United States Department of Labor
Employees' Compensation Appeals Board

C.A., Appellant	)	
and	)	**Docket No. 06-1164**
	)	**Issued: August 18, 2006**
TENNESSEE VALLEY AUTHORITY, PARADISE FOSSIL PLANT, Drakesboro, KY, Employer	)	

Appearances:
Ronald K. Bruce, Esq., for the appellant
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 April 19, 2006 appellant, through his attorney, filed a timely appeal of a January 18, 2006 nonmerit decision of the Office of Workers' Compensation Programs denying his request for reconsideration. Because more than one year has lapsed between the issuance of an Office hearing representative's November 18, 2004 merit decision and the filing of this appeal, the Board lacks the jurisdiction to review the merits of appellant's claim pursuant to 20 C.F.R. §§ 501.2(c) and 501.3.

ISSUE

The issue is whether the Office properly denied appellant's request for further review of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On April 29, 2003 appellant, then a 59-year-old boilermaker, filed an occupational disease claim alleging that in 1982 he first became aware of his occupational hearing loss. On

April 3, 2003 he first realized that his hearing loss was caused by factors of his federal employment when he saw a medical report of Dr. Uday V. Dave, a Board-certified otolaryngologist. Appellant was last exposed to noise at the employing establishment on April 7, 1986 and last exposed to hazardous noise on July 20, 1985. He submitted medical reports and employing establishment audiogram results covering the period April 16, 1968 through March 11, 2003. In a March 11, 2003 report, Dr. Dave found that appellant sustained a neurosensory hearing loss due to 19½ years of noise exposure while working as a boilermaker.

In a June 9, 2003 letter, the employing establishment stated that appellant was only employed intermittently for three years from April 17, 1968 through April 7, 1986 and provided the specific dates of his employment. Appellant last worked for the employing establishment on April 7, 1986. The employing establishment noted that 37 years of appellant's approximate 40-year employment history involved working for private employers. It stated that he may have been exposed to noise during his federal employment, noting the noise level readings at its plant where he worked four to six hours a day, five days a week. Since 1973, appellant was provided and required to wear state-of-the art hearing protection.

On May 5, 2003 appellant filed a claim for a schedule award.

By letters dated October 2, 2003, the Office referred appellant, together with the case record, statement of accepted facts and a list of questions to be addressed, to Dr. Linda A. Mumford, a Board-certified otolaryngologist, for a second opinion medical examination. An audiogram performed on November 4, 2003 at frequency levels of 500, 1,000, 2,000 and 3,000 hertz (Hz) revealed right ear decibel losses of 30, 35, 45 and 55 and left ear decibel losses of 35, 40, 45 and 90.

In a report received by the Office on November 5, 2003, Dr. Mumford stated that there was no significant variation from the statement of accepted facts. Appellant's hearing was normal (mild sensorineural hearing loss) at the beginning of his significant noise exposure in his federal employment. He did not show a sensorineural loss that was in excess of what would be normally predicated on the basis of presbycusis. Dr. Mumford opined that appellant's workplace noise exposure was sufficient as to intensity and duration to have caused the hearing loss in question. Appellant did not have any significant hobbies with noise exposure, no other work-related noise exposure and no personal history of ear disease. He complained about decreased speech discrimination. Dr. Mumford reported normal findings on physical examination and diagnosed moderate profound bilateral sensorineural hearing loss. She opined that appellant's hearing loss was not due, in part, to noise exposure during his federal employment. Dr. Mumford noted that appellant had many years in noise-related work but only worked three years at the employing establishment. The pattern of his bilateral hearing loss was consistent with presbycusis. Dr. Mumford recommended bilateral hearing aids.

By decision dated November 7, 2003, the Office found that appellant did not sustain a hearing loss causally related to factors of his federal employment based on Dr. Mumford's medical report.

In a December 2, 2003 letter, appellant, through his attorney, requested an oral hearing before an Office hearing representative. He submitted several medical reports covering the

period March 3, 2003 through January 7, 2004 from Dr. M. Anwarul Quader, a Board-certified orthopedic surgeon, regarding his cervical, right shoulder, hearing, eye and leg problems.

Appellant submitted a July 26, 2004 medical report of Dr. Thomas B. Logan, a Board-certified otolaryngologist. He applied the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (5th ed. 2001) to the results of a July 23, 2004 audiogram and found that appellant had a 33.4 percent binaural hearing loss which constituted a 12 percent impairment of the whole person. Dr. Logan opined that his hearing loss was due to noise exposure while working as a boilermaker.

