

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

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L.K., Appellant)	
)	
and)	Docket No. 22-0571
)	Issued: September 27, 2024
DEPARTMENT OF THE AIR FORCE, ROBINS)	
AIR FORCE BASE, GA, Employer)	
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Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

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

JURISDICTION

On March 10, 2022 appellant filed a timely appeal from a March 1, 2022 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days elapsed from the last merit decision dated January 6, 2021, to the filing of this appeal, pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction to review the merits of this case.

ISSUE

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

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

This case has previously been before the Board.² The facts and circumstances of the case as set forth in the Board's prior decisions are incorporated herein by reference. The relevant facts are set forth below.

On January 16, 2013 appellant, then a 53-year-old inventory management specialist, filed an occupational disease claim (Form CA-2) alleging that she developed vertigo, hearing loss, and tinnitus causally related to factors of her federal employment. She explained that she had initially sustained a head injury while working in the employing establishment's warehouse in April 1999 and that her hearing loss and tinnitus had progressed slowly before she was required to wear personal protective equipment. Appellant noted that she first became aware of her condition and realized its relation to her federal employment on November 11, 2002.³

By decision dated June 10, 2013, OWCP denied appellant's claim, finding that it was untimely filed.

On June 28, 2013 appellant requested reconsideration. By decision dated July 3, 2013, OWCP denied her request for reconsideration.

On July 22, 2013 appellant appealed to the Board. By order dated May 22, 2014, the Board set aside the June 10 and July 3, 2013 decisions and remanded the case for clarification as to whether appellant was claiming a consequential injury resulting from the April 28, 1999 work-related head injury under OWCP File No. xxxxxx820.⁴

By *de novo* decision dated October 22, 2014 under OWCP File No. xxxxxx795, OWCP accepted that appellant's occupational disease claim was timely filed; however, OWCP found that the evidence was insufficient to establish a medical condition consequential to the April 28, 1999 incident as the traumatic injury claim under OWCP File No. xxxxxx820 had not been accepted.

By decision dated December 18, 2014, OWCP denied appellant's occupational disease claim as she had not established the alleged employment factors. It concluded, therefore, that the requirements had not been met to establish an injury as defined by FECA.

Appellant requested a review of the written record by a representative of OWCP's Branch of Hearings and Review.

² Docket No. 18-1445 (issued August 3, 2020); *Order Remanding Case*, Docket No. 13-1775 (issued May 22, 2014).

³ The present claim is assigned OWCP File No. xxxxxx795. Appellant has a prior claim for an April 28, 1999 traumatic injury (Form CA-1), alleging that she sustained an injury when a piece of metal broke off the gears of a door and hit her head while she was in the performance of duty. She described her claimed injury as a "top of my head cut" and advised that the injury required seven stitches. OWCP assigned that claim OWCP File No. xxxxxx820. It has administratively combined OWCP File Nos. xxxxxx795 and xxxxxx820, with the latter serving as the master file.

⁴ *Id.*

By decision dated February 9, 2018, OWCP's hearing representative affirmed OWCP's December 18, 2014 decision.

Appellant appealed the February 9, 2018 decision to the Board. By decision dated August 3, 2020, the Board set aside OWCP's February 9, 2018 decision and remanded the case for OWCP to obtain additional information from the employing establishment regarding appellant's hazardous noise exposure during relevant periods which described appellant's job titles and inclusive dates. The Board also ordered that OWCP afford appellant an opportunity to provide additional details regarding employment factors alleged to have contributed to her claimed vertigo, hearing loss and tinnitus.

In a September 9, 2020 development letter, OWCP requested that the employing establishment provide additional details regarding the employment factors alleged to have caused appellant's claimed conditions informed appellant of the deficiencies of her hearing loss claim. By separate development letter of even date, it again advised appellant of the type of evidence needed to establish her claim and provided a questionnaire for her completion. OWCP afforded both parties 30 days to respond.

OWCP subsequently received a January 8, 2013 response to a questionnaire and a memorandum dated January 22, 2013, wherein an employing establishment supervisor noted that she was unaware of appellant's prior claim for hearing loss.

On November 24, 2020 OWCP again requested additional information from the employing establishment. No response was received.

By decision dated January 6, 2021, OWCP denied appellant's occupational disease claim, finding that the evidence of record was insufficient to establish the claimed employment factors. It concluded that she had not met the requirements to establish an injury as defined by FECA.

On February 22, 2021 appellant requested reconsideration of OWCP's January 6, 2021 decision. She described an injury on April 28, 1999 when a 50-pound gearbox fell from 30 feet above and struck her head. Appellant described her subsequent medical treatment and attached photographs and medical information.

