

request for reconsideration of the merits of his claim, finding that it was untimely filed and failed to demonstrate clear evidence of error.

FACTUAL HISTORY

On July 25, 2007 appellant, then a 55-year-old materials handler, filed an occupational disease claim (Form CA-2) for hearing loss due to factors of his federal employment including exposure to high levels of environmental and machinery noise. He noted that he first became aware of his hearing loss and realized its relationship to his federal employment on June 18, 2007.³

By letter dated August 10, 2007, OWCP informed appellant of the deficiencies of his hearing loss claim. It advised him of the type of factual and medical evidence needed. In a separate development letter of even date, OWCP requested that the employing establishment provide additional information, including comments from a knowledgeable supervisor regarding appellant's claim. It afforded both parties 30 days to respond.

In a September 6, 2007 letter, appellant, through his then representative, explained that he worked as a material handler dating back to 1979, that he first noticed a loss of hearing in October 2000, and that he has always worn hearing protection.

By decision dated September 20, 2007, OWCP denied the claim, finding the record devoid of medical evidence that provided a diagnosis in connection with the accepted employment exposure and that there were no medical treatment notes and/or audiograms from 1979 to establish the baseline for appellant's claimed hearing loss. The requirements therefore had not been met for establishing an injury as defined by FECA.

Appellant subsequently submitted additional medical evidence dated 2009 through April 2012, which contained diagnoses of occupational noise-induced hearing loss and included audiograms and hearing loss calculations.

On January 6, 2023 OWCP received a December 20, 2022 report from Dr. John W. Ellis, Board-certified in family medicine, requesting that appellant's claim be reopened. Dr. Ellis recounted appellant's history of injury medical course. He cited to an October 26, 2022 audiogram, which indicated a significant decline in appellant's binaural hearing. Dr. Ellis concluded that appellant's noise-induced hearing loss was a direct result of his employment duties.

Appellant continued to request that his claim be reopened for further review. By letters dated February 23 and April 21, 2023, OWCP advised him that his claim could not be reopened as the claim was denied on September 20, 2007.

On September 21, 2023 appellant requested a review of the written record by a representative of OWCP's Branch of Hearings and Review.

³ Under OWCP File No. xxxxxx669, the record reflects that on July 11, 2011 appellant filed an occupational disease claim (Form CA-2) for hearing loss as of June 18, 2007. OWCP, however, determined that the claim was a duplicate of the current OWCP File No. xxxxxx145.

By decision dated October 5, 2023, OWCP denied appellant's request for a review of the written record, finding that it was untimely filed. It further exercised its discretion and determined that the issue in the case could equally well be addressed by a request for reconsideration before OWCP, along with the submission of new evidence supporting his claim.⁴

On November 2, 2023 appellant requested reconsideration. He related that he was seeking reconsideration based on the medical report from Dr. Ellis dated December 20, 2022, that had not been previously considered.

By decision dated November 8, 2023, OWCP denied appellant's request for reconsideration, finding that it was untimely filed and failed to demonstrate clear evidence of error.

LEGAL PRECEDENT -- ISSUE 1

Section 8124(b)(1) of FECA provides that "a claimant for compensation not satisfied with a decision of the Secretary is entitled, on request made within 30 days after the date of the issuance of the decision, to a hearing on his or her claim before a representative of the Secretary."⁵

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."⁶ 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.⁷ OWCP has discretion, however, to grant or deny a request that is made after this 30-day period.⁸ In such a case, it will determine whether to grant a discretionary hearing and, if not, will so advise the claimant with reasons.⁹

ANALYSIS -- ISSUE 1

The Board finds that OWCP properly denied appellant's request for a review of the written record as untimely filed, pursuant to 5 U.S.C. § 8124(b).

OWCP's regulations provide that a request for review of the written record must be made within 30 days of the date of the decision for which a review is sought.¹⁰ On September 21, 2023 appellant requested a review of the written record by a representative of OWCP's Branch of

⁴ A return mail envelope indicates that the decision was undeliverable. However, on November 2, 2023, appellant indicated that he had received OWCP's October 5, 2023 decision.

⁵ 5 U.S.C. § 8124(b).

⁶ 20 C.F.R. § 10.615.

⁷ *Id.* at § 10.616.

⁸ *N.E.*, Docket No. 23-1155 (issued February 8, 2024); *M.R.*, Docket No. 22-0321 (issued July 7, 2022); *G.W.*, Docket No. 10-0782 (issued April 23, 2010).

⁹ *Id.*

¹⁰ *Supra* note 6.

Hearings and Review. As the request was made more than 30 days after OWCP's September 20, 2007 decision, it was untimely filed, and appellant was not entitled to a review of the written record as a matter of right.

Although appellant was not entitled to a review of the written record as a matter of right, OWCP's Branch of Hearings and Review may exercise its discretion to either grant or deny an oral hearing or review of the written record following reconsideration.¹¹ The Board has held that the only limitation on OWCP's authority is reasonableness. An abuse of discretion is generally shown through proof of manifest error, clearly unreasonable exercise of judgment, or actions taken which are contrary to both logic and probable deductions from established facts. In this instance, OWCP denied a discretionary review of the written record because the case could be equally well addressed through the submission of new evidence and a request for reconsideration. The Board thus finds that OWCP properly exercised discretionary authority in denying his request for a review of the written record.

