United States Department of Labor
Employees' Compensation Appeals Board

C.K., Appellant	)	
and	)	**Docket No. 18-1019**
	)	**Issued: October 24, 2018**
DEPARTMENT OF THE NAVY, NORFOLK NAVAL SHIPYARD, Portsmouth, VA, 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 April 19, 2018 appellant filed a timely appeal from a March 14, 2018 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days elapsed from OWCP's last merit decision, dated May 17, 2017, 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 over the merits of the case.[2]

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.*

[2] Appellant provided additional evidence with his appeal which was not before OWCP at the time it issued its decision. The Board's jurisdiction is limited to the evidence that was before OWCP at the time of its final decision. Therefore, the Board is precluded from reviewing this additional evidence for the first time on appeal. 20 C.F.R. § 501.2(c)(1).

FACTUAL HISTORY

On October 15, 2014 appellant, then a 60-year-old nuclear engineer technician, filed an occupational disease claim (Form CA-2) alleging that he sustained hearing loss due to exposure to hazardous noise in the workplace. He indicated that he first became aware of his claimed condition and realized its relation to his federal employment on April 12, 1985. Appellant advised that he became aware of the relationship of his hearing loss to his employment when he was taking a hearing test at the employing establishment and he was told that his hearing had worsened to the extent that the baseline for his hearing test had to be changed. He asserted that he did not file a Form CA-2 within 30 days of April 12, 1985 because his hearing loss was gradual and he "was not aware that this program existed." On the reverse side of the claim form, appellant's immediate supervisor indicated that appellant first reported his claimed hearing loss on October 15, 2014. Appellant did not stop work.

In an undated statement received by OWCP on October 28, 2014, appellant indicated that he held several machinist and inspector positions with the employing establishment from October 21, 1974 to April 12, 1986 and March 27, 1988 to February 19, 1995 which exposed him to hazardous noise from engine lathes, milling machines, carbon arc processes, generators, pumps, and pneumatic tools (such as grinders, needle guns, and drills) for varying hours per day.[3] When he worked as a nuclear mechanical systems inspector for the employing establishment from February 20, 1995 to January 29, 2000, appellant was exposed to hazardous noise from carbon arc processes, generators, pumps, and pneumatic tools for eight hours per day. Appellant reported that he was not exposed to hazardous noise when he worked as a nuclear engineering technician from January 30, 2000 to December 23, 2006 and as a nuclear engineering technician from December 24, 2006 to the present. He noted that he became aware of the relationship of his hearing loss to his employment on April 12, 1985 because he underwent a hearing test at work on April 12, 1985 and he was told that his hearing had worsened to the extent that the baseline for his hearing test had to be changed. Appellant indicated that he was last exposed to hazardous noise on April 13, 1999.

Appellant submitted reports dated between the late-1970s and late-2000s detailing the treatment of his eustachian tube dysfunction.[4] In a November 15, 1988 report, Dr. Ernest A. Murden, an attending Board-certified otolaryngologist, indicated that appellant was born with a cleft lip and plate which caused him to have eustachian tube dysfunction. In a May 12, 1988 report, Dr. Murden described his performance of septoplasty and nasal turbinoplasty procedures, noting that they were performed due to eustachian tube dysfunction.[5]

Appellant submitted audiograms obtained between October 15, 1974 and November 16, 2000 by audiologists at the employment establishment. The audiograms were not certified by physicians as accurate. Appellant also submitted audiograms dated from February 10, 1992

[3] Appellant noted that he was not exposed to hazardous noise when he worked as a nuclear mechanical systems inspector training leader for the employing establishment from April 13, 1986 to March 26, 1988.

[4] The documents included unsigned treatment notes dated from May 7, 1977 through September 30, 2008.

[5] The surgical procedures were not approved by OWCP.

through September 30, 2008 which were performed by audiologists in Dr. Murden's office. The audiograms were not certified by Dr. Murden as accurate.

