

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

S.S., Appellant)	
)	
and)	Docket No. 19-1713
)	Issued: March 19, 2020
DEPARTMENT OF THE ARMY, U.S. ARMY)	
CORPS OF ENGINEERS, Vicksburg, MS,)	
Employer)	
)	

Appearances:
Sara Kincaid, Esq., for the appellant¹
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Deputy Chief Judge
JANICE B. ASKIN, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On August 13, 2019 appellant, through counsel, filed a timely appeal from a March 25, 2019 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days has elapsed from OWCP's last merit decision, dated March 15, 2018, to the filing of this appeal, pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction over the merits of this case.

¹ In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; see also 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

² 5 U.S.C. § 8101 *et seq.*

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 October 24, 2017 appellant, then a 64-year-old tying tool repairer, filed an occupational disease claim (Form CA-2) alleging that he experienced hearing loss and pain in his left ear as well as ringing in both ears. He attributed his condition to factors of his federal employment, including working around cranes, loud engines, and winches throughout the day. On the same date, appellant filed a claim for a schedule award, (Form CA-7).

In December 2017 OWCP referred appellant for a second opinion examination with Dr. James R. House, a Board-certified otolaryngologist, to determine whether there was a causal relationship between his claimed hearing loss and factors of his federal employment.

In a March 2, 2018 report, Dr. House noted his physical examination findings and appellant's history of exposure to loud noise. He diagnosed binaural hearing loss and noted that appellant had no family history for hearing loss. Audiometric testing conducted on behalf of Dr. House was performed at frequency levels of 500, 1,000, 2,000, 3,000, 4,000, and 8,000 Hertz (Hz), which revealed the following: right ear losses of 75, 85, 85, 85, 85, and 90 decibels (dBs); and left ear losses of 75, 70, 80, 80, 85, and 90 dBs. Dr. House opined that appellant's condition was due to workplace noise exposure and he further indicated that the extent of his hearing loss exceeded expected changes related to aging. He concluded that, pursuant to the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*),³ appellant had 83.5 percent binaural hearing loss.

On March 9, 2018 OWCP referred appellant's case, along with a statement of accepted facts (SOAF) dated December 15, 2017, and medical evidence, including Dr. House's March 2, 2018 second opinion evaluation and audiogram, to a district medical adviser (DMA) for assessment of appellant's hearing loss and its relation to factors of his federal employment.

In a March 14, 2018 report, Dr. Stephen Maturo, a Board-certified otolaryngologist serving as a DMA, indicated that he had reviewed the SOAF and medical records, including a 2016 audiogram and the 2018 audiogram performed on behalf of Dr. House, which showed a worsening in hearing. He noted that appellant demonstrated profound hearing loss and opined that this type of hearing loss was inconsistent with noise-induced hearing loss (NIHL), as NIHL develops slowly after many years of exposure. The DMA further noted that appellant did not have noise exposure that would be expected to produce this type of hearing loss and noted that he wore hearing protection gear. He concluded that appellant's hearing loss was not due to occupational noise exposure.

³ A.M.A., *Guides* (6th ed. 2009).

By decision dated March 15, 2018, OWCP accepted appellant's claim for binaural hearing loss, but denied his schedule award claim finding that the evidence of record was insufficient to establish that his accepted hearing loss condition was sufficiently severe to be considered ratable.

On March 14, 2019 appellant, through counsel, requested reconsideration of OWCP's March 15, 2018 decision. Counsel argued that the DMA's report contained inaccurate conclusions regarding appellant's hearing loss. She asserted that appellant was subjected to noise levels between 84 and 98 dBs for 18 years, which was greater than the Occupational Safety Hazard Administration's (OSHA) determination of safe noise exposure levels, despite wearing hearing protection. Counsel asserted that, even if the exposure was not sufficiently severe to cause the degree of appellant's hearing loss, the level of occupational noise exposure only needed to contribute to his hearing loss to be considered employment related. She further argued that the DMA's conclusion that appellant's condition was not employment related contradicted the original OWCP decision. Counsel also submitted a copy of Dr. House's March 2, 2018 report and an undated statement from appellant in which he related that he was experiencing worsening problems with his ears, including a roaring sound and sharp pain in both ears.

