

U.S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of BOBBY LEE ORR and DEPARTMENT OF DEFENSE,
DECA COMMISSARY MEAT MARKET, ALTUS AIRFORCE BASE, Okla.

*Docket No. 97-533; Submitted on the Record;
Issued November 27, 1998*

DECISION and ORDER

Before GEORGE E. RIVERS, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issue is whether the refusal of the Office of Workers' Compensation Programs to reopen appellant's case for further consideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a) constituted an abuse of discretion

On August 13, 1994 appellant, then a 60-year-old meat cutter, filed a notice of occupational disease and claim for compensation (Form CA-2) alleging that he sustained a hearing loss in his right ear causally related to factors of his federal employment. He stated that he first became aware that he had a hearing loss problem and related it to his federal employment on October 28, 1993.

By letter dated September 22, 1994, the Office requested additional information from appellant, specifically his employment history, noise exposure, the date he first noticed his hearing loss, the date he related his hearing loss to work exposure and if he had filed prior claims for hearing loss.

In a report dated December 16, 1993, Dr. J.V.D. Hough, appellant's treating Board-certified otolaryngologist, opined that appellant has a 90 percent loss of hearing in the left ear and a 100 percent loss of hearing in the right ear. Dr. Hough noted that appellant "has had some noise exposure but there was no history of acoustic trauma that might have precipitated it and he did not give a history suggesting any other etiologic factor.

By letter dated May 25, 1995, the Office referred appellant, along with a statement of accepted facts and medical records to Dr. Alan E. Aycock, a Board-certified otolaryngologist, for a second opinion. In his June 23, 1995 report, Dr. Aycock noted that appellant had significant hearing loss, but that the sound levels at the employing establishment "were not of sufficient loudness to be considered hazardous noise."

By decision dated July 17, 1995, the Office denied appellant's claim for a hearing loss for failure to establish that his hearing loss was causally related to his employment factors, and, therefore, fact of injury was not established. In the accompanying memorandum, the Office noted that the medical evidence did not establish that appellant's hearing loss was causally related to or caused by factors of his employment.

By letter dated February 9, 1996, appellant requested reconsideration by the Office and submitted a February 6, 1996 report from Dr. Hough. In his February 6, 1996 report, Dr. Hough noted the loss of hearing and opined that he could not determine the etiology based upon appellant's history. He noted that appellant did "work around a fair amount of noise in his job in the meat market but he had no history of other factors such as head injuries, related illnesses or medications."

By decision dated May 9, 1996, the Office denied appellant's request for reconsideration on the grounds that evidence submitted in support was repetitive in nature and insufficient to warrant review of a prior decision.

By letter dated July 11, 1996, appellant requested reconsideration by the Office and resubmitted a February 6, 1996 report from Dr. Hough.

By decision dated July 25, 1996, the Office, performing a limited review, denied appellant's request for reconsideration on the grounds that evidence submitted in support was repetitive in nature and insufficient to warrant review of a prior decision.

By letter dated September 20, 1996, appellant requested reconsideration by the Office and submitted an August 5, 1996 report from Dr. Hough. In the August 5, 1996 report, he stated that appellant "has had a hearing impairment for many years and did have a considerable amount of difficulty with a childhood infection, he believes that his hearing has become much worse in the right ear due to noise exposure in 1993." As to the cause of appellant's hearing loss, Dr. Hough opined "I cannot give the precise etiologic factors regarding his hearing impairment, it is certainly possible that a large portion of it can be caused from exposure to noise which may have been work related."

By decision dated October 16, 1996, the Office denied appellant's request for modification. The Office determined that the evidence submitted was insufficient to warrant a merit review as the evidence submitted in support was repetitive in nature and insufficient to warrant review of the prior decision.

The Board's jurisdiction to consider and decide appeals from final decisions of the Office extends only to those final decisions issued within one year prior to the filing of the appeal.¹ As appellant filed his appeal with the Board on October 28, 1996, the only decisions before the Board are the nonmerit Office decisions dated May 9, July 25 and October 16, 1996.

¹ *Oel Noel Lovell*, 42 ECAB 537 (1991); 20 C.F.R. §§ 501.2(c), 501.3(d)(2).

The only decisions over which the Board has jurisdiction are the May 9, July 25 and October 16, 1996 decisions which denied appellant's request for a review of the merits of the case.² There are no other Office decisions issued within one year of the date appellant filed his appeal, October 28, 1996, over which the Board has jurisdiction.³

The Board finds that refusal of the Office to reopen appellant's case for further consideration of the merits of his claim, pursuant to 5 U.S.C. § 8128(a), did not constitute an abuse of discretion.

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act,⁴ the Office's regulations provide that a claimant must: (1) show that the Office erroneously applied or interpreted a point of law; (2) advance a point of law or a fact not previously considered by the Office; or (3) submit relevant and pertinent evidence not previously considered by the Office.⁵ When a claimant fails to meet one of the above standards, it is a matter of discretion on the part of the Office whether to reopen a case for further consideration under section 8128(a) of the Act.⁶ To be entitled to merit review of an Office decision denying or terminating a benefit, a claimant must also file his or her application for review within one year of the date of that decision.⁷

In his February 9, July 11 and September 20, 1996 reconsideration requests, appellant did not show that the Office erroneously applied or interpreted a point of law. He did not advance a point of law or a fact not previously considered by the Office. In support of his reconsideration requests, appellant submitted reports dated February 6 and August 5, 1996 from Dr. Hough. His reports are repetitive and cumulative in nature as Dr. Hough's opinion did not differ from his report considered in the July 7, 1995 decision. In his February 6, 1996 report, Dr. Hough opined that he could not determine the etiology of appellant's hearing loss and noted that appellant worked around a fair amount of noise. In his August 5, 1996 report, Dr. Hough opined that with regard to appellant's hearing loss, he could not "give the precise etiologic factors regarding his hearing impairment," but that it was "possible that a large portion of it can be caused from exposure to noise which may have been work related." Dr. Hough's reports are speculative and

² The Board notes that appellant had filed an appeal with the Board on August 8, 1996 which was assigned docket number 96-2564. On November 25, 1996 the Board issued an order dismissing appellant's appeal on the basis of lack of jurisdiction. The Board noted that appellant had filed a separate appeal of an October 16, 1996 decision under a separate docket number.

³ 20 C.F.R. §§ 501.2(c), 501.3(d).

⁴ Under section 8128(a) of the Act, "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application." 5 U.S.C. § 8128(a).

⁵ 20 C.F.R. §§ 501.2(c), 501.3(d)(2).

⁶ *Joseph W. Baxter*, 36 ECAB 228, 231 (1984).

⁷ 20 C.F.R. § 10.138(b)(2).

therefore have diminished probative value on the issue of whether appellant's hearing loss is employment related and thus are not relevant or pertinent evidence.⁸

As appellant's February 9, July 11 and September 20, 1996 requests for reconsideration do not at least meet one of the three requirements for obtaining a merit review, the Board finds that the Office did not abuse its discretion in denying that request.

The decisions of the Office of Workers' Compensation Programs dated May 9, July 25 and October 16, 1996 are hereby affirmed.

Dated, Washington, D.C.
November 27, 1998

George E. Rivers
Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member

⁸ See *Norman E. Underwood*, 43 ECAB 719 (1992); *Melvina Jackson*, 38 ECAB 443 (1987).