

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

ERNESTINE W. BURKE, Appellant

and

**DEPARTMENT OF THE NAVY, MARINE
CORPS AIR STATION, Cherry Point, NC,
Employer**

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**Docket No. 05-1775
Issued: December 6, 2005**

Appearances:
Ernestine W. Burke, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On August 24, 2005 appellant filed a timely appeal from a decision of the Office of Workers' Compensation Programs dated June 28, 2005 which denied her binaural hearing loss claim. She also appealed July 26 and August 15, 2005 decisions in which the Office denied her requests for reconsideration. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether appellant met her burden of proof to establish that her binaural hearing loss is causally related to factors of her federal employment; and (2) whether the Office properly refused to reopen appellant's claim for further merit review.

FACTUAL HISTORY

On December 10, 2003 appellant, then a 60-year-old industrial engineering technician, filed a Form CA-2, occupational disease claim, alleging that noise exposure at work caused a

binaural hearing loss. In support of her claim, she attached a list of jobs she had held and the tools used with resultant noise exposure. She also submitted employing establishment audiograms dating from 1980 to 1985 and additional audiograms dated February 3 and December 1 and 8, 2003.

By letter dated December 22, 2003, the Office informed appellant of the evidence needed to support her claim. The employing establishment submitted appellant's noise exposure records. In a February 2, 2004 report, Roger J. Rath, M.A., CCC-A, an employing establishment audiologist, advised that a May 1980 audiogram demonstrated a mild high frequency hearing loss bilaterally with a general decrease shown throughout all frequencies until February 1985. He noted the hearing loss documented in audiograms dated January and February 2003, advising that he conducted an audiogram in December 2003 and found considerable worsening of her hearing. Mr. Rath stated:

“Noteworthy is the fact that throughout [appellant's] testing record there is a persisting low frequency component in her hearing loss appearing at both 250 and 500 Hz [hertz], yielding a “flat” configuration on the audiogram and one not typically associated with noise damage. Further note is taken of the fluctuations in her testing beginning in January 2003 and ending the following December. Fluctuating hearing loss is also not typically observed in noise-induced hearing loss and may be attributable to endogenous factors which should be medically evaluated.”

In January 2004, the Office referred appellant, together with a set of questions, a statement of accepted facts and the medical record, to Dr. Charles B. Beasley, Board-certified in otolaryngology, for a second opinion evaluation and audiometric testing. In a report submitted on March 8, 2004, Dr. Beasley noted that appellant's current audiometry of February 17, 2004 revealed speech reception thresholds (SRT) better than admitted thresholds which he advised demonstrated malingering. He diagnosed probable mild to moderate sensorineural hearing loss and recommended a repeat evaluation due to unreliable audiometry results. Dr. Beasley attached the February 17, 2004 audiogram with certification.

Appellant was scheduled for additional testing with Dr. Beasley on April 30, 2004 and in a report, of that date, the physician again provided audiometric test results. Dr. Beasley again advised that the test results were unreliable because appellant was malingering. He recommended that appellant have frequency specific auditory brainstem response testing, which was scheduled for May 24, 2004. Appellant did not keep the May 24, 2004 appointment. The case was referred to an Office medical adviser for review. In a June 7, 2004 report, he advised that the audiogram results were invalid due to malingering and a functional overlay and, therefore, any employment-related hearing loss could not be reliably determined.

By decision dated June 18, 2004, the Office found that appellant had employment-related noise exposure but that she failed to establish any hearing loss caused by employment factors. In a July 14, 2004 letter, appellant notified the Office that she had been hospitalized on the day of the scheduled May 24, 2004 appointment and wanted to be retested. In a decision dated August 11, 2004, the Office denied her reconsideration request, finding that, as she furnished no documentation supporting that she was hospitalized, further merit review was not warranted.

Upon receipt of documentation demonstrating that she was hospitalized, by decision dated August 27, 2004, the Office vacated the June 18, 2004 decision and scheduled appellant for a second opinion evaluation with Dr. Justin C. MacCarthy, Board-certified in otolaryngology.

