United States Department of Labor
Employees' Compensation Appeals Board

N.F., Appellant	)	
and	)	**Docket No. 06-1218**
	)	**Issued: September 21, 2006**
DEPARTMENT OF THE ARMY, ARMY MATERIAL COMMAND, LETTERKENNY ARMY DEPOT, Chambersburg, PA, Employer	)	

Appearances:
N.F., pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge

JURISDICTION

On April 17, 2006 appellant filed a timely appeal from a March 9, 2006 nonmerit decision of the Office of Workers' Compensation Programs denying his request for reconsideration on the grounds that the request was untimely filed and failed to establish clear evidence of error. Appellant also timely appealed from an October 13, 2005 decision of the Office denying his request for a review of the written record as untimely. As there is no merit decision within one year of the filing of this appeal, pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction to review the merits of appellant's claim.[1]

ISSUES

The issues are: (1) whether the Office properly denied appellant's request for a review of the written record as untimely filed; and (2) whether the Office properly refused to reopen appellant's case for review of the merits of his claim under 5 U.S.C. § 8128(a) on the grounds that his request was not timely filed and did not demonstrate clear evidence of error.

[1] *See* 5 C.F.R. § 501.3(d)(2).

FACTUAL HISTORY

On January 7, 2004 appellant, then a 55-year-old heavy mobile mechanic, filed an occupational disease claim (Form CA-2), alleging that he sustained hearing loss in the performance of duty. According to the claim, he became aware that his employment caused or aggravated his hearing loss on May 16, 1996.

By letter dated January 29, 2004, the Office advised appellant that he needed to submit additional factual and medical information. Appellant responded to the request and provided additional information to the Office on February, 24, 2004.

In order to determine the extent and degree of any hearing loss, the Office referred appellant, a statement of accepted facts and the case record to Dr. A. Leonard Zimmerman, a Board-certified otolaryngologist, for examination. Dr. Zimmerman examined appellant on April 16, 2004 and reported his findings in a March 21, 2004 report. He found that appellant had a sloping high-tone sensorineural hearing loss in both ears which was secondary to noise exposure.

By letter dated April 27, 2004, the Office informed appellant of the acceptance of his claim for bilateral sensorineural hearing loss. It further informed him that his case was forwarded to an Office medical adviser to determine the percentage of hearing impairment.

By decision dated July 27, 2004, accompanied by appeal rights, the Office awarded appellant a schedule award for a 31 percent permanent binaural hearing loss. The award was for 62 weeks of compensation for the period June 16, 2004 to June 23, 2005. The Office mailed the decision to appellant at his last known mailing address of record, P.O. Box 262, Mount Union, PA 17066.

By letter dated September 5, 2005 and received by the Office on September 12, 2005, appellant filed a request for a review of the written record by the Office's Branch of Hearings and Review. At this time, he stated that his hearing loss would not improve, he was unable to secure employment, that he received his final check in July 2005 and that he had "received no prior notice." The request was postmarked September 6, 2005.

By decision dated October 13, 2005, the Office denied appellant's request for a review of the written record because the request was not made within 30 days of the July 27, 2004 decision. The Branch of Hearings and Review further denied the request finding that the issue could equally well be addressed through the reconsideration process.

Appellant filed a request for reconsideration by letter dated October 20, 2005 and a subsequent undated letter received by the Office on March 6, 2006. In his October 20, 2005 letter, appellant stated that his hearing loss was permanent and that he was entitled to a greater percentage of impairment. He also reiterated that he was unaware of the July 27, 2004 decision. Appellant's undated letter, received by the Office on March 6, 2006, referenced previous documents on file. Neither document was accompanied by additional evidentiary material.

The Office denied the request for reconsideration by decision dated March 9, 2006 because it was not filed within one year of the July 27, 2004 decision and was therefore untimely. Further, the Office held that appellant did not present clear evidence that the Office's last merit decision was incorrect.

LEGAL PRECEDENT -- ISSUE 1

Section 8124 of the Federal Employees' Compensation Act provides that a claimant is entitled to a hearing before an Office representative when a request is made within 30 days after issuance of an Office final decision.[2] The regulations further elaborate on this requirement. Section 10.615 of Title 20 of the Code of Federal Regulations provides, "A hearing is a review of an adverse decision by a hearing representative. Initially, the claimant can choose between two formats: An oral hearing or a review of the written record."[3] Section 10.616(a) of Title 20 of the Code of Federal Regulations further provides, "A claimant injured on or after July 4, 1966, who had received a final adverse decision by the district Office may obtain a hearing by writing to the address specified in the decision. The hearing request must be sent within 30 days (as determined by postmark or other carrier's date marking) of the date of the decision for which a hearing is sought."[4]

The Board has held that the Office, in its broad discretionary authority to administer the Act, has the power to hold hearings in certain circumstances where no legal provision was made for such hearings, including when the request is made after the 30-day period for requesting a hearing, and that the Office must exercise this discretionary authority in deciding whether to grant a hearing.[5]

ANALYSIS -- ISSUE 1

Appellant's request for a hearing was postmarked September 6, 2005 and received by the Office on September 12, 2005, more than 30 days after the Office issued its July 27, 2004 decision. Therefore, appellant is not entitled to a hearing as a matter of right. The Office properly exercised its discretion in denying a hearing upon appellant's untimely request by determining that the issue could be equally well addressed by requesting reconsideration.

Appellant's contention that he did not receive notification of either the July 27, 2004 decision or his appeal rights is without merit. The Board has held that, in the absence of evidence to the contrary, it is presumed that a notice mailed to an individual in the ordinary course of business was received by that individual.[6] Under the mailbox rule, evidence of a properly addressed letter together with evidence of proper mailing may be used to establish

[2] 5 U.S.C. § 8124(b)(1).

