United States Department of Labor
Employees' Compensation Appeals Board

D.M., Appellant	)	
and	)	**Docket No. 21-0261**
	)	**Issued: September 29, 2021**
TENNESSEE VALLEY AUTHORITY, FORT LOUDON DAM HYDRO PLANT, Lenoir City, TN, Employer	)	

Appearances:
James T. Bobo, Esq., for the appellant[1]
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
PATRICIA H. FITZGERALD, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On December 16, 2020 appellant, through counsel, filed a timely appeal from a November 2, 2020 nonmerit decision of the Office of Workers' Compensation Programs. As more than 180 days elapsed from the last merit decision dated August 8, 2019 to the filing of this appeal, pursuant to the Federal Employees' Compensation Act[2] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction over the merits of the case.

[1] In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id*. An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id*.; *see also* 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

[2] 5 U.S.C. § 8101 *et seq*.

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 February 5, 2019 appellant, then a 63-year-old retired power plant/hydro operator, filed an occupational disease claim (Form CA-2) alleging that he developed hearing loss due to factors of his federal employment, including exposure to rotating equipment, generators, turbines, and large air compressors.[3] He noted that he first became aware of his condition and its relationship to his federal employment on November 21, 2018.

In a November 26, 2018 audiometric report, David T. Cope, Au.D., an audiologist, noted symptoms of decreased hearing bilaterally which appellant attributed to significant occupational and military noise exposure. He conducted testing and diagnosed mild-to-moderate sensorineural hearing loss bilaterally.

In a letter dated December 7, 2018, Dr. Scott E. Davis, a family practitioner, indicated that appellant was being followed by Dr. Cope for gradually occurring, noise-induced bilateral hearing loss with consequential tinnitus with episodic dizziness and vertigo. He opined that, in accordance with the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*),[4] the November 21, 2018 audiogram revealed 23.4 percent binaural hearing loss. Dr. Davis further opined that appellant was entitled to an additional five percent permanent impairment for tinnitus and that, within a reasonable degree of medical certainty, his hearing loss was causally related to noise exposure at the employing establishment's facilities.

In a February 26, 2019 development letter, OWCP advised appellant of the type of evidence needed to establish his claim and provided a questionnaire for his completion. In a separate letter of even date, it requested that the employing establishment provide comments from a knowledgeable supervisor on the accuracy of his statements, describe the sources of exposure to noise, and provide a copy of all medical examinations pertaining to hearing or ear problems, including preemployment examination and audiograms. OWCP afforded both parties 30 days to respond.

Appellant noted in a March 21, 2019 response to OWCP's hearing loss questionnaire, that he worked for the employing establishment from November 1977 until July 2005. During that time, he was exposed to hydro powerhouse equipment including generators, turbines, powerhouse compressors, evacuation air blow-down equipment, cooling fans, water pumps, spillway gate machinery, and air and electric power tools. Appellant further related that he was also exposed to switchyard equipment including transformers which induced continuous 60 Hertz frequency, as well as circuit breakers and cooling fans. Prior to his federal employment, he was enlisted in the United States Army from August 1972 through August 1975, during which time he was exposed to live weapons fire, helicopter transportation, vehicle engines, compressors, and power tools.

[3] Appellant retired from the employing establishment on July 23, 2005.

[4] A.M.A., *Guides* (6th ed. 2009).

In a report dated April 10, 2019, Whitney R. Mauldin, Au.D., an audiologist, indicated that she reviewed appellant's Form CA-2, medical records, work history, and audiometric record. She opined that appellant did not meet the criteria to establish hearing loss causally related to exposure to noise at work. Dr. Mauldin explained that he had no exposure to any level of noise as a federal employee for the past 14 years due to his retirement, and opined that noise-induced hearing loss is not a latent condition. She further explained that hearing loss due to noise occurs at the time of the exposure, not many years later.

OWCP also received a report of even date summarizing appellant's audiometric testing results through the employing establishment between September 22, 1983 and July 19, 2005.

On May 2, 2019 OWCP referred appellant, along with the medical records, and a statement of accepted facts (SOAF), for audiological testing by Kenneth C. Parker, Au.D., an audiologist, and a second opinion evaluation with Dr. Joseph A. Motto, a Board-certified otolaryngologist.

In a report dated May 17, 2019, Dr. Motto reviewed the SOAF, performed a physical examination, and completed OWCP's hearing loss questionnaire. He indicated that there was no significant variation from the SOAF and noted that appellant's last noise exposure with the employing establishment was in 2005. Dr. Motto diagnosed sensorineural hearing loss and opined that the hearing loss was not attributable to exposures while working for the employing establishment. He explained that the audiometric testing was not consistent with noise-induced hearing loss.

By decision dated August 8, 2019, OWCP denied the claim, finding that the evidence of record was insufficient to establish a causal relationship between appellant's diagnosed hearing loss and the accepted factors of his federal employment.

On August 11, 2020 appellant, through counsel, requested reconsideration of OWCP's August 8, 2019 decision.

In support of the request, appellant submitted a July 14, 2020 narrative report of Dr. Mark Gurley, a Board-certified otolaryngologist, who noted appellant's history of working as a power plant operator at the employing establishment for over 30 years. Dr. Gurley indicated that he reviewed extensive medical and hearing records, which he opined revealed a steady decline in appellant's hearing through the years. He reviewed audiometric testing conducted on that date and diagnosed bilateral sensorineural hearing loss, which he opined was "likely noise induced."