In a November 18, 2004 decision, an Office hearing representative affirmed the November 7, 2003 decision. She accorded weight to Dr. Mumford's report in finding that appellant did not sustain a hearing loss causally related to factors of his federal employment.

By letter dated November 1, 2005, appellant, through his attorney, requested reconsideration of the hearing representative's November 18, 2004 decision. Counsel argued that the medical opinions of Dr. Dave and Dr. Logan established that appellant sustained a sensorineural hearing loss as a result of working as a boilermaker. Appellant submitted an October 6, 2005 report of Dr. V. Suzanne Smith, an audiologist. She stated that appellant related that he had an ongoing hearing problem that was possibly related to his history of noise exposure. On audiological examination, Dr. Smith reported precipitously sloping borderline asymmetric high frequency sensorineural hearing loss. She found that appellant's hearing loss was slightly worse in the left ear although it was not clinically significant at that time. Speech discrimination scores were within normal limits at 100 percent at the right ear and 90 percent at the left ear at 80 decibels masked presentation level bilaterally. Dr. Smith recommended specific bilateral hearing aids because she believed that higher end technology would provide the best opportunity to fit appellant's sloping hearing loss. Otherwise, she recommended repeat audiological testing in 12 months. An October 6, 2005 audiogram performed by Dr. J. Johnston, an audiologist, accompanied Dr. Smith's report. Testing of the right ear at frequency levels of 500, 1,000, 2,000 and 3,000 Hz revealed decibel losses of 15, 25, 30 and 40, respectively and in the left ear decibel losses of 20, 20, 30 and 70, respectively. Dr. Johnston diagnosed precipitously sloping bilateral hearing loss.

In a January 18, 2006 decision, the Office denied appellant's request for reconsideration on the grounds that the arguments presented and the evidence submitted were immaterial.

LEGAL PRECEDENT

To require the Office to reopen a case for merit review under section 8128 of the Federal Employees' Compensation Act,[1] the Office's regulations provide that a claimant must: (1) show that the Office erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by the Office; or (3) constitute relevant and pertinent new evidence not previously considered by the Office.[2] To be entitled to a merit review of an

[1] 5 U.S.C. §§ 8101-8193. Under section 8128 of the Act, "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on her own motion or on application." 5 U.S.C. § 8128(a).

[2] 20 C.F.R. § 10.606(b)(1)-(2).

Office 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.[3] When a claimant fails to meet one of the above standards, the Office will deny the application for reconsideration without reopening the case for review of the merits.

ANALYSIS

In a decision dated November 7, 2003, the Office found that appellant did not sustain a hearing loss causally related to factors of his federal employment. In a November 18, 2004 decision, an Office hearing representative affirmed the Office's November 7, 2003 decision. Appellant disagreed with these decisions and requested reconsideration on November 1, 2005. The underlying issue in this case is whether appellant sustained a hearing loss causally related to factors of his federal employment.

In the November 1, 2005 request for reconsideration, appellant's attorney reiterated that Dr. Dave's and Dr. Logan's reports were sufficient to establish that appellant sustained a hearing loss causally related to factors of his federal employment. Evidence that repeats or duplicates evidence already in the case record and considered by the Office has no evidentiary value and does not constitute a basis for further merit review.[4] As the Office previously considered this argument, it is repetitive in nature and, thus, insufficient to warrant further merit review.[5]

Appellant submitted Dr. Smith's October 6, 2005 report, which reviewed an audiogram performed by Dr. Johnston on that date. As the issue is causal relationship thereby being medical in nature, the Board finds that Dr. Smith's and Dr. Johnston's reports are irrelevant as they are not physicians under the Act.[6] Therefore, their reports are insufficient to require the Office to reopen appellant's claim for further merit review.[7]

The Board finds that appellant did not show that the Office erroneously applied or interpreted a specific point of law or advance a relevant legal argument not previously considered by the Office. Further, he did not submit any relevant and pertinent new evidence not previously considered by the Office. As appellant did not meet any of the necessary regulatory requirements, the Board finds that he was not entitled to a merit review.[8]

CONCLUSION

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

---

[3] *Id*. at § 10.607(a).

[4] *Edward W. Malaniak*, 51 ECAB 279 (2000).

[5] *James A. England*, 47 ECAB 115, 119 (1995).

[6] *See generally, Herman L. Henson*, 40 ECAB 341 (1988); 5 U.S.C. § 8101(2).

[7] *Annette Louise*, 54 ECAB 783 (2003).

[8] *See James E. Norris*, 52 ECAB 93 (2000).

ORDER

IT IS HEREBY ORDERED THAT the January 18, 2006 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 18, 2006
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