

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

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J.M., Appellant )  
and ) Docket No. 11-1521  
DEPARTMENT OF THE INTERIOR, ) Issued: March 1, 2012  
NATIONAL PARK SERVICE, Greenbelt, MD, )  
Employer )  
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)

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

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:  
ALEC J. KOROMILAS, Judge  
MICHAEL E. GROOM, Alternate Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On June 14, 2011 appellant filed a timely appeal from a March 28, 2011 nonmerit decision of the Office of Workers' Compensation Programs (OWCP) denying his request for reconsideration. As the last merit decision was issued on October 21, 2010, 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<sup>1</sup> (FECA) 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.

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<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

## **FACTUAL HISTORY**

On June 2, 1980 appellant, then a 38-year-old tool operator, filed an occupational disease claim alleging that he sustained binaural hearing loss due to factors of his federal employment. OWCP accepted the claim for bilateral hearing loss. Appellant last worked for the employing establishment in May 1979. By decision dated April 24, 1981, OWCP granted him a schedule award for a 20 percent binaural hearing loss.<sup>2</sup>

On May 3, 2010 appellant requested an increased schedule award under the current file number. He submitted an April 26, 2010 audiogram and an accompanying report from a physician's assistant interpreting the audiogram as showing a 97.5 percent binaural hearing loss. An OWCP medical adviser reviewed the audiogram on June 6, 2010 and found that it did not meet the requirements for audiometric testing equipment and further noted that appellant's last noise exposure was May 4, 1979.

By decision dated July 2, 2010, OWCP found that appellant was not entitled to an additional schedule award due to hearing loss. It determined that the medical evidence was insufficient to show that he had a greater hearing loss as a result of noise exposure due to factors of his federal employment.

On July 16, 2010 appellant requested a review of the written record by an OWCP hearing representative and submitted additional medical evidence.<sup>3</sup>

In a decision dated October 21, 2010, the hearing representative affirmed the July 2, 2010 decision. She determined that the medical evidence did not establish that appellant sustained any additional impairment due to a progression of his employment-related hearing loss.

By letter dated February 22, 2011, appellant requested reconsideration. He argued that he was not treated fairly by OWCP. Appellant questioned whether OWCP's hearing representative "knew what he was doing" and related, "All of the doctors that I visited have supported the fact that this has been taking place since 1981."

By decision dated March 28, 2011, OWCP denied appellant's request to reopen his case for further merit review under section 8128. It found that he had not submitted relevant evidence or raised arguments sufficient to warrant reopening his case for merit review.

On appeal appellant asserts that the hearing loss he sustained in 1981 had increased and that OWCP unfairly denied his claim because he had multiple claims.

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<sup>2</sup> This case has previously been before the Board. On July 21, 2008 the Board affirmed January 25 and September 27, 2006 decisions finding that appellant forfeited entitlement to compensation from March 24, 1990 to April 10, 1992 because he knowingly failed to report employment. The Board further affirmed OWCP's finding that he was at fault in the creation of an overpayment of \$14,275.57 resulting from the forfeiture. Docket No. 07-313 (issued July 21, 2008).

<sup>3</sup> In a report dated December 31, 2009, Dr. Kirk D. Williams, a Board-certified otolaryngologist, found that appellant's hearing loss since March 23, 2005 was unchanged and diagnosed chronic bilateral hearing loss. On July 14, 2010 Dr. Dennis Fitzgerald, a Board-certified otolaryngologist, determined that he had a 97.5 percent hearing loss based on the April 26, 2010 audiogram.

## **LEGAL PRECEDENT**

To require OWCP to reopen a case for merit review under section 8128(a) of FECA,<sup>4</sup> OWCP 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.<sup>5</sup> To be entitled to a merit review of an OWCP 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.<sup>6</sup> 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.<sup>7</sup>

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.<sup>8</sup> 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.<sup>9</sup> 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.<sup>10</sup>

## **ANALYSIS**

By decision dated April 24, 1981, OWCP granted appellant a schedule award for a 20 percent binaural hearing loss. On May 3, 2010 appellant requested an increased schedule award based on an April 26, 2010 audiogram. In decisions dated July 2 and October 21, 2010, OWCP denied his request for an increased schedule award after finding that the medical evidence was insufficient to establish that he had an additional employment-related hearing loss. Appellant requested reconsideration on February 21, 2011, which OWCP denied in a March 28, 2011 nonmerit decision.

As noted, the Board does not have jurisdiction over the July 2 and October 21, 2010 decisions. The issue 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 his request for reconsideration, appellant did not establish that OWCP 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 maintained that the hearing representative did not know what she was doing but

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<sup>4</sup> 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.”

<sup>5</sup> 20 C.F.R. § 10.606(b)(2).

<sup>6</sup> *Id.* at § 10.607(a).

<sup>7</sup> *Id.* at § 10.608(b).

<sup>8</sup> F.R., 58 ECAB 607 (2007); *Arlesa Gibbs*, 53 ECAB 204 (2001).

<sup>9</sup> P.C., 58 ECAB 405 (2007); *Ronald A. Eldridge*, 53 ECAB 218 (2001); *Alan G. Williams*, 52 ECAB 180 (2000).

<sup>10</sup> *Vincent Holmes*, 53 ECAB 468 (2002); *Robert P. Mitchell*, 52 ECAB 116 (2000).

failed to identify a specific legal error committed by the hearing representative or submit any evidence supporting his contention.<sup>11</sup> Appellant generally asserted that his physicians related his hearing loss to his 1981 work exposure. The underlying issue in this case, however, is whether the medical evidence established that he sustained greater hearing loss causally related to noise exposure in federal employment. Appellant's lay opinion is not relevant to the medical issue in this case, which can only be resolved through the submission of probative medical evidence from a physician.<sup>12</sup>

A claimant may be entitled to a merit review by submitting pertinent new and relevant evidence, but appellant did not submit any pertinent new and relevant medical evidence in this case. The Board accordingly finds that he did not meet any of the requirements of 20 C.F.R. § 10.606(b)(2).

On appeal appellant generally contends that his hearing loss has increased. As discussed, the issue of whether he sustained an additional employment-related loss of hearing is a medical issue which must be addressed by relevant medical evidence.<sup>13</sup> Appellant also asserts that OWCP denied his claim because he had multiple claims but did not identify any error by OWCP in its decision. He did not show that OWCP erroneously applied or interpreted a specific point of law, advance a relevant legal argument not previously considered by OWCP, or submit relevant and pertinent new evidence not previously considered. Consequently, pursuant to 20 C.F.R. § 10.608, OWCP properly denied merit review.

### **CONCLUSION**

The Board finds that OWCP properly refused to reopen appellant's case for further review of the merits under section 8128.<sup>14</sup>

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<sup>11</sup> See *A.P.*, Docket No. 10-1815 (issued April 7, 2011).

<sup>12</sup> *Gloria J. McPherson*, 51 ECAB 441 (2000); *L.G.*, Docket No. 09-1517 (issued March 3, 2010).

<sup>13</sup> See *Bobbie F. Cowart*, 55 ECAB 746 (2004).

<sup>14</sup> The Board notes that appellant requested oral argument before the Board. Pursuant to 20 C.F.R. § 501.5(a), oral argument may be held in the discretion of the Board. The Board finds that oral argument in this case would delay issuance of a Board decision and would not serve a useful purpose. Therefore, appellant's request for oral argument is denied.

**ORDER**

**IT IS HEREBY ORDERED THAT** the March 28, 2011 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 1, 2012  
Washington, DC

Alec J. Koromilas, Judge  
Employees' Compensation Appeals Board

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

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