



## **FACTUAL HISTORY**

On May 1, 2019 appellant, then a 64-year-old welder, filed an occupational disease claim (Form CA-2) alleging that he developed bilateral hearing loss due to factors of his federal employment, including years of exposure to loud noise. He noted that he first became aware of his condition and that it was caused or aggravated by factors of his federal employment on March 25, 2004. Appellant did not stop work.

Accompanying his claim was a hearing conservation data audiogram performed on March 18, 2019 for the left ear, at the frequency levels of 500, 1,000, 2,000, 3,000, 4,000, and 5,000 Hertz (Hz), revealed decibel (dB) losses of 5, 20, 20, 40, 45, and 55 respectively. Testing for the right ear, at the same frequency levels, revealed losses of 5, 10, 20, 20, 25, and 30 dB, respectively. It also contained a reference audiogram performed on May 5, 2015 for the left ear, at the frequency levels of 500, 1,000, 2,000, 3,000, 4,000, and 5,000 Hz, revealed dB losses of 10, 15, 20, 40, 35, and 50 respectively. Testing for the right ear, at the same frequency levels, revealed losses of 5, 5, 15, 15, 20, and 20 dB, respectively.

Appellant also submitted a position description for a welder and several notifications of personnel action (Standard Form 50) forms documenting his time in the position as a welder.

In a May 16, 2019 development letter, OWCP informed appellant that the evidence received was insufficient to support his claim. It advised him of the type of factual and medical evidence necessary to establish his claim and provided a questionnaire for his 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 "Hearing Conservation Data" audiograms covering the period September 7, 1989 through March 18, 2019. In an accompanying medical report dated March 18, 2019, Dr. Mark F. Miller, an audiologist, related appellant's history of 2 years of active-duty service as an army infantryman, and 28 years of service as a welder. He noted that appellant was currently in charge of the rod shack where he issued equipment and welding wire, however, he continued to experience noise exposure from machinery and pneumatic tools when he went out to worksites. Dr. Miller further noted that appellant wore foam earplugs for hearing protection. Appellant's audiometric examination revealed mild sloping to moderately-severe sensorineural binaural hearing loss.

On August 6, 2019 OWCP referred appellant, along with a statement of accepted facts (SOAF) and a copy of the medical record, to Dr. Edward Treyve, a Board-certified otolaryngologist, for a second opinion evaluation to determine the nature and extent of appellant's employment-related conditions.

In his August 29, 2019 medical report, Dr. Treyve reviewed the SOAF, appellant's history of injury and the medical evidence of record. He noted that appellant related that he and his wife first noticed his hearing loss four to five years ago. Dr. Treyve further noted that he wore hearing protection, which was adequate to protect him from the effects of occupational noise exposure. He explained that appellant's workplace exposure, based on the information provided and

appellant's history, would seem to be of significant intensity and duration to potentially contribute to hearing loss. Dr. Treyve further explained that it appeared that his use of hearing protection in the workplace was adequate to protect him from the effects of occupational noise exposure. He opined that there were no medical conditions or exposures that have been identified that likely contributed to his hearing loss. Dr. Treyve attributed appellant's left ear hearing loss, which first developed in 2005 and which had progressed, to an undiagnosed left ear medical condition impacting his hearing in the left ear.

By decision dated September 26, 2019, OWCP denied appellant's claim, finding that the medical evidence of record was insufficient to establish causal relationship between his diagnosed hearing loss and the accepted employment exposure.

OWCP received a December 23, 2020 report from Dr. Patrick Moon, a Board-certified otolaryngologist, noting that appellant had been medically evaluated and may be considered for bilateral hearing aids. It also received a magnetic resonance (MRI) scan of even date of the brain, noting associated diagnoses of bilateral asymmetrical sensorineural hearing loss.

In a letter dated January 15, 2020 and received on January 20, 2021, appellant noted that he had been evaluated on August 19, 2020 for his hearing loss and that a December 23, 2020 MRI scan was negative for a mass. He hoped this evidence would be sufficient for acceptance of his claim.

On December 21, 2021 appellant requested reconsideration of OWCP's September 26, 2019 decision.

By decision dated March 9, 2022, OWCP denied appellant's reconsideration request, finding that it was untimely filed and failed to demonstrate that OWCP's September 26, 2019 decision was issued in error.

### **LEGAL PRECEDENT**

Pursuant to section 8128(a) of FECA, OWCP has the discretion to reopen a case for further merit review.<sup>2</sup> This discretionary authority, however, is subject to certain restrictions. For instance, a request for reconsideration must be received within one year of the date of OWCP's decision for which review is sought.<sup>3</sup> Timeliness is determined by the document receipt date, *i.e.*, the "received date" in OWCP's Integrated Federal Employees' Compensation System (iFECS).<sup>4</sup> Imposition of this one-year filing limitation does not constitute an abuse of discretion.<sup>5</sup>

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<sup>2</sup> 5 U.S.C. § 8128(a); *T.S.*, Docket No. 21-1075 (issued March 18, 2022); *L.W.*, Docket No. 18-1475 (issued February 7, 2019); *Y.S.*, Docket No. 08-0440 (issued March 16, 2009).

<sup>3</sup> 20 C.F.R. § 10.607(a).

<sup>4</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4 (September 2020).

