



## **FACTUAL HISTORY**

This case has previously been before the Board on appeal. On June 15, 2010 appellant, then a 63-year-old electronic worker, filed an occupational disease claim (Form CA-2) alleging bilateral hearing loss as a result of noise exposure from her federal employment.

By decision dated September 5, 2012,<sup>2</sup> the Board found that OWCP had failed to properly develop the claim as it had not secured adequate workplace evidence regarding appellant's duration and levels of exposure to hazardous noise from the employing establishment. The Board further found that Dr. Gregg S. Govett, a Board-certified otolaryngologist serving as the second opinion physician, was not provided with an accurate and complete statement of accepted facts (SOAF) as the factual evidence was incomplete as to specific levels and duration of noise exposure during appellant's federal employment. The case was remanded. Following development of the case record on remand, by decision dated January 9, 2014, OWCP denied appellant's hearing loss claim as the medical evidence failed to support that her hearing loss was causally related to workplace noise exposure.

On July 2, 2014 appellant again filed an appeal before the Board. By decision dated December 10, 2014,<sup>3</sup> the Board set aside the January 9, 2014 decision finding that OWCP had again failed to properly develop the claim. The Board noted that Dr. Govett's reports did not adequately address the issue of causation and remanded the case for appellant to be referred to an appropriate second opinion physician. The Board also remanded for OWCP to request that the employing establishment submit additional information pertaining to appellant's noise level exposure. The facts and circumstances from the prior decisions and orders are incorporated herein by reference.

On remand, OWCP referred appellant to Dr. Richard B. Dawson, a Board-certified otolaryngologist, for a second opinion evaluation on April 8, 2015. It prepared a SOAF addressing appellant's federal work duties and the types of employment-related noise exposure. An audiogram was completed on April 8, 2015 which revealed the following decibel (dB) losses at 500, 1,000, 2,000, and 3,000 hertz (Hz): 15, 15, 30, and 20 for the right ear and 15, 15, 20, and 25 for the left ear. Dr. Dawson diagnosed bilateral high-tone sensorineural hearing loss which he opined was due to noise exposure encountered in appellant's federal civilian employment and in excess of what would normally be predicated on the basis of presbycusis. He reported that in accordance with the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*<sup>4</sup> (A.M.A., *Guides*), calculation of monaural and binaural impairment revealed no reportable hearing loss. Hearing aids were not authorized.

On June 10, 2015 OWCP referred the case file along with Dr. Dawson's report, to Dr. Michael M. Katz, a Board-certified orthopedic surgeon and an OWCP district medical

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<sup>2</sup> Docket No.12-733 (issued September 5, 2012).

<sup>3</sup> Docket No. 14-1570 (issued December 10, 2014).

<sup>4</sup> A.M.A., *Guides* (6<sup>th</sup> ed. 2009).

adviser to determine the extent of appellant's permanent partial impairment and date of maximum medical improvement (MMI).

In a June 11, 2015 report, Dr. Katz reviewed Dr. Dawson's report and agreed that appellant's bilateral sensorineural hearing loss was due to occupational noise exposure. He applied the April 8, 2015 audiometric data to OWCP's standard for evaluating hearing loss and determined that appellant had zero percent monaural hearing loss in the left ear and zero percent monaural hearing loss in the right ear. Dr. Katz concluded that, in accordance with the sixth edition of the A.M.A., *Guides*,<sup>5</sup> appellant had no ratable hearing loss. He determined that MMI had been reached on April 8, 2015 and that hearing aids should not be authorized.

By decision dated June 15, 2015, OWCP accepted appellant's claim for bilateral sensorineural hearing loss. It further found that hearing aids were not authorized.<sup>6</sup>

On June 22, 2011 appellant filed a claim for a schedule award (Form CA-7).

By decision dated June 29, 2015, OWCP denied appellant's schedule award claim finding that her hearing loss was not sufficiently severe to be considered ratable.

