

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 August 24, 2020 appellant, then a 69-year-old retired engineering technician,³ filed an occupational disease claim (Form CA-2) alleging that he sustained hearing loss in both ears due to factors of his federal employment including exposure to noise, without protective equipment, from flying jets, construction sites, and steam and air repairs while working at several employing establishment locations for 40 years and 11 months. He noted that he first became aware of his claimed condition and its relation to his federal employment on June 9, 2015.

Appellant submitted audiograms, dated between August 16, 1994 and June 22, 2020, which were taken at employing establishment health facilities. The audiograms were conducted by audiologists and, apart from a June 3, 2015 audiogram, were not certified by a physician as accurate.

In a September 14, 2020 development letter, OWCP notified appellant of the deficiencies of his claim. It advised him of the type of factual and medical evidence needed and provided a questionnaire for his completion. OWCP afforded appellant 30 days to respond.

In response, appellant submitted a September 19, 2020 statement in which he further discussed the types of noise he was exposed to at work, and provided additional information about the dates and workplaces where the exposure occurred.⁴ In a June 7, 2020 report, Dr. Daniel R. Hoefler, a Board-certified family medicine specialist, indicated that appellant suffered from hearing loss and wore hearing aids. Appellant's immediate supervisor provided an October 13, 2020 statement in which he discussed appellant's exposure to noise in the workplace. He asserted that appellant had been provided with earplugs and earmuffs for flight operations.

On December 29, 2020 OWCP referred appellant for otologic and audiologic testing with Dr. Jennifer MacEwan, a Board-certified otolaryngologist. It requested that she apply the standards of the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).⁵

In a January 21, 2021 report, Dr. MacEwan reported examination findings and diagnosed bilateral sensorineural hearing loss, right worse than left, and bilateral tinnitus. She opined that these diagnoses were due, in part or all, to the noise exposure appellant encountered in his federal employment. Dr. MacEwan then applied OWCP's standardized procedures to the findings of the January 21, 2021 audiogram she obtained in connection with her evaluation. Testing for the right ear at the frequency levels of 500, 1,000, 2,000, and 3,000 Hertz (Hz) revealed decibel losses of

³ Appellant retired effective July 1, 2020.

⁴ Appellant also submitted personal qualification statements regarding his former positions with the employing establishment.

⁵ A.M.A., *Guides* (6th ed. 2009).

10, 20, 70, and 80 respectively. These decibel losses were totaled at 180 decibels and were divided by 4 to obtain the average hearing loss of 45 decibels. This average loss was then reduced by 25 decibels to equal 20, which was multiplied by the established factor of 1.5 to compute 30 percent hearing loss in the right ear. Testing for the left ear at the frequency levels of 500, 1,000, 2,000, and 3,000 Hz revealed decibel losses of 15, 30, 60, and 70 respectively. These decibel losses totaled 175 decibels and when divided by 4 resulted in an average hearing loss of 43.75 decibels. This average loss when reduced by 25 decibels equaled 18.75, which when multiplied by the established factor of 1.5 equaled 28.125 percent hearing loss in the left ear. To compute the binaural hearing loss, the lesser loss in the left ear, 28.125 percent, was multiplied by the established factor of 5, added to the 30 percent loss in the right ear and this sum was divided by the established factor of 6 to calculate 28.4 percent binaural hearing loss. Dr. MacEwan then added an additional one percent to the 28.4 figure for appellant's tinnitus, which was rated as slight, to find a total permanent hearing loss of 29.4 percent under the standards of the sixth edition of the A.M.A., *Guides*.

By decision dated February 16, 2021, OWCP accepted appellant's claim for bilateral sensorineural hearing loss and tinnitus of an unspecified ear.

OWCP referred appellant's case for review by Dr. Jeffrey M. Israel, a Board-certified otolaryngologist and OWCP district medical adviser (DMA). In a March 1, 2021 report, Dr. Israel indicated that he had reviewed and agreed with Dr. MacEwan's evaluation of appellant's hearing loss. He found that appellant had a total permanent hearing loss of 29.4 percent under the standards of the sixth edition of the A.M.A., *Guides*.

By decision March 18, 2021, OWCP granted appellant a schedule award for 29.4 percent binaural work-related hearing loss.⁶ The award ran for 58 weeks from January 21, 2021 through March 2, 2022 and was based on the evaluations of Dr. MacEwan and Dr. Israel.

