

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

R.C., Appellant)	
)	
and)	
)	Docket No. 14-71
)	Issued: March 27, 2014
TENNESSEE VALLEY AUTHORITY, FOSSIL OPERATIONS, Cumberland City, TN, Employer)	
)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
PATRICIA HOWARD FITZGERALD, Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On October 3, 2013 appellant filed a timely appeal from an April 11, 2013 nonmerit decision of the Office of Workers’ Compensation Programs (OWCP) denying her request for further merit review. As more than 180 days elapsed from the last merit decision of March 8, 2013 to the filing of this appeal, pursuant to the Federal Employees’ Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction over the merits of this claim.

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).

FACTUAL HISTORY

On September 12, 2012 appellant, then a 67-year-old retired fossil electrical technician, filed an occupational disease claim alleging that her hearing loss condition was caused or

¹ 5 U.S.C. § 8101 *et seq.*

aggravated by her employment. She became was aware of her condition on February 20, 2004 and that it was caused or aggravated by her employment on March 15, 2005. Appellant was last exposed to conditions alleged to have caused her disease or illness on May 19, 2011.² No evidence was submitted with the claim.

In letters dated September 24 and November 19, 2012, OWCP advised appellant of the deficiencies in her claim and requested additional factual and medical evidence. Appellant was accorded 30 days in which to provide the requested information. The additional evidence submitted included doctor reports diagnosing hearing loss.

OWCP referred appellant, along with a statement of accepted facts and the medical record, to Dr. Jeffrey Paffrath, a Board-certified otolaryngologist, for a second opinion examination. In a February 5, 2013 report, Dr. Paffrath reviewed the medical record, the statement of accepted facts and presented examination findings. He diagnosed asymmetric high frequency sensorineural hearing loss and bilateral sensorineural hearing loss. Dr. Paffrath opined that appellant has a component of hearing loss beyond presbycusis and more likely related to a medical condition rather than just noise exposure. He stated the degree of asymmetry indicated the need for a magnetic resonance imaging (MRI) scan of the brain and internal auditory canals with and without gadolinium to rule out acoustic neuroma. Dr. Paffrath opined that the presence of an acoustic neuroma was very unlikely but the amount of asymmetry was otherwise unexplained. While her work environment had the potential to produce hearing loss, he noted that appellant wore hearing protection and he was not able to distinguish noise-induced hearing loss in the hearing testing. Dr. Paffrath stated that the majority of her hearing loss and the pattern of her hearing loss were likely due to medical conditions and presbycusis which were not related to the work environment. He recommended a hearing aid evaluation and placement of bilateral hearing aids. In a March 5, 2013 addendum, Dr. Paffrath indicated that there was no evidence of acoustic neuroma on the MRI scan although gadolinium IV contrast was not administered. He opined that appellant's hearing test pattern of loss was not consistent with a noise-induced pattern and thus the majority of her hearing loss was not likely due to noise exposure from federal employment.

By decision dated March 8, 2013, OWCP denied the hearing loss claim on the basis that the medical evidence of record failed to support that appellant's hearing loss was caused by factors of her employment.

On March 27, 2013 OWCP received appellant's request for reconsideration. In a March 25, 2013 letter, appellant expressed her disagreement with Dr. Paffrath's examination and having to undergo an MRI scan. She expressed her desire to be sent to a different doctor for hearing loss testing.

By decision dated April 11, 2013, OWCP denied appellant's request for reconsideration without reviewing the merits of the case.

² Under claim number xxxxxx086, OWCP denied appellant's hearing loss claim in an August 12, 2004 decision because it was determined that her hearing loss was due to presbycusis.

LEGAL PRECEDENT

To require OWCP to reopen a case for merit review under section 8128(a) of FECA,³ OWCP's regulations provide that the evidence or argument submitted by 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 on the merits.⁶

ANALYSIS

Appellant did not file a timely appeal of OWCP's most recent merit decision of March 8, 2013. For that reason, the Board has no authority to review that decision or the merits of her hearing loss claim. The only decision the Board may review is OWCP's April 11, 2013 nonmerit decision denying appellant's March 25, 2013 reconsideration request.

OWCP denied appellant's request for further reconsideration on the merits of her claim on the grounds that she failed to submit any evidence or argument to warrant a merit review. The record reflects that she submitted no evidence or argument to OWCP subsequent to the March 8, 2013 merit decision on her claim. Appellant's statements contained in her March 25, 2013 letter are her opinion on the matter and do not advance any relevant legal argument not previously considered by OWCP. Specifically, she had not provided any new medical evidence to support that her hearing loss was caused by her exposure to excessive noise in her federal employment.

Although timely filed, appellant's March 25, 2013 application for reconsideration did not set forth any argument or contain evidence that either: (1) showed that OWCP erroneously applied or interpreted a specific point of law; (2) advanced a relevant legal argument not previously considered by OWCP; or (3) constituted relevant and pertinent new evidence not previously considered by OWCP.⁷ Because she failed to meet any of these standards, OWCP

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

⁴ 20 C.F.R. § 10.606(b)(2).

⁵ *Id.* at § 10.607(a).

⁶ *Id.* at § 10.608(b).

⁷ *Id.* at § 10.606.

properly denied the application for reconsideration without reopening the case for a review on the merits.⁸

On appeal, appellant argues the merits of her case. She additionally requests to be sent to another doctor for hearing loss testing. As noted, the Board does not have jurisdiction over the merits of the case. It also has no authority to refer appellant for further medical examination.

CONCLUSION

The Board finds that OWCP properly denied appellant's request for merit review under 5 U.S.C. § 8128(a).

ORDER

IT IS HEREBY ORDERED THAT the April 11, 2013 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 27, 2014
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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

⁸ *Id.* at § 10.608; *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).