

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

I.B., Appellant

and

**DEPARTMENT OF THE ARMY, RED RIVER
ARMY DEPOT, Texarkana, TX, Employer**

)
)
)
)
)
)
)
)
)
)
)
)

**Docket No. 12-1055
Issued: November 21, 2012**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

COLLEEN DUFFY KIKO, Judge
PATRICIA HOWARD FITZGERALD, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On April 12, 2012 appellant filed a timely appeal from an October 20, 2011 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days elapsed from the last merit decision of October 18, 2010 and 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 does not have jurisdiction to review the merits of this case. The Board notes that appellant submitted new evidence on appeal. However, the Board lacks jurisdiction to review evidence for the first time on appeal.²

ISSUE

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

¹ 5 U.S.C. § 8101 *et seq.*

² 20 C.F.R. § 501.2(c).

On appeal, appellant reiterated the merits of her case and described her problems with her hearing since the last decision. She explained why she believed that her hearing loss was related to her federal employment. Appellant submitted new evidence on appeal.

FACTUAL HISTORY

On March 1, 2010 appellant, then a 59-year-old human resources specialist, filed an occupational disease claim alleging that she suffered a hearing loss in both of her ears due to noise from plane engines during her extensive airplane travel during her federal employment. The employing establishment controverted the claim and contended, *inter alia*, that appellant was not exposed to noise in her federal employment, noting that her office was noise free and that she traveled for work every two years, if that often. By letter dated April 2, 2010, appellant responded to a request for further information from OWCP by describing her noise exposure at work, first as a data transcriber and then as a personnel management specialist. In her statement, she contended that she was exposed to warehouse noise when she was a supply clerk for the employing establishment. Appellant noted that in her most recent assignment as a human resources specialist she was required to travel to various places on small airplanes with extremely loud engines. She noted that during a trip to and from Denver in 2000 she experienced severe pain in her ears. Appellant also noted that in 2007 she was exposed to a constant barrage of traffic noise while at work. Finally, she noted that for approximately three to four years she was required to wear a headset which exposed her to high frequency noise and static.

By decision dated April 28, 2010, OWCP denied appellant's claim as it found that the evidence submitted was insufficient to establish that the event occurred as alleged.

On August 17, 2010 appellant requested reconsideration and submitted additional evidence in support of her claim.

By decision dated October 18, 2010, OWCP denied modification of its prior decision. It found that this evidence was not sufficient to show a causal relationship between factors of appellant's federal employment and her hearing loss.

On October 12, 2011 appellant requested reconsideration. In her statement, she described her exposure to workplace noise. In support of her claim, appellant submitted position descriptions that were already in the record. She also submitted a March 24, 2008 memorandum by the Industrial Hygiene Program Manager for the employing establishment which detailed noise exposure for various positions.

By decision dated October 20, 2011, OWCP denied appellant's request for reconsideration without conducting a merit review.

LEGAL PRECEDENT

To require OWCP to reopen a case for merit review under section 8128(a) of FECA,³ OWCP's 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.⁴ To be entitled to a merit review of an OWCP 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.⁵ When a claimant fails to meet one of the above standards, OWCP will deny the application for reconsideration without reopening the case for review on the merits.⁶

ANALYSIS

OWCP denied appellant's claim because she failed to establish an employment factor or incident and as such did not show that her hearing loss was causally related to her federal employment. On appeal, appellant makes various arguments that address the merits of her case. However, the last merit decision in this case was issued on October 18, 2010 at which point OWCP denied modification of the decision denying her claim. As previously stated, this decision was issued over 180 days prior to the filing of this appeal and, accordingly, the Board does not have jurisdiction to review the merits of the case.⁷ The only issue before the Board is whether OWCP properly denied appellant's reconsideration request.

The Board notes that the arguments appellant made in her most recent reconsideration request were a repetition of the arguments she made in her correspondence of April 2, 2010. In addition to these repetitive arguments, appellant submitted copies of position descriptions with her reconsideration request that were already in the record. The Board has held that submission of evidence or argument which repeats or duplicates that already in the case record does not constitute a basis for reopening a case.⁸ The only piece of new evidence, the March 24, 2008 memorandum by the Industrial Hygiene Program Manager for the employing establishment, does not specifically address the noise exposure for appellant. The Board has held that the submission of evidence or argument which does not address the particular issue involved does not constitute a basis for reopening a case.⁹ Because appellant did not show that OWCP erroneously interpreted a specific point of law, advance a relevant legal argument not previously considered

³ *Id.* Under section 8128 of FECA, "[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).

⁴ 20 C.F.R. § 10.606(b)(3).

⁵ *Id.* at § 10.607(a).

⁶ *Id.* at § 10.608(b).

⁷ *Id.* at § 501.3(e).

⁸ *S.J.*, Docket No. 10-1318 (issued February 3, 2011); *Edward W. Malaniak*, 51 ECAB 279 (2000).

⁹ *D.B.*, Docket No. 10-2036 (issued May 13, 2011); *Edward Mathew Diekemper*, 31 ECAB 224, 225 (1979).

or submit relevant and pertinent new evidence not previously considered by OWCP, it did not abuse its discretion in denying appellant's request for reconsideration.

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated October 20, 2011 is affirmed.

Issued: November 21, 2012
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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