United States Department of Labor
Employees' Compensation Appeals Board

L.H., Appellant	)	
	)	
and	)	**Docket No. 09-760**
	)	**Issued: October 5, 2009**
TENNESSEE VALLEY AUTHORITY,	)	
BROWNS FERRY NUCLEAR PLANT,	)	
Athens, AL, 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
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On January 26, 2009 appellant filed a timely appeal from the Office of Workers' Compensation Programs' December 3, 2008 nonmerit decision denying his request for further merit review. Pursuant to 20 C.F.R. §§ 501.2 and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether the Office properly refused to reopen appellant's case for further review of the merits pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On March 2, 2006 appellant, a 49-year-old painter, filed an occupational disease claim (Form CA-2) alleging that he developed a bilateral hearing loss as a result of employment-related noise exposure. He first realized that his condition was causally related to employment factors on August 22, 2005 when he was tested and advised by his physician that he had a significant

hearing loss. The supervisor's report reflected that appellant first reported his condition on February 21, 2006. Appellant stopped working for the employing establishment on September 30, 1991. On March 3, 2006 the employing establishment controverted appellant's claim. It contended that he was hired with a preexisting hearing loss, which did not worsen during his six-year employment.

The record contains medical questionnaires completed by appellant at the beginning and end of his tenure at the employing establishment. On June 5, 1978 appellant indicated that he had no hearing loss. On July 11, 1991 he stated that he had a hearing loss. Appellant submitted an April 25, 1983 application for employment and reports of audiograms dated June 5, 1978 and August 22, 2005.

The Office submitted the medical records and a statement of accepted facts (SOAF) to the district medical adviser for an opinion as to whether appellant has sustained a work-related hearing loss during his federal employment between 1978 and 1991. On March 15, 2006 the medical adviser stated that the earliest employing establishment audiograms showed severe preexisting high frequency hearing loss, and that studies through 1988 did not document any worsening of the loss during that time frame.

On March 16, 2006 the Office informed appellant that the information submitted was insufficient to establish that his claim was timely filed. It noted that he had three years from the date of his last exposure when he last worked at the employing establishment, to make a timely filing. However, appellant's claim would be considered timely if his immediate supervisor had actual knowledge of his claim that he had a work-related hearing loss within 30 days of injury, and that test results conducted in connection with a recognized environmental hazard which reflected a worsening of his hearing loss would constitute "constructive actual knowledge," which would satisfy the time filing requirement. The Office advised appellant to submit any and all medical reports which documented a worsening of his hearing loss from 1978 to 1991.

In an April 10, 2006 statement, appellant indicated that he knew that his hearing loss had worsened during his federal employment. He provided a report of an August 22, 2005 audiogram, which he contended showed significant hearing loss. Appellant alleged that he had never worked in a hazardous noise environment prior to his federal employment and that the Office had not established his loss of hearing from 1988 to 1991.

By decision dated June 14, 2006, the Office denied appellant's claim on the grounds that it was not timely filed. It found that the August 22, 2005 audiogram was insufficient to demonstrate a worsening of his hearing loss which was causally related to factors of his employment.

On July 4, 2006 appellant requested an oral hearing. In a decision dated December 5, 2006, the Office hearing representative found the case was not in posture for a decision and remanded the case for further development. The hearing representative instructed the Office to obtain information from the employing establishment as to whether appellant had undergone annual hearing tests as part of a program to monitor hearing loss among employees exposed to hazardous noise and, if so, to obtain copies of all reports and audiograms related to the testing.

On December 7, 2006 the Office requested information from the employing establishment as to whether appellant had been tested as part of a program to monitor hearing loss or had been informed prior to his employment that he had a preexisting hearing loss. It asked the establishment to provide copies of all reports and audiograms related to any such testing. The Office also asked appellant to provide information as to the type of noise exposure which allegedly aggravated his hearing loss and whether the employing establishment had informed him prior to his employment that he had a severe preexisting hearing loss.

On December 15, 2006 appellant described exposure to noise-producing heavy equipment, such as sandblasters, diesel generators and turbines, which he alleged caused a worsening of his hearing loss. He stated that the employing establishment had informed him that he had a hearing loss in his left ear at the commencement of his employment.

On January 5, 2007 the medical adviser reported that audiograms for the period June 5, 1978 through July 20, 1988 showed a mild increase in threshold at 3,000 hertz on the right. Noting that slight changes "up or down" are considered to be within limits of normal fluctuation from test to test, he opined that there was no significant change in hearing loss within the prescribed time frame.

The record contains letters to appellant from the employing establishment, dated May 30, 1984 and July 27, 1988, reflecting testing "outside normal limits" in the areas of "urinalysis" and "blood serum chemistry," respectively. The area of "hearing" was not identified as being outside normal limits. On January 17, 2007 the employing establishment informed the Office that there were no letters on file regarding appellant's participation in a hearing conservation program and no entries indicating that he was notified of a worsening of his hearing condition.

In a January 25, 2007 decision, the Office denied appellant's claim on the grounds that it was not filed in a timely manner. It found that appellant was aware of an alleged worsening in 1991, but did not file his claim until 2005, which was beyond the three-year filing requirement. The Office found that there was no evidence that the employing establishment had actual knowledge of an increase in hearing loss during his federal employment.

