

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

J.T., Appellant

and

**DEPARTMENT OF THE ARMY, ANNISTON
ARMY DEPOT, Anniston, AL, Employer**

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**Docket No. 14-1889
Issued: January 15, 2015**

Appearances:

*Alan J. Shapiro, Esq., for the appellant
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 August 26, 2014 appellant, through counsel, filed a timely appeal from an August 7, 2014 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). Because more than one year elapsed between the last merit decision dated April 1, 2013 and pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction to review the merits of this case.²

ISSUE

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

On appeal, appellant's counsel argues that the decision is contrary to fact and law.

¹ 5 U.S.C. § 8101 *et seq.*

² A claimant has 180 days from the issuance of an adverse OWCP decision to file an appeal with the Board appeal. *See* 20 C.F.R. § 501.3(e).

FACTUAL HISTORY

On March 30, 2012 appellant, then a 48-year-old painter, filed an occupational disease claim alleging that her bilateral hearing loss was due to her employment. She stated that she first became aware of this condition and its relationship to her employment on January 18, 2011.

By letter dated March 30, 2012, OWCP informed appellant that the evidence of record was insufficient to establish her claim. Appellant was advised of the medical and factual evidence required and given 30 days to provide this information.

In support of her claim, appellant submitted hearing conservation data and audiograms dated March 16, 2005 to June 2, 2008 as well as February 22 and March 7, 2011 audiograms. A position description for a painter was submitted along with an employment history noting her employment as a painter from April 18, 2005 to the present.

In a June 6, 2008 report by Paul V. Stephens, an audiologist, stated that appellant exhibited pseudohypacusis characteristics based on her half work response, exaggerated listening, and elevated pure tone thresholds. He stated that he believed her hearing to be normal or near normal.

On March 11, 2011 Mr. Stephens reported normal bilateral hearing acuity, normal middle hearing function and “[s]peech audiometric results show significant rollover of the P1-PB function.” He opined that the inconsistencies found on appellant’s audiological examination appeared functional in nature.

On June 7, 2012 OWCP referred appellant to Dr. Dennis G. Pappas, Jr., a Board-certified otolaryngologist and neurologist, for a second opinion evaluation regarding her hearing loss. In a July 12, 2012 report, Dr. Pappas reported inconsistent hearing studies and opined that appellant had not sustained work-related hearing loss. Under history of injury, he related that she reported falling off of a ladder at work. Appellant related having bilateral ringing tinnitus, that she worked for the employing establishment for seven and one-half years and is currently retired on disability. She also stated that she consistently wore hearing protection while working with air tools with significant noise exposure. Dr. Pappas reviewed an audiogram performed that day which showed bilateral moderate-to-severe hearing loss. He compared this audiogram to the prior audiograms starting with the 2005 study. Dr. Pappas related that the 2005 audiogram was normal, but that results from the following years varied with normal studies for 2005, 2007, and March 2011 and abnormal studies with great variation showing moderate-to-severe hearing loss in 2008 and February 2011. He indicated that appellant’s “[p]ure tone results are inconsistent with speech reception thresholds at 40 to 45 decibels bilateral” and that otoacoustic emission testing was normal on all frequencies. In concluding, Dr. Pappas noted that functional hearing loss has to be considered as appellant related having hearing loss follow a 2007 fall from a ladder at work. In addition, he noted that she “demonstrated a wide variation of normal hearing studies mixed with difference degrees of hearing loss in either ear,” an otoacoustic emission study revealed normal results with a 40 percent range on testing for discrimination scores minutes later, and the results were inconsistent with speech and pure tone scores. An audiogram performed on July 12, 2012 revealed the following decibel losses at 500, 1,000, 2,000 and 3,000 hertz: 50, 65, 65, and 75 for the left ear and 50, 60, 60, and 70 for the right ear. On the

audiogram test results, Dr. Pappas related that the functional otoacoustic emission testing was normal bilaterally and that her prior test results were also inconsistent.

