

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

R.P., Appellant

and

**DEPARTMENT OF THE AIR FORCE, McGUIRE
AIR FORCE BASE, NJ, Employer**

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**Docket No. 11-500
Issued: September 12, 2011**

Appearances:
Thomas R. Uliase, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

RICHARD J. DASCHBACH, Chief Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On December 9, 2010 appellant, through his attorney, filed a timely appeal of a June 14, 2010 Office of Workers' Compensation Programs' (OWCP) merit decision and a July 1, 2010 nonmerit decision.¹ Pursuant to the Federal Employees' Compensation Act (FECA)² and 20 C.F.R. §§ 501.2(c)(1) and 501.3, the Board has jurisdiction to consider the merits of the case.

¹ Under the Board's *Rules of Procedure*, the 180-day time period for determining jurisdiction is computed beginning on the day following the date of OWCP's decision. See 20 C.F.R. § 501.3(f)(2). As OWCP's merit decision was issued on June 14, 2010, the 180-day computation begins June 15, 2010. One hundred and eighty days from June 15, 2010 was December 13, 2010. Since using December 21, 2010, the date the appeal was received by the Clerk of the Board, would result in the loss of appeal rights, the date of the postmark is considered the date of filing. The date of the U.S. Postal Service postmark is December 9, 2010, which renders the appeal timely filed. See 20 C.F.R. § 501.3(f)(1).

² 5 U.S.C. § 8101 *et seq.*

ISSUES

The issues are: (1) whether appellant has met his burden of proof in establishing that his hearing loss was due to exposures during his federal employment; and (2) whether OWCP properly denied appellant's request for reconsideration on the merits pursuant to 5 U.S.C. § 8128(a).

On appeal counsel argues that the medical evidence establishes that employment exposures contributed to appellant's hearing loss.

FACTUAL HISTORY

On November 23, 2009 appellant, then a 64-year-old material handler, filed an occupational disease claim alleging that he developed a loss of hearing in both ears due to employment-related noise exposure. He stated that he first became aware of his condition and its relation to his employment on September 14, 2009.³

In a letter dated December 23, 2009, OWCP requested additional factual and medical evidence in support of appellant's claim and allowed 30 days for a response. Appellant responded on January 5, 2010 and listed his employment from August 1983 through the present. He indicated that he worked as a sewage treatment plant operator, a heavy mobile equipment mechanic and a material handler or forklift operator. Appellant indicated loud noise exposure during his first two positions. He stated, "I was advised of my hearing loss of September 14, 2009 during an employing establishment health evaluation." Appellant noted that until he failed a hearing test during his latest physical he was not aware that he had a hearing loss. He submitted audiograms taken through the employing establishment health program dated May 21, 1991 through August 7, 2009. Appellant submitted a report dated September 1, 2009 from Dr. Priya A. Yellayi, physician, diagnosing hypertension, hyperlipidemia, chronic obstructive pulmonary disease and hearing loss. He submitted an audiological report dated August 7, 2009 which demonstrated an increased loss of hearing from appellant's April 11, 2000 audiometry. Sharon E. Gillespie, an audiologist, examined appellant on September 14, 2009 for sensorineural hearing loss and noise-induced hearing loss including audiometry. On September 22, 2009 Dr. Yellayi added the diagnoses of sensorineural hearing loss and noise-induced hearing loss.

By decision dated March 15, 2010, OWCP denied appellant's claim on the grounds that the medical evidence was not sufficient to establish a causal relationship between appellant's accepted employment noise exposure and his diagnosed loss of hearing. Appellant requested reconsideration on March 27, 2010. He attributed his loss of hearing to noise exposure as a waste water treatment plant operator from May 20, 1991 through January 31, 1996. Appellant stated that he was exposed to very loud pumps and generators with banging noises and that he had to yell to be heard. He also stated that a secondary source of noise was his position as a heavy mobile equipment mechanic during which he worked with diesel engines and motors.

³ Appellant was employed in these positions by the Department of the Army at Fort Dix, New Jersey. This base was taken over by the Department of the Air Force as McGuire Air Force Base during the pendency of appellant's claim.

OWCP referred appellant for a second opinion evaluation with Dr. Sean Smullen, a Board-certified otolaryngologist, on April 12, 2010. In his May 7, 2010 report, Dr. Smullen reviewed the statement of accepted facts and noted that, based on audiometric reports, appellant had significant sensorineural hearing loss at the beginning of his employment in 1991. Based on the physical examination he noted that appellant had a very subtle gradual hearing loss during the course of employment. Dr. Smullen reviewed appellant's current audiogram and diagnosed bilateral sensorineural hearing loss stating that appellant had much of this hearing loss present when he began his federal employment in 1991. He concluded, "This patient does have bilateral sensorineural hearing loss but his hearing loss has only progressed very slightly since the beginning of his employment in 1991 for the Federal Government. The hearing loss is within the limits expected of presbycusis therefore I think the patient does not have a work[-]related noise[-]induced hearing loss." Dr. Smullen provided audiological data comporting with OWCP's requirements.

By decision dated June 14, 2010, OWCP reviewed the merits of appellant's claim and denied modification of its prior decision finding that Dr. Smullen's report established that appellant's hearing loss since his employment was due to presbycusis rather than a noise-induced hearing loss caused by his federal employment.

Appellant requested reconsideration of this decision on June 18, 2010. He submitted a statement from a coworker and a statement from his supervisor that appellant's hearing range diminished during his federal employment. Dave Gambacorta, appellant's supervisor, stated that appellant requested repetitive instructions and made efforts to read lips. Appellant's wife also submitted a statement that his hearing loss was dramatic and that Dr. Smullen completed his examination in 20 minutes.