On April 14, 2022 appellant requested reconsideration of the March 18, 2021 decision.⁷

Appellant submitted a November 2, 2021 report of Dr. John W. Ellis, an osteopath and Board-certified family medicine specialist. Dr. Ellis asserted that, even though appellant retired in July 2020, his hearing continued to worsen as demonstrated in a September 28, 2021 audiogram. He attached a hearing impairment calculations worksheet to his report, which represented that testing for the right ear at the frequency levels of 500, 1,000, 2,000, and 3,000 Hz revealed decibel losses of 30, 45, 75 and 80 respectively. Testing for the left ear at the frequency levels of 500, 1,000, 2,000, and 3,000 Hz revealed decibel losses of 30, 50, 75, and 75 respectively. However, Dr. Ellis did not provide a copy of the referenced September 28, 2021 audiogram. Based on the figures from the hearing impairment calculations worksheet, he calculated that appellant had 48.8 percent hearing loss in each ear which in turn equaled 48.8 percent binaural hearing loss. Dr. Ellis

⁶ The policy of OWCP is to round the calculated percentage of impairment to the nearest whole number. Results should be rounded down for figures less than .5 and up for .5 and over. Thus, although OWCP indicated in the schedule award that it was granting appellant compensation for 29.4 percent binaural hearing loss, it correctly awarded appellant compensation for 58 weeks designated for 29 percent binaural hearing loss in keeping with its policy. See *H.W.*, Docket No. 20-0924 (issued January 26, 2021); *V.M.*, Docket No. 18-1800 (issued April 23, 2019); *J.H.*, Docket No. 08-2432 (issued June 15, 2009); *Robert E. Cullison*, 55 ECAB 570 (2004).

⁷ On November 9, 2021 appellant had filed a claim for compensation (Form CA-7) for an increased schedule award.

found that appellant had 4 percent impairment due to tinnitus (grade 4) and added this figure to the 48.8 percent figure to conclude that appellant had total permanent hearing loss of 52.8 percent.

In a March 17, 2022 letter, addressed to appellant, OWCP indicated that appellant had retired on July 1, 2020 and was no longer exposed to work-related noise after that date. It attached a copy of its March 18, 2021 decision.

In an April 8, 2022 letter, Dr. Ellis argued that current medical research showed that hearing loss can continue long after exposure to hazardous noise has ceased. He asserted that appellant's retirement in July 2000 would not have prevented the progression of his hearing loss. Dr. Ellis attached excerpts from medical journals.

By decision dated July 11, 2022, OWCP denied appellant's request for reconsideration, finding that it was untimely filed and failed to demonstrate clear evidence of error.

LEGAL PRECEDENT

Pursuant to section 8128(a) of FECA, OWCP has the discretion to reopen a case for further merit review.⁸ This discretionary authority, however, is subject to certain restrictions. A request for reconsideration must be received within one year of the date of OWCP's decision for which review is sought.⁹ Timeliness is determined by the document receipt date of the request for reconsideration as indicated by the received date in the Integrated Federal Employees' Compensation System (iFECS).¹⁰ Imposition of this one-year filing limitation does not constitute an abuse of discretion.¹¹

OWCP may not deny a request for reconsideration solely because it was untimely filed. When a claimant's request for reconsideration is untimely filed, it must nevertheless undertake a limited review to determine whether it demonstrates clear evidence of error.¹² If a request for reconsideration demonstrates clear evidence of error, OWCP will reopen the case for merit review.¹³

To demonstrate clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by OWCP.¹⁴ The evidence must be positive, precise, and explicit and

⁸ 5 U.S.C. § 8128(a); *see also* *A.B.*, Docket No. 19-1539 (issued January 27, 2020); *W.C.*, 59 ECAB 372 (2008).

⁹ 20 C.F.R. § 10.607(a).

¹⁰ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4b (September 2020).

¹¹ *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).

¹² *See* 20 C.F.R. § 10.607(b); *M.H.*, Docket No. 18-0623 (issued October 4, 2018); *Charles J. Prudencio*, 41 ECAB 499 (1990).

¹³ *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).

