

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

E.G., Appellant)	
)	
and)	Docket No. 17-1710
)	Issued: January 4, 2018
DEPARTMENT OF HOMELAND SECURITY,)	
CUSTOMS & BORDER PROTECTION,)	
Edinburg, TX, 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
PATRICIA H. FITZGERALD, Deputy Chief Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On August 4, 2017 appellant filed a timely appeal from a June 19, 2017 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days elapsed from the last merit decision, dated June 29, 2016, 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 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).

FACTUAL HISTORY

On October 9, 2014 appellant, then a 56-year-old supervisory border patrol agent, filed an occupational disease claim (Form CA-2) alleging that he developed hearing loss as a result of

¹ 5 U.S.C. § 8101 *et seq.*

employment-related noise exposure from checkpoint duties, firearms training courses, quarterly qualifications, and all-terrain vehicle training courses.²

In support of his claim, appellant submitted audiograms dated August 14 and September 17, 2014.

OWCP referred appellant to Dr. Gregory S. Rowin, a Board-certified otolaryngologist, for a second opinion evaluation on February 3, 2015. An audiogram was completed on February 12, 2015 which revealed the following decibel (dB) losses at 500, 1,000, 2,000, and 3,000 hertz (Hz): 10, 10, 30, and 45 for the right ear and 10, 20, 25, and 40 for the left ear. Dr. Rowin noted that the audiogram showed bilateral severe high frequency sensorineural hearing loss. He opined that appellant's bilateral high frequency sensorineural hearing loss was due to his workplace noise exposure and in excess of what would be predicated for presbycusis as the exposure was of sufficient intensity and duration to have caused the hearing loss in question. Dr. Rowin recommended the use of binaural hearing aids. In accordance with the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*),³ he explained that his calculation of monaural and binaural impairment revealed no ratable hearing loss despite appellant's bilateral high frequency hearing loss. Dr. Rowin determined that, because tinnitus impacted his activities of daily living, he sustained five percent binaural hearing impairment.

On April 6, 2015 Dr. H Mobley, an OWCP District Medical Adviser (DMA), reviewed Dr. Rowin's otologic examination and agreed that appellant developed binaural work-related hearing loss. In accordance with the A.M.A., *Guides*, the DMA applied the February 12, 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, zero percent monaural hearing loss in the right ear, and zero percent binaural hearing loss.⁴ He noted that Dr. Rowin improperly granted five percent impairment for tinnitus which could only be added if appellant had a measureable hearing impairment. The DMA concluded that appellant had no ratable hearing loss and the date of maximum medical improvement (MMI) was noted as February 12, 2015. He further noted that hearing aids should be authorized.

By decision dated April 8, 2015, OWCP accepted appellant's claim for bilateral hearing loss. It also found that, based on the medical evidence of record, hearing aids should be authorized.

On May 15, 2015 appellant filed a claim for a schedule award (Form CA-7).

By decision dated June 12, 2015, OWCP denied appellant's schedule award claim, finding that his hearing loss was not sufficiently severe to be considered ratable.

² The record reflects that appellant began working for the Border Patrol in April 1988 and was exposed to noise from handguns, semi-automatic rifles, and shotguns during trainings and qualifications, and noise from bus, tractor, and train engines and horns up to eight hours per day, five days a week.

³ A.M.A., *Guides* (6th ed. 2009).

⁴ *Id.* at 252, Table 11-2.

On May 18, 2016 appellant requested reconsideration of OWCP's June 12, 2015 schedule award determination. In an accompanying May 9, 2016 letter, he noted submission of medical documentation from Dr. Andreas Kaden, a Board-certified otolaryngologist, in support of his schedule award claim.

In a May 5, 2016 medical report, Dr. Kaden provided a hearing loss evaluation and diagnosed work-related bilateral sensorineural hearing loss associated with occupational noise exposure. An audiogram was completed that same date which revealed dB losses at 500, 1,000, 2,000, and 3,000, Hz: 20, 15, 30, and 50 for the right ear and 15, 30, 25, and 45.

By decision dated June 29, 2016, OWCP denied modification of the June 12, 2015 decision, finding that appellant's hearing loss was not sufficiently severe to be considered ratable. It noted that the weight of the medical evidence rested with the DMA as Dr. Kaden failed to provide an opinion regarding the level of impairment in accordance with the sixth edition of the A.M.A., *Guides*.

On June 9, 2017 appellant requested reconsideration of OWCP's decision. In support of his claim, he resubmitted Dr. Kaden's May 5, 2016 audiogram and otologic report.

By decision dated June 19, 2017, OWCP denied appellant's request for reconsideration, finding that he neither raised substantive legal questions, nor included relevant new evidence sufficient to warrant merit review.

