United States Department of Labor
Employees' Compensation Appeals Board

M.P., Appellant	)	
and	)	**Docket No. 16-1758**
	)	**Issued: February 1, 2017**
DEPARTMENT OF THE NAVY, PEARL HARBOR NAVAL SHIPYARD, HI, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
COLLEEN DUFFY KIKO, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On September 2, 2016 appellant filed a timely appeal from an August 10, 2016 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days elapsed from the last merit decision, dated January 21, 2016, 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 under 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On February 22, 2015 appellant, then a 66-year-old welder, filed an occupational disease claim (Form CA-2) alleging that he developed hearing loss due to noise exposure during his

[1] 5 U.S.C. § 8101 *et seq.*

federal employment. He indicated that he first became aware of his condition and related it to his employment in April 1972.

In support of his claim, appellant submitted a document dated November 4, 2011 indicating that he was permanently removed from hazardous noise by the employing establishment.

OWCP referred appellant for a second opinion evaluation with Dr. Ronald P. Peroff, a Board-certified otolaryngologist, on May 15, 2015. In his July 8, 2015 report, Dr. Peroff found that appellant had noise-induced hearing loss. He reviewed appellant's July 6, 2015 audiogram and found that he had 23.1 percent binaural loss of hearing.

On July 23, 2015 OWCP accepted appellant's claim for bilateral hearing loss.

Appellant filed a claim for a schedule award (Form CA-7) on July 27, 2015. OWCP's medical adviser reviewed the record on August 2, 2015 and agreed with Dr. Peroff's assessment of appellant's hearing loss as noise related due to employment exposures. He found that appellant had reached maximum medical improvement (MMI) on July 6, 2015 and that he had 17.5 binaural loss of hearing.

In a decision dated January 21, 2016, OWCP granted appellant a schedule award for 18 percent binaural loss of hearing. It found that he had reached MMI on July 6, 2015 and that the period of his schedule award ran from July 6 through March 13, 2016.

Appellant requested reconsideration on April 5, 2016 alleging that his hearing loss began on November 4, 2011. He requested that OWCP review its decision to correct the date of injury to November 4, 2011 rather than July 6, 2015. In support of his request, appellant resubmitted the document from the employing establishment dated November 4, 2011 noting that he was to be permanently removed from hazardous noise based on his auditory fitness-for-duty evaluation dated October 14, 2011.

By decision dated August 10, 2016, OWCP declined to reopen appellant's claim for consideration of the merits. It noted that he had not submitted relevant new evidence or argument in support of his request for reconsideration such that it was necessary to reopen his claim for consideration of the merits.

LEGAL PRECEDENT

FECA provides in section 8128(a) that OWCP may review an award for or against payment of compensation at any time on its own motion or on application by the claimant.[2] Section 10.606(b)(3) of the Code of Federal Regulations provides that a claimant may obtain review of the merits of the claim by submitting in writing an application for reconsideration which sets forth arguments or evidence and shows that OWCP erroneously applied or interpreted a specific point of law, or advances a relevant legal argument not previously considered by

[2] *Id*.

OWCP, or includes relevant and pertinent new evidence not previously considered by OWCP.[3] Section 10.608 of OWCP's regulations provides that when a request for reconsideration is timely, but does meet at least one of these three requirements, OWCP will deny the application for review without reopening the case for a review on the merits.[4] Section 10.607(a) of OWCP's regulations provides that to be considered timely an application for reconsideration must be received by OWCP within one year of the date of OWCP's merit decision for which review is sought.[5]

ANALYSIS

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

Appellant filed a timely request for reconsideration of the January 21, 2016 schedule award decision on April 5, 2016. He did not assert that the percentage of the schedule award was inaccurate nor did he allege that he was entitled to an additional schedule award based on employment exposures resulting in a worsening of his accepted bilateral hearing loss. Instead, appellant attempted to submit argument and evidence that the date of MMI should have been November 4, 2011 rather than July 6, 2015. In support of this allegation, he resubmitted the November 4, 2011 document from the employing establishment finding that he should be removed from exposure to hazardous noise.

In the case of *James Kennedy, Jr.*,[6] the Board found that the period covered by a schedule award commences on the date that the employee reaches MMI from the residuals of his employment injury. MMI means that the physical condition of the injured member of the body has stabilized and will not improve further. The determination of MMI is not to be based on surmise or prediction of what may happen in the future. A schedule award is appropriate where the physical condition of an injured member has stabilized, despite the possibility of an eventual change in the degree of functional impairment in the member.[7] The question of when MMI has been reached is a factual one which depends on the medical findings in the record and the determination of such date is made in each case upon the basis of submitted medical evidence.[8]

In this case, OWCP determined that appellant had reached MMI on July 6, 2015, the date of the audiogram reviewed by Dr. Peroff and OWCP's medical adviser. Appellant's argument that the date of MMI in his case should be determined by the employing establishment's November 4, 2011 letter lacks any validity and is insufficient to form a basis for reopening his

[3] 20 C.F.R. § 10.606(b)(3).

[4] *Id.* at § 10.608.

[5] *Id.* at § 10.607(a). Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*¸ Chapter 2.1602.4 (October 2011).

[6] 40 ECAB 620, 626 (1989).

[7] *Id.*

[8] *Eugenia L. Smith*, 41 ECAB 409, 413 (1990).

claim for consideration of the merits as the document is not medical evidence, as is required to determine the date of MMI and the commencement of schedule award benefits. Furthermore, this document was in the record at the time of OWCP's July 23, 2015 and January 21, 2016 decisions, and is therefore not new evidence and is insufficient to require OWCP to reopen appellant's claim for consideration of the merits.[9]

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the August 10, 2016 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: February 1, 2017
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

[9] *See Byrne F. Butler,* 36 ECAB 393 (1984) (evidence which is repetitious or duplicative of that already in the case record does not constitute a basis for reopening a case). *See also M.H.*, Docket No. 16-1382 (issued December 5, 2016).