018 decision.

In support of her request, appellant submitted a narrative report dated February 19, 2020 from Dr. Viraf Cooper, a neurosurgeon, who noted that she related a history of hearing loss and ringing in her ears which began in October 2015 and which she attributed to regular exposure to the loud sounds of deburring machines, steam machines, hand tools, running tools, pneumatic tools, air compressors, and rivet guns in the cleaning shop. Dr. Cooper opined that appellant had bilateral hearing loss secondary to working in the confined area of the cleaning shop and being repetitively exposed to direct contact with loud sounds, which resulted in damage to her hearing.

By decision dated April 22, 2020, OWCP denied appellant's reconsideration request finding that it was untimely filed and failed to demonstrate that OWCP's December 13, 2018 decision was issued in 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.² 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).³ 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.⁴

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 review to determine whether the request demonstrates clear evidence of error.⁵ 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 claimant's request for reconsideration demonstrates clear evidence of error on the part of OWCP.⁶

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.⁷ Evidence that does not raise a substantial question as to the correctness of OWCP's decision is insufficient to demonstrate clear evidence of error.⁸ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.⁹ This entails a limited review by OWCP of the evidence previously of record and whether the new evidence demonstrates clear error on the part of OWCP.¹⁰ The Board makes an independent determination as to 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.¹¹

² 20 C.F.R. § 10.607(a).

³ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4(b) (February 2016).

⁴ *G.L.*, Docket No. 18-0852 (issued January 14, 2020).

⁵ 20 C.F.R. § 10.607(b); *T.C.*, Docket No. 19-1709 (issued June 5, 2020); *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

⁶ *Supra* note 2; *supra* note 3 at Chapter 2.1602.5(a) (February 2016).

⁷ 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).

⁸ *S.W.*, Docket No. 18-0126 (issued May 14, 2019); *Robert G. Burns*, 57 ECAB 657 (2006).

⁹ *See G.B.*, Docket No. 19-1762 (issued March 10, 2020); *Leona N. Travis*, 43 ECAB 227, 240 (1991).

¹⁰ *Id.*

¹¹ *Id.*

OWCP's procedures further provide that the term clear evidence of error is intended to represent a difficult standard.¹² The claimant must present evidence that on its face shows that OWCP made an error (for example, proof that a schedule award was miscalculated). Evidence such as a detailed, well-rationalized medical report that, if submitted before the denial was issued, would have created a conflict in medical opinion requiring further development, is not clear evidence of error.¹³

ANALYSIS

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

OWCP received appellant's request for reconsideration on February 20, 2020, more than one year after the last merit decision dated December 13, 2018. Appellant's request was, therefore, untimely filed. Consequently, she must demonstrate clear evidence of error.¹⁴

The Board further finds that appellant has not demonstrated clear evidence of error. The underlying issue is whether appellant met her burden of proof to establish a causal relationship between her diagnosed hearing loss and her work-related noise exposure.

Appellant submitted a January 28, 2019 report of Dr. Martens and a February 19, 2020 report of Dr. Cooper. Both reports addressed the issue of causation; however, the Board finds that the reports do not demonstrate clear evidence of error, because they do not demonstrate that OWCP committed an error in finding that appellant failed to establish a causal relationship between her hearing loss and the accepted factors of her federal employment, nor did they raise a substantial question as to the correctness of OWCP's December 13, 2018 decision.¹⁵ As noted above, evidence such as a detailed, well-rationalized medical report that, if submitted before the denial was issued, would have created a conflict in medical opinion requiring further development, is not clear evidence of error.¹⁶

The term clear evidence of error is intended to represent a difficult standard. 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.¹⁷ The Board finds that appellant's request for reconsideration did not show on its face that OWCP committed error when, in its December 13, 2018 decision, it determined that the medical evidence was insufficient to establish a causal

¹² *R.K.*, Docket No. 19-1474 (issued March 3, 2020).

¹³ *W.B.*, Docket No. 20-1197 (issued February 3, 2021); *A.R.*, Docket No. 15-1598 (issued December 7, 2015).

¹⁴ *Supra* notes 5 and 6.

¹⁵ *C.D.*, Docket No. 19-1462 (issued June 26, 2020); *see also P.T.*, Docket No. 18-0494 (issued July 9, 2018).

¹⁶ *Supra* note 13.

¹⁷ *L.N.*, Docket No. 20-0742 (issued October 26, 2020).

relationship between appellant's diagnosed hearing loss and the accepted factors of her federal employment. Thus, the evidence is insufficient to demonstrate clear evidence of error.¹⁸

On appeal appellant asserts that the medical reports of her treating providers establish that her hearing loss is causally related to the accepted factors of her federal employment. As noted, however, the Board does not have jurisdiction over the merits of the claim.

Accordingly, the Board finds that OWCP properly denied her reconsideration request, finding that it was untimely filed and failed to demonstrate clear evidence of error.

CONCLUSION

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.

ORDER

IT IS HEREBY ORDERED THAT the April 22, 2020 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: May 24, 2021
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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

¹⁸ *S.D.*, Docket No. 17-1450 (issued January 8, 2018).