United States Department of Labor
Employees' Compensation Appeals Board

L.D., Appellant	)	
and	)	**Docket No. 10-1656**
	)	**Issued: March 14, 2011**
DEPARTMENT OF THE NAVY, NAVAL AVIATION DEPOT, Cherry Point, NC, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
RICHARD J. DASCHBACH, Chief Judge
ALEC J. KOROMILAS, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On June 1, 2010 appellant filed a timely appeal of a December 18, 2009 decision of the Office of Workers' Compensation Programs, denying his application for reconsideration without merit review of the claim. Pursuant to the Federal Employees' Compensation Act[1] and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the December 18, 2009 nonmerit decision. Since more than 180 days has elapsed between the last merit decision on September 15, 2009 and the filing of this appeal, the Board lacks jurisdiction to review the merits of the claim pursuant to 20 C.F.R. § 501.3(e).

ISSUE

The issue is whether the Office properly determined that appellant's application for reconsideration was insufficient to warrant merit review of the claim pursuant to section 8128(a).

[1] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

The Office accepted that appellant sustained bilateral hearing loss and tinnitus as a result of noise exposure in his federal employment.[2] According to a SOAF, appellant retired from federal employment in October 1998. By decision dated April 5, 1999, the Office issued a schedule award for a 17 percent bilateral hearing loss. The period of the award was 27.24 weeks from December 23, 1998.

In a claim for compensation (Form CA-7) dated July 25, 2009, appellant requested an additional schedule award. The Office referred appellant to Dr. Charles Beasley, an otolaryngologist, for a second opinion examination. In a report dated August 28, 2009, Dr. Beasley diagnosed bilateral sensorineural hearing loss and checked a box that the hearing loss was "due" to noise exposure in federal employment. An accompanying audiogram dated August 26, 2009 provided results at 500, 1,000, 2,000 and 3,000 hertz.

The medical evidence was referred to an Office medical adviser for review. In a report dated August 31, 2009, the medical adviser found that the audiogram revealed much greater hearing loss than the prior schedule award. The Office medical adviser opined that noise-induced hearing loss does not worsen after removal from the source of noise and since appellant had retired in 1998, the current hearing loss would not be employment related.

By decision dated September 15, 2009, the Office found that appellant was not entitled to an additional schedule award.

The record contains a number of documents marked as received by the Office on October 6, 2009.[3] These include audiograms from 1982 through July 1995, treatment notes and medical reports from 1989 to 1997 and personnel records.

On October 9, 2009 appellant requested reconsideration of his claim. In a statement dated October 5, 2009, he stated that he believed his tinnitus caused his hearing loss to worsen. Appellant stated that according to the Mayo Clinic, over a long period of time tinnitus could cause hearing loss. According to his, hearing loss does not improve after being removed from a noisy area and common sense would establish that his hearing loss was employment related. Appellant submitted medical evidence regarding treatment from 1990 to 1997.

By decision dated December 18, 2009, the Office found that appellant's reconsideration request did not warrant merit review of the claim.

[2] The December 18, 2009 Office decision stated that the claim was accepted for bilateral hearing loss and tinnitus. A statement of accepted facts (SOAF) dated August 31, 1998 reported appellant had a prior claim accepted for noise-induced hearing loss/tinnitus of the right ear. Pursuant to that claim an October 16, 1990 schedule award decision was issued for a 13 percent hearing loss in the left ear. It is not clear from the current record which ear was involved in the prior claim.

[3] The record indicates that due to a maintenance error there were imaged files that had been lost. The documents marked as received on October 6, 2009 may have been recovered documents previously of record.

LEGAL PRECEDENT

To require the Office to reopen a case for merit review under section 8128(a) of the Act,[4] the Office's regulations provide that a claimant may obtain review of the merits of the claim by submitting a written application for reconsideration that sets forth arguments and contains evidence that either "(1) shows that [the Office] erroneously applied or interpreted a specific point of law; (2) advances a relevant legal argument not previously considered by [the Office]; or (3) constitutes relevant and pertinent evidence not previously considered by [the Office]."[5] Section 10.608(b) states that any application for review that does not meet at least one of the requirements listed in section 10.606(b)(2) will be denied by the Office without review of the merits of the claim.[6]

ANALYSIS

The Office issued a schedule award decision on April 5, 1999 for a 17 percent bilateral hearing loss. Appellant sought an additional schedule award based on an increased hearing loss. In its September 15, 2009 decision, the Office determined that the weight of the medical evidence did not establish that the current hearing loss was employment related, noting that appellant had retired in 1998. Appellant requested reconsideration of the September 15, 2009 decision.

As noted above, the Board does not have jurisdiction over the September 15, 2009 Office decision. The issue presented on appeal is whether appellant met any of the requirements of 20 C.F.R. § 10.606(b)(2), requiring the Office to reopen the case for review of the merits of the claim. In his October 5, 2009 application 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. His argument was that his hearing loss was employment related, as the tinnitus had made his hearing loss worse. Appellant referred generally to the Mayo Clinic and to the American Speech, Language and Hearing Association. The underlying issue in this case was whether his current hearing loss was causally related to noise exposure in federal employment. That is a medical issue which must be addressed by relevant medical evidence.[7] A claimant may be entitled to a merit review by submitting new and relevant evidence, but appellant did not submit any new and relevant medical evidence in this case.

The Board accordingly finds that appellant did not meet any of the requirements of 20 C.F.R. § 10.606(b)(2). Appellant did not show that the Office erroneously applied or interpreted a specific point of law, advance a relevant legal argument not previously considered

[4] 5 U.S.C. § 8128(a) (providing that "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application)."

[5] 20 C.F.R. § 10.606(b)(2).

[6] *Id*. at § 10.608(b); *see also Norman W. Hanson*, 45 ECAB 430 (1994).

[7] *See Bobbie F. Cowart*, 55 ECAB 746 (2004).

by the Office or submit relevant and pertinent evidence not previously considered. Pursuant to 20 C.F.R. § 10.608, the Office properly denied merit review.

On appeal, appellant discussed his noise exposure in federal employment. He stated that he suffers from tinnitus and the Office did not use common sense in denying his claim for an increased schedule award. Appellant also reiterated his belief that his hearing loss was employment related and had gotten worse. As noted above, the Board does not have jurisdiction over the merits of his claim for an increased schedule award on this appeal.[8] The only issue is whether appellant's application for reconsideration was sufficient to require the Office to review the merits of the claim. For the above reasons, the Board finds the Office properly denied merit review.

CONCLUSION

The Board finds the Office properly determined that appellant's application for reconsideration was insufficient to warrant merit review of the claim.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated December 18, 2009 is affirmed.

Issued: March 14, 2011
Washington, DC

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

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

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

[8] A claimant may submit new medical evidence regarding a current impairment and seek an additional schedule award, requiring the Office to issue a decision on the merits. *See Linda T. Brown*, 51 ECAB 115 (1999).