

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

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C.B., Appellant

and

DEPARTMENT OF COMMERCE, CCSI,  
Dallas, TX, Employer

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**Docket No. 12-1205  
Issued: December 7, 2012**

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

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

RICHARD J. DASCHBACH, Chief Judge  
PATRICIA HOWARD FITZGERALD, Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On May 15, 2012 appellant filed a timely appeal from a February 16, 2012 decision of the Office of Workers' Compensation Programs (OWCP) denying his request for further review of the merits of his claim. Pursuant to the Federal Employees' Compensation Act<sup>1</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review the nonmerit decision by OWCP. The last merit decision of record was OWCP's June 1, 2011 decision. Because more than 180 days has elapsed between the last merit decision and the filing of this appeal on May 15, 2012, the Board lacks jurisdiction to review the merits of this case.<sup>2</sup>

**ISSUE**

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

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<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

<sup>2</sup> For decisions issued prior to November 19, 2008, a claimant had up to one year to file an appeal. An appeal of OWCP decisions issued on or after November 19, 2008 must be filed within 180 days of the decision. 20 C.F.R. § 501.3(e).

## **FACTUAL HISTORY**

On January 19, 2010 appellant, then a 70-year-old local census office manager, filed a traumatic injury claim (Form CA-1) alleging that on January 7, 2010 he sustained a perforated tympanic membrane, tinnitus and hearing loss when an overpowering alarm went off at the U.S. Census Bureau.

In medical reports dated January 28 and February 25, 2010, Dr. Andrew J. Lehr, a Board-certified otolaryngologist, reported that appellant complained of tinnitus in both ears which had worsened since noise exposure on January 7, 2010. Appellant underwent audiological testing on January 28, 2010 and Dr. Lehr diagnosed sensorineural hearing loss and tinnitus.

In a March 31, 2010 narrative statement, appellant reported that on January 7, 2010 a faulty fire alarm went off at his office for 90 minutes until the fire department finally turned it off. He stated that he had tinnitus since his time spent in Vietnam for the U.S. Army and that the January 7, 2010 acoustic trauma caused by the fire alarm resulted in aggravation of his tinnitus, causing him to experience constant ringing in his ears thereafter. Appellant further stated that his supervisor had informed him that the fire alarm was ringing at 140 decibels (dBA).

By decision dated April 30, 2010, OWCP denied appellant's claim on the grounds that the medical evidence failed to establish that his condition was causally related to the accepted January 7, 2010 employment incident.

On May 20, 2010 appellant requested an oral hearing before the Branch of Hearings and Review.

At the August 18, 2010 hearing, appellant testified that he was in the office building for 90 minutes with the fire alarm screeching. He stated that this caused a severe aggravation of his tinnitus where he was unable to sleep at night because of the constant ringing in his ears. Appellant further stated that he was terminated from the U.S. Census Bureau just two weeks after the January 7, 2010 employment incident for being grouchy. The record was held open for 30 days.

In an undated letter, Dr. Lehr stated that appellant was treated in January 2010 with complaints of life-disturbing tinnitus, which had acutely and severely worsened due to exposure from a fire alarm on January 7, 2010 for approximately 90 minutes at an estimated decibel level of 100 dBA. A January 28, 2010 audiogram revealed high frequency bilateral sensorineural hearing loss. Dr. Lehr opined that appellant suffered from acoustic trauma due to the January 7, 2010 exposure to the fire alarm because the intensity and duration of noise exposure was reasonably adequate to cause such trauma. He recommended bilateral hearing aids.

In an April 28, 2010 e-mail, Ronnie Marsh, the fire marshall, informed the employing establishment that the alarms in their jurisdiction were usually 70 to 80 dBA.

A statement by TC Life Safety Company, the manufacturer of the fire alarms used at the Census Bureau offices, stated that the indoor alarm system used was 80 to 90 dBA and that only outdoor alarms reached 100 or more dBA. Specifications for the fire alarms were also submitted.

By decision dated October 5, 2010, the hearing representative remanded the case for further development of the medical evidence. She found that appellant was exposed to noise from the fire alarm on January 7, 2010 for about 90 minutes and that noise exposure was approximately 80 to 90 dBA. The hearing representative directed OWCP to obtain his audiograms from the Veterans Administration, prepare a statement of accepted facts and refer him and the case file to a Board-certified otolaryngologist to determine if the January 7, 2010 noise exposure caused or aggravated his tinnitus and hearing loss.

