

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of LOUIS R. TROUSDALE and TENNESSEE VALLEY AUTHORITY,
COLBERT STEAM PLANT, Tuscumbia, AL

*Docket No. 98-2623; Submitted on the Record;
Issued March 9, 2000*

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issue is whether the refusal of the Office of Workers' Compensation Programs, in decisions dated January 5, March 30 and August 12, 1998, to reopen appellant's case for further consideration of the merits of his claim, constituted an abuse of discretion.

On June 26, 1997 appellant, then a 66-year-old boilermaker, filed an occupational disease claim (Form CA-2) alleging that he sustained a loss of hearing in the performance of duty. Appellant indicated that he initially became aware of and related his loss of hearing to factors of his federal employment on July 20, 1990. Appellant resigned effective November 27, 1991.

By decision dated August 20, 1997, the Office denied appellant's claim for an employment-related loss of hearing on the grounds that he did not file his claim within the applicable time limitation provision of the Federal Employees' Compensation Act,¹ as he should have been aware of a relationship between his employment and the claimed condition by November 27, 1991, the date he retired. The Office further found that the evidence of record did not support that appellant's immediate superior had actual knowledge of the claimed condition within 30 days of the injury.²

By an undated letter received by the Office on December 15, 1997, appellant requested reconsideration of the Office's August 20, 1997 decision. By decision dated January 5, 1998, the Office denied appellant a merit review of his claim on the grounds that he neither raised substantive legal questions nor submitted new and relevant evidence.

By another undated letter received by the Office on February 24, 1998, appellant requested reconsideration of the Office's January 5, 1998 decision and submitted audiometric

¹ 5 U.S.C. § 8122(b).

² 5 U.S.C. § 8122(a)(1).

results, dated April 21, 1980 and March 7, 1989, which were previously of record. Additionally, appellant submitted audiograms dated April 30, 1996 and February 19, 1998.

By decision dated March 30, 1998, the Office denied appellant a merit review. The Office explained that the audiometric record was previously of record and was considered to be repetitious in nature and, thus, insufficient to warrant review of the prior decision. The Office further explained that the audiograms were “irrelevant at this point, because they do not help establish that your claim was timely filed.” Therefore, the Office found the audiograms to be insufficient to warrant review of the prior decision.

On July 6, 1998 appellant, again requested reconsideration and resubmitted the audiometric record and other audiograms, which were previously of record and considered by the Office. By decision dated August 12, 1998, the Office denied appellant’s request for a merit review on the grounds that the submitted evidence was repetitious in nature and, accordingly, was insufficient to warrant further review of the prior decision.

The Board only has jurisdiction to review final decisions of the Office issued within one year of the docketing of the appeal.³ The only decisions issued by the Office within one year of the docketing of the current appeal, on September 1, 1998, are the Office’s January 5, March 30 and August 12, 1998 decisions, in which the Office declined to reopen its August 20, 1997 decision to conduct a further merit review.

It is a matter of discretion on the part of the Office whether to reopen a case for further consideration under 5 U.S.C. § 8128. Therefore, the function of the Board on this appeal is to determine whether there has been an abuse of this discretionary authority.

The Board finds that the refusal of the Office, by its January 5, March 30 and August 12, 1998 decisions, to reopen appellant’s case for further review of the merits of the claim did not constitute an abuse of discretion.

To require the Office to reopen a case for reconsideration, section 10.138(b)(1) of Title 20 of the Code of Federal Regulations provides in relevant part that a claimant may obtain review of the merits of his claim by written request to the Office identifying the decision and the specific issue(s) within the decision which claimant wishes the Office to reconsider and the reasons why the decision should be changed and by:

- “(i) Showing that the Office erroneously applied or interpreted a point of law, or
- “(ii) Advancing a point of law or fact not previously considered by the Office , or
- “(iii) Submitting relevant and pertinent evidence not previously considered by the Office.”⁴

³ 20 C.F.R. § 501.3(d)(2); *see also Donald J. Miletta*, 34 ECAB 1822 (1983).

⁴ 20 C.F.R. § 10.138(b)(1).

Section 10.138(b)(2) provides that any application for review of the merits of the claim which does not meet at least one of the requirements listed in paragraphs (b)(1)(i) through (iii) of this section will be denied by the Office without review of the merits of the claim.⁵

The threshold issue in this case is whether appellant properly filed a claim for an employment-related loss of hearing within the applicable time limitation provision of the Act. By its August 20, 1997 decision, the Office found that appellant failed to timely file such a claim. Thus, any evidence appellant submits must be relevant to this issue.

With his initial request for reconsideration, which was received by the Office on December 15, 1997, appellant simply requested reconsideration of the Office's August 20, 1997 decision. Therefore, he neither demonstrated that the Office erroneously applied or interpreted a point of law, advanced a point of law or fact not previously considered by the Office, nor submitted relevant and pertinent evidence not previously considered by the Office. The Board finds that the Office properly declined to reopen appellant's claim for further merit review on January 5, 1998.

With his second request for reconsideration, which was received by the Office on February 24, 1998, appellant resubmitted an audiometric record containing test results from April 21, 1980 and March 7, 1989. As this record was previously of record and considered by the Office when denying his hearing loss claim as untimely filed and was deemed irrelevant to the issue of timely filing, the Board finds that the Office properly declined to conduct a further merit review of appellant's claim. Although appellant also submitted new evidence, consisting of audiograms dated April 30, 1996 and February 19, 1998, these audiograms are irrelevant to the issue of whether appellant timely filed a claim for an employment-related loss of hearing. As such, the Board finds that the Office properly declined to reopen appellant's case for further merit review on March 30, 1998.

With his third request for reconsideration, appellant resubmitted the audiometric record and other audiograms, which were previously contained in the case record and reviewed by the Office. With regard to the resubmission of evidence previously of record and considered by the Office, the Board has held that evidence which is repetitious or duplicative of that already contained in the record is of no evidentiary value and does not warrant a reopening of the case for further merit review.⁶ In view of the foregoing, the Board finds that the Office properly declined to reopen appellant's case for further merit review on August 12, 1998 based on the submission of this type of evidence.

⁵ 20 C.F.R. § 10.138(b)(2).

⁶ See *Eugene F. Butler*, 36 ECAB 393 (1984).

The decisions of the Office of Workers' Compensation Programs dated August 12, March 30 and January 5, 1998 are hereby affirmed.

Dated, Washington, D.C.
March 9, 2000

Michael J. Walsh
Chairman

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member