

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

D.W., Appellant	)	
	)	
and	)	<b>Docket No. 14-571</b>
	)	<b>Issued: July 1, 2014</b>
<b>DEPARTMENT OF JUSTICE, FEDERAL</b>	)	
<b>BUREAU OF INVESTIGATION,</b>	)	
<b>Salt Lake City, UT, Employer</b>	)	
	)	

<i>Appearances:</i>	<i>Case Submitted on the Record</i>
<i>Appellant, pro se</i>	
<i>Office of Solicitor, for the Director</i>	

**DECISION AND ORDER**

Before:  
PATRICIA HOWARD FITZGERALD, Acting Chief Judge  
COLLEEN DUFFY KIKO, Judge  
MICHAEL E. GROOM, Alternate Judge

**JURISDICTION**

On January 23, 2014 appellant filed a timely appeal from a December 11, 2013 merit decision and a January 6, 2014 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>1</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to consider the merits of the case.

**ISSUES**

The issues are: (1) whether appellant met his burden of proof to establish a loss of hearing due to factors of his federal employment; and (2) whether OWCP properly denied his request for reconsideration of the merits pursuant to 5 U.S.C. § 8128(a).

**FACTUAL HISTORY**

On August 22, 2013 appellant, then a 54-year-old special agent, filed an occupational disease claim alleging on that date that he realized that he had mild-to-moderate high-frequency

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

hearing loss in both ears. He attributed his condition to conducting firearms training or instructing others in firearms training since 1998; performing the duties of a Special Weapons and Tactics (SWAT) team member from November 1990 until August 2012; and as a sniper on SWAT teams from May 1992 until August 2012. Appellant was advised of his hearing loss during a fitness-for-duty examination on August 22, 2013.

In a letter dated September 3, 2013, OWCP requested that appellant provide additional factual and medical evidence in support of his claim. It allowed 30 days for a response. OWCP also requested information regarding appellant's claim from the employing establishment on the same date.

On September 26, 2013 appellant responded that he was not sure of the first date that he became aware of his loss of hearing but it may have been in 2003. During his bi-annual fitness-for-duty examinations, he was beginning to show a high-frequency hearing loss in his left ear. Appellant also developed loss of hearing in his right ear with tinnitus. He attributed his hearing loss to exposure to loud noises in the performance of duty as well as his hobby of competition firearms shooting. Appellant usually shot two pistol matches a month for a total of 18 to 20 months and two or three multi-gun, rifle, pistol and shotgun, matches a year. As a SWAT agent, training did not allow for normal ear muff sound protection until 2005 and radio communication was done with a small air hose which did not provide the same degree of sound protection. Appellant stated that his SWAT training and missions also included the use of flash-bangs as diversion devices which were louder than any weapon. He engaged in SWAT training two days a month and in four actual SWAT missions with firearms and flash-bangs and additional firearms and sniper training monthly.

By decision dated December 11, 2013, OWCP denied appellant's claim on the grounds that he failed to submit any medical evidence addressing his loss of hearing.

Appellant requested reconsideration on December 19, 2013 through an appeal request form by placing a checkmark by reconsideration. He stated that a medical report dated December 18, 2013 was attached. However, the record on appeal does not contain any medical evidence.

By decision dated January 6, 2014, OWCP denied appellant's request for reconsideration on the grounds that he failed to submit any relevant new evidence of argument in support of his request.

### **LEGAL PRECEDENT -- ISSUE 1**

OWCP's regulations define an occupational disease as "a condition produced by the work environment over a period longer than a single workday or shift."<sup>2</sup> 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

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<sup>2</sup> 20 C.F.R. § 10.5(q).

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.<sup>3</sup>

### **ANALYSIS -- ISSUE 1**

Appellant submitted factual evidence pertaining to his exposure to noise in the performance of duty. The evidence establishes that he was exposed to gunfire and flash-bangs while performing his duties as a special agent since 1990. The Board, however, finds that appellant has not submitted medical evidence to establish that he sustained hearing loss causally related to that noise exposure.<sup>4</sup> Appellant did not submit any medical evidence addressing his hearing loss or any audiometric examination. Without such medical evidence, he failed to meet his burden of proof to establish work-related hearing loss.

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP 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.<sup>5</sup> Section 10.606(b) of the Code of Federal Regulations provide that a claimant may obtain review 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.<sup>6</sup> 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.<sup>7</sup>

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<sup>3</sup> *Lourdes Harris*, 45 ECAB 545, 547 (1994).

<sup>4</sup> *D.B.*, Docket No. 13-1988 (issued April 18, 2014); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6(c) (February 2013).

<sup>5</sup> 5 U.S.C. §§ 8101-8193, 8128(a).

<sup>6</sup> 20 C.F.R. § 10.606.

<sup>7</sup> *Id.* at § 10.608.

## **ANALYSIS -- ISSUE 2**

Appellant requested reconsideration on December 19, 2013 and stated that he was submitting medical evidence in support of his hearing loss claim. The record does not contain any evidence in support of the December 19, 2013 request for reconsideration. Appellant did not submit arguments or evidence showing that OWCP erroneously applied or interpreted a specific point of law did not advance a relevant legal argument not previously considered by OWCP and did not include relevant and pertinent new evidence not previously considered by OWCP. 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 sufficient medical evidence to establish that he sustained an employment-related loss of hearing. The Board further finds that OWCP properly denied his request for reconsideration.

## **ORDER**

**IT IS HEREBY ORDERED THAT** the January 16, 2014 and December 11, 2013 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: July 1, 2014  
Washington, DC

Patricia Howard Fitzgerald, Acting Chief Judge  
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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