

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

B.W., Appellant

and

**DEPARTMENT OF HOMELAND SECURITY,
U.S. COAST GUARD, Baltimore, MD, Employer**

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**Docket No. 11-230
Issued: August 16, 2011**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On November 5, 2010 appellant filed a timely appeal from an October 21, 2010 nonmerit decision of the Office of Workers' Compensation Programs (OWCP) denying his request for reconsideration. As the last merit decision was issued June 24, 2009, more than 180 days before the filing of the appeal, the Board lacks jurisdiction to review the merits of this case pursuant to the Federal Employees' Compensation Act (FECA)¹ and 20 C.F.R. §§ 501.2(c) and 501.3.

ISSUE

The issue is whether OWCP properly refused to reopen appellant's case for further review of the merits under 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On October 7, 1993 appellant, then a 54-year-old pipefitter foreman, filed an occupational disease claim alleging that he sustained bilateral hearing loss causally related to

¹ 5 U.S.C. § 8101 *et seq.*

factors of his federal employment. OWCP accepted the claim for binaural hearing loss. By decision dated May 21, 1996, it granted appellant a schedule award for a 12 percent binaural hearing loss. In a decision dated April 16, 1999, OWCP granted him a schedule award for an additional 30 percent binaural hearing loss.² Appellant retired in 2001.

On November 21, 2007 appellant filed a claim for an increased schedule award. He submitted a June 22, 2007 report from Dr. Juan M. Pardo, a Board-certified otolaryngologist, who diagnosed moderate to severe sensorineural hearing loss due to age and noise exposure. On June 19, 2008 Dr. Pardo submitted an audiogram. By decision dated December 4, 2008, OWCP found that he was not entitled to an increased award under the current file number. It determined that as appellant was claiming an increased award based on new exposure he should file a new claim.

On December 9, 2008 appellant requested reconsideration. He argued that he had complied with OWCP's instructions to submit another audiogram and examination from Dr. Pardo but that OWCP did not consider the medical evidence submitted. Appellant contended that it erred in failing to send the June 19, 2008 report of Dr. Pardo for review by OWCP's medical adviser. In a December 22, 2008 statement, he asserted that the medical evidence did not support that he was claiming hearing loss due to additional noise exposure.

By decision dated February 25, 2009, OWCP modified its December 4, 2008 decision to show that it had denied appellant's schedule award claim as he did not establish causal relationship. It determined that he had not alleged increased hearing loss due to additional noise exposure. OWCP found, however, that appellant was not entitled to an additional schedule award as he had not submitted rationalized medical evidence supporting causal relationship.

On March 23, 2009 appellant requested reconsideration. By decision dated June 24, 2009, OWCP denied modification of its February 25, 2009 decision. It found that appellant had not submitted a rationalized medical report addressing causal relationship between any increased hearing loss and his accepted work injury.

On July 11, 2009 appellant requested reconsideration. He argued that 2007 and 2008 statement of accepted facts established a causal relationship between his hearing loss and his employment and thus questioned why OWCP denied his schedule award claim. In a decision dated November 19, 2009, OWCP denied appellant's request for reconsideration after finding that the evidence submitted was insufficient to warrant reopening his case for further merit review under section 8128.

On December 26, 2009 appellant again requested reconsideration. In a statement dated December 14, 2009, he argued that OWCP's medical adviser should have reviewed the medical evidence. Appellant described the medical evidence submitted and asserted that OWCP did not meet its burden to rescind acceptance of his hearing loss claim.

By decision dated March 25, 2010, OWCP denied appellant's request to reopen his case for further merit review under section 8128. It advised him to file a new occupational disease

² Appellant retired in 2001.

claim and attached a claim form to the decision. OWCP explained that it required an updated statement describing appellant's noise exposure after 1998 and informed him that it would refer him for an otolaryngological evaluation after it received his statement and the completed claim form.

On May 29, 2010 appellant requested reconsideration. He maintained that Board case law provided that he could apply for an additional schedule award if he sustained an additional impairment even after noise exposure ceased. Appellant additionally argued that OWCP erred in failing to issue a decision on his July 10, 2009 request for reconsideration before the expiration of 90 days, and that he was thus entitled to a merit review.

By decision dated October 21, 2010, OWCP denied appellant's request to reopen his case for further merit review. It found that its delay in issuing its decision on his July 10, 2009 request for reconsideration did not jeopardize his appeal rights to the Board. OWCP again informed appellant that as he had continued noise exposure from 1998 to 2001 he should file a new claim.

On appeal appellant contends that as more than 90 days elapsed between his July 10, 2009 request for reconsideration of OWCP's June 24, 2009 decision and its November 19, 2009 decision he is entitled to a merit review.

LEGAL PRECEDENT

To require OWCP to reopen a case for merit review under section 8128(a) of FECA,³ OWCP's regulations provide that a claimant must: (1) show that OWCP erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by OWCP; or (3) constitute relevant and pertinent new evidence not previously considered by OWCP.⁴ To be entitled to a merit review of OWCP's 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.⁵ When a claimant fails to meet one of the above standards, OWCP will deny the application for reconsideration without reopening the case for review on the merits.⁶

The Board has held that the submission of evidence which repeats or duplicates evidence already in the case record does not constitute a basis for reopening a case.⁷ The Board also has held that the submission of evidence which does not address the particular issue involved does not constitute a basis for reopening a case.⁸ While the reopening of a case may be predicated

³ 5 U.S.C. § 8101 *et seq.* Section 8128(a) of FECA provides that "[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."

