

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

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C.V., Appellant )

and )

DEPARTMENT OF THE NAVY, NAVY )  
PUBLIC WORKS CENTER, Oakland, CA, )  
Employer )

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**Docket No. 14-1449  
Issued: October 14, 2014**

*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  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On June 13, 2014 appellant filed a timely appeal from the February 12, 2014 nonmerit decision of the Office of Workers' Compensation Programs (OWCP) denying his request for reconsideration. The Board lacks jurisdiction to review the merits of the case pursuant to the Federal Employees' Compensation Act<sup>1</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3 as the last merit decision of March 4, 2013 was issued more than 180 days from the filing of the appeal.

**ISSUE**

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

On appeal appellant contends that he is entitled to a greater schedule award due to his incurable tinnitus condition. He further contends that the employing establishment was negligent in administering and enforcing its preventive measures. Appellant also contends that he

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

sustained an emotional condition as a consequence of his tinnitus. He requests authorization for hearing aids.

### **FACTUAL HISTORY**

On April 17, 2011 appellant, then a 66-year-old equipment operator/shop material controller, filed an occupational disease claim alleging that he first became aware of constant ringing in both ears between 1975 and 1976. He alleged that he first realized that his condition was caused by his employment on November 20, 2010. Appellant retired from the employing establishment on March 31, 1997. In a March 23, 2011 statement, he contended that his hearing loss and tinnitus were caused by exposure to loud noise from equipment at work.

By letter dated May 19, 2011, the employing establishment stated that appellant's last exposure to the implicated employment factor was on March 31, 1997. Its practice was always to provide personal protective equipment to any employee to eliminate exposure to possible hazards in the workplace. The employing establishment stated that employees were provided training on the use of this equipment.

Medical records, including employing establishment audiograms from February 10, 1978 to March 4, 1997, showed hearing loss in both of appellant's ears.

In a September 27, 2011 decision, OWCP denied appellant's claim, finding that it was not timely filed under FECA. By letter dated January 24, 2012, he requested reconsideration.

By letter dated February 10, 2012, OWCP referred appellant, together with a statement of accepted facts and the medical record, to Dr. Barry C. Baron, a Board-certified otolaryngologist, for a second opinion regarding his hearing loss. In a March 15, 2012 medical report, Dr. Baron listed examination findings and diagnosed bilateral high frequency sensorineural hearing loss and mild-to-moderate tinnitus. He advised that a significant part of appellant's hearing loss was related to noise exposure at the employing establishment. A small portion was related to his military service. Dr. Baron stated that his hearing loss was permanent and not reversible. He stated that appellant reached maximum medical improvement in 1997. Dr. Baron recommended that he avoid any loud noise and wear ear protection if he were exposed to such noise. An audiogram performed on his behalf on March 15, 2012 reflected testing at the frequency levels of 500, 1,000, 2,000 and 3,000 cycles per second (cps) and revealed the following decibel losses: 15, 15, 40 and 65 for the right ear and 10, 15, 55 and 65 for the left ear, respectively. Based on these results and in accordance with the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*), Dr. Baron calculated that appellant had a 13.12 percent monaural hearing impairment for the right ear and a 16.87 percent monaural hearing impairment for the left ear. He calculated a binaural hearing impairment of 13.75 percent. Dr. Baron recommended hearing aids.

In an April 24, 2012 decision, OWCP found that appellant's occupational disease claim was timely filed and vacated the September 27, 2011 decision. The record established that the employing establishment had actual knowledge of appellant's hearing loss on February 22, 1993. The record also established that appellant was a part of the employing establishment's hearing

conservation program. OWCP accepted that he sustained sensorineural bilateral hearing loss and tinnitus based on Dr. Baron's opinion.

On October 10, 2012 appellant filed a claim for a schedule award.