¹⁴ *A.A.*, Docket No. 19-1219 (issued December 10, 2019); *J.F.*, Docket No. 18-1802 (issued May 20, 2019); *J.D.*, Docket No. 16-1767 (issued January 12, 2017); *Dean D. Beets*, 43 ECAB 1153 (1992).

must manifest on its face that OWCP committed an error.¹⁵ Evidence that does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to demonstrate clear evidence of error.¹⁶ 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 request for reconsideration bears on the evidence previously of record and whether the new evidence demonstrates clear error on the part of OWCP.¹⁷ 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.¹⁸

OWCP's procedures note that the term clear evidence of error is intended to represent a difficult standard.¹⁹ The claimant must present evidence which on its face shows that OWCP made an error.²⁰ 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.²¹ The Board makes an independent determination of whether a claimant has demonstrated clear evidence of error on the part of OWCP.²²

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 properly determined that appellant failed to file a timely request for reconsideration. A request for reconsideration must be received within one year of the date of the last merit decision for which review is sought.²³ As appellant's request for reconsideration was not received by OWCP until April 14, 2022, more than one year after issuance of its March 18, 2021 merit decision, it was untimely filed. Consequently, he must demonstrate clear evidence of error by OWCP in its March 18, 2021 decision.

The Board further finds that appellant has not demonstrated clear evidence of error. Appellant submitted a November 2, 2021 report in which Dr. Ellis asserted that a September 28, 2021 audiogram established that appellant had an increased work-related hearing loss in the form

¹⁵ *J.D.*, Docket No. 19-1836 (issued April 6, 2020); *Leone N. Travis*, 43 ECAB 227 (1999).

¹⁶ *S.W.*, Docket No. 18-0126 (issued May 14, 2019); *Robert G. Burns*, 57 ECAB 657 (2006).

¹⁷ *T.N.*, Docket No. 18-1613 (issued April 29, 2020).

¹⁸ *J.M.*, Docket No. 19-1842 (issued April 23, 2020).

¹⁹ *See supra* note 10 at Chapter 2.1602.5(a) (September 2020); *see also J.S.*, Docket No. 16-1240 (issued December 1, 2016).

²⁰ *K.W.*, Docket No. 19-1808 (issued April 2, 2020).

²¹ *Id.*

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

²³ *See supra* note 9.

of 52.8 percent binaural hearing loss. The Board finds, however, that the submission of this report does not establish clear evidence of error in OWCP's March 18, 2021 decision. Given that Dr. Ellis did not provide a copy of the ostensible September 28, 2021 audiogram, the November 2, 2021 report would not tend to raise a substantial question concerning the correctness of OWCP's March 18, 2021 decision.²⁴ Appellant also submitted an April 8, 2022 letter in which Dr. Ellis argued that current medical research show that hearing loss can continue long after exposure to hazardous noise has ceased. He asserted that appellant's retirement in July 2000 would not have prevented the progression of his hearing loss. Dr. Ellis attached excerpts from medical journals. However, these generalized comments about the progression of hearing loss, as well as the attached excerpts of general application, do not raise a substantial question concerning the correctness of OWCP's March 18, 2021 decision.

As noted, clear evidence of error is intended to represent a difficult standard.²⁵ 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.²⁶ The evidence submitted by appellant in support of his untimely request for reconsideration would not shift the weight in his favor.

The Board finds that the evidence appellant submitted on reconsideration does not demonstrate on its face that OWCP committed error when it found in its March 18, 2021 decision that he had 29.4 percent permanent hearing loss.²⁷ Therefore, OWCP properly denied appellant's untimely request for reconsideration.

CONCLUSION

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

²⁴ See *supra* notes 15 and 17. Dr. Ellis attached a hearing impairment calculations worksheet to his report which contained single test results at the frequency levels of 500, 1,000, 2,000, and 3,000 Hz for each ear without any distinction between whether the figures were derived from bone or air testing. The Board notes that hearing loss is evaluated under the A.M.A., *Guides* through a process which includes interpreting audiograms which have been prepared or certified by a physician as accurate. See A.M.A., *Guides* 248-52; A.L., Docket No. 21-1233 (issued January 31, 2022).

²⁵ See *supra* note 18.

²⁶ *M.E.*, Docket No. 18-1442 (issued April 22, 2019).

²⁷ See *S.F.*, Docket No. 09-0270 (issued August 26, 2009).

ORDER

IT IS HEREBY ORDERED THAT the July 11, 2022 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 5, 2023
Washington, DC

Alec J. Koromilas, 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