United States Department of Labor
Employees' Compensation Appeals Board

JAMES R. MIRRA, Appellant	)	
and	)	**Docket No. 05-998**
	)	**Issued: September 6, 2005**
DEPARTMENT OF THE AIR FORCE, NATIONAL GUARD BUREAU, Latham, NY, Employer	)	

Appearances:
James R. Mirra, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On March 24, 2005 appellant filed a timely appeal from the Office of Workers' Compensation Programs' February 8, 2005 nonmerit decision denying his reconsideration request. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2), the Board has jurisdiction over this nonmerit decision. The last merit decision of record was the Office's October 26, 2001 decision denying his hearing loss claim. Because more than one year has elapsed between the last merit decision and the filing of this appeal on March 24, 2005, the Board lacks jurisdiction to review the merits of this claim.[1]

ISSUE

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

[1] *See* 20 C.F.R. §§ 501.2(c) and 501.3(d)(2).

FACTUAL HISTORY

On March 14, 2001 appellant, then a 54-year-old aircraft jet engine mechanic, filed an occupational disease claim alleging that he sustained a hearing loss in the performance of duty. He claimed that he was exposed to hazardous noise from aircrafts, support vehicles and machines when he was deployed in Saudi Arabia during the Desert Shield/Desert Storm campaign between January 2 and April 17, 1991. Appellant also stated, "While working at Hancock Field was subjected to high levels of noise from five minutes to two or three hours when on the flight line and while in the shop when doors are open in summer months from planes taking off." He retired from the employing establishment effective February 10, 2001.

Appellant submitted copies of various audiograms dated between 1981 and 2000.[2] The record contains a February 21, 2001 statement in which Phillip Greenwood, a supervisor, stated that appellant worked at the employing establishment between June 14, 1981 and February 10, 2001 where he was exposed to noise from aircrafts, support vehicles and machines.[3] The record also contains a 1997 description of appellant's work duties at the Hancock Field work site,[4] memoranda concerning June 1998 and December 1999 noise studies of his workplace at Hancock Field, and a March 20, 2001 statement in which appellant described his exposure to noise at work between May 1981 and February 2001.[5]

By letter dated May 30, 2001, the Office requested that appellant provide additional information about his employment history (including names of employers, job titles and periods of employment) and about the type and extent of noise he was exposed to during these periods of employment. The Office asked appellant to list all civilian federal employers, nonfederal employers and military employers. The Office sent a copy of the letter to the employing establishment and noted that appellant related his hearing problems to his employment in Saudi Arabia, but that it was unclear whether he was on "military time" during this period. The Office asked the employing establishment to submit an official statement indicating whether appellant was a civilian employee at the time of his claimed injury.

Appellant submitted additional copies of documents he had previously submitted to the Office.

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[2] The audiograms dated between 1981 and 1996 listed appellant's "civilian grade" as WG-10. An August 14, 2000 audiogram listed appellant's "pay grade -- uniformed services" as E-6.

[3] Mr. Greenwood indicated that the exposure could occur anytime during an eight-hour day for periods of five minutes to two hours depending on the task being performed.

[4] The description listed appellant's grade as WG-10.

[5] Appellant indicated that he was exposed to hazardous noise at work between May 1981 and February 2001 and that this exposure occurred for most of each workday between May 1981 and approximately 1998. He indicated that the individual instances of noise exposure could last for minutes or hours. Appellant stated that he worked in a flight line dispatch position between May 1981 and 1994 and as a jet engine intermediate maintenance worker between 1994 and 2001.

By decision dated October 26, 2001, the Office denied appellant's hearing loss claim. The Office stated that appellant claimed his hearing loss began while employed in Saudi Arabia and noted:

> "It can only be assumed that you were on active military duty at the time and not working in a federal civil employee capacity. Although you also claim exposure to high-decibel noise sources at Hancock Field, you do not identify the specific time frames of your civil employment as opposed to those of your military service. There is no evidence from you identifying when you were employed in what capacity."

The Office concluded that appellant had not established that he was a civil federal employee at the time of the claimed injury and that therefore he had not met the "requirements for establishing that you were a civilian employee at any point during your reported exposure."

On January 24, 2005 appellant requested reconsideration of his claim indicating that he was submitting evidence which showed that he was a civilian federal employee during the period that he alleged he sustained an employment-related hearing loss. He submitted a Certified Summary of Federal Service form, signed by an employee relations specialist for the employing establishment on October 27, 2000, which indicated that appellant was under the Civil Service Retirement System while employed with the Department of the Air Force, New York Air National Guard from August 9, 1981 until the time he retired on February 10, 2001.[6]

By decision dated February 8, 2005, the Office denied appellant's request for further review of the merits of his claim on the grounds that his request was untimely filed and failed to demonstrate clear evidence of error.

LEGAL PRECEDENT

To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant must file his application for review within one year of the date of that decision.[7] The Board has found that the imposition of the one-year time limitation does not constitute an abuse of the discretionary authority granted the Office under section 8128(a) of the Federal Employees' Compensation Act.[8]

The Office, however, may not deny an application for review solely on the grounds that the application was not timely filed. When an application for review is not timely filed, the Office must nevertheless undertake a limited review to determine whether the application

[6] The form also indicated that appellant was under military retirement while employed by the Air Force between June 2, 1966 and June 1, 1970 and under Federal Insurance Contribution Act retirement while employed by the Air Force, New York Air National Guard between June 14 and August 8, 1981. Appellant also submitted copies of documents that he had previously submitted to the Office.