In an August 6, 2012 addendum, Dr. Pappas related that testing performed in 2005, 2007 and March 2011 was normal while testing performed in 2008 and February 2011 demonstrated abnormal findings. He related that the results of appellant's pure tone speech testing were inconsistent and, thus, were unreliable. Dr. Pappas reported that her otoacoustic omissions test for both ears was normal and that these results were inconsistent with the audiometry pure tone results. He related that appellant's ability to converse during her examination was inconsistent with the discrimination results found on testing. For these, reasons, Dr. Pappas opined that appellant had not sustained an employment-related hearing loss.

By decision dated August 17, 2012, OWCP denied appellant's claim on the grounds that the evidence was insufficient to establish hearing loss causally related to the identified employment factors. In reaching this conclusion, it relied upon the report of Dr. Pappas and the lack of any supporting evidence establishing a noise-induced hearing loss.

On August 21, 2012 appellant requested an oral hearing before an OWCP hearing representative which was changed to a review of the written record after appellant failed to call in at the scheduled time.

On January 22, 2013 appellant submitted a September 24, 2012 audiogram in support of her claim.

By decision dated April 1, 2013, the hearing representative reviewed the merits of the claim and affirmed the denial of appellant's claim on the grounds that she failed to establish that she sustained an injury as alleged.

On March 28, 2014 appellant's attorney requested reconsideration and noted that a copy of an audiogram was attached. He argued that Dr. Pappas' opinion was insufficient to support the denial of her claim as the report was inadequate and not based on the facts. Appellant argued that the facts and documents in the record should outweigh a physician's opinion. No audiogram was submitted with this request.

By decision dated August 7, 2014, OWCP denied reconsideration.

LEGAL PRECEDENT

To require OWCP to reopen a case for merit review under section 8128(a) of FECA,³ OWCP's regulations provide that 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

³ *Supra* note 1. Section 8128(a) of FECA provides that the Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application.

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

On March 28, 2014 appellant, through counsel, disagreed with the denial of her hearing loss claim and requested reconsideration. The threshold issue on reconsideration is whether she submitted sufficient medical evidence to establish her claim for employment-related bilateral hearing loss.

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 the claim. In her March 28, 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 by OWCP. Appellant's representative argued that OWCP should not have relied on Dr. Pappas' opinion as inadequate, not based on the facts and the facts and documents in the record should outweigh physician's opinion. However, this is not a new argument and has been thoroughly reviewed by an OWCP hearing representative in its April 1, 2013 decision. Evidence or argument that repeats or duplicates evidence previously of record has no evidentiary value and does not constitute a basis for reopening a case.⁷ Consequently, appellant was not entitled to a review of the merits of the claim based on the first and second above-noted requirements under section 10.606(b)(3).⁸

A claimant may be entitled to a merit review by submitting pertinent new and relevant evidence, but appellant did not submit any new evidence in support of her request. Consequently, appellant was not entitled to a review of the merits of the claim based on the third above-noted requirements under section 10.606(b)(3).⁹

The Board accordingly finds that appellant did not meet any of the requirements of 20 C.F.R. § 10.606(b)(3).

⁴ 20 C.F.R. § 10.606(b)(3). See *J.M.*, Docket No. 09-218 (issued July 24, 2009); *Susan A. Filkins*, 57 ECAB 630 (2006).

⁵ *Id.* at § 10.607(a). See *S.J.*, Docket No. 08-2048 (issued July 9, 2009); *Robert G. Burns*, 57 ECAB 657 (2006).

⁶ *Id.* at § 10.608(b). See *Y.S.*, Docket No. 08-440 (issued March 16, 2009); *Tina M. Parrelli-Ball*, 57 ECAB 598 (2006).

⁷ *J.P.*, 58 ECAB 289 (2007); *Helen E. Paglinawan*, 51 ECAB 591 (2000).

⁸ 20 C.F.R. § 10.606(b)(3)(i, ii).

⁹ *Id.* at 10.606(b)(3)(iii).

On appeal, counsel contends that OWCP's decision was contrary to fact and law. Based on the findings and reasons stated above, the Board finds the attorney's arguments are not substantiated.

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated August 7, 2014 is affirmed.

Issued: January 15, 2015
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