United States Department of Labor
Employees' Compensation Appeals Board

R.J., Appellant	)	
and	)	**Docket No. 17-0674**
	)	**Issued: December 14, 2017**
DEPARTMENT OF LABOR, MINE, SAFETY & HEALTH ADMINISTRATION, Belcher, KY, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
PATRICIA H. FITZGERALD, Deputy Chief Judge
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On January 13, 2017 appellant filed a timely appeal from a September 9, 2016 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). Because more than 180 days elapsed from the most recent merit decision dated December 1, 2015 to the filing of this appeal, pursuant to the Federal Employees' Compensation Act[1] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3 the Board lacks jurisdiction to review the merits of this case.

ISSUE

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

[1] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On June 2, 2015 appellant, then a 71-year-old coal mine inspector, filed an occupational disease claim (Form CA-2) alleging permanent hearing loss due to new noise exposure at work. He first became aware of his hearing loss and its relationship to his federal employment on May 27, 2014. Appellant did not stop work and continued to be exposed to noise.[2]

By letter dated June 9, 2015, OWCP advised appellant of the type of evidence needed to establish his claim. In a letter of the same date, it requested that the employing establishment address the sources of his noise exposure, decibel and frequency level, period of exposure, and hearing protection provided.

In an undated occupational disease checklist appellant listed his employment history and noise exposure since 1972. Since November 2001 he worked for the employing establishment as a coal mine inspector and was exposed to noise from all phases of mining underground and surface. Earplugs were provided. Appellant indicated that he did not have any hobbies that exposed him to loud noise. He indicated that his job duties still exposed him to loud noise and that employing establishment hearing examinations supported hearing loss. On December 17, 2008 appellant filed a claim for hearing loss as of April 2, 2009 assigned OWCP File No. xxxxxx048 and first noticed his hearing loss on July 17, 2012 when the employing establishment performed an examination and stated he had severe bilateral hearing loss.

In an undated response to OWCP's federal development questionnaire appellant indicated that, in his work with the employing establishment as a coal mine health and safety inspector, he was exposed to noise while inspecting continuous mining, mineral and roof bolting machines, ventilation fans, shuttle cars, belt conveyers, head drives, and during the inspection of coal trucks and front-end loaders. He noted being exposed to noise four to six hours daily while inspecting coal mines, coal trucks, and coal preparation plants. Appellant was provided earplugs and used them daily while performing his job. He indicated that he was exposed to hazardous noise at work on a daily basis and he had no hobbies that would expose him to loud noise.

On June 15, 2015 appellant's supervisor described appellant's work environment and advised that appellant's statements were correct to the best of his knowledge. Appellant and the employing establishment submitted medical and audiological records from October 15, 2002 to June 2, 2014.

On August 11, 2015 OWCP referred appellant, together with the statement of accepted facts, to Dr. Charles Abraham, a Board-certified otolaryngologist, for an otologic examination and an audiological evaluation. In a September 2, 2015 report, Dr. Abraham noted examining appellant on that date and referenced appellant's workplace noise exposure. Appellant reported

[2] The record indicates that appellant has prior claims for occupational hearing loss. On December 17, 2008 he filed a claim for a schedule award (Form CA-7) for hearing loss that he became aware of on October 15, 1992. OWCP accepted his claim for binaural hearing loss and, on May 15, 2009, granted him a schedule award for 25 percent binaural hearing loss in File No. xxxxxx048. The award ran from April 2, 2009 to March 17, 2010. On November 14, 2012 appellant filed a claim for increased hearing loss. On April 15, 2013 OWCP granted him an additional schedule award for 20 percent binaural hearing loss in File No. xxxxxx025. The award ran from February 20 to November 26, 2013. These other claims are not before the Board on the present appeal.

having difficulty understanding conversational speech, trouble hearing on the telephone, difficulty hearing the television at a reasonable level, and difficulty hearing in group situations. Dr. Abraham noted that his audiogram showed significant hearing loss consistent with prolonged exposure to loud noises. He diagnosed bilateral sensorineural deafness. Dr. Abraham recommended that appellant have a hearing aid evaluation, annual audiograms, and wear hearing protection when exposed to loud noise. Audiometric testing was performed for Dr. Abraham on September 2, 2015. Testing at the frequency levels of 500, 1,000, 2,000, and 3,000 cycles per second revealed the following: right ear 35, 35, 50, and 60 decibels; and left ear 30, 25, 65, and 60 decibels.

On September 23, 2015 an OWCP medical adviser reviewed Dr. Abraham's report and the audiometric test of September 2, 2015. He concluded that, in accordance with the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*,[3] (A.M.A., *Guides*), appellant had no additional binaural hearing loss. The medical adviser indicated that appellant was previously granted schedule awards that totaled 45 percent permanent binaural hearing loss. On May 15, 2009 he was granted a schedule award for 25 percent binaural hearing loss, and on April 15, 2013, he was granted a schedule award for 20 percent binaural hearing loss. The medical adviser noted that the current examination documented 30 percent binaural hearing loss. Consequently, he concluded that appellant had no additional permanent impairment.

