United States Department of Labor
Employees' Compensation Appeals Board

R.M., Appellant	)	
and	)	**Docket No. 07-644**
	)	**Issued: June 11, 2007**
DEPARTMENT OF THE ARMY, CORPS OF ENGINEERS, McNARRY DAM, Umatilla, OR, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On December 26, 2006 appellant filed a timely appeal of the Office of Workers' Compensation Programs' nonmerit decisions dated August 21 and December 7, 2006 denying his requests for reconsideration. Because more than one year has elapsed between the most recent merit decision dated July 7, 2005 and the filing of this appeal, the Board lacks jurisdiction to review the merits of appellant's claim pursuant to 20 C.F.R. §§ 501.2(c) and 501.3.

ISSUES

The issues are: (1) whether the Office properly refused to reopen appellant's case for further review of the merits of his claim pursuant to 5 U.S.C. § 8128(a); and (2) whether the Office properly refused to reopen appellant's claim for reconsideration of the merits on the grounds that his request for reconsideration was not timely filed and failed to demonstrate clear evidence of error.

FACTUAL HISTORY

On August 10, 2004 appellant, then a 54-year-old crane operator, filed an occupational disease claim alleging a worsening of his hearing loss condition, as a result of noise exposure in the workplace. He identified the date of injury as June 23, 1988.

On August 24, 2004 the Office informed appellant that the information submitted was insufficient to establish his claim. It noted that, under a previously accepted hearing loss claim (File No. 140332903), appellant had received a schedule award covering the period January 1, 1988 through February 18, 1999. The Office advised appellant to provide information as to his exposure to noise in the workplace subsequent to the expiration of his schedule award. On September 15, 2004 appellant stated that he had continued to work with the employing establishment as a crane operator since February 19, 1999 and had experienced significant loss of hearing during that time as a result of his occupational noise exposure.

The record contains a report of a September 1, 2004 audiogram. In a September 10, 2004 report, Dr. Richard Flaiz, a Board-certified otolaryngologist, stated that the September 1, 2004 audiogram confirmed high frequency hearing loss. He opined that the progression of appellant's hearing loss since 1999 was "apparently noise related."

The Office referred appellant, together with a statement of accepted facts[1] and the entire medical record, to Dr. Mark Clemons, a Board-certified otolaryngologist, for a second opinion examination. In a May 25, 2005 report, Dr. Clemons stated that the most recent audiogram showed normal hearing at 500 kilohertz in both ears, with sloping, progressive, high-frequency hearing loss, which was profound at the highest frequencies. Comparing the results of appellant's 1998 audiogram to those of his May 25, 2005 audiogram, Dr. Clemons found a progression of high-frequency hearing loss bilaterally. Noting that appellant had worn earplugs when exposed to noise at work and had a family history of hearing loss, he opined that there was only a small likelihood that his hearing loss was caused by noise exposure. He further indicated that the process of aging could magnify the problem once it occurred. In response to the Office's question as to whether exposure to noise in the workplace, as described in the statement of accepted facts, was sufficient in intensity and duration to have caused or materially impacted appellant's hearing loss, Dr. Clemens responded, "No, not with earplug use."

By decision dated July 7, 2005, the Office denied appellant's claim. The Office found that the evidence of record failed to establish that his hearing loss subsequent to February 19, 1999 was causally related to his federal employment.

On July 5, 2006 appellant requested reconsideration of the Office's denial of his claim. He indicated that he was submitting several documents, which he summarized, including a letter from Dr. Steven R. Zielinski, a Board-certified internist, concerning appellant's family history. The record does not reflect the receipt of such a report in support of the July 5, 2005 request for

[1] The March 31, 2005 statement of accepted facts provided that appellant was exposed to occupational noise ranging from 72.1 decibels to 107 decibels for more than 40 hours per week. Appellant wore earplugs during his exposure.

reconsideration. Appellant iterated the history of his case and indicated his willingness to undergo an examination by another physician. He submitted an April 20, 2005 report from the Department of Health and Human Services, which was reviewed by Dr. Kate Flanigan, Board-certified in the field of occupational medicine. Referencing appellant's March 31, 2005 audiogram results, Dr. Flanigan placed a checkmark in a box, indicating that appellant appeared to show a standard threshold shift (STS) that may be work related. Appellant did not submit audiogram results. Rather, he submitted a duplicate of the September 1, 2004 audiogram report.

