United States Department of Labor
Employees' Compensation Appeals Board

P.G., Appellant	)	
and	)	**Docket No. 20-1419**
	)	**Issued: September 16, 2021**
DEPARTMENT OF THE NAVY, FLEET READINESS CENTER SOUTHEAST, Jacksonville, FL, Employer	)	

Appearances:
Lisa Varughese, Esq., for the appellant[1]
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
JANICE B. ASKIN, Judge
PATRICIA H. FITZGERALD, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On July 13, 2020 appellant, through counsel, filed a timely appeal from a January 27, 2020 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days has elapsed from the last merit decision, dated January 28, 2019, to the filing of this appeal, pursuant to the Federal Employees' Compensation Act[2] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction to review the merits of this claim.

[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 June 13, 2017 appellant, then a 55-year-old supervisor safety and occupational health specialist, filed an occupational disease claim (Form CA-2) alleging that he developed hearing loss due to factors of his federal employment including exposure to noise from pneumatic tools, handling units, compressors, and aircraft engines for 10 years as an environmental engineer. He noted that he first became aware of his hearing loss on June 1, 2012 and first realized its relation to his federal employment on December 5, 2016.

In a report dated December 5, 2016, Dawn Dion, an audiologist, examined appellant for complaints of bilateral hearing loss, worse on the left, noticed over the course of two years. She noted that he was exposed to noise in his occupational environment at the employing establishment. On audiological examination, Ms. Dion observed sensorineural hearing loss above 750 Hertz (Hz) on the right, mild from 1,000 to 6,000 Hz and steeply sloping to moderately severe for 8,000 Hz. On the left, she observed sensorineural hearing loss above 500 Hz, mild progressing to moderate for 1,000 to 2,000 Hz, rising to mild for 3,000 Hz, and progressing to moderate for 4,000 to 8,000 Hz. Ms. Dion diagnosed bilateral sensorineural hearing loss.

Appellant submitted the results of audiologic testing taken on December 5, 2016. He also submitted his employment history and a statement outlining his history of noise exposure.

In a report dated March 14, 2017, Dr. Jeffrey Sandler, a Board-certified otolaryngologist, examined appellant for complaints of left-sided hearing loss and reviewed a magnetic resonance imaging (MRI) scan of his brain. He noted slight asymmetry of hearing with the left side having poorer discrimination according to audiogram. The MRI scan demonstrated no lesions and clear sinuses and mastoids, and thus no source of the hearing loss as demonstrated by MRI scan. Dr. Sandler diagnosed bilateral sensorineural hearing loss.

In an audiometric examination dated December 18, 2014, Dr. Laura Stephenson, an audiologist, recorded audiometric findings at the frequency levels of 500, 1,000, 2,000, and 3,000 Hz of losses for the right ear of 10, 15, 35, and 25 decibels (dBs) and for the left ear of 10, 35, 40, and 30 dBs, respectively. She noted that the reason for conducting the audiogram was to obtain an established reference prior to initial duty in hazardous noise areas. In a follow-up report dated July 20, 2017, Dr. Stephenson noted that appellant was not enrolled in a hearing conservation program at the employing establishment, had taken only one hearing test that appeared in the occupational medical record, and that a hearing test taken on that date revealed hearing thresholds identical to the prior findings.

In a development letter dated October 4, 2017, OWCP informed appellant of the deficiencies of his claim. It requested that he submit additional medical evidence establishing that his medical condition was causally related to factors of his federal employment. Appellant was

also provided a questionnaire for his completion. OWCP afforded him 30 days to submit the necessary evidence.

In a letter dated October 16, 2017, appellant indicated that he was not enrolled in the employing establishment's hearing conservation program and that thus, he did not undergo a baseline hearing evaluation or receive annual hearing tests. He indicated that in his role managing hazardous waste and environmental compliance programs he was constantly exposed to hazardous noise at the employing establishment from pneumatic tools, air handling units and compressors.

OWCP referred the case record to Dr. Stephen Maturo, a Board-certified otolaryngologist serving as an OWCP district medical adviser (DMA), in order to determine whether the December 18, 2014 reference audiogram indicated sensorineural/noise-induced hearing loss. In a report dated November 9, 2017, the DMA stated that there was no accepted medical condition noted, and that without a medical history or history of noise exposure, one could not comment on the etiology of appellant's sensorineural hearing loss.

OWCP then referred appellant, along with a statement of accepted facts (SOAF) and the case record, to Dr. Robert M. Loper, a Board-certified otolaryngologist, for a second opinion examination. The SOAF outlined appellant's work-related noise exposure in jobs he had held from 1986 through the present. In an undated report, Dr. Loper related that audiometric testing performed on December 12, 2017 at the frequency levels of 500, 1,000, 2,000, and 3,000 Hz which indicated frequency losses of 15, 25, 40, and 30 dBs on the right and 20, 45, 45, and 30 dBs on the left, respectively. He completed an outline for otologic evaluation and noted that current findings demonstrated mild-to-moderate bilateral hearing loss in excess of presbycusis. Dr. Loper opined that appellant's sensorineural hearing loss was not due to noise exposure encountered in appellant's federal civilian employment, explaining that the configuration of audiometric results was not consistent with noise-induced hearing loss and that the hearing loss could not be attributed to noise exposure due to the short duration of such exposure. He recommended hearing conservation and the continued use of hearing aids.

By decision dated December 19, 2017, OWCP denied appellant's claim, finding that the medical evidence of record was insufficient to establish causal relationship between his diagnosed hearing loss and his work-related noise exposure. It accorded the weight of the medical evidence to the report of Dr. Loper.