In a December 21, 2004 report, Dr. MacCarthy provided audiometric findings which included a comment “SRTs slightly better than pure tones. Performance on each was consistent. Possibly small nonorganic component.” He diagnosed moderate to severe binaural hearing loss which was employment related and recommended hearing aids. Dr. MacCarthy further noted that he had reviewed previous audiology reports which suggested malingering but concluded that he saw no such behavior on examination.

The case was again referred to an Office medical adviser for review. In a January 31, 2005 report, he advised that the December 21, 2004 audiology results were again invalid, stating that Dr. MacCarthy did not explain the poor agreement between SRT and pure tones which was indicative that the degree of hearing loss was exaggerated. He recommended another evaluation by Dr. Beasley.

On February 10, 2005 the Office again referred appellant to Dr. Beasley. In a March 1, 2005 report, he noted that there was still a discrepancy between the SRTs and pure tones on audiometric results. He diagnosed possible bilateral mild hearing loss consistent with speech reception thresholds, concluding that he was unable to determine if the hearing loss was conductive or sensorineural because appellant did not give valid pure tone thresholds. Appellant was then referred to Mary Maddock, Au.D., for a brainstem response evaluation.

In a June 8, 2005 report, an Office medical adviser noted that, although appellant had undergone multiple hearing evaluations, none were judged to be valid because of poor agreement between the pure tones and SRTs. He advised that Dr. Maddock’s report was noncontributory and concluded that the available data did not permit acceptance that her hearing loss was employment related.

By decision dated June 28, 2005, the Office found that appellant failed to meet her burden of proof to establish that her claimed hearing loss was caused by employment factors. The Office noted that Dr. MacCarthy’s findings were contradictory, and relied upon the opinion of Dr. Beasley and the Office medical adviser. On July 12, 2005 appellant requested reconsideration, contending that Dr. MacCarthy’s opinion was sufficient to establish that her hearing loss was employment related. In a July 26, 2005 decision, the Office denied appellant’s request for reconsideration on the grounds that she did not provide any additional evidence or argument that would warrant further merit review.

On August 2, 2005 appellant again requested reconsideration, and submitted a one-page, unsigned, audiology report dated December 8, 2003. By decision dated August 15, 2005, the Office denied appellant’s reconsideration request noting that, as the one-page report had previously been submitted and reviewed by the Office, it was duplicative and therefore insufficient to warrant a merit review.

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under the Federal Employees' Compensation Act¹ has the burden of establishing the essential elements of his or her claim including the fact that the individual is an employee of the United States within the meaning of the Act, that the claim was timely filed within the applicable time limitation period of the Act, that an injury was sustained in the performance of duty as alleged and that any disability and/or specific condition for which compensation is claimed are causally related to the employment injury. Regardless of whether the asserted claim involves traumatic injury or occupational disease, an employee must satisfy this burden of proof.²

To establish that an injury was sustained in the performance of duty in an occupational disease claim, a claimant must submit the following: (1) medical evidence establishing the presence or existence of the disease or condition for which compensation is claimed; (2) a factual statement identifying employment factors alleged to have caused or contributed to the presence or occurrence of the disease or condition; and (3) medical evidence establishing that the diagnosed condition is causally related to the employment factors identified by the claimant. The medical opinion must be one of reasonable medical certainty, and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.³

Causal relationship is a medical issue, and the medical evidence required to establish a causal relationship is rationalized medical evidence.⁴ Rationalized medical evidence is medical evidence which includes a physician's rationalized medical opinion on the issue of whether there is a causal relationship between the claimant's diagnosed condition and the implicated employment factors. The opinion of the physician must be based on a complete factual and medical background of the claimant, must be one of reasonable medical certainty, and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.⁵ Neither the mere fact that a disease or condition manifests itself during a period of employment nor the belief that the disease or condition was caused or aggravated by employment factors or incidents is sufficient to establish causal relationship.⁶

Office procedures set forth requirements for the type of medical evidence used in evaluating hearing loss. These include that the employee undergo both audiometric and otologic examination; that the audiometric testing precede the otologic examination; that the audiometric testing be performed by an appropriately certified audiologist; that the otologic examination be

¹ 5 U.S.C. §§ 8101-8193.