On December 12, 2012 an OWCP medical adviser reviewed the medical record and Dr. Baron's March 15, 2012 findings. Utilizing the sixth edition of the A.M.A., *Guides*, he calculated that appellant had 13.1 percent monaural hearing loss in the right ear and 16.9 percent monaural hearing loss in the left ear, resulting in 13.8 percent binaural hearing loss. The medical adviser added 2 percent impairment for mild-to-moderate tinnitus as described by Dr. Baron, resulting in a 15.8 percent binaural hearing impairment. He opined that appellant reached maximum medical improvement on March 15, 2012, the date of Dr. Baron's examination. The medical adviser recommended hearing aids for both ears.

In a March 4, 2013 decision, OWCP granted appellant a schedule award for 16 percent binaural hearing loss. It found that OWCP medical adviser properly applied the A.M.A., *Guides* to Dr. Baron's findings. The award ran for 32 weeks from March 15 to October 24, 2012.

By letter dated November 5, 2013, appellant requested reconsideration. He contended that the compensation period for his schedule award incorrectly reflected that he was only employed for 10 months and that he filed claims for his condition during this period. Appellant stated that he was struggling to cope with tinnitus and hearing loss 10 years prior to his retirement, which prompted him to retire early with a penalty. He also contended that the opinions of the two appointed audiologists in regards to tinnitus were marginal and subjective and there was no inquiry to determine the extent of his debilitation and depression. Appellant stated that, since his tinnitus was getting progressively worse, a mental health professional should provide a diagnosis and an opinion on the extent of severity and debilitation of his condition. He asserted that the employing establishment's physician ignored the progression and deterioration of his tinnitus and hearing loss for 25 years and the employing establishment failed to take hearing loss prevention measures. Appellant stated that documents regarding these matters were considered irrelevant during the review process which made it possible to dismiss the accountability and responsibility of the negligent administration and supervision at the workplace. Lastly, he disagreed with the amount of his schedule award. Appellant alleged that a coworker with the same hearing loss received significantly higher compensation and programmable hearing aids to lessen the severity of the tinnitus condition.

In a February 12, 2014 decision, OWCP denied appellant's request for reconsideration without a merit review.

### **LEGAL PRECEDENT**

To require OWCP to reopen a case for merit review under section 8128 of FECA,<sup>2</sup> 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

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<sup>2</sup> 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 his own motion or on application. 5 U.S.C. § 8128(a).

considered by OWCP; or (3) constitute relevant and pertinent new evidence not previously considered by OWCP.<sup>3</sup> 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.<sup>4</sup> Section 10.608(b) of the implementing regulations state that any application for review that does not meet at least one of the requirements listed in 20 C.F.R. § 10.606(b)(3) will be denied by OWCP without review of the merits of the claim.<sup>5</sup>

### ANALYSIS

On November 5, 2013 appellant disagreed with OWCP's March 4, 2013 decision, granting him a schedule award for a 16 percent binaural hearing impairment. He requested reconsideration.

The Board finds that appellant did not show that OWCP erroneously applied or interpreted a specific point of law. Moreover, he did not advance a relevant legal argument not previously considered. In a November 5, 2013 request for reconsideration, appellant contended that the compensation period for his schedule award incorrectly reflected that he was only employed for 10 months and that he filed claims for his condition during this period. He stated that he was struggling to cope with tinnitus and hearing loss 10 years prior to his retirement, which prompted him to retire early with a penalty. However, OWCP properly began the award on the date of maximum medical improvement as found by OWCP's medical adviser. The period covered by a schedule award commences on the date that the employee reaches maximum medical improvement from the residuals of the employment injury.<sup>6</sup> In this case, the period of award ran for 32 weeks, the amount of time statutorily mandated under FECA for a 16 percent binaural hearing impairment.<sup>7</sup>

Appellant contended that the opinions of the two appointed audiologists in regards to tinnitus were marginal and subjective and there was no inquiry to determine the extent of his debilitation and depression. His simple assertion disagreeing with the audiologists' test results does not warrant merit review of the claim. The Board notes that the underlying issue in this case is whether appellant has greater than 16 percent binaural hearing impairment for which he received a schedule award. That is a medical issue which must be addressed with relevant medical evidence.<sup>8</sup> Appellant failed to submit pertinent new and relevant medical evidence in support of his claim.<sup>9</sup> Thus, the Board finds that appellant was not entitled to a merit review of his claim.

