

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

<p>W.C., Appellant</p> <p>and</p> <p>DEPARTMENT OF HOMELAND SECURITY, CUSTOMS & BORDER PROTECTION, Cape Canaveral, FL, Employer</p>	<p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p>	<p>Docket No. 13-2161 Issued: March 7, 2014</p>
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Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

PATRICIA HOWARD FITZGERALD, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On September 23, 2013 appellant filed a timely appeal from a May 13, 2013 decision of the Office of Workers' Compensation Programs (OWCP) which denied his request for reconsideration without conducting a merit review. Because more than 180 days elapsed since the most recent merit decision dated February 26, 2013 to the filing of this appeal, the Board lacks jurisdiction to review the merits of the claim pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3.

ISSUE

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

¹ 5 U.S.C. §§ 8101-8193.

FACTUAL HISTORY

On October 30, 2012 appellant, then a 62-year-old senior detection enforcement officer, filed a claim alleging permanent hearing loss and tinnitus at work. He became aware of his hearing loss and realized it was causally related to his employment on September 17, 2012.

In an undated statement, appellant related that his noise exposure began in 1969 when he was in the U.S. Navy and worked around aircraft as a maintenance technician. He worked for the U.S. Navy for 21 years. Appellant retired from the U.S. Navy in 1990 and began work at the employing establishment as a contract maintenance man and in flight maintenance technician on aircraft. In 1998, he began work as a full-time detection enforcement officer, flying as a crew member and flight technician on aircraft. In October 2011, appellant was reassigned to the unmanned air vehicle program operating systems on the MQ-9 predator. He estimated his daily noise exposure in the Navy as well as with the employing establishment.

Appellant submitted a report from Melanie K. Sembach, an audiologist, dated October 22, 2012. Ms. Sembach found sensorinual hearing loss in both ears and tinnitus of both ears. She noted fitting him for bilateral hearing aids.

By letter dated November 16, 2012, OWCP advised appellant of the evidence needed to establish his claim. In a letter of the same date, it also requested that the employing establishment address the sources of appellant's noise exposure, decibel and frequency levels, periods of exposure and any hearing protection provided.

The employing establishment submitted a statement from Michael Webb, supervisory air interdiction agent, who noted that appellant was an aircrew member in a P-3 Orion aircraft with the Office of Air and Marine and, before that, at the U.S. Customs Service, from January 6, 1991 to October 2011. Appellant operated equipment in the aircraft while airborne from 8 to 12 hours a day and he would accrue 1,000 hours in a year. Mr. Webb noted that the noise level in a P-3 Orion ranged from 105 to 150 decibels and appellant was provided with light speed noise cancellation headsets. Appellant was currently assigned to the unmanned aircraft systems.

A January 11, 2013 statement of accepted facts noted that appellant was employed from 1969 to 1990 as a U.S. Navy aircraft maintenance technician on the flight deck of an aircraft carrier and served continually in aviation on aircraft carriers and naval air stations. He was exposed to noise from aircraft carriers 6 to 10 hours a day for seven days a week for months and at the naval air station, from 3 to 4 hours a day for five to six days a week. From 1990 to 1998 appellant work at the employing establishment as a contract maintenance and flight maintenance technician on P-3 Orion aircraft. From 1998 to 2011, he worked as a detection enforcement officer flying as a crew member and flight technician on aircraft. From 2011 to the present, appellant was reassigned to the unmanned air vehicle program operating systems on the MQ-9 predator for customs and border protection. He was exposed to noise 2 to 3 hours a day on the ground, but 10 to 12 hours a day when flying approximately 120 hours a month.

On January 11, 2013 OWCP referred appellant to Dr. R. Michael Loper, a Board-certified otolaryngologist, for an otologic examination and an audiological evaluation. In a January 29, 2013 report, Dr. Loper examined appellant and reviewed his history of noise

exposure from hunting and while in the military service. Appellant had binaural hearing aids provided by the Veteran's Administration for a known service-related hearing loss. Dr. Loper advised that the hearing loss was in excess of presbycusis. He diagnosed bilateral sensorineural hearing loss which was not due to the noise exposure encountered in his job. Dr. Loper advised that appellant's canals and eardrums were clear and intact with intact tympanic membranes and the drum motility was good. He opined that there was a previous report of hearing loss during military service for which appellant was provided hearing aids. Dr. Loper recommended continued use of hearing aids and hearing conservation. He performed an otologic evaluation of appellant on February 27, 2012 and audiometric testing was obtained on his behalf. Testing at the frequency levels of 500, 1,000, 2,000 and 3,000 cycles per second revealed the following: right ear 5, 15, 20 and 35 decibels; left ear 10, 10, 45 and 65 decibels. Dr. Loper opined that appellant had zero percent monaural hearing loss and zero percent binaural hearing loss.

On February 7, 2013 OWCP's medical adviser reviewed Dr. Loper's report and the audiometric test of January 29, 2013. The medical adviser determined that appellant's hearing loss was not due to noise exposure encountered in his federal civilian employment.