On July 31, 2006 the Office denied appellant's reconsideration request, finding that the evidence submitted was insufficient to warrant merit review. The Office found that the evidence presented was either repetitive or held no probative value. On August 21, 2006 the Office reissued the July 31, 2006 decision.[2]

On September 24, 2006 appellant filed an appeal with the Board. On November 1, 2006 his withdrew his appeal and requested reconsideration by the Office in order to present additional evidence. Appellant contended that Dr. Clemon's opinion was incorrect, as it was based on a family history of hearing loss and that his hearing loss was job related.

Appellant submitted a July 5, 2006 letter from Dr. Zielinski, who stated that he had served as appellant's physician for over two decades. Dr. Zielinski opined that appellant's hearing loss was unquestionably occupationally induced, as he was exposed to high noise levels while operating industrial cranes for many years. He found no evidence of hearing loss in appellant's genetic history. Dr. Zielinski reasoned that the hearing loss was not age related, as there had been no increase in hearing loss since appellant's retirement, when exposure to the noise ceased.

Appellant also provided an August 11, 2004 medical examination report for commercial driver fitness determination from Dr. Ed Ricketts, a Board-certified internist, who noted "hypocrisies -- progressive for years -- from noise at work." He submitted reports from the Department of Health and Human Services dated August 20, 2004 and April 20, 2005, reflecting abnormal hearing loss and a significant change from appellant's most recent baseline audiograms. Dr. Ricketts submitted a report of individual hearing tests dated March 23, 2003; April 6, 2004 and March 31, 2005 which included a table of audiogram results of these dates. In an August 11, 2004 medical history and physical examination form, Dr. Flanigan placed a checkmark in a box indicating that "medical findings support a work-related injury/illness or hazardous condition." She also noted "STS hearing loss present." The record contains an audiogram summary and report form for the period April 2, 1980 through March 31, 2005. Appellant submitted a November 20, 2006 report from Dr. Thomas E. Long, a Board-certified otolaryngologist, who stated that even though appellant wore protective equipment, his bilateral hearing loss progressed significantly after 1999, and found it "logical" that his condition has been made worse with continued noise exposure. He opined that both noise exposure and age have been equally responsible for the worsening of appellant's condition since 1999. Appellant also submitted duplicates of reports previously submitted and considered by the Office.

[2] The record reflects that the decision dated July 31, 2006 had erroneously been sent to appellant's prior address. Accordingly, the Office reissued the decision on August 21, 2006, sending it to appellant at his current address.

In a nonmerit decision dated December 7, 2006, the Office denied appellant's November 1, 2006 request for reconsideration on the basis that it was untimely filed and failed to present clear evidence of error.

LEGAL PRECEDENT -- ISSUE 1

Under section 8128(a) of the Act, the Office has the discretion to reopen a case for review on the merits. The Office must exercise this discretion in accordance with the guidelines set forth in section 10.606(b)(2) of the implementing federal regulation,[3] which provides that a claimant may obtain review of the merits of his or her written application for reconsideration, including all supporting documents, which sets forth arguments and contains evidence that:

> "(i) Shows that [the Office] erroneously applied or interpreted a specific point of law; or
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> "(ii) Advances a relevant legal argument not previously considered by [the Office]; or
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> "(iii) Constitutes relevant and pertinent new evidence not previously considered by [the Office]."

Section 10.608(b) provides that any application for review of the merits of the claim which does not meet at least one of the requirements listed in section 10.606(b) will be denied by the Office without review of the merits of the claim.[4]

Evidence that repeats or duplicates evidence already in the case record has no evidentiary value and does not constitute a basis for reopening a case.[5]

ANALYSIS -- ISSUE 1

Appellant's July 5, 2006 request for reconsideration neither alleged, nor demonstrated, that the Office erroneously applied or interpreted a specific point of law. Additionally, he did not advance a relevant legal argument not previously considered by the Office. Appellant merely related the history of his case and volunteered to undergo another medical examination. Consequently, he is not entitled to a review of the merits of his claim based on the first and second above-noted requirements under section 10.606(b)(2).