Appellant submitted additional narrative statements dated October 13 and 18 and November 17, 2010 repeating previous factual assertions and allegations made. In his October 18, 2010 statement, he reported that he was exposed to fire alarms 20 different times while working for the U.S. Census Bureau. Physician reports dated April 11, 1996 to March 1, 1999 documenting appellant's treatment for tinnitus and intermittent loss of hearing as a result of exposure to cannon fire and tank fire training dating back to 1957 were submitted. In a March 1, 1999 medical report, appellant complained that he was unable to sleep through the night as a result of his worsening tinnitus. An April 30, 1996 audiogram and August 19, 2008 audiogram were also submitted which noted that he suffered from bilateral sensorineural hearing loss and tinnitus.

OWCP referred appellant to Dr. Frank Little, Jr., a Board-certified otolaryngologist, for a second opinion evaluation on November 30, 2010. It prepared a statement of accepted facts which noted that appellant had a preexisting hearing problem from firing cannons in Vietnam and that he was exposed to a fire alarm of at least 80 to 90 dBA for 90 minutes on January 7, 2010. In his report, Dr. Little reported that an audiogram was completed on January 30, 2010 which revealed the following dBA losses at 500, 1,000, 2,000 and 3,000 hertz: 15, 5, 15 and 30 for the right ear and 5, 10, 10 and 20 for the left ear. Speech discrimination thresholds were 5 dBA bilaterally and the auditory discrimination score was 100 percent for both ears. Dr. Little also reported that appellant's physical examination and examination findings were within normal limits and there was no perforation of the eardrums. He diagnosed sensory loss from noise exposure prior to the January 7, 2010 employment incident. Dr. Little stated that appellant's hearing loss was not caused by his federal employment because an audiogram taken prior to the January 7, 2010 employment incident showed the same findings as the audiogram performed on November 30, 2010.

By decision dated December 3, 2010, OWCP denied appellant's claim on the grounds that the medical evidence failed to establish that his injury was causally related to the accepted January 7, 2010 noise exposure. It further noted that none of the medical reports provided a diagnosis for perforated eardrum.

On December 17, 2010 appellant requested an oral hearing before the Branch of Hearings and Review. He provided narrative statements dated December 17 and 30, 2010 repeating many of the factual assertions already made and explaining the reasons why OWCP should accept his claim.

At the April 11, 2011 hearing, appellant testified that Dr. Little's medical opinion was in direct contradiction of his physician's reports who had related his increased tinnitus to the January 7, 2010 noise exposure.

On a May 2, 2011 appellant resubmitted medical evidence already of record.

By decision dated June 1, 2011, the hearing representative affirmed OWCP's December 3, 2010 decision on the grounds that the weight of the medical evidence rested with Dr. Little who found that appellant's injury was not causally related to the January 7, 2010 noise exposure.

By letter dated January 31, 2012, appellant requested reconsideration of the June 1, 2011 OWCP decision. He stated that his Vietnam-era tinnitus was exacerbated by a 90-minute Census Bureau fire alarm on January 7, 2010. Because this fire alarm blasted in an enclosed space, appellant argued that the intensity was magnified and estimated to be 140 dBA, which caused damage to his auditory cortex. He further argued that Dr. Little's medical report was not sufficient because he failed to discuss or evaluate appellant's tinnitus. Appellant stated that tinnitus and hearing loss are two different brain conditions that stem from two different injuries to the auditory system. Thus, Dr. Little failed to consider the hearing loss and tinnitus together. Appellant concluded that his physicians disagree with Dr. Little's assertion and the weight of the medical evidence should rest with them. In support of his claim, he submitted a copy of the table of contents from the "Neuromonics Tinnitus Treatment Oasis Workbook."

By decision dated February 16, 2012, OWCP denied appellant's request for reconsideration finding that he neither raised substantive legal questions nor included new and relevant evidence.<sup>3</sup>

### **LEGAL PRECEDENT**

To require OWCP to reopen a case for merit review under FECA section 8128(a), OWCP regulations provide that the evidence or argument submitted by a claimant must: (1) show that OWCP erroneously applied or interpreted a specific point of law, (2) advance a relevant legal argument not previously considered by OWCP; or (3) constitute relevant and pertinent new evidence not previously considered by OWCP.<sup>4</sup> Section 10.608(b) of OWCP regulations provide that, when an application for reconsideration does not meet at least one of the three requirements enumerated under section 10.606(b)(2), OWCP will deny the application for reconsideration without reopening the case for a review on the merits.<sup>5</sup>

### **ANALYSIS**

The Board finds that the refusal of OWCP to reopen appellant's case for further consideration of the merits of his claim, pursuant to 5 U.S.C. § 8128(a), did not constitute an abuse of discretion.