By decision dated March 25, 2019, OWCP denied appellant's request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

LEGAL PRECEDENT

Section 8128(a) of FECA vests OWCP with discretionary authority to determine whether to review an award for or against compensation. The Secretary of Labor may review an award for or against compensation at any time on his own motion or on application.⁴

To require OWCP to reopen a case for merit review pursuant to FECA, the claimant must provide evidence or an argument which: (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.⁵

A request for reconsideration must be received by OWCP within one year of the date of OWCP's decision for which review is sought.⁶ If it chooses to grant reconsideration, it reopens and reviews the case on its merits.⁷ If the request is timely, but fails to meet at least one of the

⁴ 5 U.S.C. § 8128(a); *see M.S.*, Docket No. 19-1001 (issued December 9, 2019); *L.D.*, Docket No. 18-1468 (issued February 11, 2019); *see also V.P.*, Docket No. 17-1287 (issued October 10, 2017); *W.C.*, 59 ECAB 372 (2008).

⁵ 20 C.F.R. § 10.606(b)(3); *see also E.W.*, Docket No. 19-1393 (issued January 29, 2020); *L.D., id.; B.W.*, Docket No. 18-1259 (issued January 25, 2019).

⁶ *Id.* at § 10.607(a). The one-year period begins on the next day after the date of the original contested decision. 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). *Id.* at Chapter 2.1602.4b.

⁷ *Id.* at § 10.608(a); *see also Y.H.*, Docket No. 18-1618 (issued January 21, 2020); *R.W.*, Docket No. 18-1324 (issued January 21, 2020); *M.S.*, 59 ECAB 231 (2007).

requirements for reconsideration, OWCP will deny the request for reconsideration without reopening the case for review on the merits.⁸

ANALYSIS

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

In her timely request for reconsideration, counsel advanced a new and relevant legal argument. She contended that appellant submitted sufficient evidence demonstrating that he had permanent hearing loss attributable to factors of his federal employment, which was ratable for purposes of a schedule award. Counsel further asserted that OWCP improperly based its decision on the report of the DMA, as his report consisted of inaccurate conclusions regarding appellant's hearing loss. She also argued that the DMA's opinion that appellant suffered no employment-related hearing loss was inconsistent with OWCP's decision which had accepted appellant's claim. Counsel concluded that the weight of the evidence should rest with Dr. House, as his opinion was based on an accurate history and formed the basis for OWCP's March 15, 2018 decision accepting appellant's claim.

As appellant has advanced new and relevant legal arguments not previously considered by OWCP, he is entitled to a review of the merits of the claim under section 10.606(b)(3) of OWCP's regulations.⁹ Following such further development as deemed necessary, OWCP shall issue an appropriate merit decision on the claim.

CONCLUSION

The Board finds that OWCP improperly denied appellant's request for reconsideration on the merits of his claim.

⁸ *Id.* at § 10.608(b); *D.C.*, Docket No. 19-0873 (issued January 27, 2020); *M.S.*, Docket No. 19-0291 (issued June 21, 2019).

⁹ *T.P.*, Docket No. 18-0608 (issued August 2, 2018). *See L.K.*, Docket No. 15-0659 (issued September 15, 2016); *T.L.*, Docket No. 16-0536 (issued July 6, 2016).

ORDER

IT IS HEREBY ORDERED THAT the March 25, 2019 decision of the Office of Workers' Compensation Programs is set aside and this case is remanded for further proceedings consistent with the decision of the Board.

Issued: March 19, 2020
Washington, DC

Christopher J. Godfrey, Deputy Chief Judge
Employees' Compensation Appeals Board

Janice B. Askin, Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board