

FACTUAL HISTORY

On September 15, 2009 appellant, then a 57-year-old maintenance mechanic supervisor, filed an occupational disease claim alleging that he sustained occupational hearing loss after “19 years working around power tools in shop and out on jobs sites being around mechanical spaces on station.” He indicated that he realized his condition was caused or aggravated by his employment on September 1, 2009. Appellant provided his job history and job description.

On October 30, 2009 the employing establishment controverted the claim. Christine Miller, a human resources officer, noted that appellant had hearing conservation training on several occasions, including June 1, 2005, October 25, 2006 and November 29, 2007. She noted that he was required to wear hearing protection when exposed to loud noise in the workplace. The employing establishment also provided information pertaining to its hearing conservation program.

OWCP referred appellant to Dr. David S. Hurst, a Board-certified otolaryngologist. In a report received on February 25, 2010, Dr. Hurst opined that appellant had classic presbycusis and did not have a classic audiogram confirming a hearing loss due solely to noise. He advised that it “may be that the moderate noise exposure accelerated the development of normal presbycusis.” Dr. Hurst concluded that appellant’s hearing loss was not due in all or in part to noise exposure at work.

By decision dated March 11, 2010, OWCP denied appellant’s claim. It found that the medical evidence of record was insufficient to establish that he sustained an injury due to work factors as alleged.

On May 24 and July 6, 2010 appellant requested reconsideration. He repeated his employment history and reiterated that this contributed to his hearing loss. Appellant specifically noted that he had operated the key cutting machine and the key stamp machine and that there were no requirements for hearing protection. He indicated that in 2009, the employing establishment implemented requirements for hearing protection.

In support of his request, appellant submitted an April 22, 2010 report from Dr. Peter Guzzetti, a Board-certified internist, who noted that appellant was a patient of his for many years. Dr. Guzzetti advised that he had reviewed the medical records and history of noise exposure. He stated that appellant “may have been exposed to this loud sound” at the employing establishment over 19 years. Dr. Guzzetti noted reviewing Dr. Hurst’s report and indicated that the fact that appellant was “constantly exposed to a lot of high level background noise one could conclude that his presbycusis, hearing loss, was accelerated by his work environment.”

In a May 3, 2010 memorandum, Jonathan Vinskey, a certified hospital safety professional from the employing establishment, provided machine noise readings for the key cutting machine.

In a June 2, 2010 letter, appellant again requested reconsideration and repeated his belief that his employment activities contributed to his hearing loss. Specifically, he referred to the noise levels of the stamp machine and the key cutting machine.

By decision dated October 4, 2010, OWCP denied appellant's request for reconsideration without a review of the merits on the grounds that the evidence submitted was insufficient to warrant a merit review. It found that Dr. Guzzetti's opinion was duplicative of evidence previously considered and supported causal relationship in a speculative manner.

LEGAL PRECEDENT

Under section 8128(a) of FECA,² OWCP may reopen a case for review on the merits in accordance with the guidelines set forth in section 10.606(b)(2) of the implementing federal regulations, which provides that a claimant may obtain review of the merits if the written application for reconsideration, including all supporting documents, sets forth arguments and contains evidence that:

“(1) Shows that OWCP erroneously applied or interpreted a specific point of law;
or

“(2) Advances a relevant legal argument not previously considered by OWCP; or

“(3) Constitutes relevant and pertinent new evidence not previously considered by OWCP.”³

Section 10.608(b) provides that any application for review of the merits of the claim which does not meet at least one of the requirements listed in section 10.606(b) will be denied by OWCP without review of the merits of the claim.⁴

ANALYSIS

On October 4, 2010 OWCP denied merit review of appellant's claim on the grounds that the evidence submitted was irrelevant because the report of Dr. Guzzetti was duplicative of evidence already in the record and previously considered. However, the Board finds that the case is not in posture for decision.

Appellant disagreed with the denial of his claim for an injury in the performance of duty and requested reconsideration. The underlying issue on reconsideration was whether he submitted sufficient medical evidence to establish his claim for employment-related hearing loss.

On reconsideration, appellant submitted an April 22, 2010 report from Dr. Guzzetti. The Board notes that this is relevant and pertinent new evidence which, contrary to OWCP's finding, was not previously considered. The Board's review of the case record does not indicate that Dr. Guzzetti previously submitted this report or any other report regarding the cause of appellant's hearing loss. Thus, Dr. Guzzetti report is new to the record and it was not previously considered by OWCP. He opined that, as appellant was “constantly exposed to a lot of high

² 5 U.S.C. § 8128(a).

³ 20 C.F.R. § 10.606(b).

⁴ *Id.* at § 10.608(b).

level background noise one could conclude that his presbycusis, hearing loss, was accelerated by his work environment.” The requirements for reopening a case for merit review do not include the requirement that a claimant submit all evidence which may be necessary to discharge appellant’s burden of proof. The claimant need only submit evidence that is relevant and pertinent and not previously considered.⁵ If OWCP should determine that the new evidence submitted lacks probative value, it may deny modification of the prior decision, but only after the case has been reviewed on the merits.⁶ The Board finds that Dr. Guzzetti’s report is new and that it is relevant because he supports that work-related noise exposure accelerated appellant’s hearing loss. The case shall be remanded to OWCP to conduct a merit review of the entire record. After such further development as is deemed necessary, OWCP shall issue an appropriate merit decision.

The Board notes that subsequent to OWCP’s October 4, 2010 decision, appellant submitted additional evidence. The Board has no jurisdiction to review this evidence for the first time on appeal.⁷ On appeal, appellant indicated that he believed his hearing loss was work related, at least partially. As noted above, this case is not in posture for decision. It is being remanded for a merit review of the claim.

CONCLUSION

The Board finds that OWCP improperly refused to reopen appellant’s case for further review of the merits of his claim under 5 U.S.C. § 8128(a).

⁵ *Billy B. Scoles*, 57 ECAB 258 (2005); *see also Kenneth R. Mroczkowski*, 40 ECAB 855 (1989); *Helen E. Tschantz*, 39 ECAB 1382 (1988).

⁶ *See Dennis J. Lasanen*, 41 ECAB 933 (1990).

⁷ 20 C.F.R. § 501.2(c); *James C. Campbell*, 5 ECAB 35 (1952).

ORDER

IT IS HEREBY ORDERED THAT the October 4, 2010 decision of the Office of Workers' Compensation Programs is set aside. The case is remanded for a review of the merits.

Issued: December 23, 2011
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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