LEGAL PRECEDENT -- ISSUE 2

Pursuant to section 8128(a) of FECA, OWCP has the discretion to reopen a case for further merit review.¹² 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.¹³ Timeliness is determined by the document receipt date (*i.e.*, the "received date" in OWCP's Integrated Federal Employees' Compensation System (iFECS)).¹⁴ Imposition of this one-year filing limitation does not constitute an abuse of discretion.¹⁵

When a request for reconsideration is untimely, OWCP undertakes a limited review to determine whether the request demonstrates clear evidence that its most recent merit decision was in error.¹⁶ Its 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.¹⁷ In this

¹¹ *T.D.*, Docket No. 21-1063 (issued April 17, 2023); *A.S.*, Docket No. 22-1227 (issued April 6, 2023).

¹² 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).

¹³ 20 C.F.R. § 10.607(a).

¹⁴ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4 (September 2020).

¹⁵ *W.B.*, Docket No. 23-0473 (issued August 29, 2023); *G.G.*, Docket No. 18-1072 (issued January 7, 2019); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

¹⁶ *See* 20 C.F.R. § 10.607(b); *R.C.*, Docket No. 21-0617 (issued August 25, 2023); *M.H.*, Docket No. 18-0623 (issued October 4, 2018); *Charles J. Prudencio*, 41 ECAB 499 (1990).

¹⁷ *L.C.*, Docket No. 18-1407 (issued February 14, 2019); *M.L.*, Docket No. 09-0956 (issued April 15, 2010). *See also id.* at § 10.607(b); *supra* note 14 at Chapter 2.1602.5 (September 2020).

regard, OWCP will limit its focus to a review of how the newly submitted evidence bears on the prior evidence of record.¹⁸

To demonstrate clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by OWCP.¹⁹ 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.²⁰

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. 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 -- ISSUE 2

The Board finds that OWCP properly found that appellant's request for reconsideration was untimely filed.

OWCP's regulations²³ and procedures²⁴ establish a one-year time limit for requesting reconsideration, which begins on the date of the last merit decision issued in the case. A right to reconsideration within one year also accompanies any subsequent merit decision on the issues.²⁵ The most recent merit decision was OWCP's September 20, 2007 decision. As appellant's November 2, 2023 request for reconsideration was received more than one year after the

¹⁸ *S.D.*, Docket No. 23-0626 (issued August 24, 2023); *J.M.*, Docket No. 19-1842 (issued April 23, 2020); *Robert G. Burns*, 57 ECAB 657 (2006).

¹⁹ *J.M.*, Docket No. 22-0630 (issued February 10, 2023); *S.C.*, Docket No. 18-0126 (issued May 14, 2016).

²⁰ *C.M.*, Docket No. 19-1211 (issued August 5, 2020); *Robert G. Burns*, *supra* note 18.

²¹ *J.S.*, Docket No. 16-1240 (issued December 1, 2016); *supra* note 14 at Chapter 2.1602.5(a) (September 2020).

²² *L.J.*, Docket No. 23-0282 (issued May 26, 2023); *D.S.*, Docket No. 17-0407 (issued May 24, 2017).

²³ 20 C.F.R. § 10.607(a); *see L.T.*, Docket No. 21-0844 (issued April 21, 2023); *J.W.*, Docket No. 18-0703 (issued November 14, 2018); *Alberta Dukes*, 56 ECAB 247 (2005).

²⁴ *Supra* note 14 at Chapter 2.1602.4 (February 2016); *Veletta C. Coleman*, 48 ECAB 367, 370 (1997).

²⁵ 20 C.F.R. § 10.607(b); *see Debra McDavid*, 57 ECAB 149 (2005).

September 20, 2007 decision, the Board finds that it was untimely filed. Therefore, he must demonstrate clear evidence of error by OWCP in denying his claim for hearing loss.²⁶

The Board further finds, however, that OWCP denied appellant's request for reconsideration without complying with the review requirement of FECA and its implementing regulations.²⁷ As noted, 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.²⁸ Its regulations at 20 C.F.R. § 10.126 provide that the decision of the director of OWCP shall contain findings and facts and a statement of reasons.²⁹ 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.³⁰

The Board will therefore set aside OWCP's November 8, 2023 decision, and remand the case for an appropriate decision on appellant's untimely reconsideration request.³¹

CONCLUSION

The Board finds that OWCP properly denied appellant's request for a review of the written record as untimely filed, pursuant to 5 U.S.C. § 8124(b). The Board further finds that his request for reconsideration was untimely filed; however, the case is not in posture for decision regarding whether he has demonstrated clear evidence of error.

²⁶ *Id.* at § 10.607(b); *see W.B.*, Docket No. 23-0473 (issued August 29, 2023); *M.W.*, Docket No. 17-0892 (issued May 21, 2018).

²⁷ *I.L.*, Docket No. 23-0329 (issued August 1, 2023); *L.J.*, *supra* note 22; *M.G.*, Docket No. 21-0893 (issued December 27, 2021); *see also id.* at § 10.607(b).

²⁸ 5 U.S.C. § 8124(a).

²⁹ 20 C.F.R. § 10.126.

³⁰ *Supra* note 14 at Chapter 2.1400.5 (February 2013) (all decisions should contain findings of fact sufficient to identify the benefit being denied and the reason for the disallowance).

³¹ *L.J.*, *supra* note 22; *V.R.*, Docket No. 19-0536 (issued February 22, 2021).

ORDER

IT IS HEREBY ORDERED THAT the October 5, 2023 decision of the Office of Workers' Compensation Programs is affirmed. The November 8, 2023 decision of the OWCP is affirmed in part and set aside in part. The case is remanded for further proceedings consistent with this decision of the Board.

Issued: June 5, 2024
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