In a December 9, 2004 medical report, Dr. Barry Strasnick, an attending Board-certified otolaryngologist, indicated that appellant presented with his longstanding problems of eustachian tube dysfunction and bilateral tympanic membrane perforations. He noted that appellant had bilateral mixed hearing loss associated with these conditions. On September 30, 2008 Dr. Murden discussed the history of appellant's ear problems since he became a patient in 1977, including numerous ear infections and tympanic membrane perforations. In an August 22, 2014 report, Dr. Lorenz Lassen, an attending Board-certified otolaryngologist, noted that appellant's underlying hearing problem was eustachian tube dysfunction.

In a January 14, 2015 letter, an employing establishment official acknowledged that appellant was routinely exposed to hazardous noise from equipment and operations at the employing establishment. In a January 16, 2015 letter, an audiologist for the employing establishment indicated that appellant's audiogram from October 1974 showed that he had hearing loss prior to when he started working for the employing establishment.

In an October 15, 2015 development letter, OWCP advised appellant about the standards for the timely filing of claims and requested that he submit additional evidence in support of his claim. It requested that appellant complete and return an attached questionnaire which posed various questions about the history of his hearing problems. OWCP afforded appellant 30 days to submit a response. Appellant did not respond.[6]

By decision dated March 3, 2016, OWCP denied appellant's hearing loss claim as untimely filed. It noted that appellant first became aware that his claimed hearing loss was related to his federal employment on April 12, 1985 and he was last exposed to hazardous noise at work on April 13, 1999. OWCP determined that, because appellant did not file his hearing loss claim until October 15, 2014, it was untimely filed.

On February 17, 2017 appellant requested reconsideration of the March 3, 2016 decision. In a February 13, 2017 statement, he advised that he made a mistake when he listed April 12, 1985 as the date he first became aware that his claimed hearing loss was related to his employment. Appellant indicated that he was changing that date to September 5, 2014 as denoted in an attached corrected version of his Form CA-2. He asserted that a November 6, 2015 letter of a supervisor supported that he was last exposed to hazardous noise at work on April 30, 2016, the date of his retirement.[7]

In a Form CA-2 dated February 13, 2017 and entitled "corrected copy," appellant indicated that he first became aware of his claimed condition on April 12, 1985 and first realized on September 5, 2014 that it was caused or aggravated by his employment. He indicated that he

[6] In a December 7, 2015 letter, an employing establishment official indicated that appellant was routinely exposed to hazardous noise from equipment and operations at the employing establishment.

[7] The case record does not contain a November 6, 2015 letter from appellant's supervisor.

purchased hearing aids on September 5, 2014 and noted that he then realized his hearing loss was caused by his work with the employing establishment "as I had not worked any place else."

By decision dated May 17, 2017, OWCP denied modification of its March 3, 2016 decision. It noted that appellant's hearing loss claim was still considered to have been untimely filed. OWCP determined that he failed to provide adequate support for his new assertion that he first became aware of the employment-related cause of his claimed hearing loss on September 5, 2014.

On March 5, 2018 appellant requested reconsideration of his claim. In support of his reconsideration request, he submitted a Form CA-2 which was dated February 28, 2018 and entitled "corrected copy." On the form, appellant indicated that he first became aware of his claimed condition on September 5, 2014 and first realized on September 5, 2014 that it was caused or aggravated by his employment. He indicated that he purchased hearing aids on September 5, 2014 and noted that he then realized his hearing loss was caused by his work with the employing establishment "as I had not worked any place else."

By decision dated March 14, 2018, OWCP denied appellant's request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a). It found that the evidence he submitted in support of his reconsideration request was duplicative in nature.

LEGAL PRECEDENT

Section 8128(a) of FECA vests OWCP with discretionary authority to determine whether to review an award for or against compensation. OWCP may review an award for or against payment of compensation at any time based on its own motion or on application.[8]

A claimant seeking reconsideration of a final decision must present arguments or provide evidence that: (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.[9] If OWCP determines that at least one of these requirements is met, it reopens and reviews the case on its merits.[10] 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.[11]

A request for reconsideration must also be received by OWCP within one year of the date of OWCP's decision for which review is sought.[12] For OWCP decisions issued on or after

[8] 5 U.S.C. § 8128(a).