By decision dated July 1, 2010, OWCP declined to reopen appellant's claim for consideration of the merits on the grounds that the evidence submitted in support of his request for reconsideration was not relevant to the issue for which his claim was denied.

LEGAL PRECEDENT -- ISSUE 1

To establish that an injury was sustained in the performance of duty in an occupational disease claim, a claimant must submit the following: (1) medical evidence establishing the presence or existence of the disease or condition for which compensation is claimed; (2) a factual statement identifying employment factors alleged to have caused or contributed to the presence or occurrence of the disease or condition; and (3) medical evidence establishing that the employment factors identified by the claimant were the proximate cause of the condition for which compensation is claimed or, stated differently, medical evidence establishing that the diagnosed condition is causally related to the employment factors identified by the claimant. The evidence required to establish causal relationship is rationalized medical opinion evidence, based upon a complete factual and medical background, showing a causal relationship between the claimed condition and identified factors. The belief of a claimant that a condition was caused or aggravated by the employment is not sufficient to establish causal relation.⁴

⁴ *Lourdes Harris*, 45 ECAB 545, 547 (1994).

ANALYSIS -- ISSUE 1

The Board finds that appellant has submitted evidence substantiating a medical condition, bilateral loss of hearing. Appellant has also submitted factual evidence establishing his loss of hearing. However, the Board finds that appellant has not submitted the necessary medical opinion evidence to establish a causal relationship between his loss of hearing and job-related noise exposure.

Appellant submitted medical evidence from Dr. Yellayl dated September 1 and 22, 2009 diagnosing hearing loss. On September 22, 2009 Dr. Yellayl stated that this hearing loss was noise induced, but he did not provide a history of injury including employment-related noise exposure and did not state that the noise-induced hearing loss was due to his work exposure. This report does not contain the necessary opinion on causal relationship requisite to meet appellant's burden of proof. Appellant also submitted a report from Ms. Gillespie, an audiologist, dated September 14, 2009 diagnosing sensorineural hearing loss and noise-induced hearing loss. Audiologists are not included among the healthcare professionals recognized as a physician under FECA.⁵ Therefore, this report is not sufficient to meet appellant's burden of proof.

OWCP referred appellant for a second opinion evaluation with Dr. Smullen, who reviewed the statement of accepted facts as well as the audiograms submitted by appellant noting that appellant had significant loss of hearing prior to his federal employment. Dr. Smullen stated that appellant's employment audiograms demonstrated a gradual increase in his hearing loss. He opined that this increased hearing loss was due to presbycusis rather than to noise exposure. This report does not support appellant's claim for job-related loss of hearing. Instead Dr. Smullen opined that appellant's loss of hearing was not due to noise exposure but was of the gradual type and limited extent that he believed was due to age-related hearing loss or presbycusis rather than due to noise exposure.

The Board finds that as there is no medical evidence stating that appellant's loss of hearing is due to employment-related noise exposure, he has failed to meet his burden of proof. By this finding, the Board is not persuaded by counsel's argument on appeal that the medical evidence is sufficient to support appellant's claim for bilateral loss of hearing.

Appellant may submit new evidence or argument with a written request for reconsideration to the Office within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

LEGAL PRECEDENT -- ISSUE 2

FECA provides in section 8128(a) that OWCP may review an award for or against payment of compensation at any time on its own motion or on application by the claimant.⁶ Section 10.606(b) of the Code of Federal Regulations provide that a claimant may obtain review

⁵ 5 U.S.C. § 8101(2); *Thomas O. Bouis*, 57 ECAB 602 (2006).

⁶ 5 U.S.C. §§ 8101-8193, 8128(a).

of the merits of the claim by submitting in writing an application for reconsideration which sets forth arguments or evidence and shows that OWCP erroneously applied or interpreted a specific point of law; or advances a relevant legal argument not previously considered by OWCP; or includes relevant and pertinent new evidence not previously considered by OWCP.⁷ Section 10.608 of OWCP's regulations provide that, when a request for reconsideration is timely, but does meet at least one of these three requirements, OWCP will deny the application for review without reopening the case for a review on the merits.⁸

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. The Board has also held that the submission of evidence which does not address the particular issue involved does not constitute a basis for reopening a case.⁹

ANALYSIS -- ISSUE 2

Appellant requested reconsideration of OWCP's June 14, 2010 merit decision and submitted additional factual evidence consisting of three statements, one each from his supervisor, a coworker and his wife all noting that appellant had severe loss of hearing. These factual statements, although supportive of the fact of hearing loss, are not relevant to the issue for which OWCP denied appellant's claim. OWCP denied appellant's claim as the medical evidence did not support a causal relationship between his diagnosed loss of hearing and exposures to noise during his federal employment. As the evidence appellant submitted with his request for reconsideration was not relevant to that underlying issue, the Board finds that OWCP properly declined to reopen appellant's claim for consideration of the merits.

CONCLUSION

The Board finds that appellant has not submitted the necessary medical opinion evidence to establish that he sustained employment-related bilateral loss of hearing. The Board further finds that appellant failed to submit relevant new evidence in support of his request for reconsideration such that OWCP should have reviewed the merits of his claim on July 1, 2010

⁷ 20 C.F.R. § 10.606.

⁸ *Id.* at § 10.608.

⁹ *Ronald A. Eldridge*, 53 ECAB 218 (2001).

ORDER

IT IS HEREBY ORDERED THAT the July 1 and June 14, 2010 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: September 12, 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