United States Department of Labor
Employees' Compensation Appeals Board

M.M., Appellant	)	
and	)	**Docket No. 10-138**
	)	**Issued: September 27, 2010**
DEPARTMENT OF THE NAVY, NAVAL SEA SYSTEMS COMMAND-CENTERS, New Orleans, LA, Employer	)	

Appearances:
Alan J. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On October 19, 2009 appellant filed a timely appeal of a September 14, 2009 decision of the Office of Workers' Compensation Programs which denied his request for reconsideration as being untimely filed. Because more than one year elapsed between the most recent merit decision of February 9, 2004 to the filing of this appeal, the Board lacks jurisdiction to review the merits of appellant's claim pursuant to 20 C.F.R. §§ 501.2(c) and 501.3. The only decision properly before the Board is the Office's September 14, 2009 decision denying his request for reconsideration.

ISSUE

The issue is whether the Office properly refused to reopen appellant's claim for reconsideration of the merits on the grounds that his request was untimely filed and failed to establish clear evidence of error.

FACTUAL HISTORY

On September 22, 2003 appellant, then a 54-year-old quality assurance specialist, filed an occupational disease claim alleging that he sustained progressive hearing loss in the performance of duty. The employing establishment advised that he worked in a noisy environment. Appellant did not stop work.

Appellant submitted evidence which included a statement regarding his employment history and noise exposure; a November 22, 2002 memorandum from James Sweat an audiological technician, who indicated that appellant required follow up testing related to possible changes in his hearing and an October 7, 2003 memorandum from the employing establishment requesting a follow-up appointment related to his hearing. The record concludes diagnostic hearing examination and audiogram results dated June 18, 1998 to December 16, 2002; a January 2, 2003 report from Pascagoula Occupational Health, which revealed a significant threshold shift and worsening hearing loss; and a January 6, 2003 report from David Pedersen, an audiologist, advising that appellant needed to be permanently removed from noise.

On December 5, 2003 the Office referred appellant, together with a statement of accepted facts, to Dr. John Keebler, a Board-certified otolaryngologist, for a second opinion evaluation. In a January 6, 2004 report, Dr. Keebler reviewed appellant's history of injury and treatment and determined that he had severe bilateral hearing loss, which was present prior to his federal employment. He noted that when appellant was tested in June 1998, seven months after his federal employment started, there was a severe hearing loss. Dr. Keebler advised that no change had occurred since June 1998.[1]

In a February 9, 2004 decision, the Office denied appellant's claim finding that his hearing loss was not causally related to his employment exposure.

On March 15, 2004 appellant requested reconsideration. He requested that his June 1998 audiology report be considered. Appellant noted that Dr. Keebler's hearing booth had a broken door and was not usable. The Office received copies of previously submitted evidence.

In a February 10, 2005 decision, the Office denied appellant's request for reconsideration without a review of the merits on the grounds that his request did not raise substantial legal questions or include new and relevant evidence.

On August 18, 2009 appellant filed a claim for recurrence commencing on November 22, 2002. He submitted an April 13, 2009 letter from the Office of Personnel Management finding that he was disabled from his position as a quality assurance specialist and approving his claim for disability retirement. On August 25, 2009 the Office advised appellant that it could not consider a recurrence on a denied claim.

On September 8, 2009 appellant requested reconsideration and submitted new evidence. In a November 8, 2006 report, Christon J. Duhon, an audiologist, determined that appellant was

[1] Dr. Keebler and an audiologist indicated that the audiometric test results were valid and representative of appellant's hearing sensitivity.

exposed to high levels of environmental noise and advised that he could no longer work in noise hazardous areas. In a November 14, 2006 report, Commander Ward L. Reed, of the employing establishment outpatient clinic, advised that appellant was seen for an administrative evaluation of permanent threshold shift. Appellant was seen by Mr. Duhon, who determined that he had a significant degree of ongoing hearing loss, consistent with continued sensorineural damage, most likely due to noise exposure in the occupational setting. Commander Reed indicated that appellant was no longer qualified for occupational exposure to noise. He advised that continued exposure to the noise most likely would cause the hearing loss to progress. Commander Reed advised that it was questionable as to whether appellant had sufficient hearing to safely perform his critical job functions, especially on board ships that were undergoing sea trials. Additionally a February 19, 2009 audiogram from an unknown audiologist noted findings and indicated that appellant was seeking medical retirement. It noted a history of army service in Vietnam from 1968 to 1971 and exposure to artillery since 1997. The report contained an annotation that appellant's hearing loss was comparable to 2006. The Office also received a January 29, 2008 audiogram from Garreth E. Barber, an audiologist.

In a September 14, 2009 decision, the Office denied appellant's request for reconsideration for the reason that it was not timely filed and failed to present clear evidence of error.

LEGAL PRECEDENT

Section 8128(a) of the Federal Employees' Compensation Act[2] does not entitle a claimant to a review of an Office decision as a matter of right. This section vests the Office with discretionary authority to determine whether it will review an award for or against compensation.[3] The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a).[4] As one such limitation, it has stated that it will not review a decision denying or terminating a benefit unless the application for review is filed within one year of the date of that decision.[5] The Board found that the imposition of this one-year limitation does not constitute an abuse of the discretionary authority granted the Office under section 8128(a).[6] Section 10.607(b) states that the Office will consider an untimely application for reconsideration only if it demonstrates clear evidence of error by the Office in its most recent merit decision. The reconsideration request must establish that the Office's decision was, on its face, erroneous.[7]

To establish clear evidence of error, a claimant must submit evidence relevant to the issue that was decided by the Office. The evidence must be positive, precise and explicit and must

[2] 5 U.S.C. §§ 8101-8193.