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<sup>3</sup> 20 C.F.R. § 10.606(b)(3).

<sup>4</sup> *Id.* at § 10.607(a).

<sup>5</sup> *Id.* at § 10.608(b); *see also Norman W. Hanson*, 45 ECAB 430 (1994).

<sup>6</sup> *Albert Valverde*, 36 ECAB 233, 237 (1984).

<sup>7</sup> 5 U.S.C. § 8107(c)(13)(B).

<sup>8</sup> *See Bobbie F. Cowart*, 55 ECAB 746 (2004).

<sup>9</sup> *M.H.*, Docket No. 13-2051 (issued February 21, 2014).

Appellant asserted that he developed depression as a consequence of his employment-related tinnitus. The Board notes, however, that the issue of whether appellant sustained a consequential emotional condition is medical in nature and can only be established by probative medical evidence.<sup>10</sup> This issue is not presently before the Board as there is no final adverse OWCP decision.<sup>11</sup> Thus, he was not entitled to a review of the merits of his claim.

Appellant further asserted that the employing establishment's physician ignored the progression and deterioration of his tinnitus and hearing loss for 25 years and the employing establishment failed to take hearing loss prevention measures. He stated that documents regarding these matters were considered irrelevant during the review process which made it possible to dismiss the accountability and responsibility of the negligent administration and supervision at the workplace. Appellant's contentions, which focus on alleged errors by the employing establishment, are not relevant to the underlying medical issue in this case, namely, whether he has greater impairment than 16 percent binaural hearing impairment granted by OWCP. As stated, that is a medical issue which must be addressed by relevant medical evidence.<sup>12</sup> The Board finds, therefore, that appellant's contentions are insufficient to reopen his claim for a merit review.

Appellant also contended that a coworker with the same hearing loss received significantly higher compensation and programmable hearing aids to lessen the severity of this condition. However, appellant has not submitted any pertinent new and relevant medical evidence to support greater impairment. In addition, he did not submit any evidence indicating that the claim was not properly developed. The Board finds that appellant's contention is insufficient to reopen his claim for a merit review.<sup>13</sup>

The Board accordingly finds that appellant did not meet any of the requirements of 20 C.F.R. § 10.606(b)(3). 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 constitute relevant and pertinent new evidence not previously considered by OWCP. Pursuant to 20 C.F.R. § 10.608, OWCP properly denied merit review.

Further on appeal, appellant requested authorization for hearing aids. The Board notes that OWCP has not rendered a decision related to this request. The only issue before the Board is whether OWCP properly denied appellant's request for reconsideration of the merits pursuant to 5 U.S.C. § 8128(a). The Board's review of the case is limited to the evidence of record which was before OWCP at the time of its final decision.<sup>14</sup> Similarly, the Board cannot review the

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<sup>10</sup> *Supra* note 8.

<sup>11</sup> *See* 20 C.F.R. §§ 501.2(c) and 501.3(a).

<sup>12</sup> *Supra* note 8.

<sup>13</sup> The Board notes that OWCP referenced appellant's need for hearing aids but noted, in its February 24, 2012 decision, that a request for authorization of such hearing aids should be submitted to OWCP.

<sup>14</sup> *See* 20 C.F.R. § 501.2(c)(1); *J.T.*, 59 ECAB 293 (2008); *G.G.*, 58 ECAB 389 (2007); *Donald R. Gervasi*, 57 ECAB 281 (2005); *Rosemary A. Kayes*, 54 ECAB 373 (2003).

evidence submitted by appellant on appeal as the Board has no jurisdiction to review this evidence for the first time on appeal.<sup>15</sup>

**CONCLUSION**

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

**ORDER**

**IT IS HEREBY ORDERED THAT** the February 12, 2014 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 14, 2014  
Washington, DC

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge  
Employees' Compensation Appeals Board

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

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<sup>15</sup> *Id.*