In support of his request for reconsideration, appellant submitted an April 20, 2005 report from the Department of Health and Human Services indicating that appellant appeared to show a standard threshold shift that may be work related. In its July 7, 2005 decision, the Office found that the evidence of record failed to establish that his hearing loss subsequent to February 19,

[3] 20 C.F.R. § 10.606(b).

[4] *Id.*

[5] *See Helen E. Paglinawan,* 51 ECAB 591 (2000).

1999 was causally related to his federal employment. The April 20, 2005 report does not address the worsening of appellant's hearing loss after February 19, 1999; does not contain audiogram results; nor does it explain how that loss was causally related to his employment. Therefore, the report does not constitute relevant and pertinent new evidence not previously considered by the Office.[6]

Appellant also submitted a duplicate of the September 1, 2004 audiogram report. Evidence that repeats or duplicates evidence already in the case record has no evidentiary value and does not constitute a basis for reopening a case.[7] Therefore, the Office properly determined that this evidence did not constitute a basis for reopening the case for a merit review.

The Board finds that the Office properly determined that appellant was not entitled to a review of the merits of his claim pursuant to any of the three requirements under section 10.606(b)(2) and properly denied his July 5, 2006 request for reconsideration.

LEGAL PRECEDENT -- ISSUE 2

A claimant may seek an increased schedule award if the evidence establishes that he sustained an increased impairment at a later date causally related to the employment injury.[8] Even if the term reconsideration is used, when a claimant is not attempting to show error in the prior schedule award decision and submits medical evidence regarding a permanent impairment at a date subsequent to the prior schedule award decision, it should be considered a claim for an increased schedule award which is not subject to time limitations.[9] A proper claim for increased hearing loss is not subject to time limitations and is not subject to the clear evidence of error standard.

ANALYSIS -- ISSUE 2

Appellant disagreed with the denial of his claim for an increased schedule award and requested reconsideration on November 1, 2006. On December 7, 2006 the Office denied appellant's request for reconsideration for the reason that it was not timely filed and failed to present clear evidence of error.

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[6] *See Susan A. Filkins*, 57 ECAB ___ (Docket No. 06-868, issued June 16, 2006).

[7] *See Helen E. Paglinawan*, *supra* note 5.

[8] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.7b (August 2002).

[9] *Linda T. Brown*, 51 ECAB 115 (1999). In B*rown* the Office issued a 1995 decision denying entitlement to a schedule award as no ratable impairment was established. Appellant requested that the Office reconsider in 1997, submitting a current report with an opinion that appellant had a 25 percent permanent impairment to the arms and legs. The Office determined that appellant submitted an untimely request for reconsideration that did not show clear evidence of error. The Board remanded the case for a merit decision. *See also Paul R. Reedy*, 45 ECAB 488 (1994).

Although appellant used the term reconsideration in his November 1, 2006 request, he clearly indicated that he was providing new medical evidence and wanted further review of the schedule award issue. In this case, appellant has submitted medical evidence regarding a permanent impairment at a date subsequent to the prior schedule award decision. Appellant submitted audiogram results from his March 31, 2005 hearing test and a July 5, 2006 report from Dr. Zielinski discussing the employment-related cause of his increased hearing loss. While in his earlier request appellant failed to submit new audiogram results and an opinion that his increased hearing loss was causally related to employment, he did so with his November 1, 2006 request for additional schedule award.

CONCLUSION

The Board finds that the Office properly denied appellant's July 5, 2006 request for reconsideration without conducting a merit review of the claim. The Board further finds that the Office improperly reviewed appellant's November 1, 2006 request for an increased schedule award under the "clear evidence of error" standard.

ORDER

IT IS HEREBY ORDERED THAT the August 21, 2006 decision of the Office of Workers' Compensation Programs is affirmed. It is further ordered that the Office's December 7, 2006 decision is set aside and remanded for further action consistent with this decision of the Board.

Issued: June 11, 2007
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

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