

**United States Department of Labor
Employees' Compensation Appeals Board**

M.D., Appellant)	
)	
and)	Docket No. 23-0312
)	Issued: August 7, 2023
DEPARTMENT OF JUSTICE, DRUG)	
ENFORCEMENT ADMINISTRATION,)	
Centennial, CO, Employer)	
)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

ORDER REMANDING CASE

Before:
JANICE B. ASKIN, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge
JAMES D. MCGINLEY, Alternate Judge

On December 19, 2022 appellant filed a timely appeal from a December 2, 2022 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). The Clerk of the Appellate Boards assigned Docket No. 23-0312 to the appeal.

On January 21, 2021 appellant, then a 59-year-old criminal investigator, filed an occupational disease claim (Form CA-2) alleging that he developed hearing loss due to factors of his federal employment, including years of exposure to noise hazards. He noted that he first became aware of his condition and its relation to his federal employment on January 11, 2021. Appellant stopped work on January 11, 2021.

Appellant submitted a position description for a criminal investigator and special agent.

In a February 5, 2021 development letter, OWCP informed appellant of the deficiencies of 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 letter of even date, OWCP also requested that the employing establishment provide additional information, including comments from a knowledgeable supervisor, regarding appellant's occupational disease claim. It afforded both parties 30 days to respond.

In a letter dated March 19, 2021, D.L., chief of the employing establishment health services unit, explained that the health services unit was currently undergoing a major renovation project and all retired medical records were not accessible.

By decision dated April 29, 2021, OWCP denied appellant's occupational disease claim, finding that the evidence of record was insufficient to establish the alleged factors of employment. It concluded, therefore, that the requirements had not been met to establish an injury as defined by FECA.

On November 21, 2022 appellant requested reconsideration. He explained that he was unable to obtain his medical records until October 2022 because the medical records archive was closed due to renovations. Appellant requested that OWCP reconsider his claim now that he submitted his medical records.

OWCP received a reference audiogram performed on September 12, 1996 for the right ear, at the frequency levels of 500, 1,000, 2,000, 3,000, 4,000, and 6,000 Hertz (Hz) revealed losses of -5, 5, 0, 10, 20, and 15 decibels (dBs) respectively. Testing for the left ear, at the same frequency levels, revealed losses of 0, 5, 0, 5, 5, and 5 dBs respectively.

Appellant also submitted additional audiogram and hearing assessment reports dated from September 12, 1996 through March 3, 2021, laboratory test results dated July 16, 1999, and copies of articles regarding the hazards of noise exposure from firearms, planes, and ships.

In his response to the February 5, 2021 development letter, appellant provided a completed questionnaire and a detailed history regarding his noise-induced hearing loss. He indicated that during his years of federal employment, he worked as a special agent, turbine/reciprocating powered engine airplane and helicopter pilot, certified firearms instructors, certified tactical instructor, certified clandestine methamphetamine laboratory team investigator, and tactical team leader. Appellant reported that he underwent annual physical examinations, which included hearing, and it was noted that his hearing was getting progressively worse. He noted that he was diagnosed with tinnitus and moderate-to-severe hearing loss in January 2021.

Appellant submitted several traumatic injury claims (Form CA-1) dated October 4, 1999 through August 14, 2001.

By decision dated December 2, 2022, OWCP denied appellant's reconsideration request, finding that it was untimely filed and failed to demonstrate clear evidence of error. It noted, "[y]ou did not present clear evidence of error. Therefore, your request for reconsideration is denied because it was not received within the one-year limit."

The Board, having duly considered the matter, finds that this case is not in posture for decision.

OWCP did not make findings regarding the evidence appellant submitted in support of the reconsideration request.¹ It summarily denied his request for reconsideration without complying with the review requirement of FECA and its implementing regulations.² Section 8124(a) of FECA provides that OWCP shall determine and make findings of fact and make an award for or against payment of compensation.³ OWCP's regulations at 20 C.F.R. § 10.126 further provide that the decision of the Director of OWCP shall contain findings of fact and a statement of reasons.⁴ As well, its procedures provide that the reasoning behind OWCP's decision should be clear enough for the reader to understand the precise defect of the claim, and the kind of evidence which would overcome it.⁵

In the December 2, 2022 decision, OWCP did not discharge its responsibility to set forth findings of fact, and a clear statement of reasons explaining the disposition so that appellant could understand the basis for the decision, *i.e.*, why the evidence submitted in connection with the request for reconsideration did not demonstrate clear evidence of error in the April 29, 2021 decision, and was insufficient to warrant further merit review.⁶ It did not address the evidence submitted by appellant on reconsideration, including the medical reports, audiogram reports, and appellant's statements. This case must therefore be remanded to OWCP for an appropriate decision on appellant's request for reconsideration that describes the evidence submitted on reconsideration, and provides detailed reasons for accepting or rejecting the request for reconsideration pursuant to the relevant standards.⁷

The Board will therefore set aside OWCP's December 2, 2022 decision and remand the case for findings of fact and a statement of reasons, pursuant to the standards set forth in 20 C.F.R. §§ 10.500(a) and 10.126, to be followed by an appropriate decision on appellant's request for reconsideration.

¹ See *Order Remanding Case, S.G.*, Docket No. 22-1136 (issued January 17, 2023); *Order Remanding Case, J.K.*, Docket No. 20-0556 (issued April 13, 2020); *Order Remanding Case, T.B.*, Docket No. 20-0426 (issued July 27, 2020).

² See *M.G.*, Docket No. 21-0893 (issued December 27, 2021); *Order Remanding Case, W.D.*, Docket No. 20-0859 (issued November 20, 2020); *T.P.*, Docket No. 19-1533 (issued April 30, 2020); see also 20 C.F.R. § 10.607(b).

³ 5 U.S.C. § 8124(a).

⁴ 20 C.F.R. § 10.126.

⁵ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Disallowances*, Chapter 2.1400.5 (February 2013).

⁶ Pursuant to 5 U.S.C. § 8128(a), OWCP has the discretion to reopen a case for further merit review. A request for reconsideration must be received by OWCP within one year of the date of OWCP's decision for which review is sought. 20 C.F.R. § 10.607(a). 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. If a request for reconsideration demonstrates clear evidence of error, OWCP will reopen the case for merit review. See 20 C.F.R. § 10.607(b); *L.C.*, Docket No. 18-1407 (issued February 14, 2019).

⁷ See *A.G.*, Docket No. 21-0817 (issued July 26, 2022); *R.T.*, Docket No. 19-0604 (issued September 13, 2019); *T.M.*, Docket No. 17-1609 (issued December 4, 2017); *J.J.*, Docket No. 11-1958 (issued June 27, 2012).

IT IS HEREBY ORDERED THAT the December 2, 2022 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded to OWCP for further proceedings consistent with this order of the Board.

Issued: August 7, 2023
Washington, DC

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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

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