

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

V.G., Appellant)	
)	
and)	Docket No. 17-0494
)	Issued: July 6, 2018
DEPARTMENT OF THE NAVY,)	
Bremerton, WA, 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
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On January 3, 2017 appellant filed a timely appeal from an August 10, 2016 merit decision and a November 17, 2016 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.²

ISSUES

The issues are: (1) whether appellant established that her claimed increased hearing loss is causally related to her accepted occupational exposure; and (2) whether OWCP properly denied appellant's request for reconsideration of the merits of her claim under 5 U.S.C. § 8128(a).

¹ 5 U.S.C. § 8101 *et seq.*

² Appellant submitted additional evidence with her appeal to the Board. The Board's jurisdiction is limited to reviewing the evidence which was before OWCP at the time of its decision. Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. 20 C.F.R. § 501.2(c)(1); *P.W.*, Docket No. 12-1262 (issued December 5, 2012).

FACTUAL HISTORY

This case has previously been before the Board.³ The facts and circumstances as set forth in the Board's prior decision are incorporated herein by reference. The relevant facts follow.

On May 5, 2015 appellant, then a 56-year-old pipefitter leader, filed an occupational disease claim (Form CA-2) alleging that her binaural hearing loss was caused by factors of her federal employment. She indicated that she first became aware of her condition and its relationship to her federal employment on January 2, 2004.⁴ By decision dated July 28, 2015, OWCP denied appellant's claim for compensation as the medical evidence of record failed to demonstrate that the claimed hearing loss in the present claim was causally related to the accepted employment-related noise exposure. Appellant filed an appeal to the Board. The Board set aside and remanded the case for OWCP to further develop the medical evidence for a reasoned opinion regarding whether she had an increased hearing loss due to her accepted employment injury. The Board explained that the second opinion physician, Dr. Randolph, a Board-certified otolaryngologist, provided an opinion in appellant's prior claim, File No. xxxxxx125, that she had a work-related binaural hearing loss of 28 percent for which she received a schedule award on March 10, 2008. The Board found that his most recent report was dated July 20, 2015, and was in conflict with his prior report and was insufficient to resolve the issue of whether she was entitled to an increased schedule award.

Following the remand, by letter dated July 15, 2016, OWCP requested that Dr. Randolph provide a supplemental opinion clarifying his opinion from July 20, 2015 and his January 16, 2007 report. It noted that, in his January 16, 2007 report, under claim, File No. xxxxxx125, he opined that appellant sustained industrial noise-related hearing loss. However, in a July 20, 2015 report, in the present claim, Dr. Randolph opined that her progressive hearing loss since 1984 was in a manner not consistent with hearing loss due to work noise exposure. OWCP requested an opinion with regard to whether appellant sustained an increased hearing loss beginning October 10, 2006, due to work-related noise exposure. It noted that a new statement of accepted facts (SOAF) was being provided and advised that she retired on July 3, 2015.

In a July 19, 2016 supplemental report, Dr. Randolph explained that he had not been provided with the prior claim information from 2006 when he made his report. He related that, prior to 2006, there was audiometric evidence that appellant's hearing loss had likely been aggravated by noise exposure in those frequencies generally affected by noise. However, Dr. Randolph indicated that since 2006, more information had become available, which included that she had a significant increase in her hearing loss since the claim of 2006. He explained that a review of the materials revealed that appellant's hearing had not increased in severity in those frequencies affected by noise since the prior evaluation performed in 2006. Dr. Randolph explained that the ratable hearing loss did increase significantly due to an increase in hearing loss

³ Docket No. 15-1750 (issued June 15, 2016).

⁴ The record reflects that appellant had filed a prior claim for a schedule award (Form CA-7) under OWCP Master File No. xxxxxx125. In that file OWCP accepted occupational hearing loss and referred appellant to Dr. Gerald Randolph, a Board-certified otolaryngologist and a second opinion physician for an impairment evaluation. Appellant was awarded a schedule award for 28 percent binaural hearing loss on March 10, 2008.

in the lower frequencies, which were not generally affected by industrial noise exposure. He explained that the new SOAF did not reveal any significant industrial noise exposure prior to February 2000. Dr. Randolph opined that his extensive review revealed that “on a more likely than not basis, [appellant’s] hearing loss had not increased in severity due to industrial noise exposure since placement of her prior claim of 2006.”

By decision dated August 10, 2016, OWCP denied appellant’s schedule award claim for increased hearing loss, as the evidence did not establish increased hearing loss due to occupational exposure.