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

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

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

[12] 20 C.F.R. § 10.607(a).

August 29, 2011, the date of the application for reconsideration is the "received date" as recorded in the Integrated Federal Employees' Compensation System.[13]

The Board has held that the submission of evidence or argument which repeats or duplicates evidence or argument already in the case record does not constitute a basis for reopening a case.[14]

In cases of injury on or after September 7, 1974, section 8122(a) of FECA provides that an original claim for compensation for disability or death must be filed within three years after the injury or death.[15] Compensation for disability or death, including medical care in disability cases, may not be allowed if a claim is not filed within that time unless the immediate superior had actual knowledge of the injury or death within 30 days, or written notice of injury or death as specified in section 8119 of FECA was given within 30 days.[16] In a case of occupational disease, the time for filing a claim begins to run when the employee first becomes aware, or reasonably should have been aware, of a possible relationship between his or her condition and the employment.[17] Where the employee continues in the same employment after he reasonably should have been aware that he has a condition which has been adversely affected by factors of federal employment, the time limitation begins to run on the date of the last exposure to the implicated factors.[18]

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).

On May 17, 2017 OWCP issued a decision denying appellant's hearing loss claim as untimely filed. On March 5, 2018 it received his request for reconsideration of its May 5, 2017 decision. Appellant's request was timely filed because it was received within one year of OWCP's May 5, 2017 decision.[19]

The Board must consider whether appellant's request for reconsideration met any of the requirements of 20 C.F.R. § 10.606(b)(3), requiring OWCP to reopen the case for further review of the merits of the claim. The Board finds that appellant's request for reconsideration did not show that OWCP erroneously applied or interpreted a specific point of law, advance a new and

[13] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4 (February 2016). *See also C.B.*, Docket No. 13-1732 (issued January 28, 2014). For decisions issued before June 1, 1987 there is no regulatory time limit for when reconsideration requests must be received. For decisions issued from June 1, 1987 through August 28, 2011, the one-year time period begins on the next day after the date of the original decision and must be mailed within one year of OWCP's decision for which review is sought.

[14] *Eugene F. Butler*, 36 ECAB 393, 398 (1984); *Jerome Ginsberg*, 32 ECAB 31, 33 (1980).

[15] 5 U.S.C. § 8122(a).

[16] *Id.*

[17] *Larry E. Young*, 52 ECAB 264 (2001).

[18] *Id.*

[19] *See supra* note 14.

relevant legal argument not previously considered by OWCP, or constitute relevant and pertinent new evidence not previously considered by OWCP.[20]

In support of his request for reconsideration, appellant submitted a Form CA-2 which was dated February 28, 2018 and entitled "corrected copy." On the form, he indicated that he first became aware of his claimed condition on September 5, 2014 and first realized on September 5, 2014 that it was caused or aggravated by his employment. Appellant indicated that he purchased hearing aids on September 5, 2014 and noted that he then realized his hearing loss was caused by his work with the employing establishment "as I had not worked any place else."

The Board notes that appellant's submission of this newly completed Form CA-2 essentially constitutes a repetition of his previously presented argument that he was not aware of the possible connection of his hearing loss to his employment until September 5, 2014. The February 28, 2018 Form CA-2 contains information which is similar to that contained in the previously submitted February 13, 2017 Form CA-2. OWCP has already considered and rejected appellant's argument that he was not aware of the possible connection of his hearing loss to his employment until September 5, 2014. Because this document effectively repeats or duplicates evidence/argument already in the case record, the Board finds that appellant's submission does not require reopening his claim for review on the merits.[21]

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).

[20] *See supra* note 11.

[21] *See supra* note 17.

ORDER

IT IS HEREBY ORDERED THAT the March 14, 2018 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 24, 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