On December 1, 2015 OWCP accepted appellant's claim for bilateral sensorineural hearing loss due to noise exposure. It also informed him how to proceed to obtain hearing aids.

In a decision dated December 1, 2015, OWCP denied appellant's claim for an additional schedule award because the medical evidence did not establish that he had additional permanent hearing impairment due to the accepted work injury.

On July 14, 2016 appellant requested reconsideration. He also requested that his hearing loss be reevaluated and his recent audiograms be reviewed as there was indication of a potential shift in both ears, based upon audiograms dated May 5 and June 7, 2016.

Appellant submitted an audiogram performed by Lisa M. Koch, an audiologist, dated February 5, 2016, which noted bilateral sensorineural hearing loss with a recommendation for hearing aids. He also submitted audiogram results dated May 5 and June 7, 2016 performed by Paula Belcher, an audiologist, which revealed severe hearing loss in the left ear in high frequencies. With regard to the right ear, the audiologist indicated that the audiogram indicated a lack of response to the key frequencies for calculating threshold shift and the calculation could not be performed.

On April 13, 2016 OWCP authorized bilateral hearing aids.

[3] A.M.A., *Guides* (6th ed. 2009).

In an e-mail dated May 17, 2016, the employing establishment noted that, based on appellant's May 5, 2016 hearing test, he had a potential shift in both ears and should undergo a retest.

In a letter dated June 28, 2016, the employing establishment noted that the results of the last audiometric test performed on June 7, 2016 revealed both ears sustained a standard threshold shift in hearing ability. It advised that appellant would be scheduled for retraining to assist in protecting his hearing.

In a September 9, 2016 decision, OWCP denied appellant's request for reconsideration as the evidence submitted was insufficient to warrant a merit review.

LEGAL PRECEDENT

Under section 8128(a) of FECA,[4] 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)(3) 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 which:

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

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

"(3) Constitutes relevant and pertinent new evidence not previously considered by OWCP."[5]

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.[6]

ANALYSIS

OWCP's most recent merit decision denied appellant's claim for an additional schedule award for hearing loss because the evidence of record was insufficient to establish that he sustained additional permanent impairment due to the accepted work injury. Thereafter, it denied his reconsideration request, without conducting a merit review.

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 his request for reconsideration, he did not show that OWCP erroneously applied or interpreted a specific point of law. Appellant submitted a statement dated July 9, 2016, and

[4] 5 U.S.C. § 8128(a).

[5] 20 C.F.R. § 10.606(b)(3).

[6] *Id*. at § 10.608(b).

requested that his hearing loss be reevaluated and his recent audiograms dated May 5 and June 7, 2016 be reviewed as there was indication of a potential shift in both ears. These assertions do not show a legal error by OWCP or a new and relevant legal argument. The underlying issue in this case is whether appellant submitted sufficient evidence to establish that he sustained additional permanent impairment to a scheduled member due to his federal employment. That is a medical issue which must be addressed by relevant new medical evidence.[7] However, the Board finds that appellant did not submit any pertinent new and relevant medical evidence in support of his claim.

Appellant submitted an audiogram performed by Lisa M. Koch, an audiologist, dated February 5, 2016 which noted bilateral sensorineural hearing loss with a recommendation for hearing aids. Also submitted were audiograms dated May 5 and June 7, 2016 performed by Paula Belcher, an audiologist, which revealed severe hearing loss in the left ear in high frequencies. However, although the February 5, May 5, and June 7, 2016 audiograms were new, they did not constitute relevant and pertinent new medical evidence as they were not signed by a physician.[8] The Board has held the audiograms that have not been certified as accurate by a physician of record are not a proper basis for calculating a schedule award.[9] Therefore, these reports are not relevant medical evidence and are insufficient to require OWCP to reopen the claim for a merit review.[10]

On appeal, appellant asserts that he was discriminated against and questioned the amount of time allowed to pursue appeal rights. As explained, the Board does not have jurisdiction over the merits of the claim. There is also no indication in the record that appellant was not properly advised of his appeal rights.

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.

CONCLUSION

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

[7] *See Bobbie F. Cowart*, 55 ECAB 746 (2004).

[8] *See Thomas Lee Cox*, 54 ECAB 509 (2003) (an audiologist is not defined as a "physician" under section 8101(2) and an opinion of an audiologist cannot be considered a medical opinion by a qualified physician).

[9] *See Joshua A. Holmes*, 42 ECAB 231 (1990).

[10] *See S.M.*, Docket No. 12-0235 (issued May 15, 2012) (where the underlying issue was medical in nature, reports from an audiologist did not require OWCP to review the merits of appellant's case as such reports did not constitute medical evidence).

ORDER

IT IS HEREBY ORDERED THAT the September 9, 2016 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: December 14, 2017
Washington, DC

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

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

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