

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

M.W., Appellant

and

**DEPARTMENT OF THE NAVY, NORFOLK
NAVAL SHIPYARD, Norfolk, VA, Employer**

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**Docket No. 12-41
Issued: May 1, 2012**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On October 5, 2011 appellant filed a timely appeal from a June 8, 2011 nonmerit decision of the Office of Workers' Compensation Programs (OWCP) which denied his request for reconsideration.¹ Pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board does not have jurisdiction over the merits of this case.

¹ The last merit decision in this case was the March 22, 2010 hearing representative decision, which granted appellant a schedule award for two percent hearing loss of the left ear. For final adverse OWCP decisions issued prior to November 19, 2008, a claimant had up to one year to file an appeal. 20 C.F.R. § 501.3(d)(2). For final adverse decisions of OWCP issued on or after November 19, 2008, a claimant must file an appeal within 180 days of the decision. 20 C.F.R. § 501.3(e). Because more than 180 days has elapsed between the most recent merit decision dated August 5, 2009 to the filing of this appeal on March 10, 2011 the Board lacks jurisdiction to review the merits of this case.

² 5 U.S.C. § 8101 *et seq.*

ISSUE

The issue is whether OWCP properly denied appellant's March 13, 2011 request for reconsideration under 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On August 14, 2008 appellant, then a 55-year-old retired welder, filed an occupational disease claim alleging hearing loss as a result of working around grinders, needle guns and machines with loud noises. OWCP accepted his claim for binaural sensorineural hearing loss and granted a schedule award for two percent monaural hearing loss of the left ear based on the reports of the second opinion examiner, Dr. William J. Lewis, a Board-certified otolaryngologist³ and the district medical adviser (DMA).⁴

On November 12, 2009 appellant requested a review of the written record. He disagreed with the schedule award decision as his hearing had worsened and he sought compensation beginning from the date of injury of June 15, 2000, and not just for seven days. Appellant pointed out that he worked for the employing establishment for 30 years and reported that both of his physicians found that his hearing loss resulted from his employment.

In a November 10, 2009 report, Dr. Raymond Lesser, a Board-certified otolaryngologist, stated that appellant had a history of hearing loss and noted that he worked in a loud environment at the shipyard. He reported that the audiogram⁵ showed a moderate dip in hearing between 2,000 to 8,000 Hz, which was consistent with noise-induced hearing loss. Appellant also resubmitted the second-opinion examiner's and DMA report.

By decision dated March 22, 2010, an OWCP hearing representative affirmed the October 19, 2009 decision awarding appellant two percent hearing loss of the left ear. He stated that an October 30, 2009 audiogram from Dr. Lesser's office was somewhat illegible and unclear, but indicated that appellant had decibel losses of hearing of 15, 20, 25 and 50 on the left, and 10, 15, 15 and 40 on the right at the respective frequencies of 500, 1,000, 2,000 and 3,000 Hz. The hearing representative determined that, although Dr. Lesser's audiogram showed greater loss of hearing in the left ear, it did not meet the requirements of OWCP's procedure manual or address how the increased hearing loss was causally related to appellant's employment. The October 30, 2009 audiogram does not appear in the record before the Board.

³ The December 23, 2008 audiogram showed decibel losses of 10, 20, 25 and 50 on the left and 10, 15, 15 and 40 on the right at the frequencies of 500, 1,000, 2,000 and 3,000 Hertz (Hz). In the second-opinion report, Dr. Lewis opined that appellant had bilateral high frequency sensorineural hearing loss frequently seen with noise exposure and consistent with his employment history.

⁴ In the January 23, 2009 report, the DMA noted that he reviewed appellant's records and diagnosed binaural sensorineural hearing loss with a maximum date of improvement of December 23, 2008. Based on the December 23, 2008 audiogram, he reported that appellant had 0 percent monaural hearing loss of the right ear, 1.88 percent monaural hearing loss of the left ear and 0 percent binaural hearing loss.

⁵ Dr. Lesser referred to an October 30, 2009 audiogram from his office, which demonstrated decibel losses of hearing of 15, 20, 25 and 50 on the left and 10, 15, 15 and 40 on the right at the respective frequencies of 500, 1,000, 2,000 and 3,000 Hz.

On March 13, 2011 appellant submitted a request for reconsideration. He stated that he had a new statement from Dr. Lesser to support a greater loss in his left ear.

