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

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| **S.S., Appellant** | ) | |
| **and** | ) | **Docket No. 09-2365** |
| | ) | **Issued: June 29, 2010** |
| **DEPARTMENT OF VETERANS AFFAIRS, CENTRAL TEXAS VETERANS HEALTH CARE SYSTEM, Temple, TX, 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
MICHAEL E. GROOM, Alternate Judge

### ***JURISDICTION***

On September 22, 2009 appellant filed a timely appeal of an April 27, 2009 decision of the Office of Workers' Compensation Programs denying her request for reconsideration without a merit review. Because more than 180 days elapsed from the last merit decision dated March 25, 2009 to the filing of this present appeal on September 22, 2009, the Board lacks jurisdiction over the merits of this case pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(e).

### ***ISSUE***

The issue is whether the Office properly denied appellant's request for reconsideration without a merit review pursuant to 5 U.S.C. § 8128(5).

### ***FACTUAL HISTORY***

On June 19, 2008 appellant, then a 47-year-old pharmacy technician, filed an occupational disease claim alleging that she developed hearing loss in both ears due to high levels of noise exposure in the performance of duty. She first became aware of her condition on

January 1, 2007 and realized that it was caused or aggravated by her employment activities on June 12, 2008. Appellant did not stop work. The employing establishment controverted the claim.

On July 2, 2008 the Office advised appellant of the factual and medical evidence necessary to establish her claim and allowed her 30 days to submit such evidence.

Appellant submitted a June 27, 2008 sound level survey for the inpatient pharmacy that tested noise levels from an auto-fill robot. The survey results indicated that the measured levels of noise did not pose a hearing loss hazard as defined by the Occupational Safety and Health Administration (OSHA). Appellant also submitted audiogram results dated June 12, 2008.

A July 14, 2008 attending physician's report signed by a physician's assistant diagnosed high frequency hearing loss.

In a July 28, 2008 statement, appellant noted that she worked at the employing establishment as a clerk from 1996 to 2000 where there was noise exposure from telephones and people talking. Beginning in 2000, workplace noise exposure came from a tubes system, robot, telephone, printer, people talking and an improperly installed air duct. Appellant first realized her hearing loss in January 2007 when she experienced ringing in her ears. She indicated that her physician attributed this condition to being around loud noise. Appellant noted that the pharmacy was the only loud noise to which she was exposed. She submitted a July 31, 2008 statement reiterating her belief that she sustained hearing loss from noise exposure in her work area at an inpatient pharmacy.

On November 3, 2008 the Office referred appellant with a statement of accepted facts (SOAF) to Dr. Donald Matheson, a Board-certified otolaryngologist, for a second opinion. In a November 21, 2008 report, Dr. Matheson noted that appellant reported long-term exposure to low noise levels, tinnitus for one year and an awareness of occasional hearing difficulty. He noted that the earliest available audiogram was dated June 12, 2008. Dr. Matheson found that as of the date of examination appellant had normal hearing. He opined that appellant's workplace noise exposure was not of sufficient intensity and duration to cause hearing loss. Upon examination, Dr. Matheson found normal ear canals and drums. He diagnosed normal ears, normal hearing and clinical tinnitus. Dr. Matheson reiterated that appellant's sensorineural hearing loss was not due to noise from her federal employment as her hearing was essentially normal and her workplace had been measured for damaging noise levels. The record also contains an audiogram dated November 21, 2008 performed on Dr. Matheson's behalf. Testing at the frequency levels of 500, 1,000, 2,000 and 3,000 cycles per second revealed the following: right ear 5, 5, 20 and 15 decibels; left ear 15, 15, 15 and 5 decibels.

In a February 27, 2009 report, an Office medical adviser reviewed Dr. Matheson's report and audiogram. The medical adviser determined that appellant's hearing loss was not caused or worsened by occupational noise as she had normal hearing and Dr. Matheson opined that the noise levels at the employing establishment were insufficient to cause noise-induced hearing loss.

