

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

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P.G., Appellant )

and )

DEPARTMENT OF THE NAVY, PUGET )  
SOUND NAVAL SHIPYARD & )  
INTERMEDIATE MAINTENANCE FACILITY, )  
Bremerton, WA, Employer )

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**Docket No. 20-0244**  
**Issued: February 25, 2021**

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

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

ALEC J. KOROMILAS, Chief Judge  
JANICE B. ASKIN, Judge  
PATRICIA H. FITZGERALD, Alternate Judge

**JURISDICTION**

On November 13, 2019 appellant filed an appeal from a June 7, 2019 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days elapsed from the last merit decision dated March 14, 2018, to the filing of this appeal, pursuant to the Federal Employees' Compensation Act<sup>1</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction to review the merits of appellant's claim.

**ISSUE**

The issue is whether OWCP properly denied appellant's request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

**FACTUAL HISTORY**

On September 11, 2017 appellant, then a retired 59-year-old supervisory civil engineer, filed an occupational disease claim (Form CA-2) alleging that he suffered bilateral hearing loss

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<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

and tinnitus due to factors of his federal employment. He noted that he first became aware of his condition and first realized it was caused or aggravated by his federal employment on February 9, 2015. Appellant explained that his physician concluded on evaluation that excessive noise and stress at work were aggravating factors of his tinnitus. A Notice of Personnel Action (Form SF-50) indicated that appellant retired effective July 31, 2015.

In a July 9, 2015 medical report, Dr. Preston Rice, Board-certified in otolaryngology, evaluated appellant for frequent headaches and a possible sinus issue. Appellant informed him that he experienced headaches and fullness in his ear related to constant tinnitus. Dr. Rice provided a diagnosis of sinusitis and pneumonia and referenced appellant's symptoms of sensorineural hearing loss and tinnitus. In his assessment, he noted that appellant would be retiring at the end of the month and opined that being away from the noise at the shipyard may decrease the tinnitus, as well as some of the headaches he had been experiencing. Dr. Rice explained that, while the tinnitus will most likely be chronic, it should fade with time. He concluded by noting that appellant's symptoms began six months prior and that, from a subjective standpoint, some of the excessive noise and stress he experienced at work were probably an aggravating factor for his tinnitus and headaches.

Appellant also submitted the results of a September 11, 2017 audiometric evaluation from Kim Coy, a Board-certified hearing instrument specialist.

On October 24, 2017 OWCP referred appellant, along with a statement of accepted facts (SOAF) and the medical record, to Dr. Jackson Holland, Board-certified in otolaryngology, for a second opinion evaluation to determine the nature and extent of his alleged employment-related conditions.

In his November 20, 2017 medical report, Dr. Holland reviewed the SOAF and the July 9, 2015 medical report from Dr. Rice. He noted appellant's history of noise exposure during his federal employment and indicated that appellant's hazardous noise exposure on marine repair facilities/Department of Defense was spotty and sparse. Dr. Holland noted contributory noise exposure that included discharging of various firearms and personal use of a chainsaw and a push lawnmower. He noted Dr. Rice's opinion of a probable inflammatory process involving the left side of appellant's inner ear. Dr. Holland also noted an unremarkable February 2015 magnetic resonance imaging (MRI) scan of appellant's brain. He indicated that audiometric testing performed on the date of examination revealed an entirely normal right ear with pure-tone thresholds in all test frequencies spanning 250 through 8,000 Hertz (Hz) and mild neurosensory impairment on the left at 4,000 to 8,000 Hz. Dr. Holland diagnosed neurosensory hearing loss and tinnitus of the left ear and concluded that appellant had a calculated hearing impairment of zero percent binaural. He opined that appellant's tinnitus was of an uncertain cause and that he likely had multiple potentiating nonoccupational factors responsible for his condition. Dr. Holland concluded by finding that no workplace injury occurred and that the circumstances of appellant's condition were unrelated to any exposure or any possibility of acquired injury while he served as a member of the federal civilian workforce.

By decision dated December 5, 2017, OWCP denied appellant's occupational disease claim, finding that the evidence of record was insufficient to establish that his diagnosed condition was causally related to the accepted factors of his federal employment.

On March 12, 2018 appellant requested reconsideration of OWCP's December 5, 2017 decision. In an attached letter, he corrected the SOAF, noting that he worked for the Puget Sound Naval Shipyard from November 2000 to July 2015 and not Naval Facilities Engineering Command Northwest. Appellant calculated his noise exposure while employed was 10 percent from 1980 to 1984, 25 percent from 1986 to 1992, 10 percent from 1992 to 2000, and 5 percent from 2000 to 2015.

