

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

R.B., Appellant

and

**DEPARTMENT OF THE ARMY, U.S. ARMY
CORPS OF ENGINEERS, Rogersville, AL,
Employer**

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**Docket No. 12-180
Issued: May 23, 2012**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

RICHARD J. DASCHBACH, Chief Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On October 30, 2011 appellant filed a timely appeal from an August 10, 2011 nonmerit decision of the Office of Workers' Compensation Programs (OWCP) denying his request for reconsideration. As more than 180 days elapsed since the most recent merit decision of February 16, 2010 to the filing of this appeal, the Board lacks jurisdiction to review the merits of the claim pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3.²

ISSUE

The issue is whether OWCP properly denied appellant's July 29, 2011 request for reconsideration under 5 U.S.C. § 8128(a).

¹ 5 U.S.C. § 8101 *et seq.*

² For OWCP decisions issued prior to November 19, 2008, a claimant had one year to file an appeal. An appeal of OWCP decisions issued on or after November 19, 2008 must be filed within 180 days of the decision. *See* 20 C.F.R. §§ 501.2(c) and 501.3.

FACTUAL HISTORY

On March 21, 2008 OWCP accepted that appellant, then a 53-year-old lock and dam equipment mechanic, sustained left monaural hearing loss as a result of performing his federal employment duties, including diving. By decision dated June 9, 2008, it granted him a schedule award for a two percent left monaural hearing loss based on the district medical adviser's report. The period of the award ran from March 18 to 25, 2008.

On September 16, 2008 appellant submitted a request for reconsideration. He alleged that a recent hearing evaluation showed more severe damage and requested additional compensation for his hearing loss.

In a September 4, 2008 report, Dr. Sam F. Frankel, a Board-certified otolaryngologist, noted that appellant had worked for the employing establishment for 35 years. He was exposed to noise of cranes and other heavy machinery without hearing protection. Dr. Frankel reported that appellant's audiogram showed a dip starting at 2,000 hertz (Hz), most severe at 4,000 Hz down to 70 decibels (dB) in the right ear which was worse than the left. He stated that this hearing loss was consistent with noise exposure and was the most likely source of appellant's tinnitus. Dr. Frankel also provided an audiogram from that day.

By decision dated January 4, 2010, OWCP accepted appellant's claim for bilateral sensorineural hearing loss with ratable left monaural hearing loss.

In a decision dated February 16, 2010, OWCP denied modification of the June 9, 2008 schedule award decision finding that the evidence did not support greater than two percent left ear impairment and zero percent right ear impairment.

On July 29, 2011 OWCP received appellant's request for reconsideration. Appellant stated that his previous claim had the incorrect date of injury and he was resubmitting his claim with the correct date. He explained that he had continuous loud noise exposure throughout his 35 years of employment and also had many hours of diving that was not shown on the claim form. Appellant resubmitted his medical records dated from 1978 to 2006 and Dr. Frankel's September 4, 2008 report and audiogram.

In a telephone memorandum dated August 9, 2011, the claims examiner noted that appellant was requesting an additional schedule award for increased hearing loss impairment. Appellant retired in January 2009.

In an undated statement, appellant noted that he worked as a lock and dam operator and equipment mechanic from December 26, 1976 to May 1, 2009. He explained that earlier in his career he used scuba gear without ear protection because there was no awareness about different water pressures. Appellant stated that diving helmets were used with constant air flow and loud noise. He reported that other sources of noise exposure included working around cranes, air compressors, sandblasters, core drills, underwater concrete drills and other loud equipment for 8

to 10 hours a day. Appellant explained that he began to notice his hearing was diminishing in the early 1980s and that his last exposure to hazardous noise at work in 2009.³

By decision dated August 10, 2011, OWCP denied merit review of the claim.