In a March 25, 2009 decision, the Office denied appellant's claim finding the medical evidence insufficient to support a hearing loss connected to factors of her federal employment.

Appellant requested reconsideration on April 4, 2009. In a March 23, 2009 statement, she indicated that she had new information about noise levels in the pharmacy that had been discovered by her coworker, who had filed a hearing loss claim which the Office accepted. The coworker discovered additional information about inappropriate air ducting in the pharmacy that he believed caused excessive noise levels. Appellant also noted that her coworker gave her permission to use the information from his claim.

Appellant attached several statements from her coworker's claim, including a description of his research findings on noise levels caused by airflow from the air ducts at work. She also submitted an undated internet article regarding how to measure noise together with documents already of record.

In an April 27, 2009 decision, the Office denied appellant's request for reconsideration without a merit review finding that she did not raise substantive legal questions or include new and relevant evidence.

## ***LEGAL PRECEDENT***

To require the Office to reopen a case for merit review under section 8128(a), the Office's regulations provide that the evidence or argument submitted by 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.[1] Section 10.608(b) of Office regulations provide 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.[2]

## ***ANALYSIS***

Appellant's reconsideration request included a statement dated March 23, 2009 advising that she had additional information from a coworker supporting that inappropriate air ducting in her workplace caused excessive noise levels. The coworker had filed a hearing loss claim for the same workplace noise exposure that the Office had apparently accepted. Appellant has not established why the acceptance of a coworker's claim is relevant to the facts pertaining to her history of noise exposure. While the reopening of a case may be predicated solely on a legal premise not previously considered, such reopening is not required where the legal contention does not have a reasonable color of validity.[3] The fact that the Office accepted the claim of a coworker is not relevant to whether appellant's claim should be reopened for a merit review.

[1] 20 C.F.R. § 10.606(b)(2); *D.K.*, 59 ECAB ___ (Docket No. 07-1441, issued October 22, 2007). *See* 5 U.S.C. § 8128(a).

[2] 20 C.F.R. § 10.608(b); *K.H.*, 59 ECAB ___ (Docket No. 07-2265, issued April 28, 2008).

[3] *E.M.*, 60 ECAB ___ (Docket No. 09-39, issued March 3, 2009).

These assertions are insufficient to show a specific point of law that was erroneously applied or interpreted in appellant's claim and they also do not advance a relevant legal argument not previously considered.

Appellant submitted new evidence consisting of her coworker's statements regarding noise from the air ducts at work and an internet article about measuring noise. She did not submit any additional medical evidence. This is important as the underlying issue is medical in nature regarding whether appellant established that workplace noise caused or aggravated her claimed hearing loss. Although the statements from appellant's coworker and the internet article are new, they are not relevant to the underlying medical issue and do not constitute relevant or pertinent new evidence not previously considered by the Office.[4]

Appellant also resubmitted a June 27, 2007 pharmacy sound level survey and June 12, 2008 audiogram. These documents had previously been of record and considered in the Office's March 25, 2009 decision. They are duplicative and do not constitute a basis for reopening a case.[5]

On appeal, appellant asserts that the Office improperly denied her reconsideration request as she submitted evidence not previously of record in the form of information about sound level measurements of her workplace duct system. As noted, the underlying issue is a medical one and requires the submission of relevant medical evidence from a physician supporting that appellant has a work-related hearing loss. As appellant did not submit new and relevant medical evidence, the evidence submitted was insufficient to warrant reopening her claim for further merit review.

## ***CONCLUSION***

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

[4] *See E.M.*, *supra* note 3 (where the Board held that new evidence submitted upon a reconsideration request that does not address the pertinent issue is not relevant evidence); *Freddie Mosley*, 54 ECAB 255 (2002).

[5] *D.K.*, *supra* note 1. *D.I.*, 59 ECAB ___ (Docket No. 07-1534, issued November 6, 2007).

## ***ORDER***

**IT IS HEREBY ORDERED THAT** the Office of Workers' Compensation Programs' decision dated April 27, 2009 is affirmed.

Issued: June 29, 2010
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