[3] *Id.* at § 8128(a).

[4] *Annette Louise*, 54 ECAB 783, 789-90 (2003).

[5] 20 C.F.R. § 10.607(a); *see Alberta Dukes*, 56 ECAB 247 (2005).

[6] *Sean C. Dockery*, 56 ECAB 652 (2005); *Mohamed Yunis*, 46 ECAB 827, 829 (1995).

[7] 20 C.F.R. § 10.607(b).

manifest on its face that the Office committed an error. Evidence that does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish 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 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.[8] To show clear evidence of error, the evidence submitted must not only be of sufficient probative value to create a conflict in the 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. The Board makes an independent determination of whether a claimant has submitted clear evidence of error on the part of the Office such that it abused its discretion in denying merit review in the face of such evidence.[9]

ANALYSIS

In its September 14, 2009 decision, the Office properly determined that appellant failed to file a timely application for review. It issued its most recent merit decision on February 9, 2004. Appellant's September 8, 2009 letter requesting reconsideration was submitted more than one year after the February 9, 2004 merit decision and was, therefore, untimely.

In accordance with internal guidelines and with Board precedent, the Office properly performed a limited review to determine whether appellant's application for review showed clear evidence of error, which would warrant reopening his case for merit review under section 8128(a) of the Act, notwithstanding the untimeliness of his application. It reviewed the evidence submitted by appellant, but found that it did not establish that the Office's prior decision was in clear error.

The Board finds that the evidence submitted by appellant in support of his application for review does not raise a substantial question as to the correctness of the Office's decision and is insufficient to demonstrate clear evidence of error. The issue in this case is whether the Office properly denied appellant's claim for hearing loss on February 9, 2004. It found that the medical evidence was insufficient to establish that appellant's hearing loss was due to employment-related noise exposure.

In a November 14, 2006 report, Commander Reed, advised that appellant was seen for an administrative evaluation of permanent threshold shift and noted that an audiologist determined that appellant had a significant degree of ongoing hearing loss, consistent with continued sensorineural damage, most likely due to noise exposure in the occupational setting. The Board finds that this report does not establish clear evidence of error. There is no indication that Commander Reed is a physician. Appellant's claim was denied on the lack of medical evidence supporting that his claimed hearing loss was causally related to his employment. As he is not a physician, as defined under the Act, this evidence is not sufficient to show that the Office erred

[8] *Steven J. Gundersen*, 53 ECAB 252, 254-55 (2001).

[9] *Id.*

in its prior decision.[10] Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.

Appellant also submitted reports and audiograms from audiologists and nurses who similarly are not physicians under the Act. This evidence includes a November 8, 2006 report from Mr. Duhon, an audiologist, a January 24, 2009 nurse's report and a January 29, 2008 audiogram from Mr. Barber, an audiologist. Additionally, appellant submitted a February 19, 2009 audiogram from an unknown audiologist. The Board notes that audiologists and nurses are not physicians and this evidence was never reviewed or interpreted by a physician.[11] Accordingly, this evidence has no probative medical value and is insufficient to establish clear evidence of error.

Office procedures provide that the term "clear evidence of error" is intended to represent a difficult standard. The claimant must present evidence which on its face shows that the Office made an error (for example, proof of a miscalculation in a schedule award). Evidence such as a detailed, well-rationalized report, which if submitted prior to the Office's denial, would have created a conflict in medical opinion requiring further development, is not clear evidence of error and would not require a review of a case.[12]

The Board finds that the evidence submitted by appellant in support of his untimely reconsideration request is insufficient to shift the weight of the evidence in favor of his claim or raise a substantial question as to the correctness of the Office's last merit decision. Therefore, the Board finds that appellant has not established clear evidence of error.

On appeal, appellant alleged that the medical evidence was not taken into consideration. However, the record reflects that the medical evidence was reviewed. Appellant also questioned the report of Dr. Keebler and contended that it should be invalidated as the sound proof booth was not capable of being closed and was very dusty. The Board notes that Dr. Keebler and the audiologist advised that the test results were valid and indicative of his hearing sensitivity. There is no evidence to support appellant's assertion. Appellant also asserted that the Office's decision was fraught with errors including the wrong place of employment. The Board notes that the Office noted that appellant was employed by the Department of the Navy as a quality assurance specialist. There is no evidence of any other civilian employer. Furthermore, any reference to the wrong place of employment would not be clear evidence of error regarding the underlying issue of whether appellant's hearing loss was employment related.[13]

[10] *See* 5 U.S.C. § 8101(2). This subsection defines the term "physician." *See also Charley V.B. Harley*, 2 ECAB 208, 211 (1949) (where the Board held that medical opinion, in general, can only be given by a qualified physician).

[11] *See id.*

[12] *Annie L. Billingsley*, 50 ECAB 210 (1998); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(c) (January 2004).

[13] The Board notes that, on appeal, appellant submitted new evidence. The Board cannot consider this evidence, however, as its review of the case is limited to the evidence of record which was before the Office at the time of its final decision. 20 C.F.R. § 501.2(c); *see Steven S. Saleh*, 55 ECAB 169 (2003).

CONCLUSION

The Board finds that the Office properly refused to reopen appellant's claim for reconsideration of the merits on the grounds that it was untimely filed and failed to show clear evidence of error.

ORDER

IT IS HEREBY ORDERED THAT the September 14, 2009 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 27, 2010
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board