On a September 14, 2016 appellant requested reconsideration arguing that she did not know where Dr. Randolph got the impression that she was not exposed to noise during her last nine years of employment. She indicated that she was a pipefitter from 1988 to 2015 when she retired and explained that she was “never away from noise exposure.” Appellant noted that Dr. Randolph was inconsistent with regard to his opinions on hearing loss. She also advised that a comparison of her audiograms from 2006 and 2015 revealed a decrease in hearing in each of the frequencies. Appellant argued that the difference was the degree of hearing loss and her noise exposure partially or wholly caused her additional hearing loss. She enclosed a copy of the audiograms utilized by Dr. Randolph to formulate his July 20, 2015 opinion.

By decision dated November 17, 2016, OWCP denied appellant’s request for reconsideration finding that statements and the audiograms submitted were insufficient to warrant a merit review of the case.

LEGAL PRECEDENT -- ISSUE 1

A claimant seeking benefits under FECA⁵ has the burden of proof to establish the essential elements of his or her claim by the weight of the reliable, probative, and substantial evidence, including that any specific condition or disability for work for which he or she claims compensation is causally related to the employment injury.⁶

In an occupational disease claim, to establish that an injury was sustained in the performance of duty, a claimant must submit the following: (1) medical evidence establishing the presence or existence of the disease or condition for which compensation is claimed;⁷ (2) a factual statement identifying employment factors alleged to have caused or contributed to the presence or occurrence of the disease or condition;⁸ and (3) medical evidence establishing that the diagnosed condition is causally related to the employment factors identified by the claimant.⁹

⁵ *Supra* note 1.

⁶ *See Jacquelyn L. Oliver*, 48 ECAB 232 (1996).

⁷ *Michael R. Shaffer*, 55 ECAB 386 (2004).

⁸ *Marlon Vera*, 54 ECAB 834 (2003); *Roger Williams*, 52 ECAB 468 (2001).

⁹ *Beverly A. Spencer*, 55 ECAB 501 (2004).

A claim for an increased schedule award may be based on new employment exposure; however, additional occupational exposure is not a prerequisite. A claim for an increased schedule award based on additional exposure constitutes a new claim.¹⁰ Absent additional employment exposure, an increased schedule award may also be based on evidence demonstrating that the progression of an employment-related condition has resulted in a greater permanent impairment than previously calculated.¹¹

ANALYSIS -- ISSUE 1

The Board finds that appellant has not established that her claimed increased hearing loss is causally related to her accepted occupational exposure.

As noted in the prior appeal, it is undisputed that appellant was exposed to work-related noise, which included noise exposure from 1988 to the present as a pipefitter. The record also reflects that OWCP accepted her claim for noise exposure under claim File No. xxxxxx125. Under that claim, appellant received a schedule award on March 10, 2008 in the amount of 28 percent for binaural hearing loss based upon January 29, 2007 reports from Dr. Randolph, who opined that her hearing loss was work related. Dr. Randolph determined that she had 27.5 percent employment-related binaural hearing loss and recommended bilateral hearing aids.

Appellant subsequently filed the present occupational disease claim on May 5, 2015 alleging additional hearing loss due to noise exposure while working for the employing establishment. As she sustained a period of additional exposure, OWCP properly considered it as a new claim.¹²

Following remand by the Board, by letter dated July 15, 2016, OWCP provided Dr. Randolph with a new SOAF and requested that he clarify his opinion with regard to whether appellant sustained any additional increased employment-related hearing loss subsequent to October 10, 2006.

In a July 19, 2016 report, Dr. Randolph explained that he was not provided with the prior claim information from 2006 when he made his report. He related that, prior to 2006, there was evidence audiometrically that appellant's hearing loss was aggravated by noise exposure in those frequencies generally affected by noise. However, Dr. Randolph determined that since 2006, more information had become available. He indicated that appellant's hearing loss had not increased in severity in those frequencies affected by industrial noise exposure since the prior evaluation performed in 2006. Dr. Randolph explained that the ratable hearing loss did increase significantly due to an increase in hearing loss in the lower frequencies, which were not generally affected by industrial noise exposure. He explained that the SOAF did not reveal any significant industrial

¹⁰ See *James R. Hentz*, 56 ECAB 573 (2005); *Paul Fierstein*, 51 ECAB 381 (2000).

¹¹ *Linda T. Brown*, 51 ECAB 115 (1999).

¹² See *James R. Hentz* *supra* note 10; additionally, OWCP's procedures provide that a claim for an additional schedule award based on an additional period of exposure to the same work factors, such as often occurs in hearing loss cases, should be adjudicated as a new claim. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.9(c) (February 2013).

noise exposure prior to February 2000. Dr. Randolph opined that his extensive review revealed that “on a more likely than not basis, [appellant’s] hearing loss had not increased in severity due to industrial noise exposure since placement of her prior claim of 2006.”

