

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

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**J.L., Appellant**

**and**

**U.S. POSTAL SERVICE, POST OFFICE,  
Portland, OR, Employer**

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**Docket No. 13-1010  
Issued: September 6, 2013**

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

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

RICHARD J. DASCHBACH, Chief Judge  
COLLEEN DUFFY KIKO, Judge  
ALEC J. KOROMILAS, Alternate Judge

**JURISDICTION**

On March 21, 2013 appellant filed a timely appeal from a September 24, 2012 nonmerit decision of the Office of Workers' Compensation Programs (OWCP) denying his request for reconsideration.<sup>1</sup> Pursuant to the Federal Employees' Compensation Act<sup>2</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board does not have jurisdiction over the merits of this case.

**ISSUE**

The issue is whether OWCP properly denied appellant's August 30, 2012 request for reconsideration under 5 U.S.C. § 8128(a).

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<sup>1</sup> The last merit decision in this case was the September 23, 2011 decision which denied his traumatic injury claim. For final adverse decisions of OWCP issued on or after November 19, 2008, a claimant must file an appeal within 180 days of the decision. 20 C.F.R. § 501.3(e). Because more than 180 days elapsed between the most recent merit decision dated September 23, 2011 to the filing of this appeal on March 21, 2013, the Board lacks jurisdiction to review the merits of this case.

<sup>2</sup> 5 U.S.C. § 8101 *et seq.*

## **FACTUAL HISTORY**

On March 28, 2011 appellant, then a 57-year-old electronic technician, filed a traumatic injury claim alleging that on March 22, 2011 he experienced ringing in both his ears and tinnitus when he heard a loud noise caused by hammering on a metal bracket.

In an April 27, 2011 report, Dr. James J. Knackstedt, a Board-certified otolaryngologist, noted that he examined appellant on March 30, 2011. He stated that appellant had complained of tinnitus after he heard the loud noise of a metal hammer striking some type of metal frame on a table at work. Dr. Knackstedt noted that appellant worked around airplanes and used hearing protection. He reported that an audiogram revealed high frequency nerve-type hearing loss at approximately 4,000 hertz (Hz) in both ears showing a moderately severe high frequency nerve hearing loss. Dr. Knackstedt stated that he could only surmise that since he had worked in a noisy environment in the past there may have been some degree of high frequency hearing loss. He reported that, if appellant had preexisting high frequency hearing loss, appellant could have had an event at work that worsened his hearing loss even further.

In a decision dated May 11, 2011, OWCP denied appellant's claim based on insufficient medical evidence.

In a decision dated September 23, 2011, OWCP set aside the May 11, 2011 denial decision because some of the information submitted was for another employee. It also found that the March 22, 2011 incident occurred as alleged and that appellant suffered from hearing loss, but denied the claim because he had not submitted a well-reasoned medical opinion explaining how the accepted incident caused his hearing loss. OWCP determined that Dr. Knackstedt's opinion was speculative about the relationship between the work incident and appellant's hearing loss.

In an August 30, 2012 narrative statement, appellant requested reconsideration and alleged that he was submitting relevant new evidence which established that his hearing loss was caused by the March 22, 2011 employment incident. He explained that when Dr. Knackstedt first examined him on March 30, 2011 he had not seen his 2004 and 2005 audiograms, but after reviewing the audiograms, Dr. Knackstedt modified his conclusion regarding appellant's hearing loss.

In a February 29, 2012 report, Dr. Knackstedt disagreed with the rationale of OWCP's denial decision. He stated that he reviewed appellant's screening audiograms dated October 2, 2004 and September 26, 2005 and noted that appellant's frequency loss at 4,000 Hz averaged 25 decibels (dB). The audiogram obtained after the injury showed 60 dB loss at 4,000 Hz. Dr. Knackstedt explained that this substantial hearing loss was not a typical advancement that one would see with the aging process. He opined that given the frequency of noise trauma at appellant's workplace and the event of a metal exposure, it strongly suggested to him that there was a direct connection between his hearing loss and tinnitus and the workplace events. Appellant submitted October 2, 2004, September 26, 2005, March 30 and June 2, 2011 and January 31, 2012 audiograms.

In an April 4, 2012 note, Dr. Kelvin Lindgren, a Board-certified otolaryngologist, stated that he examined appellant and an audiogram and that he agreed with Dr. Knackstedt's February 29, 2012 conclusion.

By decision dated September 24, 2012, OWCP denied appellant's request for reconsideration finding that the evidence submitted was insufficient to warrant further merit review under 5 U.S.C. § 8128(a).