LEGAL PRECEDENT

Section 8128(a) of FECA vests OWCP with discretionary authority to determine whether to review an award for or against compensation.⁴ OWCP's regulations provide that OWCP may review an award for or against compensation at anytime on its own motion or upon application. The employee shall exercise his right through a request to the district OWCP.⁵

To require OWCP to reopen a case for merit review pursuant to FECA, the claimant must provide evidence or an argument that: (1) shows that OWCP erroneously applied or interpreted a specific point of law; (2) advances a relevant legal argument not previously considered by OWCP; or (3) constitutes relevant and pertinent new evidence not previously considered by OWCP.⁶

A request for reconsideration must also be submitted within one year of the date of the OWCP decision for which review is sought.⁷ A timely request for reconsideration may be granted if OWCP determines that the employee has presented evidence or provided an argument that meets at least one of the requirements for reconsideration. If OWCP chooses to grant reconsideration, it reopens and reviews the case on its merits.⁸ If the request is timely but fails to meet at least one of the requirements for reconsideration, OWCP will deny the request for reconsideration without reopening the case for review on the merits.⁹

ANALYSIS

The Board has no jurisdiction to review OWCP's June 9, 2008 and February 16, 2010 merit decisions granting him a schedule award for two percent left monaural hearing loss. As appellant did not file a timely appeal of those decisions, the Board may not review the merits of his case. The only decision before the Board is the August 10, 2011 nonmerit decision denying appellant's request for reconsideration. The issue before the Board, therefore, is whether OWCP properly denied appellant's July 29, 2011 request for reconsideration. The Board finds that

³ On July 26, 2011 appellant submitted a request for an additional schedule award.

⁴ 5 U.S.C. § 8128(a); *see also D.L.*, Docket No. 09-1549 (issued February 23, 2010); *W.C.*, 59 ECAB 372 (2008).

⁵ 20 C.F.R. § 10.605; *see also R.B.*, Docket No. 09-1241 (issued January 4, 2010); *A.L.*, Docket No. 08-1730 (issued March 16, 2009).

⁶ *Id.* at § 10.606(b); *see also L.G.*, Docket No. 09-1517 (issued March 3, 2010); *C.N.*, Docket No. 08-1569 (issued December 9, 2008).

⁷ *Id.* at § 10.607(a).

⁸ *Id.* at § 10.608(a); *see also M.S.*, 59 ECAB 231 (2007).

⁹ *Id.* at § 10.608(b); *E.R.*, Docket No. 09-1655 (issued March 18, 2010).

OWCP properly denied appellant's request for reconsideration as he did not meet any of the requirements sufficient to warrant merit review.

With his July 29, 2011 request for reconsideration, appellant resubmitted medical reports dating from 1978 regarding his hearing loss. As these reports were previously considered by OWCP and repeat evidence already of record, they are duplicative and do not constitute relevant and pertinent new evidence.¹⁰ In addition, appellant's statement was also insufficient to warrant merit review as it was irrelevant to the underlying issue of whether the medical evidence supported a greater schedule award than two percent left monaural hearing loss, at the pay rate existing on the date of his last audiogram. He submitted no new evidence or legal argument to substantiate that he was entitled to a greater schedule award, or that his pay rate was improperly calculated. The Board finds that because appellant's request for reconsideration failed to show that OWCP erroneously applied or interpreted a specific point of law, failed to advance a relevant legal argument not previously considered by OWCP and failed to provide relevant and pertinent new evidence not previously considered by OWCP, the Board finds that OWCP properly denied further merit review of appellant's case. The Board will affirm the August 10, 2011 decision.

On appeal, appellant contests that he has a greater schedule award than two percent impairment and alleges that he should be compensated for longer than the period March 18 to 25, 2008 since he began to experience hearing problems in 1978. These arguments go to the merits of his claim, as previously noted, however, the Board does not have jurisdiction to review the merits of his schedule award claim. The only issue before the Board is whether OWCP properly denied appellant's request for reconsideration. As appellant did not show that OWCP erroneously applied a specific point of law nor advance any new legal argument, his request did not meet any of the requirements warranting further merit review.

The Board accordingly finds that appellant did not meet any of the requirements of 20 C.F.R. § 10.606(b). Pursuant to 20 C.F.R. § 10.608, OWCP properly denied merit review.

CONCLUSION

The Board find that OWCP properly denied appellant's July 29, 2011 request for reconsideration pursuant to 5 U.S.C. § 8128(a).

¹⁰ *D.K.*, 59 ECAB 141 (2007).

ORDER

IT IS HEREBY ORDERED THAT the August 10, 2011 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: May 23, 2012
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

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

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board