United States Department of Labor
Employees' Compensation Appeals Board

K.W., Appellant	)	
and	)	**Docket No. 07-292**
	)	**Issued: April 16, 2007**
U.S. POSTAL SERVICE, PROCESSING & DISTRIBUTION CENTER, City of Industry, CA, Employer	)	

Appearances:
Appellant, 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
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On November 13, 2006 appellant filed a timely appeal from an August 16, 2006 nonmerit decision of the Office of Workers' Compensation Programs that denied his request for reconsideration of his occupational disease claim. Because more than one year has elapsed between the Office's most recent merit decision dated May 19, 2005 and the filing of this appeal the Board lacks jurisdiction to review the merits 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 reconsideration without conducting a merit review.

FACTUAL HISTORY

On August 29, 2003 appellant, then a 53-year-old mail processing clerk, filed an occupational disease claim stating that he developed bilateral hearing impairment secondary to occupational noise pollution in the performance of duty. He indicated that he was "partially

deaf" in the right ear prior to beginning work for the employing establishment, but that occupational noise pollution caused his hearing to deteriorate in both ears. Appellant stated that he was exposed to noise from "letter sorting machines, flat sorters, overhead tray transport systems and mules that pull metal cages across a tiled floor which creates a loud constant sound, also the horns of the mules, the alarms on the machines and forklifts."

On September 25, 2003 the Office requested additional information concerning appellant's claim. In response, appellant provided an October 9, 2003 statement indicating that he had never engaged in off-the-job musical activities and was requesting additional information from his physician. He forwarded a statement dated August 22, 2003 listing 19 sources of noise to which he was exposed on the job.

Appellant also submitted a May 23, 2003 audiogram and an August 8, 2003 report from Dr. I. Grant Orlin[1] who noted that appellant's history was significant for hearing impairment prior to his employment with the employing establishment. Dr. Orlin diagnosed "bilateral hearing impairment secondary to occupational noise pollution" and concluded that appellant's condition was "caused by … his exposure to many years of noise pollution in his work environment." Appellant also submitted a June 2, 2003 report from Dr. Hassney A. Hamood, a Board-certified otolaryngologist, who diagnosed hearing loss secondary to noise exposure as well as tinnitus. Dr. Hamood characterized appellant's condition as work related. On February 19, 2004 the Office requested information from the employing establishment concerning appellant's noise exposure on the job. On March 8, 2004 Mario A. Gallardo, a human resources specialist, noted that appellant had a hearing disability when he began work with the employing establishment and had never complained of loud noise during his time working there. The employing establishment also submitted light and noise surveys from June 13, 2002 and July 25, 2003, which indicated that noise levels in all areas were less than 85 decibels.

By decision dated April 13, 2004, the Office denied appellant's claim on the grounds that he had not met his burden of proof in establishing that he sustained an injury at the time, place and in the manner alleged. The Office indicated that he had not established noise exposure as alleged.

Appellant requested reconsideration on March 27, 2005. In a statement supporting his request, he again noted the sources of noise exposure at his workplace and asserted that the light and noise study performed on behalf of the employing establishment may be flawed. Appellant questioned whether the contractors conducting the study were shown to the noisiest parts of the building or allowed to perform their testing during the noisiest parts of the day as well as whether the results were verified by the union. He also expressed concern regarding whether the contractors could be impartial, as the employing establishment had retained and paid them. Additionally, appellant submitted an April 22, 2004 form report from Dr. Orlin who diagnosed bilateral hearing impairment secondary to noise pollution and indicated that appellant's condition had not improved since his last examination.

By decision dated May 19, 2005, the Office denied modification of its prior decision.

[1] Dr. Orlin's specialty could not be ascertained from the record.