² *Gary J. Watling*, 52 ECAB 278 (2001).

³ *Solomon Polen*, 51 ECAB 341 (2000).

⁴ *Jacqueline M. Nixon-Steward*, 52 ECAB 140 (2000).

⁵ *Leslie C. Moore*, 52 ECAB 132 (2000); *Gary L. Fowler*, 45 ECAB 365 (1994).

⁶ *Dennis M. Mascarenas*, 49 ECAB 215 (1997).

performed by an otolaryngologist certified or eligible for certification by the American Academy of Otolaryngology; that the audiometric and otologic examination be performed by different individuals as a method of evaluating the reliability of the findings; that all audiological equipment authorized for testing meet the calibration protocol contained in the accreditation manual of the American Speech and Hearing Association; that the audiometric test results include both bone conduction and pure tone air conduction thresholds, speech reception thresholds and monaural discrimination scores; and that the otolaryngologist's report include: date and hour of examination, date and hour of employee's last exposure to loud noise, a rationalized medical opinion regarding the relation of the hearing loss to the employment-related noise exposure and a statement of the reliability of the tests.⁷ A physician conducting an otologic examination should be instructed to conduct additional tests or retests in those cases where the initial tests were inadequate or there is reason to believe the claimant is malingering.⁸

ANALYSIS -- ISSUE 1

The Board notes that, although appellant had employment-related noise exposure, she has failed to establish that she sustained an employment-related hearing loss.

The Board notes that the Office referred appellant for audiological examination and testing with Dr. Beasley. In a March 8, 2004 report, Dr. Beasley noted that appellant's current audiometry of February 17, 2004 revealed SRTs better than pure tone thresholds, which he advised demonstrated malingering on her part. He recommended repeat evaluation due to the unreliable audiometry results. After review by an Office medical adviser, the Office referred appellant for reexamination by Dr. Beasley. In an April 30, 2004 report, he provided audiometric test results which he again advised were unreliable because appellant was malingering.

Following an initial denial of the claim, the Office referred appellant for another second opinion evaluation with Dr. MacCarthy. In a December 21, 2004 report, Dr. MacCarthy reviewed previous audiometric testing which suggested malingering but concluded that he saw no such evidence. He diagnosed employment-related moderate to severe binaural hearing loss, and provided audiometric findings which included a comment "SRTs slightly better than pure tones. Performance on each was consistent. Possibly small nonorganic component." In a January 31, 2005 report, an Office medical adviser determined that the December 21, 2004 audiology results were invalid, stating that Dr. MacCarthy did not adequately explain the poor agreement between SRT and pure tones results which was indicative that the degree of hearing loss was exaggerated.

On February 10, 2005 the Office again referred appellant to Dr. Beasley. In a March 1, 2005 report, he noted that there was still a discrepancy between SRTs and pure tones on audiometric testing and concluded that he was unable to determine if the hearing loss demonstrated was conductive or sensorineural because she did not give valid pure tone

⁷ See Federal (FECA) Procedure Manual, Part 3 -- Requirements for Medical Reports, *Special Conditions*, Chapter 3.600.8(a) (September 1995); *Luis M. Villanueva*, 54 ECAB ___ (Docket No. 03-977, issued July 1, 2003).

⁸ *Luis M. Villanueva*, *supra* note 7.

thresholds. In a June 8, 2005 report, the Office medical adviser noted that appellant had undergone multiple hearing loss evaluations, but none were judged to be valid because of the poor agreement between the pure tones and SRTs. He concluded that the available information of record did not permit acceptance that her hearing loss was employment related.