On February 26, 2013 OWCP denied appellant's claim on the grounds that the medical evidence did not demonstrate that the claimed medical condition was related to the established work-related events.

On April 15, 2013 appellant requested reconsideration. He asserted that Dr. Loper did not consider the dates of the events he appraised. Appellant indicated that the record documented that he was discharged in excellent health with no hearing loss or disability 22 years before the hearing claim was filed. He indicated that on September 17, 2012 he was diagnosed with severe hearing loss and tinnitus and he underwent medical tests and procedures at a military hospital because he has military health coverage. Appellant noted that the hearing test that discovered his hearing loss was performed at a naval hospital. He noted that he was counseled about the severity of his hearing loss and tinnitus and was fitted for hearing aids. Appellant thought Dr. Loper mistakenly concluded that since the hearing test was performed at a military hospital and diagnosed by a military hospital that it was a military disability and compensation. He indicated that the dates in his employment statement provided that he left military service 22 years ago. Appellant indicated that Dr. Loper did not question him or perform more than a cursory examination.

In an appeal request form dated April 30, 2013, appellant requested reconsideration. He submitted a credit card payment for two hearing aids. Appellant also submitted a release from active duty and transfer to inactive duty on the retired list of the U.S. Navy dated July 25, 1990. He submitted a certificate of release or discharge from active duty which noted that he was honorably discharged and transferred to the fleet reserve on August 31, 1990.

In a May 13, 2013 decision, OWCP denied appellant's request for reconsideration on the grounds that the evidence submitted was insufficient to warrant a merit review.

LEGAL PRECEDENT

Under section 8128(a) of FECA,² OWCP has the discretion to reopen a case for review on the merits. It must exercise this discretion in accordance with the guidelines set forth in section 10.606(b)(2) of the implementing federal regulations, which provides that a claimant may obtain review of the merits of his or her written application for reconsideration, including all supporting documents, sets forth arguments and contain evidence that:

“(1) Shows that OWCP erroneously applied or interpreted a specific point of law;
or

“(2) Advances a relevant legal argument not previously considered by OWCP; or

“(3) Constitutes relevant and pertinent new evidence not previously considered by OWCP.”³

Section 10.608(b) provides that any application for review of the merits of the claim which does not meet at least one of the requirements listed in section 10.606(b) will be denied by OWCP without review of the merits of the claim.⁴

ANALYSIS

OWCP’s most recent merit decision dated February 26, 2013 denied appellant’s claim for occupational hearing loss. The Board does not have jurisdiction over the February 26, 2013 OWCP decision. The issue 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 asserted that Dr. Loper did not properly consider that he was in good health when he left military service 22 years before he filed his claim for hearing loss. On September 17, 2012 appellant was diagnosed with severe hearing loss and tinnitus and he underwent medical tests and procedures at a military hospital because he had military health coverage. He was counseled about the severity of his hearing loss and tinnitus and was fitted for hearing aids. Appellant contended that Dr. Loper mistakenly concluded that his hearing loss was a military disability. He stated that Dr. Loper did not question him or perform more than a cursory examination. The Board notes that the underlying issue in this case is whether appellant sustained a work-related hearing loss. That is a medical issue which must be addressed by

² *Id.* at § 8128(a).

³ 20 C.F.R. § 10.606(b)(2).

⁴ *Id.* at § 10.608(b).

relevant medical evidence.⁵ Appellant did not submit any new and relevant medical evidence in support of his claim.

With respect to the third requirement, submitting relevant and pertinent new evidence not previously considered by OWCP, appellant submitted a credit card payment for two hearing aids. He also submitted a release from active duty and transfer to inactive duty dated July 25, 1990, and a certificate of release or discharge from active duty which noted that he was honorably discharged and transferred to the fleet reserve on August 31, 1990. However, this evidence is not relevant to the issue of whether appellant sustained a work-related hearing loss. As noted, this is an issue which must be addressed by relevant medical evidence from a physician.⁶ Appellant did not submit any new and relevant medical evidence in support of his claim. Therefore, this evidence is not relevant and is insufficient to warrant reopening the case for further merit review.

The Board accordingly finds that appellant did not meet any of the requirements of 20 C.F.R. § 10.606(b)(2). Appellant 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 evidence not previously considered. Pursuant to 20 C.F.R. § 10.608, OWCP properly denied merit review.

CONCLUSION

The Board finds that OWCP properly denied appellant's request for reconsideration.⁷

⁵ See *Bobbie F. Cowart*, 55 ECAB 746 (2004).

⁶ *Id.*

⁷ With his appeal, appellant submitted additional evidence; however, the Board may not consider new evidence for the first time on appeal; see 20 C.F.R. § 501.2(c).

ORDER

IT IS HEREBY ORDERED THAT the May 13, 2013 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 7, 2014
Washington, DC

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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

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