On January 31, 2007 appellant submitted a request for an oral hearing. His request was later modified to a request for a telephonic hearing, which was held on October 3, 2007.

In a letter dated October 1, 2007, appellant stated that the employing establishment did not conduct hearing tests during the last five years of his employment. On October 4, 2007 he alleged that he was never told of a time limitation for filing a claim for hearing loss. The record contains copies of audiograms performed by the employing establishment dated June 5, 1978, January 9, 1980, May 21, 1984 and July 16, 1986.

The record contains a June 5, 1978 report from the employing establishment reflecting that appellant had a hearing loss in the left ear. A January 9, 1980 document entitled "Employee Status and Information Record" contained the following notation: "Medical said hearing loss getting worse."

In a December 7, 2007 decision, the Office hearing representative affirmed the January 25, 2007 decision denying appellant's claim as untimely, finding that the evidence

showed no significant change in hearing loss from 1978 to 1988. As appellant was last exposed to work-related noise in 1991, he had until 1994 to file a timely claim. The hearing representative noted that appellant's 2006 claim would still be considered timely if his supervisor had actual knowledge within 30 days of injury that he had hearing loss due to his federal employment. He found, however, that the evidence did not demonstrate that the supervisor had actual knowledge that appellant's hearing loss was causally related to his employment or that his condition was worsening.

On October 8, 2008 appellant requested reconsideration reiterating that his claim was timely filed. He identified five former coworkers whose 2005 hearing loss claims were allegedly accepted, although they last worked for the employing establishment in 1991.

Appellant submitted an affidavit dated October 7, 2008 from his immediate supervisor, Ronald Little, who stated that appellant worked with high noise equipment, such as sandblasting compressors. Mr. Little indicated that appellant "reported hearing problems and asked for better protection."

By decision dated December 3, 2008, the Office denied appellant's request for reconsideration. Noting that Mr. Little's October 7, 2008 statement did not address the cause of appellant's hearing loss, the Office found that the evidence submitted was insufficient to warrant further merit review.

LEGAL PRECEDENT

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act,[1] the Office regulations provide that the evidence or argument submitted by a claimant must: (1) show that the Office erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by the Office; or (3) constitute relevant and pertinent new evidence not previously considered by the Office.[2] To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant also must file his or her application for review within one year of the date of that decision.[3] When a claimant fails to meet one of the above standards, the Office will deny the application for reconsideration without reopening the case for review on the merits.[4] The Board has held that the submission of evidence which does not address the particular issue involved does not constitute a basis for reopening a case.[5] Evidence that repeats

[1] 5 U.S.C. §§ 8101-8193. Under section 8128 of the Act, [t]he Secretary of Labor may review an award for or against payment of compensation at any time on her own motion or on application. 5 U.S.C. § 8128(a).

[2] 20 C.F.R. § 10.606(b)(2).

[3] *Id*. at § 10.607(a).

[4] *Id*. at § 10.608(b).

[5] *Edward Matthew Diekemper*, 31 ECAB 224, 225 (1979).

or duplicates evidence already in the case record has no evidentiary value and does not constitute a basis for reopening a case.[6]

ANALYSIS

Appellant's October 8, 2008 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. Consequently, appellant 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 affidavit from his immediate supervisor, who stated that appellant was exposed to excessive noise during his federal employment. Mr. Little also indicated that appellant reported hearing problems and asked for better protection. However, his statement is not relevant to the issue that was before the Office. In its December 7, 2007 decision, the hearing representative's denial of appellant's claim as untimely turned on his failure to demonstrate that his supervisor had actual knowledge that his hearing loss was causally related to his employment or that his condition had worsened. While Mr. Little acknowledged that appellant had a hearing problem for which he requested protection, he did not indicate his awareness that the hearing loss, or the worsening of his condition, was due to noise exposure during his federal employment. The affidavit merely repeated evidence already of record, namely that appellant had a hearing loss and that he worked in a noisy environment. As it is repetitive and irrelevant, it has no evidentiary value and does not constitute a basis for reopening this case.[7]

On appeal, appellant contends that the Office improperly denied his request for reconsideration on the grounds that Mr. Little's affidavit did not address the relevant issue of causal relationship; whereas, his claim was actually denied because it was not timely filed. He further contends that his claim should be considered timely because the Office previously accepted claims filed by other individuals who experienced the same working conditions, were laid off in 1991 and filed claims in 2005. The Board finds appellant's arguments to be without merit. Although the ultimate issue in this was whether appellant's claim was timely filed, the hearing representative's December 7, 2007 decision turned on the issue of whether appellant's supervisor had actual knowledge that appellant's alleged hearing loss was work related. Mr. Little's affidavit did not address this issue. Additionally, the Office must determine the timeliness of a claim based on the evidence of record in each case, including the date of filing, the date of last exposure and whether appellant's immediate supervisor had actual knowledge of a work-related injury within 30 days. The fact that a claim filed by a coworker who experienced the same working conditions, was laid off in 1991 and filed claims in 2005 may have been accepted when appellant's claim was not, does not establish that the Office erred in denying appellant's claim.

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

[7] *Id.*

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 October 8, 2008 request for reconsideration.

CONCLUSION

The Board finds that the Office properly refused to reopen appellant's case for further review of the merits pursuant to 5 U.S.C. § 8128(a).

ORDER

IT IS HEREBY ORDERED THAT the December 3, 2008 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 5, 2009
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board