

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

_____)
J.M., Appellant)
))
and))
))
DEPARTMENT OF THE INTERIOR,)
NATIONAL PARK SERVICE, Greenbelt, MD,)
Employer)
_____)

Docket No. 13-1812
Issued: February 3, 2014

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

Case Submitted on the Record

ORDER REMANDING CASE

Before:
COLLEEN DUFFY KIKO, Judge
PATRICIA HOWARD FITZGERALD, Judge
ALEC J. KOROMILAS, Alternate Judge

On July 30, 2013 appellant filed a timely appeal from an April 25, 2013 nonmerit decision of the Office of Workers' Compensation Programs (OWCP) denying his request for reconsideration as untimely and insufficient to establish clear evidence of error. The Board docketed the appeal as No. 13-1812.

This case has previously been before the Board. By decision dated March 1, 2012, the Board affirmed a March 28, 2011 nonmerit decision denying appellant's request for reconsideration as insufficient to warrant reopening his case for further review of the merits under 5 U.S.C. § 8128.¹ The Board noted that OWCP accepted his June 2, 1980 occupational disease claim for bilateral hearing loss and granted him a schedule award on April 24, 1981 for a 20 percent bilateral hearing loss. In decisions dated July 2 and October 21, 2010, OWCP denied appellant's claim for an increased schedule award after finding that the medical evidence was

¹ Docket No. 11-1521 (issued March 1, 2011). On July 24, 2012 the Board issued an order denying appellant's petition for reconsideration. Order Denying Petition for Reconsideration, Docket No. 11-1521 (issued July 124, 2012). (RD 7-31-12) In a prior decision dated July 21, 2008, the Board affirmed September 27 and January 25, 2006 decisions finding that appellant forfeited entitlement to compensation from March 24, 1990 to April 10, 1992 because he knowingly failed to report employment. It further affirmed OWCP's finding that he was at fault in the creation of an overpayment of \$14,275.57 resulting from the forfeiture. Docket No. 07-313 (issued July 21, 2008).

insufficient to show a greater hearing loss causally related to factors of his federal employment. It noted that he was last exposed to hazardous noise in May 1979. On March 28, 2011 OWCP denied appellant's request to reopen his case for further merit review. The Board affirmed its denial of his request for reconsideration. The Board found that the issue of whether appellant sustained additional employment-related hearing loss was a medical issue that must be addressed by relevant medical evidence.

On November 5, 2012 appellant requested reconsideration of OWCP's October 21, 2010 decision. In a report dated November 12, 2012, Dr. Bibhas C. Bandy, a Board-certified otolaryngologist and OWCP referral physician, diagnosed bilateral tinnitus and moderate-to-profound sensorineural hearing loss most likely due to noise trauma superimposed on presbycusis. He provided the results of an audiogram.

By decision dated January 10, 2013, OWCP denied his request for reconsideration as untimely filed and as it did not demonstrate clear evidence of error.

On March 25, 2013 appellant again requested reconsideration.² He described his complaints against OWCP. Appellant argued that he did not stop work in 1979 but continued working in federal employment until 1991 "under the same conditions." He alleged that he had an increased hearing loss. Appellant noted that OWCP referred him for a second opinion examination in 2012 but inaccurately informed the physician he had not worked since 1980.

In schedule award cases, a distinction is made between an application for an additional schedule award and a request for reconsideration of the existing schedule award. When a claimant is asserting that the original award was erroneous based on his or her medical condition at that time, this is a request for reconsideration. A claim for an additional schedule award may be based on new exposure to employment factors or on the progression of an employment-related condition, without new exposure, resulting in greater permanent impairment.³

On March 25, 2013 appellant requested an increased schedule award, noting that OWCP had referred him for a second opinion evaluation regarding his hearing loss. He further argued that he had additional noise exposure in federal employment after 1979, the date OWCP found that his noise exposure ceased. In a report dated November 12, 2012, Dr. Bandy, an OWCP referral physician, evaluated appellant's hearing loss and provided the results of an audiogram. The Board has repeatedly held that a claimant may request a schedule award or increased schedule award based on evidence of a new exposure or medical evidence showing progression of an employment-related condition resulting in permanent impairment or increased impairment.⁴ The Board finds, therefore, that OWCP erroneously issued a denial of appellant's request for reconsideration under the clear evidence of error standard. On remand, OWCP should review and develop the factual and medical evidence and issue an appropriate decision regarding his request for an increased schedule award.

² Appellant also referred to another case number. OWCP indicated that it would address these issues under the other file number.

³ See *B.K.*, 59 ECAB 228 (2007); *Candace A. Karkoff*, 56 ECAB 622 (2005).

⁴ See *Linda T. Brown*, 51 ECAB 115 (1999); *Paul R. Reedy*, 45 ECAB 488 (1994).

IT IS HEREBY ORDERED THAT the April 25, 2013 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this order of the Board.

Issued: February 3, 2014
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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