



## ISSUE

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

## FACTUAL HISTORY

On December 7, 2015 appellant, then a 51-year-old federal air marshal, filed an occupational disease claim (Form CA-2) alleging hearing loss due to his federal employment where he was exposed to loud noise. He noted that on October 27, 2015 Dr. Ken Kwok, a family practitioner, who provided annual physical examinations for the employing establishment, informed him that he had an additional 9 percent hearing loss in addition to his previously documented 30 percent hearing loss. Appellant claimed that he first became aware of his hearing loss on December 17, 2014 and first realized its relationship to his federal employment on October 27, 2015. He did not submit additional evidence.

By development letter dated December 23, 2015, OWCP advised appellant of the type of factual evidence needed to establish his claim. It provided a development questionnaire for his completion. In another letter dated December 23, 2015, OWCP requested that the employing establishment address the sources of appellant's noise exposure, including decibel and frequency level, period of exposure, and hearing protection provided. It also requested that the employing establishment provide treatment notes if appellant was treated at an employing establishment medical facility. OWCP afforded appellant and the employing establishment 30 days to submit their responses.

OWCP received appellant's employing establishment health records, which included audiograms performed as part of the employing establishment's hearing conservation program dated January 26, 2005 through August 6, 2015.

By letter dated January 21, 2016, the employing establishment controverted appellant's claim, specifically contending that his claimed hearing loss was not work related. It noted its policy that required employees to wear ear protection during live fire training. The employing establishment further noted the results of noise studies, which revealed that air marshals were never exposed to sound pressure levels exceeding 85 decibels/weighted over eight hours and that sound pressure measurements in the interiors of an aircraft cabin did not approach regulatory action levels under the Occupational Safety and Health Administration. It submitted appellant's yearly audiogram records dated January 26, 2005 through January 9, 2015.

By decision dated June 10, 2016, OWCP denied appellant's occupational disease claim as the evidence of record was insufficient to establish that he actually experienced the employment factors alleged to have caused his claimed employment-related hearing loss. It noted that it had received multiple audiogram reports from January 26, 2005 through January 9, 2015 in response to its December 23, 2015 development letter, but did not receive any description of his employment duties to which he attributed his hearing loss.

On May 10, 2017 appellant, through counsel, requested reconsideration. Counsel contended that OWCP did not reference the audiograms dated 2005 through 2015 in its June 10,

2016 decision. He further contended that these audiograms were not reviewed by a medical doctor. Counsel asserted that appellant had established a *prima facie* case of work-related hearing loss as the audiograms showed progressive hearing loss during the duration of appellant's federal employment. He maintained that, if OWCP had any question as to whether appellant suffered from work-related, noise-induced hearing loss, it should have referred him to a specialist for evaluation.

In support of his reconsideration request, counsel submitted duplicate copies of the employing establishment audiograms dated May 11, 2005 through August 6, 2015 and contended that OWCP did not reference the audiograms in its decision.

By decision dated December 19, 2017, OWCP denied further merit review of appellant's claim. It found that he failed to present any relevant evidence to show that OWCP erroneously applied or interpreted a specific point of law. OWCP noted that appellant did not submit factual evidence describing the implicated employment factors.

### **LEGAL PRECEDENT**

Section 8128 of FECA vests OWCP with a discretionary authority to determine whether it will review an award for or against compensation, either under its own authority or on application by a claimant.<sup>3</sup> Section 10.608(b) of OWCP's regulations provide that a timely request for reconsideration may be granted if OWCP determines that the claimant has presented evidence and/or argument that meet at least one of the standards described in section 10.606(b)(3).<sup>4</sup> This section provides that the application for reconsideration must be submitted in writing and set forth arguments and contain evidence that either: (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.<sup>5</sup> Section 10.608(b) provides that when a request for reconsideration is timely, but fails to meet at least one of these three requirements, OWCP will deny the application for reconsideration without reopening the case for a review on the merits.<sup>6</sup>

### **ANALYSIS**

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).

In his May 10, 2017 request for reconsideration, counsel did not show that OWCP erroneously applied or interpreted a specific point of law, or advance a new and relevant legal argument not previously considered. He contended that OWCP's June 10, 2016 decision did not reference audiograms dated 2005 through 2015 that were submitted by appellant. Counsel further

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<sup>3</sup> 5 U.S.C. § 8128(a).

<sup>4</sup> 20 C.F.R. § 10.608(a).

<sup>5</sup> *Id.* at § 10.606(b)(3).

<sup>6</sup> *Id.* at § 10.608(b).

contended that these audiograms were not reviewed by a medical doctor. He alleged that appellant had established a *prima facie* case of work-related hearing loss as the audiograms showed progressive hearing loss during the duration of appellant's federal employment. Counsel also alleged that, if OWCP had any question as to whether appellant suffered from work-related, noise-induced hearing loss, it should have referred him to a specialist for evaluation. Contrary to counsel's contention, OWCP, in its June 10, 2016 decision, specifically noted that it had received multiple audiogram reports from February 10, 2009 through January 9, 2015 in response to its December 23, 2015 development letter. Moreover, counsel's contentions that the submitted audiograms were sufficient to establish appellant's employment-related, noise-induced hearing loss and that appellant should be referred to a medical specialist for evaluation if necessary are not relevant to the underlying issue, which is factual in nature. These assertions do not address the factual issue of whether appellant established factors of his federal employment that caused or contributed to his claimed hearing loss. Evidence which does not address the particular issue under consideration does not constitute a basis for reopening a case.<sup>7</sup> For these reasons, the Board finds that appellant is not entitled to a review of the merits of his claim based on the first and second above-noted requirements under section 10.606(b)(3).

The Board further finds that appellant did not submit relevant and pertinent new evidence in support of his May 10, 2017 request for reconsideration. Appellant submitted duplicate copies of the employing establishment audiograms dated May 11, 2005 through August 6, 2015. The Board has previously held that evidence that repeats or duplicates evidence previously of record has no evidentiary value and does not constitute a basis for reopening a case.<sup>8</sup> OWCP had denied the claim as appellant had not established factors of his federal employment sufficient to cause hearing loss. Appellant did not submit any statement or evidence that clarified factors of employment. The audiograms did not provide evidence of factors of appellant's employment. Evidence which does not address the particular issue under consideration does not constitute pertinent new and relevant evidence.<sup>9</sup>

The Board accordingly finds that appellant failed to meet any of the requirements of 20 C.F.R. § 10.606(b)(3) in his May 10, 2017 request for reconsideration. Pursuant to 20 C.F.R. § 10.608, OWCP properly denied merit review.

On appeal counsel argues the merits of appellant's claim and asserts that he need not rule out other causes, that he provided *prima facie* evidence of work-related hearing loss based on a work audiogram, and that he triggered necessary elements of his claim for allowance or further development. As noted above, the Board only has jurisdiction over OWCP's June 10, 2016 nonmerit decision which denied appellant's request for reconsideration and, therefore, is precluded from conducting a merit review.

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<sup>7</sup> See *K.T.*, Docket No. 15-1916 (issued February 1, 2016).

<sup>8</sup> *D.K.*, 59 ECAB 141 (2007).

<sup>9</sup> See *E.E.*, Docket No. 18-0141 (issued May 18, 2018).

**CONCLUSION**

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

**ORDER**

**IT IS HEREBY ORDERED THAT** the December 19, 2017 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 5, 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