LEGAL PRECEDENT

Section 8128(a) of FECA vests OWCP with discretionary authority to determine whether to review an award for or against compensation. 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

To require OWCP to reopen a case for merit review pursuant to FECA, the claimant must provide evidence or an argument 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.⁶ If OWCP chooses to grant reconsideration, it reopens and reviews the case on its merits.⁷ If the request is timely, but fails to meet at least one of the requirements for reconsideration, OWCP will deny the request for reconsideration without reopening the case for review on the merits.⁸

⁵ 5 U.S.C. § 8128(a).

⁶ 20 C.F.R. § 10.606(b); *see also L.G.*, Docket No. 09-1517 (issued March 3, 2010); *C.N.*, Docket No. 08-1569 (issued December 9, 2008).

⁷ *Id.* at § 10.608(a); *see also M.S.*, 59 ECAB 231 (2007).

⁸ *Id.* at § 10.608(b); *E.R.*, Docket No. 09-1655 (issued March 18, 2010).

Even if the term reconsideration is used, when a claimant is not attempting to show error in the prior schedule award decision and submits medical evidence regarding an increased permanent impairment at a date subsequent to the prior schedule award decision, it should be considered a claim for an increased schedule award.⁹

ANALYSIS

The Board finds that this case is not in posture for decision and must be remanded to OWCP for application of the appropriate standard of review.¹⁰

By letter dated May 9, 2016, received on May 18, 2016, appellant provided new evidence relating to his medical diagnosis and schedule award claim. In particular, he submitted a May 5, 2016 audiogram and otologic evaluation from Dr. Kaden, his attending physician. OWCP's June 29, 2016 decision noted that Dr. Kaden's May 5, 2016 report was insufficient to modify the prior schedule award determination, yet OWCP failed to consider submission of the May 5, 2016 audiogram. The June 19, 2017 decision also failed to consider this new and relevant evidence and declined to reopen appellant's claim for consideration of the merits pursuant to 5 U.S.C. § 8128(a). The Board finds, however, that he was not seeking reconsideration of the previous schedule award determination. Rather, appellant submitted new evidence and argument showing increased hearing loss impairment for schedule award purposes.¹¹

The Board has held that a claimant may request a schedule award or increased schedule award based on evidence of new exposure or medical evidence showing the progression of an employment-related condition resulting in permanent impairment or increased impairment.¹² OWCP relied on the February 12, 2015 audiogram when determining that the weight of the medical evidence rested with the DMA's April 6, 2015 report. Appellant, however, submitted a more recent May 5, 2016 audiogram, over one year later, showing an increase in both right and left ear hearing loss levels.¹³ It is evident from the record that appellant was not seeking reconsideration of OWCP's decision, but was seeking a schedule award based on new medical evidence.¹⁴

As in *Paul R. Reedy*, the June 19, 2017 decision treated appellant's claim as a request for reconsideration. The Board has held, however, that even if the term reconsideration is used, when a claimant is not attempting to show error in the prior schedule award decision and submits additional medical evidence regarding permanent impairment based on increased impairment or

⁹ See *B.K.*, 59 ECAB 228 (2007).

¹⁰ See *K.K.*, Docket No. 16-1187 (issued February 7, 2017); *E.B.*, Docket No. 16-0746 (issued June 1, 2016).

¹¹ *G.E.*, Docket No. 17-0594 (issued September 14, 2017).

¹² *C.W.*, Docket No. 16-0749 (issued August 26, 2016).

¹³ *W.H.*, Docket No. 15-1167 (issued November 10, 2015).

¹⁴ *K.D.*, Docket No. 15-0524 (issued August 3, 2015).

new exposure, it should be considered a claim for an increased schedule award, not a request for reconsideration.¹⁵

Thus, the Board finds that OWCP failed to issue an appropriate decision regarding appellant's claim for an increased schedule award and improperly denied his request for reconsideration.¹⁶ On remand, OWCP should review and develop the medical evidence as is necessary and thereafter issue a *de novo* decision regarding his claim for a schedule award.¹⁷

CONCLUSION

The Board finds that OWCP improperly denied appellant's request for reconsideration by adjudicating his schedule award claim under the standard for timely reconsideration requests.¹⁸

¹⁵ See *J.K.*, Docket No. 14-1082 (issued November 24, 2014). OWCP's procedures provide that if a claimant is seeking an increased schedule award due to increased impairment and/or additional exposure, but not contesting the decision or prior award, this should not be treated as a reconsideration request and OWCP should develop the issue of entitlement to an additional award. The Federal (FECA) Procedure Manual, Part 2 -- *Claims, Reconsiderations*, Chapter 2.1602.3(b) (February 2016).

¹⁶ *E.T.*, Docket No. 13-1691 (issued September 25, 2013).

¹⁷ *D.S.*, Docket No. 17-0407 (issued May 24, 2017).

¹⁸ *Supra* note 9.

ORDER

IT IS HEREBY ORDERED THAT the June 19, 2017 decision of the Office of Workers' Compensation Programs is set aside, and the case is remanded for further action consistent with this decision of the Board.

Issued: January 4, 2018
Washington, DC

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

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

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