⁴ 20 C.F.R. § 10.606(b)(2).

⁵ *Id.* at § 10.607(a).

⁶ *Id.* at § 10.608(b).

⁷ *F.R.*, 58 ECAB 607 (2007); *Arlesa Gibbs*, 53 ECAB 204 (2001).

⁸ *P.C.*, 58 ECAB 405 (2007); *Ronald A. Eldridge*, 53 ECAB 218 (2001); *Alan G. Williams*, 52 ECAB 180 (2000).

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.⁹

ANALYSIS

OWCP issued a decision on December 4, 2008 denying appellant's claim that he sustained employment-related hearing loss. It noted that he had a previously accepted claim for hearing loss and that he had sustained additional noise exposure subsequent to the accepted claim. OWCP advised appellant to file a new occupational disease claim. On February 25 and June 24, 2009 OWCP modified its December 4, 2008 decision to show that he had not established a causal relationship between his hearing loss and work factors.

As noted above, the Board does not have jurisdiction over the last merit decision issued by OWCP on June 24, 2009. The issue presented on appeal is whether appellant met any of the requirements of 20 C.F.R. § 10.606(b)(2), requiring OWCP to reopen the case for review of the merits of the claim. In nonmerit decisions dated March 25 and October 21, 2010, OWCP advised him that he should file a new occupational disease claim. In hearing loss claims, a claim based on an additional period of exposure constitutes a new claim.¹⁰ Thus, if a claimant requests review of a hearing loss schedule award, OWCP must clarify whether the request is for review of the award or for additional compensation subsequent to the prior award. If the claimant is requesting additional compensation, it will inform the claimant that a new claim should be filed "one year after the beginning date of the last award or the date of last exposure, whichever occurs first."¹¹ OWCP properly advised appellant, as he had a period of additional noise exposure subsequent to his previously accepted hearing loss claim, that he should file a new occupational disease claim and submit evidence describing any continued exposure to noise at work.

In his May 29, 2010 request for reconsideration, appellant did not show that the Office erroneously applied or interpreted a specific point of law. He did not identify a specific point of law or show that it was erroneously applied or interpreted. Appellant did not advance a new and relevant legal argument. He argued that Board case law provided that he could apply for an additional schedule award even after noise exposure ceased. The Board has long recognized that if a claimant's employment-related hearing loss worsens in the future, he or she may apply for an additional schedule award for any increased permanent impairment.¹² The Board has also recognized that a claimant may be entitled to an award for an increased hearing loss, even after exposure to hazardous noise has ceased, if causal relationship is supported by the medical evidence of record.¹³ In this latter instance, the request for an increased schedule award is not

⁹ *Vincent Holmes*, 53 ECAB 468 (2002); *Robert P. Mitchell*, 52 ECAB 116 (2000).

¹⁰ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.7(b)(3) (March 1995). See also *Stacey L. Walker*, 48 ECAB 353 (1997); *Henry Ross, Jr.*, 39 ECAB 373 (1988) and cases cited therein.

¹¹ *Id.*

¹² See *J.R.*, 59 ECAB 710 (2008); *Paul R. Reedy*, 45 ECAB 488 (1994).

¹³ See *J.R.*, *supra* note 12; *Adelbert E. Buzzell*, 34 ECAB 96 (1982).

deemed as a new claim.¹⁴ As discussed, however, it appears that appellant sustained a period of additional noise exposure subsequent to OWCP's acceptance of a prior hearing loss claim. A claim based on an additional period of exposure constitutes a new claim.¹⁵

On appeal to the Board and on reconsideration, appellant maintained that he requested reconsideration of OWCP's June 24, 2009 decision on July 10, 2009. OWCP, however, did not issue its nonmerit decision denying his reconsideration request until November 1, 2009, more than 90 days later. Appellant argues that he is consequently entitled to a merit review. OWCP's procedure provides that, when an OWCP decision is delayed more than 90 days after a request for reconsideration is filed and the delay jeopardizes the claimant's right to merit review before the Board, OWCP should conduct a merit review.¹⁶ Appellant, however, had until December 21, 2009 to request an appeal of the merits of this case to the Board; instead, on December 26, 2009 he again requested reconsideration before OWCP. Consequently, OWCP did not jeopardize appellant's right to merit review by the Board in delaying beyond 90 days in issuing its decision.

Appellant did not show that the Office erroneously applied or interpreted a specific point of law, advance a relevant legal argument not previously considered by the Office or submit new and relevant evidence not previously considered. As he did not meet any of the necessary regulatory requirements, he is not entitled to further merit review.

CONCLUSION

The Board finds that OWCP properly refused to reopen appellant's case for further review of the merits under section 8128.

¹⁴ *Paul Fierstein*, 51 ECAB 391, 385 (2000).

¹⁵ *See supra* note 10.

¹⁶ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.9 (January 2004); *Janice M. Hatcher*, 55 ECAB 155 (2003).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated October 21, 2010 is affirmed.

Issued: August 16, 2011
Washington, DC

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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