### **LEGAL PRECEDENT**

Section 8128(a) of FECA vests OWCP with discretionary authority to determine whether to review an award for or against compensation.<sup>3</sup> OWCP's regulations provide that OWCP may review an award for or against compensation at any time on its own motion or upon application. The employee shall exercise his right through a request to the district Office.<sup>4</sup>

To require OWCP to reopen a case for merit review pursuant to FECA, the claimant must provide evidence or an argument that: (1) shows that OWCP erroneously applied or interpreted a specific point of law; (2) advances a relevant legal argument not previously considered by OWCP; or (3) constitutes relevant and pertinent new evidence not previously considered by OWCP.<sup>5</sup>

A request for reconsideration must also be submitted within one year of the date of the OWCP decision for which review is sought.<sup>6</sup> A timely request for reconsideration may be granted if OWCP determines that the employee has presented evidence or provided an argument that meets at least one of the requirements for reconsideration. If OWCP chooses to grant reconsideration, it reopens and reviews the case on its merits.<sup>7</sup> If the request is timely but fails to meet at least one of the requirements for reconsideration, OWCP will deny the request for reconsideration without reopening the case for review on the merits.<sup>8</sup>

### **ANALYSIS**

Appellant did not file a timely appeal of OWCP's most recent merit decision of September 23, 2011. For that reason, the Board has no authority to review that decision or the merits of his injury claim. The only decision that the Board may review is OWCP's

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<sup>3</sup> 5 U.S.C. § 8128(a); *see also D.L.*, Docket No. 09-1549 (issued February 23, 2010); *W.C.*, 59 ECAB 372 (2008).

<sup>4</sup> 20 C.F.R. § 10.605; *see also R.B.*, Docket No. 09-1241 (issued January 4, 2010); *A.L.*, Docket No. 08-1730 (issued March 16, 2009).

<sup>5</sup> *Id.* at § 10.606(b); *see also L.G.*, Docket No. 09-1517 (issued March 3, 2010); *C.N.*, Docket No. 08-1569 (issued December 9, 2008).

<sup>6</sup> *Id.* at § 10.607(a).

<sup>7</sup> *Id.* at § 10.608(a); *see also M.S.*, 59 ECAB 231 (2007).

<sup>8</sup> *Id.* at § 10.608(b); *E.R.*, Docket No. 09-1655 (issued March 18, 2010).

September 24, 2012 nonmerit decision denying appellant's August 30, 2012 reconsideration request.

Along with his August 30, 2012 reconsideration request, appellant submitted the February 29, 2012 report of Dr. Knackstedt, in which he discussed the causal relationship between appellant's hearing loss and the March 22, 2011 employment incident, and Dr. Lindgren's April 4, 2012 note agreeing with Dr. Knackstedt's opinion. Dr. Knackstedt explained that the frequency of noise trauma at appellant's workplace and the event of a metal exposure strongly suggested that there was a direct connection between his hearing loss and workplace.

The Board has conducted a limited review of Dr. Knackstedt's February 29, 2012 report, as well as Dr. Lindgren's April 4, 2012 report and can find no similar opinion on causal relationship. The evidence is new and relevant.<sup>9</sup> It directly addresses OWCP's previous findings that the medical evidence did not explain whether appellant's hearing loss was causally related to the March 22, 2011 exposure to noise at work.

To obtain a reopening of his case for a merit review, appellant need not submit evidence that cures all the deficiencies in his claim and establishes his entitlement to compensation.<sup>10</sup> He need only submit evidence that is relevant and pertinent new evidence not previously considered by OWCP.<sup>11</sup> The Board finds that appellant has submitted such evidence and is therefore entitled to a merit review of his case. The Board sets aside OWCP's September 24, 2012 decision denying reconsideration and will remand the case for a merit review and *de novo* decision on his injury claim.

### CONCLUSION

The Board finds that OWCP improperly denied appellant's August 30, 2012 reconsideration request. Appellant is entitled to a merit review of his case.

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<sup>9</sup> See Fed. R. Evid. 401 (relevant evidence means evidence having any tendency to make the existence of any fact that is of consequent to the determination of the action more probable or less probable than it would be without the evidence).

<sup>10</sup> See *S.G.*, Docket No. 12-1107 (issued January 22, 2012); see also *Helen E. Tschantz*, 39 ECAB 1382 (1988).

<sup>11</sup> See 20 C.F.R. § 10.606(b)(3)(iii). See also *Mark H. Dever*, 53 ECAB 710 (2002).

**ORDER**

**IT IS HEREBY ORDERED THAT** the September 24, 2012 decision of the Office of Workers' Compensation Programs is set aside. The case is remanded for further action in conformance with this decision.

Issued: September 6, 2013  
Washington, DC

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

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge  
Employees' Compensation Appeals Board