Appellant again requested reconsideration on March 19, 2021.

In a development letter dated June 17, 2021, OWCP noted that the incident of April 28, 1999 had been established as factual and requested that appellant submit additional information regarding her exposure to hazardous noise in the course of her federal employment. It afforded her 30 days to submit additional evidence. By separate letter of even date, OWCP also requested further information from the employing establishment regarding appellant's exposure to hazardous noise.

Appellant subsequently submitted a June 17, 2021 statement wherein she explained that she intended to file a recurrence of her claim for the April 1999 traumatic injury, and not a new occupational disease claim. She indicated that a magnetic resonance imaging (MRI) scan from 2002 revealed that the April 1999 incident caused her inner ear bones to fuse together, causing

permanent vertigo, tinnitus, and hearing loss. Appellant noted that she had previously worked on military jets.

Appellant's current supervisor at the employing establishment responded on June 24, 2021, noting that she had no knowledge of appellant's April 28, 1999 injury claim for an incident that occurred at a warehouse.

In a letter dated June 21, 2021, appellant again described the April 28, 1999 incident and her subsequent medical issues and treatment history.

Appellant replied to OWCP's development letter on June 29, 2021. From 1984 to 1999, she worked as a warehouse worker with exposure to noise from trucks, forklifts, aircraft, and whistles for eight to twelve hours for up to seven days per week. From 1999 to 2003, appellant worked as a repaint and equipment cleaner with exposure to harsh chemicals and water blasting for twelve hours per day for seven days per week. Foam earplugs were provided in this position. From 2001 to 2004 appellant worked as a sheet metal mechanic with exposure to buckling rivets and impact guns for 12 hours per day for seven days per week. Foam earplugs were provided in this position. From 2004 to 2007 appellant worked as a maintenance inventory control center manager with little exposure to noise. From 2006 to 2011 she worked as a supply technician supervisor with exposure to aircraft hangars for twelve hours per day for seven days per week. From 2011 appellant worked as an inventory specialist with exposure to office noise including high pitched screams. Foam earplugs were provided in this position. Appellant stated that she was no longer exposed to hazardous noise at work, though screaming babies or people and aircraft could trigger a migraine.

In a letter dated July 1, 2021, appellant noted that in addition to the response she had provided on the questionnaire, she had also worked as an equipment cleaner and supply chief supervisor at the employing establishment, noting that she was exposed to jets and maintenance at the employing establishment.

Appellant submitted statements reiterating the arguments made in her February 22, 2021 statement.

By decision dated March 1, 2022, OWCP denied appellant's request for reconsideration of the merits of her 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 or her own motion or on application.⁵

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

⁵ 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).

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 be received by OWCP within one year of the date of OWCP's decision for which review is sought.⁷ If it 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 finds that OWCP improperly denied appellant's request for reconsideration of the merits of her claim.

In support of her reconsideration requests, appellant submitted several statements describing her history of employment and exposure to hazardous noise. Though she had previously submitted statements providing some level of detail regarding her history of employment and exposure to hazardous noise, her June 29, 2021 statement provided additional information regarding her exposure to hazardous noise to OWCP that was not previously considered. The underlying issue in this case is whether appellant submitted sufficient evidence to establish compensable factors of her federal employment. As such, her factual statements regarding exposure to hazardous noise in the course of her federal employment constitute relevant and pertinent new evidence that was not previously considered by OWCP. Therefore, the Board finds that the submission of this evidence requires reopening of appellant's claim for merit review pursuant to the third requirement of 20 C.F.R. § 10.606(b)(3).¹⁰

Consequently, the Board will set aside OWCP's March 1, 2022 decision and remand the case for an appropriate merit decision on appellant's claim.¹¹

⁶ 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).

⁷ *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 (September 2020). 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.

⁸ *Id.* at § 10.608(a); *F.V.*, Docket No. 18-0230 (issued May 8, 2020); *see also M.S.*, 59 ECAB 231 (2007).

⁹ *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).

¹⁰ 20 C.F.R. § 10.606(b)(3); *see also S.C.*, 20-1661 (issued May 6, 2022); *J.T.*, Docket No. 20-1301 (issued July 28, 2021); *M.J.*, Docket No. 20-1067 (issued December 23, 2020).

¹¹ *F.K.*, Docket No. 21-0998 (issued December 29, 2021).

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the March 1, 2022 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: September 27, 2024
Washington, DC

Patricia H. Fitzgerald, 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