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<sup>3</sup> The Board notes that appellant submitted additional evidence after OWCP rendered its February 16, 2012 decision. The Board's jurisdiction is limited to reviewing the evidence that was before OWCP at the time of its final decision. Therefore, this additional evidence cannot be considered by the Board. 20 C.F.R. § 510.2(c)(1); *Dennis E. Maddy*, 47 ECAB 259 (1995); *James C. Campbell*, 5 ECAB 35, 36 n.2 (1952).

<sup>4</sup> *D.K.*, 59 ECAB 141 (2007).

<sup>5</sup> *K.H.*, 59 ECAB 495 (2008).

The only OWCP decision before the Board on appeal is the February 16, 2012 decision, denying appellant's application for review. Because more than 180 days elapsed between the date of OWCP's most recent merit decision on June 1, 2011 and the filing of his appeal on May 15, 2012, the Board lacks jurisdiction to review the merits of appellant's claim.<sup>6</sup>

The issue presented on appeal is whether appellant met any of the requirements of 20 C.F.R. § 10.606(b)(2), requiring OWCP to reopen the case for review of the merits of the claim. In his January 31, 2012 application for reconsideration, appellant did not show that OWCP erroneously applied or interpreted a specific point of law. He did not advance a new and relevant legal argument. Appellant's argument was that his injury was employment related and he referenced his physician's reports, which were previously considered and addressed by OWCP.

The underlying issue in this case was whether appellant's injury was causally related to the accepted January 7, 2010 employment incident. That is a medical issue which must be addressed by relevant medical evidence.<sup>7</sup> A claimant may obtain a merit review of an OWCP decision by submitting new and relevant evidence. The only evidence received was a copy of the table of contents from the "Neuromonics Tinnitus Treatment Oasis Workbook." While this evidence is new, the Board finds that it is not relevant to the issue of causal relationship. 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.<sup>8</sup> The Board has also notes that it has long held that newspaper clippings, medical texts and excerpts from publications are of no evidentiary value in establishing the necessary causal relationship as they are of general application and are not determinative of whether the specific condition claimed was causally related to the particular employment injury.<sup>9</sup>

In this case, appellant failed to submit any new and relevant evidence addressing causal relationship.

Appellant further argued that Dr. Little's report was not sufficient to deny his claim because he failed to discuss and evaluate his tinnitus. This is not a new and relevant argument as FECA does not list tinnitus in the schedule of eligible members, organs or functions of the body. Hearing loss is a covered function of the body. If tinnitus contributes to a ratable loss of hearing, the schedule award evaluation may reflect that contribution. The evidence must first however establish that appellant sustained a ratable hearing loss, causally related to his employment.<sup>10</sup> As Dr. Little did not relate appellant's hearing loss to the January 7, 2010 noise exposure, his failure to discuss appellant's tinnitus is not a relevant argument.

The Board accordingly finds that appellant did not meet any of the requirements of 20 C.F.R. § 10.606(b)(2). Appellant did not show that OWCP erroneously applied or interpreted a

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<sup>6</sup> 20 C.F.R. § 501.3(e) requires that an application for review by the Board be filed within 180 days of the date of OWCP's final decision being appealed.

<sup>7</sup> See *Bobbie F. Cowart*, 55 ECAB 746 (2004).

<sup>8</sup> *Jimmy O. Gilmore*, 37 ECAB 257 (1985); *Edward Matthew Diekemper*, 31 ECAB 224 (1979).

<sup>9</sup> *E.A.*, 58 ECAB 677 (2007); *Mildred Powell*, 11 ECAB 187, 188 (1959).

<sup>10</sup> See *Richard Larry Enders*, 48 ECAB 184 (1996).

specific point of law, advance a relevant legal argument not previously considered by OWCP or submit relevant and pertinent evidence not previously considered. Pursuant to 20 C.F.R. § 10.608, OWCP properly denied merit review.

**CONCLUSION**

The Board finds that OWCP 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 February 16, 2012 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: December 7, 2012  
Washington, DC

Richard J. Daschbach, Chief Judge  
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge  
Employees' Compensation Appeals Board

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