<sup>5</sup> *T.S.*, *supra* note 2; *G.G.*, Docket No. 18-1072 (issued January 7, 2019); *E.R.*, Docket No. 09-0599 (issued June 3, 2009); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

When a request for reconsideration is untimely, OWCP undertakes a limited review to determine whether the request demonstrates clear evidence that OWCP's most recent merit decision was in error.<sup>6</sup> OWCP's procedures provide that it will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth in 20 C.F.R. § 10.607, if the claimant's request for reconsideration demonstrates "clear evidence of error" on the part of OWCP.<sup>7</sup> In this regard, OWCP will limit its focus to a review of how the newly submitted evidence bears on the prior evidence of record.<sup>8</sup>

To demonstrate clear evidence of error, a claimant must submit evidence relevant to the issue, which was decided by OWCP.<sup>9</sup> The evidence must be positive, precise, and explicit and must manifest on its face that OWCP committed an error. Evidence, which does not raise a substantial question concerning the correctness of OWCP's decision, is insufficient to demonstrate clear evidence of error. It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion. 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. To demonstrate clear evidence of error, the evidence submitted 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.<sup>10</sup>

OWCP's procedures note that the term clear evidence of error is intended to represent a difficult standard. The claimant must present evidence, which on its face demonstrates that OWCP made an error (for example, proof that a schedule award was miscalculated). Evidence such as a detailed, well-rationalized medical report, which if submitted before the denial was issued, would have created a conflict in medical opinion requiring further development, is not clear evidence of error.<sup>11</sup> The Board makes an independent determination of whether a claimant has demonstrated clear evidence of error on the part of OWCP.<sup>12</sup>

### ANALYSIS

The Board finds that OWCP properly denied appellant's request for reconsideration as it was untimely filed.

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<sup>6</sup> See 20 C.F.R. § 10.607(b); *D.M.*, Docket No. 21-0261 (issued September 29, 2021); *M.H.*, Docket No. 18-0623 (issued October 4, 2018); *Charles J. Prudencio*, 41 ECAB 499 (1990).

<sup>7</sup> *D.M.*, *id.*; *L.C.*, Docket No. 18-1407 (issued February 14, 2019); *M.L.*, Docket No. 09-0956 (issued April 15, 2010). See also 20 C.F.R. § 10.607(b).

<sup>8</sup> *J.M.*, Docket No. 19-1842 (issued April 23, 2020); *Robert G. Burns*, 57 ECAB 657 (2006).

<sup>9</sup> See *D.M.*, *supra* note 6; *S.C.*, Docket No. 18-0126 (issued May 14, 2016).

<sup>10</sup> *C.M.*, Docket No. 19-1211 (issued August 5, 2020).

<sup>11</sup> *J.S.*, Docket No. 16-1240 (issued December 1, 2016); *supra* note 4 at Chapter 2.1602.5(a) (September 2020).

<sup>12</sup> *D.S.*, Docket No. 17-0407 (issued May 24, 2017).

OWCP's regulations provide that the one-year time limitation period for requesting reconsideration begins on the date of the last merit decision.<sup>13</sup> The last merit decision was dated September 26, 2019. Because appellant's request for reconsideration was received on December 21, 2021, more than one year after the September 26, 2019 merit decision, the Board finds that the request was untimely filed.<sup>14</sup> Consequently, appellant must demonstrate clear evidence of error on the part of OWCP.<sup>15</sup>

The Board further finds that appellant failed to demonstrate clear evidence of error.

On reconsideration, appellant submitted a December 23, 2020 report from Dr. Moon, noting that appellant had been medically evaluated and may be considered for bilateral hearing aids. It also received an MR scan of even date of the brain, noting associated diagnoses of bilateral asymmetrical sensorineural hearing loss. This evidence report, however, did not address the underlying issue of whether hearing loss was causally related to the accepted employment noise exposure. Thus, the Board finds that this evidence is insufficient to shift the weight of the evidence in favor of appellant or raise a fundamental question as to the correctness of OWCP's decision.<sup>16</sup>

As noted, clear evidence of error is intended to represent a difficult standard.<sup>17</sup> Even 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. 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.<sup>18</sup>

As the evidence submitted in support of the untimely request for reconsideration is insufficient to shift the weight of the evidence in favor of appellant's claim or to raise a substantial question that OWCP erred in its September 26, 2019 decision, the Board finds that appellant has not demonstrated clear evidence of error. Accordingly, OWCP properly denied appellant's untimely reconsideration request.

### CONCLUSION

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.

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<sup>13</sup> 20 C.F.R. § 10.607(a).

<sup>14</sup> *Id.* at § 10.607(a).

<sup>15</sup> *See M.L.*, Docket No. 20-0628 (issued June 3, 2022); *R.T.*, Docket No. 20-0298 (issued August 6, 2020).

<sup>16</sup> *See M.L., id.*; *B.C.*, Docket No. 16-1404 (issued April 14, 2017); *F.R.*, Docket No. 09-0575 (issued January 4, 2010) (evidence that is not germane to the issue on which the claim was denied is insufficient to demonstrate clear evidence of error).

<sup>17</sup> *Supra* note 12; *see also J.S.*, Docket No. 16-1240 (issued December 1, 2016).

<sup>18</sup> *M.E.*, Docket No. 18-1442 (issued April 22, 2019).

**ORDER**

**IT IS HEREBY ORDERED THAT** the March 9, 2022 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 8, 2022  
Washington, DC

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

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

James D. McGinley, Alternate Judge  
Employees' Compensation Appeals Board