[3] 20 C.F.R. § 10.615.

[4] 20 C.F.R. § 10.616(a).

[5] *Claudio Vasquez*, 52 ECAB 496 (2001).

[6] *Joseph R. Giallanza*, 55 ECAB ___ (Docket No. 03-2024, issued December 23, 2003).

receipt.[7] The Office sent appellant the July 27, 2004 decision to his last known address, which was P.O. Box 262, Mount Union, PA 17066. Since there is no evidence to rebut the presumption of receipt by appellant under the mailbox rule, the Board finds that appellant is deemed to have received the decision.

LEGAL PRECEDENT -- ISSUE 2

The Office has imposed limitations on the exercise of its discretionary authority under section 8128(a) of the Act.[8] The Office will not review a decision on the merits of a claim unless the application for review is filed within one year of the date of that decision.[9] When an application for review is untimely, the Office undertakes a limited review to determine whether the application presents clear evidence that the Office's final merit decision was in error.[10] The Office procedures state that the Office 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 application for review shows clear evidence of error on the part of the Office.[11] In this regard, the Office will limit its focus to a review of how the newly submitted evidence bears on the prior evidence of record.[12]

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office. The evidence must be positive, precise and explicit and must manifest on its face that the Office committed an error. Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.[13] 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 the Office 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 the Office. To show clear evidence of error, the evidence submitted must not only be of sufficient probative value to create a conflict in medical opinion or establish 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 the Office's decision.[14] The Board makes an independent

[7] *See Larry L. Hill*, 42 ECAB 596 (1991); *George F. Gidicsin*, 36 ECAB 175 (1984).

[8] 5 U.S.C. §§ 8101-8193.

[9] 20 C.F.R. § 10.607; *see also Alan G. Williams*, 52 ECAB 180 (2000).

[10] *Veletta C. Coleman*, 48 ECAB 367 (1997).

[11] *See Gladys Mercado*, 52 ECAB 255 (2001). Section 10.607(b) provides: [The Office] will consider an untimely application for reconsideration only if the application demonstrates clear evidence of error on the part of [it] in its most recent decision. The application must establish, on its face, that such decision was erroneous. 20 C.F.R. § 10.607(b).

[12] *See Nelson T. Thompson*, 43 ECAB 919 (1992).

[13] *Leon J. Modrowski*, 55 ECAB ___ (Docket No. 03-1702, issued January 2, 2004); *Darletha Coleman*, 55 ECAB ___ (Docket No. 03-868, issued November 10, 2003).

[14] *Id*.

determination of whether a claimant has submitted clear evidence of error on the part of the Office such that the Office abused its discretion in denying merit review in the face of such evidence.[15]

ANALYSIS -- ISSUE 2

The Office properly determined that appellant failed to file a timely application for review. The Office's regulation provides that a request for reconsideration must be sent within one year of the date of the Office decision for which review is sought.[16] A right to reconsideration within one year also accompanies any subsequent merit decision on the issues.[17] In this case, appellant's October 20, 2005 letter requesting reconsideration was submitted more than one year after the last merit decision of record, July 27, 2004. Therefore, it was untimely. Consequently, appellant must demonstrate clear evidence of error by the Office in denying his claim for compensation.[18]

In accordance with its internal guidelines and with Board precedent, the Office properly performed a limited inquiry to determine whether appellant's application for review showed clear evidence of error that would warrant reopening his case for merit review under section 8128(a) of the Act, notwithstanding the untimeliness of his application. In his October 20, 2005 request for reconsideration, appellant stated that his hearing loss was permanent entitling him to a larger award and that he was unaware of the Office's July 27, 2004 decision until September 2005 when he received a copy of the decision from the Office. Appellant did not submit any new evidence with his request. Similarly, the undated letter wherein appellant briefly summarized previous medical records and facts, failed to include any new information.

In order to establish clear evidence of error, the evidence must be of sufficient probative value to shift the weight of evidence in favor of the claimant and raise a substantial question as to the correctness of the merits of the Office's decision. The Board finds that appellant did not submit sufficient probative evidence to shift the weight of the evidence in favor of the claimant and raise a substantial question as to the correctness of the Office's decision.[19] Appellant did not provide any additional medical evidence as to why he was entitled to additional compensation. Instead, he argued that he had a permanent injury, for which the Board notes he was compensated, and stated that he had never received the Office's July 27, 2004 decision. However, as the Board found above, his contention is without merit or has no reasonable color of validity as the Office mailed the decision to appellant's last known address during the course of business and it is presumed that appellant received it under the mailbox rule. Thus, the evidence

[15] *Pete F. Dorso*, 52 ECAB 424 (2001); *John Crawford*, 52 ECAB 395 (2001).

[16] 20 C.F.R. § 10.607(a).

[17] *Robert F. Stone*, 57 ECAB ___ (Docket No. 04-1451, issued December 22, 2005).

[18] 20 C.F.R. § 10.607(b); *Donna M. Campbell*, 55 ECAB ___ (Docket No. 03-2223, issued January 9, 2004).

[19] *See Alberta Dukes*, 56 ECAB ___ (Docket No. 04-2028, issued January 11, 2005); *see also Nelson T. Thompson*, *supra* note 12.

and argument submitted by appellant are insufficient to show clear evidence of error by the Office and the Office properly denied merit review.

CONCLUSION

The Board finds that the Office properly denied appellant's request for a review of the written record as untimely. The Board finds that the Office properly refused to reopen appellant's case for review of the merits of his claim on the grounds that his request was not timely filed and did not demonstrate clear evidence of error.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated March 9, 2006 and October 13, 2005 are affirmed.

Issued: September 21, 2006
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board