On December 18, 2018 appellant, through counsel, requested reconsideration of OWCP's December 19, 2017 decision. With his request, appellant submitted records from the employing establishment regarding industrial hygiene, historical noise dosimetry, individual hazard assessments for various positions, and a noise survey. He also submitted a statement regarding his hearing loss, a narrative of exposure, employment history, and details of his noise hazard exposure at the employing establishment.

In a letter dated December 17, 2018, Dr. Sandler reviewed appellant's history of employment and noise exposure. He stated that appellant was exposed to hazardous noise levels in his federal employment. Dr. Sandler opined that appellant's hearing loss far exceeded that which would be expected from presbycusis and that his audiograms taken in December 2014 and 2018 were consistent.

By decision dated January 28, 2019, OWCP denied modification of the December 19, 2017 decision. It again found that Dr. Loper's report of December 12, 2017 represented the weight of the medical evidence.

On January 21, 2020 appellant, through counsel, requested reconsideration of OWCP's January 28, 2019 decision. Counsel argued that appellant had submitted sufficient evidence to establish the elements of his claim for hearing loss. She further argued that Dr. Sandler's December 17, 2018 letter contained sufficient medical reasoning to establish causal relationship between appellant's history of occupational noise exposure and his diagnosed hearing loss, and that Dr. Loper's report was not well rationalized. With the request, appellant resubmitted the December 18, 2014 audiogram results, the December 5, 2016 audiogram and report from Ms. Dion, and the March 14, 2017 report and the December 17, 2018 letter from Dr. Sandler. He also submitted general information from the Occupational Safety and Health Administration (OSHA) regarding noise exposure.

By decision dated January 27, 2020, 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.[3]

To require OWCP to reopen a case for merit review pursuant to FECA, the claimant must provide evidence or 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.[4]

A request for reconsideration must be received by OWCP within one year of the date of OWCP's decision for which review is sought.[5] If it chooses to grant reconsideration, it reopens and reviews the case on its merits.[6] If the request is timely, but fails to meet at least one of the

[3] 5 U.S.C. § 8128(a); *see T.K.*, Docket No. 19-1700 (issued April 30, 2020); *L.D.*, Docket No. 18-1468 (issued February 11, 2019); *W.C.*, 59 ECAB 372 (2008).

[4] 20 C.F.R. § 10.606(b)(3); *see L.D.*, *id*.; *see also L.G.*, Docket No. 09-1517 (issued March 3, 2010); *C.N.*, Docket No. 08-1569 (issued December 9, 2008).

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

[6] *Id*. at § 10.608(a); *F.V.*, Docket No. 18-0230 (issued May 8, 2020); *see also 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.[7]

ANALYSIS

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

On reconsideration counsel asserted that appellant had submitted sufficient evidence to establish the elements of his claim for hearing loss. She argued that Dr. Sandler's December 17, 2018 letter contained sufficient medical reasoning to establish a causal relationship between appellant's history of occupational noise exposure and his diagnosed hearing loss and that Dr. Loper's report was not well rationalized. As Dr. Sandler's report was previously considered by OWCP, counsel's argument is insufficient to warrant merit review of appellant's claim. Consequently, the Board finds that appellant is not entitled to a review of the merits of his claim based on the first and second above-noted requirements under 20 C.F.R. § 10.606(b)(3).[8]

Furthermore, appellant did not provide any relevant and pertinent new evidence not previously considered. The underlying issue in this case is whether he has established hearing loss causally related to the accepted factors of his federal employment. Causal relationship is a medical issue that must be addressed by relevant medical evidence.[9] While the general information from the website of OSHA regarding noise exposure was new, it was not relevant because it was not from a physician and did not address appellant's specific noise exposure as related to its causal relationship to his diagnosed hearing loss. The Board has held that the submission of evidence or argument which does not address the underlying issue involved does not constitute a basis for reopening a case.[10] Appellant also resubmitted: the December 17, 2018 letter from Dr. Sandler, as well as the December 18, 2014 audiogram results; the December 5, 2016 audiogram and report from audiologist Ms. Dion; and the March 14, 2017 report from Dr. Sandler. Providing additional evidence that either duplicates or is substantially similar to evidence already of record does not constitute a basis for reopening a case.[11] As appellant did not provide relevant and pertinent new evidence not previously considered by OWCP, he is not entitled to a merit review based on the third requirement under 20 C.F.R. § 10.606(b)(3).[12]

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[7] *Id*. at § 10.608(b); *B.S.*, Docket No. 20-0927 (issued January 29, 2021); *E.R.*, Docket No. 09-1655 (issued March 18, 2010).

[8] *Supra* note 4.

[9] *E.J.*, Docket No. 20-0841 (issued February 12, 2021); *A.G.*, Docket No. 20-0290 (issued June 24, 2020).

[10] *See J.R.*, Docket No. 19-1280 (issued December 4, 2019); *M.K.*, Docket No. 18-1623 (issued April 10, 2019); *L.D.*, Docket No. 18-1468 (issued February 11, 2019); *Edward Matthew Diekemper*, 31 ECAB 224-25 (1979).

[11] *Id*. *See also G.J.*, Docket No. 20-0071 (issued July 1, 2020); *V.Q.*, Docket No. 19-1309 (issued January 3, 2020); *Eugene F. Butler*, 36 ECAB 393, 398 (1984).

[12] *See E.J., supra* note 9; *T.W.*, Docket No. 18-0821 (issued January 13, 2020).

The Board, accordingly, finds that appellant did not meet any of the requirements of 20 C.F.R. § 10.606(b)(3). Pursuant to 20 C.F.R. § 10.608, OWCP properly denied merit review.[13]

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the January 27, 2020 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 16, 2021
Washington, DC

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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

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

[13] *See J.B.*, Docket No. 20-0145 (issued September 8, 2020); *D.G.*, Docket No. 19-1348 (issued December 2, 2019).