United States Department of Labor
Employees' Compensation Appeals Board

S.M., Appellant	)	
and	)	**Docket No. 12-235**
	)	**Issued: May 15, 2012**
U.S. POSTAL SERVICE, POST OFFICE, Springfield, IL, Employer	)	

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
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On November 22, 2011 appellant filed a timely appeal of the September 7, 2011 nonmerit decision of the Office of Workers' Compensation Programs (OWCP) denying her request for reconsideration. Because more than 180 days has elapsed between the most recent merit decision dated December 1, 2010 to the filing of this appeal, the Board lacks jurisdiction to review the merits of the case pursuant to the Federal Employees' Compensation Act[1] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3.

ISSUE

The issue is whether OWCP properly denied appellant's request for further merit review of her claim pursuant to 5 U.S.C. § 8128(a).

On appeal, appellant submitted a medical report from an attending physician and alleged that this evidence was sufficient to establish her claim of injury.

[1] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On February 3, 2010 appellant, then a 63-year-old clerk, filed an occupational disease claim alleging that on April 10, 2009 she first became aware of her hearing loss. On May 7, 2009 she first realized that her condition was caused by noise exposure 8 to 12 hours a day, 5 to 6 days a week while loading and sweeping optical character reader and bar code sorter machines at the employing establishment.[2] Medical evidence dated August 26, 1993 to August 19, 2009 stated that appellant had bilateral hearing loss and otosclerosis. She underwent right and left stapedotomies on August 26, 1993 and March 1, 1995, respectively, to treat her bilateral otosclerosis.

In an April 8, 2010 decision, OWCP denied appellant's claim, finding that the medical evidence was insufficient to establish a causal relationship between her claimed bilateral hearing loss condition and the established work-related noise exposure.

On May 5, 2010 appellant requested a review of the written record by an OWCP hearing representative.

In a June 22, 2010 decision, an OWCP hearing representative set aside the April 8, 2010 decision. Noting that the evidence of record established that appellant had hearing loss, the hearing representative remanded the case to OWCP for further development of the medical evidence. OWCP was instructed to refer appellant along with a statement of accepted facts and the case record to a second opinion physician for a rationalized opinion on whether her hearing loss was causally related to the established work-related noise exposure.

By letter dated October 4, 2010, OWCP referred appellant to Dr. Gerald W. Moritz, a Board-certified otolaryngologist, for a second opinion. In an October 24, 2010 medical report, Dr. Moritz opined that appellant had bilateral mixed hearing loss secondary to otosclerosis based on a history of the accepted employment-related noise exposure, appellant's medical treatment for ostosclerosis and his review of audiograms performed in 1999 and on October 19, 2010. He advised that there was no evidence establishing that her work-related noise exposure contributed to her hearing loss since the 1999 and 2010 audiograms were very similar. Dr. Moritz concluded that appellant's otosclerosis was most likely enough to protect her ears from noise.

In a December 1, 2010 decision, OWCP denied appellant's claim, finding that Dr. Moritz's opinion represented the weight of the medical evidence.

On June 14, 2011 appellant requested reconsideration and submitted new audiological evidence. Testing at 500, 1,000, 2,000 and 3,000 hertz (Hz) performed on intermittent dates from August 11, 1993 through February 8, 2011 by Dr. Charles E. Swain, Jr., an audiologist, revealed bilateral hearing loss.

In a September 7, 2011 decision, OWCP denied merit review of appellant's claim, finding that the audiograms submitted on reconsideration were similar to previously submitted audiograms and, thus, did not constitute new and relevant evidence.

[2] Appellant retired from the employing establishment on October 31, 2009.

LEGAL PRECEDENT

To require OWCP to reopen a case for merit review under section 8128 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 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.[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 of the merits.

ANALYSIS

On June 14, 2011 appellant disagreed with OWCP's December 1, 2010 decision denying her claim for an injury in the performance of duty and requested reconsideration. The relevant issue on reconsideration is whether she submitted sufficient medical evidence to establish her claim for employment-related bilateral hearing loss.

The audiograms from Dr. Swain, an audiologist, did not require OWCP to review the merits of appellant's case. These audiograms do not constitute medical evidence as an audiologist is not a physician as defined under FECA.[6] These audiograms are not certified by a physician and there is no requirement that OWCP review an uncertified audiogram.[7] As the underlying issue in this case is medical in nature, these reports are not sufficient to require OWCP to reopen the claim for consideration of the merits.

The Board finds that OWCP properly determined that appellant was not entitled to further review of the merits of her claim pursuant to any of the three requirements under section 10.606(b)(2) and properly denied her June 14, 2011 request for reconsideration.[8]

[3] 5 U.S.C. §§ 8101-8193. Under section 8128 of FECA, the Secretary of Labor may review an award for or against payment of compensation at any time on her own motion or on application. 5 U.S.C. § 8128(a).

[4] 20 C.F.R. § 10.606(b)(1)-(2).

[5] *Id.* at § 10.607(a).

[6] *See* 5 U.S.C. § 8101(2). *See also T.B.*, Docket No. 09-1504 (issued April 12, 2010); *Charley V.B. Harley*, 2 ECAB 208, 211 (1949) (where the Board held that medical opinion, in general, can only be given by a qualified physician).

[7] *Robert E. Cullison*, 55 ECAB 570 (2004); *Henry T. Scott*, 27 ECAB 444 (1976); *see Joshua A. Holmes*, 42 ECAB 231 (1990); *Alfred Avelar*, 26 ECAB 426 (1975).

[8] *M.E.*, 58 ECAB 694 (2007) (when an application for reconsideration does not meet at least one of the three requirements enumerated under section 10.606(b)(2), OWCP will deny the application for reconsideration without reopening the case for a review on the merits).

On appeal, appellant submitted new evidence. However, the Board lacks jurisdiction to review evidence for the first time on appeal.[9]

CONCLUSION

The Board finds that OWCP properly denied appellant's request for further merit review of her claim pursuant to 5 U.S.C. § 8128(a).

ORDER

IT IS HEREBY ORDERED THAT the September 7, 2011 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: May 15, 2012
Washington, DC

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

[9] *See* 20 C.F.R. § 501.2(c)(1); *Sandra D. Pruitt*, 57 ECAB 126 (2005).