

FACTUAL HISTORY

On October 10, 2012 appellant, then a 55-year-old sheet metal mechanic, filed an occupational disease claim alleging that noise exposure at work caused hearing loss. He first became aware of his condition and of its relationship to his employment on January 1, 1988. Appellant noted that he was retiring.

On April 11, 2013 OWCP referred appellant to Dr. David Kiener, a Board-certified otolaryngologist, to determine whether appellant had compensable hearing loss and to determine the level of impairment. In a May 14, 2013 report, Dr. Kiener reviewed appellant's history of noise exposure at work, a statement of accepted facts, and the medical record. He concluded that appellant had significant high frequency hearing loss causally related to his federal employment and submitted the results of audiometric testing performed on May 14, 2013. Dr. Kiener noted that appellant had tinnitus, but that it did not interfere with sleep or other activities. The audiogram performed on May 14, 2013 reflected testing at the frequency levels of 500, 1,000, 2,000, and 3,000 cycles per second and revealed the following: right ear 10, 10, 20, and 50 decibels (dBs); left ear 10, 10, 15, and 60 dBs, respectively.

By decision dated June 14, 2013, OWCP accepted appellant's claim for bilateral sensory hearing loss.

On June 20, 2013 appellant filed a claim for a schedule award.

In a report dated July 31, 2013, Dr. Brian Schindler, a Board-certified otolaryngologist and OWCP medical adviser, reviewed Dr. Kiener's report and audiometric testing. He stated that the date of maximum medical improvement was May 14, 2013 and determined that appellant's binaural hearing loss was not severe enough to be ratable under the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).² Dr. Schindler found that appellant had zero percent right-sided hearing loss and zero percent left-sided hearing loss, for a total of zero percent binaural hearing loss. He advised that appellant's tinnitus did not appear to be ratable because it did not interfere with his sleep or other activities. Dr. Schindler indicated that hearing aids should not be authorized.

By decision dated September 6, 2013, OWCP accepted the additional condition of bilateral tinnitus under appellant's claim.

In a separate decision dated September 6, 2013, OWCP denied appellant's claim for a schedule award because the extent of his hearing loss was not severe enough to be ratable under the A.M.A., *Guides*.

By form received on June 19, 2014, appellant requested reconsideration. With his request, he submitted a letter and the results of audiological testing from Tara R. Roberts, a clinical audiologist, dated June 4, 2014. In her report, Audiologist Roberts opined that appellant's audiometric test results were consistent with a precipitously sloping moderate-to-severe high frequency sensorineural hearing loss, bilaterally. She concluded that appellant had

² A.M.A., *Guides* (6th ed. 2008).

hearing loss and tinnitus, as likely as not, the result of noise exposure. The audiogram Audiologist Roberts submitted dated June 4, 2014 recorded frequency levels at 500, 1,000, 2,000, and 3,000 cycles per second for the right ear of 10, 20, 20, and 60 dBs. For the left ear losses were recorded at 10, 15, 20, and 65 dBs. This audiogram did not reflect any calibration protocol and was not accompanied by an otolaryngologist's report.

On June 26, 2014 OWCP denied appellant's request for reconsideration of his claim and did not review the merits of his case. It found that the report from Audiologist Roberts did not constitute probative medical evidence.

LEGAL PRECEDENT

To require OWCP to reopen a case for merit review under section 8128(a), 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.³ Section 10.608(b) of OWCP's 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.⁴

The Board has found that evidence that repeats or duplicates evidence already in the case record has no evidentiary value.⁵ The Board also has held that the submission of evidence which does not address the particular issue involved does not constitute a basis for reopening a case.⁶ While the reopening of a case may be predicated solely on a legal premise not previously considered, such reopening is not required where the legal contention does not have a reasonable color of validity.⁷

ANALYSIS

OWCP issued a June 14, 2013 decision accepting that appellant sustained bilateral sensory hearing loss. Subsequently, on September 6, 2013 OWCP issued a decision denying appellant's claim for a schedule award as his hearing loss was not severe enough to be considered ratable.

By form received on June 19, 2014, appellant requested reconsideration of this decision.

³ 20 C.F.R. § 10.606(b)(2); *D.K.*, 59 ECAB 141, 146 (2007).

⁴ *Id.* at § 10.608(b); *see K.H.*, 59 ECAB 495, 499 (2008).

⁵ *See Daniel Deparini*, 44 ECAB 657, 659 (1993).

⁶ *P.C.*, 58 ECAB 405, 412 (2007); *Ronald A. Eldridge*, 53 ECAB 218, 222 (2001); *Alan G. Williams*, 52 ECAB 180, 187 (2000).

⁷ *Vincent Holmes*, 53 ECAB 468, 472 (2002); *Robert P. Mitchell*, 52 ECAB 116, 119 (2000).

As noted above, the Board does not have jurisdiction over the merits of the September 6, 2013 decision. The issue presented on appeal is whether appellant met any of the requirements of 20 C.F.R. § 10.606(b)(3), requiring OWCP to reopen the case for review of the merits of his claim. In his June 19, 2014 request for reconsideration, appellant did not show that OWCP erroneously applied or interpreted a specific point of law, or advance a new and relevant legal argument not previously considered. Thus, he 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).

The relevant issue in this case is whether appellant has submitted new and relevant medical evidence establishing a ratable percentage of impairment due to hearing loss. The Board finds that, while the report of Audiologist Roberts was not previously of record, it does not constitute relevant new evidence, which would require OWCP to reopen the case for merit review.

The Board notes that if a claim for hearing loss is accepted as causally related and the issue is one of extent, if any, for a schedule award, an audiogram prepared by an audiologist may determine that percentage of hearing loss. The audiologist must properly determine the percentage of appellant's hearing loss by utilizing the approved standardized procedures and the audiogram must be accompanied by a physician's opinion certifying that the audiogram is accurate.⁸ OWCP procedures require that all audiologic equipment authorized for testing meet the calibration protocol contained in the accreditation manual of the American Speech and Hearing Association.⁹

The audiogram submitted by Audiologist Roberts, however, did not provide any calibration information, and was not certified as accurate by a physician.¹⁰ The Board has long held that OWCP does not have to review every uncertified audiogram which has not been prepared in connection with an examination by a medical specialist.¹¹

The Board accordingly finds that appellant did not meet any of the requirements of 20 C.F.R. § 10.606(b)(2). Pursuant to 20 C.F.R. § 10.608, OWCP properly denied merit review.

CONCLUSION

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

⁸ See *Joshua A. Holmes*, 42 ECAB 231 (1990); see also *A.B.*, Docket No. 13-316 (issued June 20, 2013).

⁹ See Federal (FECA) Procedure Manual, Part 3 -- Medical, *Requirements for Medical Reports*, Chapter 3.600.8(a) (September 1994). See also *R.C.*, Docket No. 07-1924 (issued December 20, 2007).

¹⁰ See 5 U.S.C. § 8101(2); see also *M.P.*, Docket No. 13-1790 (issued December 17, 2013) finding that an audiologist is not a physician under FECA.

¹¹ See *Joshua A. Holmes*, *supra* note 8.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated June 26, 2014 is affirmed.

Issued: February 6, 2015
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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