With his request for reconsideration, appellant submitted a January 4, 2018 medical report, wherein Dr. Rice noted that appellant presented with ongoing hearing loss, tinnitus, and headaches. Dr. Rice indicated that appellant's tinnitus was most likely associated with his asymmetric sensorineural hearing loss. He noted that it was still undetermined as to whether appellant's condition was viral or a result of unilateral acoustic trauma. Dr. Rice concluded by recommending a second opinion from an alternative neurologist regarding appellant's headaches.

By decision dated March 14, 2018, OWCP denied modification of its December 5, 2017 decision.

On June 6, 2019 OWCP received appellant's request for reconsideration of OWCP's March 14, 2018 decision. In an attached letter, appellant asserted that, although the root cause of his condition was unclear, Dr. Rice concluded that the most probable cause was his extensive career working with the Department of the Navy. He also rejected OWCP's determination that "the name of the facility would not change the source and duration of noise exposure," asserting that working in an office building was drastically different than working in a congested industrial setting.

By decision dated June 7, 2019, OWCP denied appellant's request for reconsideration of the merits of his claim.

### **LEGAL PRECEDENT**

Section 8128(a) of FECA does not entitle a claimant to review of an OWCP decision as a matter of right.<sup>2</sup> OWCP has discretionary authority in this regard and has imposed certain limitations in exercising its authority.<sup>3</sup> One such limitation is that the request for reconsideration must be received by OWCP within one year of the date of the decision for which review is sought.<sup>4</sup>

OWCP's procedures require a review of the file to determine whether the application for reconsideration was received within one year of a merit decision. The one-year period begins on the date of the original decision. However, a right to reconsideration within one year accompanies any subsequent merit decision on the issues. This includes any hearing or review of the written

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<sup>2</sup> This section provides in pertinent part: "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on [his] own motion or on application." 5 U.S.C. § 8128(a).

<sup>3</sup> 20 C.F.R. § 10.607.

<sup>4</sup> *Id.* at § 10.607(a). For merit decisions issued on or after August 29, 2011, a request for reconsideration must be received by OWCP within one year of OWCP's decision for which review is sought. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4 (February 2016). Timeliness is determined by the document receipt date of the request for reconsideration as indicated by the received date in the Integrated Federal Employees Compensation System (iFECS). Chapter 2.1602.4b.

record decision, any denial of modification following reconsideration, any merit decision by the Board, and any merit decision following action by the Board, but does not include precoupment hearing decisions.<sup>5</sup> Timeliness is determined by the document receipt date of the reconsideration request, *i.e.*, the received date in the Integrated Federal Employees' Compensation System (iFECS). If the request for reconsideration has a document received date greater than one year, the request must be considered untimely.<sup>6</sup>

OWCP will consider an untimely request for reconsideration only if it demonstrates clear evidence of error on the part of it in its most recent merit decision. The request for reconsideration must establish, on its face, that such decision was erroneous.<sup>7</sup> The term clear evidence of error is intended to represent a difficult standard. If clear evidence of error has not been presented, OWCP should deny the request by letter decision, which includes a brief evaluation of the evidence submitted and a finding made that clear evidence of error has not been shown.<sup>8</sup>

### **ANALYSIS**

The Board finds that this case is not in posture for decision.

The most recent merit decision of OWCP was the March 14, 2018 decision. Appellant had one year from the date of that decision to timely request reconsideration.<sup>9</sup> As OWCP did not receive appellant's request for reconsideration until June 6, 2019, more than one year after the March 14, 2018 merit decision, it was untimely filed.<sup>10</sup>

The proper standard of review for an untimely reconsideration request is the clear evidence of error standard.<sup>11</sup> In denying her request, OWCP, however, applied the standard of review for timely requests for reconsideration. The Board will, consequently, remand the case for application of the proper standard for untimely reconsideration requests, to be followed by the issuance of an appropriate decision.

### **CONCLUSION**

The Board finds that this case is not in posture for decision.

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<sup>5</sup> Federal (FECA) Procedure Manual, *id.* at Chapter 2.1602.4.a (February 2016).

<sup>6</sup> *Id.* at Chapter 2.1602.4b (February 2016); *see also S.J.*, Docket No. 19-1864 (issued August 12, 2020); *W.A.*, Docket No. 17-0225 (issued May 16, 2017).

<sup>7</sup> *W.A.*, *id.*; *D.O.*, Docket No. 08-1057 (issued June 23, 2009); *Robert F. Stone*, 57 ECAB 292 (2005).

<sup>8</sup> *Supra* note 4 at Chapter 2.1602.5(a) (October 2011).

<sup>9</sup> *Supra* note 5.

<sup>10</sup> *Supra* note 7.

<sup>11</sup> *Supra* note 8.

**ORDER**

**IT IS HEREBY ORDERED THAT** the June 7, 2019 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: February 25, 2021  
Washington, DC

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

Janice B. Askin, Judge  
Employees' Compensation Appeals Board

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