By request postmarked May 15, 2006, appellant requested reconsideration. In support of his request, he reiterated his previous arguments about his hearing loss and employing establishment noise studies. Appellant indicated that he did not recall noise studies being performed during the hours he was present in the building and expressed his opinion that they were performed in quieter areas or during quieter times. He also expressed his opinion that the noise auditors in question may have been biased in favor of the employing establishment. Appellant also submitted a photocopied page from the Office's procedure manual, section 2.803.5, stating that: "Causal relationship is a separate issue from fact of injury, even though medical evidence is needed to establish both elements of the claim. A case with a diagnosis present should never be denied on the basis that fact of injury is not established."[2]

By decision dated August 16, 2006, the Office denied appellant's request for reconsideration without conducting a merit review on the grounds that he did not present new and relevant medical evidence or advance new legal arguments, nor did he contend that the Office had misinterpreted a point of law. The Office noted that appellant's reference to the procedure manual pertained to the medical aspect of "fact of injury." The Office noted that the procedural provision was not relevant because appellant's claim had been denied for failure to establish the factual aspect of "fact of injury."

LEGAL PRECEDENT

Under section 8128 of the Federal Employees' Compensation Act, the Office has discretion to grant a claimant's request for reconsideration and reopen a case for merit review. Section 10.606(b)(2) of the implementing federal regulation provides guidance for the Office in using this discretion.[3] The regulation provides that the Office should grant a claimant merit review when the claimant's request for reconsideration and all documents in support thereof:

> "(i) Shows that [the Office] erroneously applied or interpreted a specific point of law; or
>
> "(ii) Advances a relevant legal argument not previously considered by [the Office]; or
>
> "(iii) Constitutes relevant and pertinent new evidence not previously considered by [the Office]."[4]

Section 10.608(b) provides that when an application for review of the merits of a claim 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.[5] When reviewing an Office decision denying a merit review, the function of the

[2] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Fact of Injury*, Chapter 2.803.5(a) (October 1992).

[3] 20 C.F.R. § 10.606(b)(2).

[4] *Id.*

[5] 20 C.F.R. § 10.608(b).

Board is to determine whether the Office properly applied the standards set forth at section 10.606(b)(2) to the claimant's application for reconsideration and any evidence submitted in support thereof.[6]

ANALYSIS

The Board finds that the Office properly denied appellant's request for reconsideration without conducting a merit review of the claim. To require the Office to reopen his claim for a merit review, appellant must meet one of three requirements set forth in section 10.606(b)(2). He must show that the Office erroneously applied or interpreted a point of law, advance a new and relevant legal argument or constitute new and relevant factual or medical evidence. The Board finds that appellant did not meet any of the above listed requirements.

Appellant made no assertion concerning the Office's interpretation or application of a point of law, nor did he advance any new and relevant legal arguments. On reconsideration, he submitted an undated statement. The statement was largely repetitious regarding types and causes of exposure.[7] Other portions of the statement questioned the employing establishment's veracity and the validity of the light and air studies. The Board has held that, while the reopening of a case may be predicated solely on a legal premise not previously considered, such reopening for further review of the merits is not required where the legal contention does not have a reasonable color of validity.[8] However, the allegations made by appellant, unsupported by any evidence lack a reasonable color of validity.

Appellant's assertion that section 2.803.5 of the Office's procedures[9] requires further development of his claim is also insufficient to require a merit review of the claim. This procedural provision, regarding development of medical evidence in a claim does not constitute a showing that the Office misinterpreted a point of fact, nor is it a relevant new legal argument, as it pertains to the medical development of a claim. Appellant has not established the factual element of his claim -- noise exposure as alleged in the workplace. Consequently, the Office's procedures, regarding the development of medical issues in a claim are irrelevant. Likewise, the procedure manual does not constitute new and relevant evidence in accordance with the third requirement of section 10.606(b)(2), as it addresses an aspect of claim development, namely, review of medical evidence, which was not applicable at the time the Office adjudicated appellant's claim.

Accordingly, the Board finds that appellant failed to meet the requirements of section 8128 and, therefore, the Office properly denied the request for reconsideration without conducting a merit review of appellant's claim.

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

[7] *See Eugene F. Butler*, 36 ECAB 393, 398 (1984) (where the Board held that material which is repetitious or duplicative of that already in the case record is of no evidentiary value in establishing a claim and does not constitute a basis for reopening a case).

[8] *Vincent Holmes*, 53 ECAB 468 (2002).

[9] *See supra* note 2.

CONCLUSION

The Board finds that the Office properly denied appellant's request for reconsideration without conducting a merit review.

ORDER

IT IS HEREBY ORDERED THAT the August 16, 2006 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 16, 2007
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board