In further support of his request, appellant resubmitted the May 4, 2020 audiological report of Dr. Cope and the July 14, 2020 testing results by Dr. Katie Fuller, an audiologist.

By decision dated November 2, 2020, OWCP denied appellant's request for reconsideration, finding that it was untimely filed and failed to demonstrate clear evidence of error. It stated, "You submitted new medical evidence which cannot be considered in arriving at a determination of 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.[5] 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.[6] Timeliness is determined by the document receipt date, *i.e.*, the "received date" in OWCP's Integrated Federal Employees' Compensation System (iFECS).[7] Imposition of this one-year filing limitation does not constitute an abuse of discretion.[8]

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.[9] 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.[10] In this regard, OWCP will limit its focus to a review of how the newly submitted evidence bears on the prior evidence of record.[11]

To demonstrate clear evidence of error, a claimant must submit evidence relevant to the issue, which was decided by OWCP.[12] 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.[13]

---

[5] 5 U.S.C. § 8128(a); *L.W.*, Docket No. 18-1475 (issued February 7, 2019); *Y.S.*, Docket No. 08-0440 (issued March 16, 2009).

[6] 20 C.F.R. § 10.607(a).

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

[8] *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).

[9] *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).

[10] *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); *supra* note 7 at Chapter 2.1602.5 (February 2016).

[11] *J.M.*, Docket No. 19-1842 (issued April 23, 2020); *Robert G. Burns*, 57 ECAB 657 (2006).

[12] *S.C.*, Docket No. 18-0126 (issued May 14, 2016); *supra* note 7 at Chapter 2.1602.5(a) (February 2016).

[13] *C.M.*, Docket No. 19-1211 (issued August 5, 2020).

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.[14] The Board makes an independent determination of whether a claimant has demonstrated clear evidence of error on the part of OWCP.[15]

ANALYSIS

The Board finds that OWCP properly determined that appellant's August 11, 2020 request for reconsideration was untimely filed.

The last merit decision of record was issued on August 8, 2019. As appellant's request for reconsideration was received by OWCP on August 11, 2020, more than one year after the August 8, 2019 merit decision, pursuant to 20 C.F.R. § 10.607(a), the Board finds the request for reconsideration was untimely filed. Consequently, appellant must demonstrate clear evidence of error by OWCP in denying the claim.[16]

The Board further finds, however, that OWCP did not make sufficient findings regarding the evidence submitted in support of the reconsideration request.[17] OWCP denied appellant's request for reconsideration without complying with the review requirements of FECA and its implementing regulations.[18] Section 8124(a) of FECA provides that OWCP shall determine and make a finding of fact and make an award for or against payment of compensation.[19] Its regulations at section 10.126 provide that the decision of the Director of OWCP shall contain findings of fact and a statement of reasons.[20] As well, OWCP's procedures provide that the reasoning behind OWCP's evaluation should be clear enough for the reader to understand the precise defect of the claim and the kind of evidence which would overcome it.[21]

In denying appellant's August 11, 2020 reconsideration request, OWCP noted: "You submitted new medical evidence which cannot be considered in arriving at a determination of clear

[14] *J.S.*, Docket No. 16-1240 (issued December 1, 2016); *supra* note 7 at Chapter 2.1602.5(a) (February 2016).

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

[16] 20 C.F.R. § 10.607(b); *see R.T.*, Docket No. 19-0604 (issued September 13, 2019); *see Debra McDavid*, 57 ECAB 149 (2005).

[17] *See Order Remanding Case*, *J.K.*, Docket No. 20-0556 (issued August 13, 2020); *Order Remanding Case*, *C.D.*, Docket No. 20-0450 (issued August 13, 2020); *Order Remanding Case*, *T.B.*, Docket No. 20-0426 (issued July 27, 2020).

[18] *See C.G.*, Docket No. 20-0051 (issued June 29, 2020); *T.P.*, Docket No. 19-1533 (issued April 30, 2020); *see also* 20 C.F.R. § 10.607(b).

[19] 5 U.S.C. § 8124(a).

[20] 20 C.F.R. § 10.126.

[21] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Disallowances*, Chapter 2.1400.5 (February 2013).

evidence of error." However, it provided no further discussion relative to the specific medical evidence submitted.[22]

The Board will, therefore, set aside OWCP's August 11, 2020 decision and remand the case for an appropriate decision on appellant's untimely reconsideration request, which describes the evidence submitted on reconsideration and provides detailed reasons for accepting or denying the reconsideration request.

CONCLUSION

The Board finds that OWCP properly determined that appellant's August 11, 2020 request for reconsideration was untimely filed. However, the Board further finds that the case is not in posture for decision with regard to whether the untimely reconsideration request demonstrates clear evidence of error.

ORDER

IT IS HEREBY ORDERED THAT the November 2, 2020 decision of the Office of Workers' Compensation Programs is affirmed in part, set aside in part, and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: September 29, 2021
Washington, DC

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

Patricia H. Fitzgerald, Alternate Judge
Employees' Compensation Appeals Board

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

[22] *See Order Remanding Case, C.G.*, Docket No. 20-0051 (issued June 29, 2020); *R.T., supra* note 16; *R.C.*, Docket No. 16-0563 (issued May 4, 2016).