The Board finds that the medical evidence of record is insufficient to establish an employment-related hearing loss. The issue of causal relationship is a medical one and must be resolved by probative medical evidence.⁹ The Office extensively developed the medical evidence by referring appellant for multiple otologic evaluations and audiometric tests. While Dr. MacCarthy diagnosed employment-related hearing loss, he did not provide an explanation for the contradictory findings on audiometric testing. Dr. Beasley, as supported by the Office medical adviser, noted the discrepancies between the SRT and pure tone findings and concluded that it was impossible to determine the cause of appellant's hearing loss on an accurate basis. The Board finds that the Office fulfilled its obligation in the development of the medical evidence in this case.¹⁰ Appellant has not submitted any other medical evidence providing reliable audiometric testing or a reasoned opinion that her hearing loss was caused or aggravated by noise exposure in her federal employment.¹¹ She has failed to meet her burden of proof.

LEGAL PRECEDENT -- ISSUE 2

Section 10.606(b)(2) of Office regulations provides that a claimant may obtain review of the merits of the claim by either: (1) showing that the Office erroneously applied or interpreted a specific point of law; (2) advancing a relevant legal argument not previously considered by the Office; or (3) submitting relevant and pertinent new evidence not previously considered by the Office.¹² Section 10.608(b) provides that when an application for reconsideration does not meet at least one of the three requirements enumerated under section 10.606(b)(2), the Office will deny the application for reconsideration without reopening the case for a review on the merits.¹³ 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.¹⁴ Similarly, evidence that does not address the particular issue involved does not constitute a basis for reopening a case.¹⁵

ANALYSIS -- ISSUE 2

In a July 12, 2005 letter, requesting reconsideration, appellant argued that Dr. MacCarthy's opinion was sufficient to establish that her hearing loss was employment

⁹ See *Jacqueline M. Nixon-Steward*, *supra* note 4.

¹⁰ See *Luis M. Villanueva*, *supra* note 7.

¹¹ *Id.*

¹² 20 C.F.R. § 10.606(b)(2).

¹³ 20 C.F.R. § 10.608(b).

¹⁴ *Helen E. Paglinawan*, 51 ECAB 591 (2000).

¹⁵ *Kevin M. Fatzner*, 51 ECAB 407 (2000).

related. The Board however finds that her argument does not demonstrate that the Office erroneously applied or interpreted a specific point of law, or advance a relevant legal argument not previously considered by the Office. As noted, there were inconsistencies in Dr. McCarthy's report which reduced the probative value of his opinion on causal relationship. Consequently, appellant is not entitled to a review of the merits of her claim based on the first and second above-noted requirements under section 10.606(b)(2).¹⁶

With respect to the third above-noted requirement under section 10.606(b)(2), appellant submitted no additional evidence with her July 12, 2005 reconsideration request. She therefore did not submit relevant and pertinent new evidence not previously considered by the Office, and in its decision dated July 26, 2005, the Office properly denied her reconsideration request.

Appellant submitted a one-page, unsigned, audiology report dated December 8, 2003 with her August 2, 2005 reconsideration request. As she made no legal argument, she was not entitled to a review of the merits of her claim based on the first and second above-noted requirements under section 10.606(b)(2).¹⁷ Moreover, the December 8, 2003 report was previously of record, and is therefore duplicative. The Board has long held that evidence that repeats or duplicates evidence already in the case record has no evidentiary value and does not constitute a basis for reopening a case.¹⁸ Appellant therefore did not submit relevant and pertinent new evidence not previously considered by the Office with her August 2, 2005 reconsideration request, and the Office properly denied her request in its August 15, 2005 decision.

CONCLUSION

The Board finds that appellant has failed to meet her burden of proof to establish that she has an employment-related hearing loss and further finds that the Office properly refused to reopen appellant's case for further consideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

¹⁶ 20 C.F.R. § 10.606(b)(2).

¹⁷ 20 C.F.R. § 10.606(b)(2).

¹⁸ *James A. Castagno*, 53 ECAB 782 (2002); *Eugene F. Butler*, 36 ECAB 393 (1984).

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated August 15, July 26 and June 28, 2005 be affirmed.

Issued: December 6, 2005
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

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