The Board finds that Dr. Randolph’s opinion is based on a review of the evidence and supported by medical rationale explaining that appellant’s increased hearing loss was not due to industrial noise exposure since placement of her prior claim of 2006. Dr. Randolph explained that her hearing had not increased in severity in those frequencies affected by noise since the prior evaluation performed in 2006. He also related that, while appellant did have an increase in hearing loss, it was in the lower frequencies, which were not generally affected by industrial noise exposure. The Board finds that Dr. Randolph’s opinion was sufficient to establish that she has not shown an increase in her bilateral hearing loss due to additional workplace noise exposure.¹³ Appellant has not submitted any additional evidence in support of an increased hearing loss for purposes of an additional schedule award.

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

LEGAL PRECEDENT -- ISSUE 2

Under section 8128(a) of FECA,¹⁴ OWCP may reopen a case for review on the merits in accordance with the guidelines set forth in section 10.606(b)(2) of the implementing federal regulations, which provides that a claimant may obtain review of the merits if the written application for reconsideration, including all supporting documents, sets forth arguments and contains evidence that:

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

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

“(3) Constitutes relevant and pertinent new evidence not previously considered by [OWCP].”¹⁵

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.¹⁶

¹³ See *J.B.*, Docket No. 15-1474 (issued March 4, 2016).

¹⁴ 5 U.S.C. § 8128(a).

¹⁵ 20 C.F.R. § 10.606(b)(3).

¹⁶ *Id.* at § 10.608(b).

ANALYSIS -- ISSUE 2

The Board finds that OWCP properly declined to reopen appellant's claim for consideration of the merits.

Appellant has not shown that OWCP erroneously applied or interpreted a specific point of law or advanced a relevant legal argument not previously considered by OWCP.

In support of her request for reconsideration, appellant argued that she did not know where Dr. Randolph got the impression that she was not exposed to noise during her last nine years of employment. She explained that she was a pipefitter from 1988 to 2015 when she retired and that she was "never away from noise exposure." The Board notes that there is no indication in the record that she was not exposed to noise and this argument does not have any reasonable color of validity. Rather, Dr. Randolph explained that the additional hearing loss exhibited was at frequencies not expected to be lost due to industrial noise exposure.

Appellant also argued that Dr. Randolph was inconsistent with regard to his opinions on hearing loss. However, the Board finds that he explained his findings before and after her earlier award for hearing loss. Dr. Randolph explained why appellant's claim for increased hearing loss due to occupational factors was not valid in his medical opinion. Thus, this argument does not show that OWCP erroneously applied or interpreted a point of law nor did it advance a point of law or fact not previously considered by OWCP.

Appellant also argued that a comparison of her audiograms from 2006 and 2015 revealed a decrease in hearing in each of the frequencies. She argued that the difference was the degree of hearing loss and her noise partially or wholly caused her additional hearing loss. Appellant provided a copy of the referenced audiograms. However, lay persons are not competent to render a medical opinion.¹⁷ The relevant issue in this claim, whether appellant has established an increased hearing loss causally related to her occupational exposure, is a medical question and must be resolved by the submission of relevant medical evidence.¹⁸ The Board finds that her general statements and allegations on reconsideration have not otherwise shown that OWCP erroneously applied or interpreted a point of law nor did it advance a point of law or fact not previously considered by OWCP. Consequently, appellant is not entitled to a review of the merits of her claim based on the first and second above-noted requirements under section 10.606(b)(3).

With regard to medical evidence submitted with appellant's reconsideration request, the Board notes the audiograms she submitted were previously of record. Material which is cumulative or duplicative of that already in the record has no evidentiary value in establishing the claim and does not constitute a basis for reopening a case for further merit review.¹⁹

Appellant therefore 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

¹⁷ *Jaja K. Asaramo*, 55 ECAB 200, 206 (2004).

¹⁸ *Id.*

¹⁹ *Betty A. Butler*, 56 ECAB 545 (2000).

new and relevant evidence not previously considered. As she did not meet any of the necessary regulatory requirements, she is not entitled to further merit review.

CONCLUSION

The Board finds that appellant has not met her burden of proof to establish that her claimed increased hearing loss is causally related to her accepted occupational exposure. The Board also finds that OWCP properly refused to reopen her case for further review of the merits of her claim under 5 U.S.C. § 8128(a).

ORDER

IT IS HEREBY ORDERED THAT the November 17 and August 10, 2016 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: July 6, 2018
Washington, DC

Christopher J. Godfrey, 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