[7] 20 C.F.R. § 10.607(a).

[8] *Leon D. Faidley, Jr.*, 41 ECAB 104, 111 (1989).

establishes "clear evidence of error."[9] Office regulations and procedure provide 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(a), if the claimant's application for review shows "clear evidence of error" on the part of the Office.[10]

ANALYSIS

In its October 26, 2001 decision, the Office properly determined that appellant filed an untimely request for reconsideration. Appellant's reconsideration request was filed on January 24, 2005, more than one year after the Office's October 26, 2001 decision and, therefore, he must demonstrate clear evidence of error on the part of the Office in issuing this decision.

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.[11] The evidence must be positive, precise and explicit and must manifest on its face that the Office committed an error.[12] 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.[14] 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.[15] 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 *prima facie* shift the weight of the evidence in favor of the claimant and raise a substantial question as to the correctness of the Office decision.[16]

Appellant alleged that he sustained a hearing loss because he was exposed to hazardous noise from aircraft, support vehicles and machines at work between May 1981 and

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[9] *See* 20 C.F.R. § 10.607(b); *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

[10] 20 C.F.R. § 10.607(b); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3d (January 2004). Office procedure further provides, "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 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." *Id.* at Chapter 2.1602.3c.

[11] *See Dean D. Beets*, 43 ECAB 1153, 1157-58 (1992).

[12] *See Leona N. Travis*, 43 ECAB 227, 240 (1991).

[13] *See Jesus D. Sanchez*, 41 ECAB 964, 968 (1990).

[14] *See Leona N. Travis*, *supra* note 12.

[15] *See Nelson T. Thompson*, 43 ECAB 919, 922 (1992).

[16] *Leon D. Faidley, Jr.*, *supra* note 8.

February 2001.[17] By decision dated October 26, 2001, the Office denied appellant's claim on the grounds that he had not established that he was a civilian federal employee at any point during the time he was exposed to hazardous noise which he felt caused his hearing loss.

In support of his reconsideration request, appellant submitted a Certified Summary of Federal Service form, signed by an employee relations specialist for the employing establishment on October 27, 2000, which indicated that he was under the Civil Service Retirement System while working for the employing establishment from August 9, 1981 until the time he retired on February 10, 2001. This evidence shows that appellant was a civilian federal employee for the employing establishment between 1981 and 2001.[18] Appellant had claimed that he sustained a hearing loss because he was exposed to hazardous noise at work between 1981 and 2001. The sole basis for the Office's denial of appellant's hearing loss claim was that he had not established that he was a civilian federal employee at any point during the time he claimed he was exposed to hazardous noise at work. Appellant has shown that he was a civilian federal employee during at least part of the period that he claimed he sustained an employment-related hearing loss and therefore he has shown that the Office's determination in this regard was improper. Therefore, appellant has demonstrated clear evidence of error on the part of the Office in issuing its October 26, 2001 decision.

Because appellant has shown clear evidence of error, he is entitled to a merit review of his hearing loss claim. The case should be remanded to the Office in order to conduct a merit review under the relevant standards of the Act regarding the establishment of employment-related hearing loss.[19]

[17] He indicated that this hazardous noise exposure started when he began working at Hancock Field in 2001 and that he also was exposed to hazardous noise when he was deployed in Saudi Arabia during the Desert Shield/Desert Storm campaign between January 2 and April 17, 1991.

[18] The Act provides that the United States "shall pay compensation as specified by this subchapter for the disability or death of an employee resulting from personal injury sustained while in the performance of his duty." 5 U.S.C. § 8102(a). A claimant seeking compensation under the Act has the burden of establishing the essential elements of his claim by the weight of the reliable, probative and substantial evidence, including that he was an "employee" within the meaning of the Act. *See Elaine Pendleton*, 40 ECAB 1143, 1145 (1989). For purposes of determining entitlement to compensation benefits under the Act, an "employee" is defined, in relevant part, as "(A) a civil officer or employee in any branch of the [g]overnment of the United States, including an officer or employee of an instrumentality wholly owned by the United States; (B) an individual rendering personal service to the United States similar to the service of a civil officer or employee of the United States, without pay or for nominal pay, when a statute authorizes the acceptance or use of the service, or authorizes payment of travel or other expenses of the individual...." 5 U.S.C. § 8101(1).

[19] The schedule award provision of the Act and its implementing regulation sets forth the number of weeks of compensation payable to employees sustaining employment-related permanent impairment from loss, or loss of use, of scheduled members or functions of the body. 5 U.S.C. § 8107; 20 C.F.R. § 10.404 (1999). However, the Act does not specify the manner in which the percentage of loss shall be determined. For consistent results and to ensure equal justice under the law to all claimants, good administrative practice necessitates the use of a single set of tables so that there may be uniform standards applicable to all claimants. The American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) has been adopted by the implementing regulation as the appropriate standard for evaluating schedule losses. 20 C.F.R. § 10.404 (1999).

CONCLUSION

The Board finds that the Office improperly refused to reopen appellant's case for further review of the merits of his claim. The case will be remanded to the Office in order to conduct a merit review under the relevant standards of the Act and, after such development as it deems necessary, the Office will issue an appropriate decision.

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' February 8, 2005 decision is reversed and the case remanded to the Office for further proceedings consistent with this decision of the Board.

Issued: September 6, 2005
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

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