In an October 29, 2010 report, Dr. Lesser noted that he examined appellant that day and reviewed his medical history. He reported that appellant's audiogram showed a mild-to-moderate sensorineural hearing loss bilaterally with the worst hearing at 4,000 Hz. Dr. Lesser stated that his hearing loss was consistent with a noise-induced hearing loss. He concluded that appellant's hearing loss was 0 percent on the right and 9.4 percent on the left, or a combined hearing loss of 1.6 percent. Dr. Lesser recommended hearing aids for both ears. Appellant also resubmitted Dr. Lesser's November 10, 2009 report.

By decision dated June 8, 2011, OWCP denied appellant's request for reconsideration finding that the evidence submitted was insufficient to warrant further merit review under 5 U.S.C. § 8128(a). It determined that the materials were immaterial and not relevant to the issue.

LEGAL PRECEDENT

Section 8128(a) of FECA vests OWCP with discretionary authority to determine whether to review an award for or against compensation.⁶ OWCP's regulations provide that OWCP may review an award for or against compensation at any time on its own motion or upon application. The employee shall exercise her right through a request to the district OWCP.⁷

To require OWCP to reopen a case for merit review pursuant to FECA, the claimant must provide evidence or an argument that: (1) shows that OWCP erroneously applied or interpreted a specific point of law; (2) advances a relevant legal argument not previously considered by OWCP; or (3) constitutes relevant and pertinent new evidence not previously considered by OWCP.⁸

A request for reconsideration must also be submitted within one year of the date of OWCP's decision for which review is sought.⁹ A timely request for reconsideration may be granted if OWCP determines that the employee has presented evidence or provided an argument that meets at least one of the requirements for reconsideration. If OWCP chooses to grant reconsideration, it reopens and reviews the case on its merits.¹⁰ If the request is timely but fails to meet at least one of the requirements for reconsideration, OWCP will deny the request for reconsideration without reopening the case for review on the merits.¹¹

⁶ 5 U.S.C. § 8128(a); *see also D.L.*, Docket No. 09-1549 (issued February 23, 2010); *W.C.*, 59 ECAB 372 (2008).

⁷ 20 C.F.R. § 10.605; *see also R.B.*, Docket No. 09-1241 (issued January 4, 2010); *A.L.*, Docket No. 08-1730 (issued March 16, 2009).

⁸ 20 C.F.R. § 10.606(b); *see also L.G.*, Docket No. 09-1517 (issued March 3, 2010); *C.N.*, Docket No. 08-1569 (issued December 9, 2008).

⁹ 20 C.F.R. § 10.607(a).

¹⁰ *Id.* at § 10.608(a); *see also M.S.*, 59 ECAB 231 (2007).

¹¹ *Id.* at § 10.608(b); *E.R.*, Docket No. 09-1655 (issued March 18, 2010).

ANALYSIS

The Board has no jurisdiction to review OWCP's March 22, 2010 hearing representative decision affirming the schedule award for two percent monaural hearing loss of the left ear. Appellant did not file a timely appeal of that decision and the Board may not review the merits of his case on this appeal. The only decision the Board may review is the June 8, 2011 nonmerit decision denying his request for reconsideration. The Board finds that OWCP properly denied appellant's request for reconsideration. Dr. Lesser's October 29, 2010 report is not sufficient to warrant further merit review.

The October 29, 2010 report of Dr. Lesser noted generally that an undated audiogram showed a mild to moderate sensorineural hearing loss bilaterally with the worst hearing at 4,000 Hz. He stated that appellant's hearing loss was consistent with a noise-induced hearing loss and was 0 percent on the right, 9.4 percent on the left or 1.6 percent for both.

OWCP denied merit review finding that Dr. Lesser did not submit a copy of the audiometric testing referred to in his report or any other medical evidence to support an increased hearing loss conforming to the protocols for evaluating hearing loss. In the March 22, 2010 decision, OWCP's hearing representative reviewed an October 30, 2009 audiogram from Dr. Lesser's office, but this audiogram is not of record. Dr. Lesser's October 29, 2010 report referred to an undated audiogram allegedly demonstrating a hearing loss of 9.4 percent on the left, but this audiogram is also not of record. To the extent appellant asserts the original schedule award was incorrect, the evidence submitted is irrelevant to establish this contention.

The Board notes that a claim for an increased schedule award may be based on relevant medical evidence establishing the progression of the accepted employment-related condition.¹² To support such a contention appellant may submit additional medical evidence to OWCP with a request for reconsideration.

CONCLUSION

The Board finds that OWCP properly denied appellant's March 13, 2011 request for reconsideration pursuant to 5 U.S.C. § 8128(a).

¹² See A.A., 59 ECAB 726 (2008).

ORDER

IT IS HEREBY ORDERED THAT the June 8, 2011 nonmerit decision of the Office of Workers' Compensation Programs is affirmed.

Issued: May 1, 2012
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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