By letter dated October 14, 2015, appellant requested reconsideration of the June 29, 2015 OWCP decision. She argued that she was exposed to severe, ongoing noise for 41 years as a result of her federal employment duties. Appellant noted that she was submitting two audiometry tests in support of her conditions. No evidence was submitted with the reconsideration request and no other evidence was received.

By decision dated January 25, 2016, OWCP denied appellant's request for reconsideration finding that she neither raised substantive legal questions nor included pertinent and relevant new evidence.

### **LEGAL PRECEDENT**

To require OWCP to reopen a case for merit review under FECA section 8128(a), OWCP 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.<sup>7</sup> Section 10.608(b) of OWCP regulations provide that when an application for reconsideration does not meet at least one of the three requirements enumerated under section 10.606(b)(3), OWCP will deny the application for reconsideration without reopening the case for a review on the merits.<sup>8</sup>

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<sup>5</sup> *Id.*

<sup>6</sup> In a separate June 15, 2015 decision, OWCP vacated the April 15 and September 14, 2011 decisions finding that the claim was accepted for bilateral sensorineural hearing loss.

<sup>7</sup> *D.K.*, 59 ECAB 141 (2007).

<sup>8</sup> *K.H.*, 59 ECAB 495 (2008).

## ANALYSIS

The Board finds that OWCP properly refused to reopen appellant's case for further consideration of the merits of her claim, pursuant to 5 U.S.C. § 8128(a).

The issue presented on appeal is whether appellant met any of the requirements of 20 C.F.R. § 10.606(b)(3), requiring OWCP to reopen the case for review of the merits of the claim. In her October 14, 2015 application for reconsideration, appellant did not establish that OWCP erroneously applied or interpreted a specific point of law. She did not advance a new and relevant legal argument. Appellant argued that her hearing loss was caused by work-related noise exposure. However, the issue is not whether appellant developed work-related hearing loss as OWCP had already accepted the claim for bilateral sensorineural hearing loss. Rather, the issue is whether appellant has established a ratable loss of hearing such that she is entitled to a schedule award. That is a medical issue which must be addressed by relevant medical evidence.<sup>9</sup>

Appellant alleged that she submitted two audiometry tests in support of her claim. However, her reconsideration request was not accompanied by additional medical evidence and no other evidence was received. A claimant may obtain a merit review of an OWCP decision by submitting pertinent new and relevant evidence. In this case, appellant failed to submit any relevant and pertinent new evidence addressing permanent impairment to a scheduled member such that she would be entitled to a schedule award for hearing loss.<sup>10</sup>

On appeal appellant argues that she developed work-related hearing loss which has drastically changed her lifestyle. As noted, the denial of her schedule award claim does not mean that she has no hearing loss. Rather, it means that the extent or degree of loss is not sufficient to show a practical impairment in hearing according to the A.M.A., *Guides*. The A.M.A., *Guides* set a threshold for impairment and appellant's occupational hearing loss did not cross that threshold.<sup>11</sup>

Appellant may request a schedule award or increased schedule award based on evidence of a new exposure or medical evidence showing progression of an employment-related condition resulting in permanent impairment or increased impairment.

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. Pursuant to 20 C.F.R. § 10.608, OWCP properly denied merit review.

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<sup>9</sup> See *Bobbie F. Cowart*, 55 ECAB 746 (2004).

<sup>10</sup> See *E.M.*, Docket No. 16-0471 (issued May 16, 2016).

<sup>11</sup> See *R.R.*, Docket No. 12-1840 (issued February 14, 2013). See also A.M.A., *Guides* 250.

**CONCLUSION**

The Board finds that OWCP properly refused to reopen appellant's case for further review of the merits pursuant to 5 U.S.C. § 8128(a).

**ORDER**

**IT IS HEREBY ORDERED THAT** the January 25, 2016 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 24, 2016  
Washington, DC

Christopher J. Godfrey, Chief Judge  
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge  
Employees' Compensation Appeals Board