

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

R.W., Appellant)	
)	
and)	Docket No. 18-1714
)	Issued: April 1, 2019
TENNESSEE VALLEY AUTHORITY,)	
WIDOWS CREEK FOSSIL PLANT,)	
Stevenson, AL, Employer)	
)	

Appearances:
Gerard Siciliano, Esq., for the appellant¹
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 September 11, 2018 appellant, through counsel, filed a timely appeal from a July 31, 2018 nonmerit decision of the Office of Workers' Compensation Programs (OWCP).² As more than 180 days has elapsed from the last merit decision, dated August 7, 2017, to the filing of this

¹ In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; *see also* 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

² The Board notes that appellant submitted additional evidence on appeal and that following the July 31, 2018 decision, OWCP received additional evidence. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

appeal, pursuant to the Federal Employees' Compensation Act³ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction over 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 February 15, 2017 appellant, then a 59-year-old boilermaker, filed an occupational disease claim (Form CA-2) alleging that he sustained hearing loss and tinnitus causally related to factors of his federal employment. He noted that he first became aware of his condition on May 15, 2004 and attributed it to factors of his federal employment on June 1, 2005. Appellant did not stop work.

In a statement dated February 8, 2017, appellant related that he was exposed to noise from air tools, welding, rigging, and working around boilers beginning in 1978. He also "had to shoot boiler clinkers using a[n] eight gauge shot gun" for around six hours a day for two days at a time. From August 2000, appellant had been exposed to noise from air tools, hand tools, and pulverizers, and shooting "clinkers from the boiler using [an eight] gauge shot gun...." He described in detail his employment history, his work for contractors in 1997, and his use of hearing protection. Appellant noted that, as of September 15, 2015, his work location was no longer operational and that he now worked around pumps and other equipment only two to four hours per day.

The employing establishment, on February 13, 2017, advised that appellant was exposed to noise from pulverizers, boilers, pumps, and pneumatic tools. It indicated that his statements regarding his job duties and the equipment providing his exposure was accurate. The employing establishment indicated that appellant was exposed to around 85 decibels for five to six hours per day and that he wore hearing protection. It indicated that the plant had stopped operating in September 2015.

OWCP, on April 13, 2017, referred appellant to Dr. Joseph A. Motto, a Board-certified otolaryngologist, for a second opinion evaluation. It prepared a statement of accepted facts (SOAF), which indicated that he was exposed to noise from turbines, boiler feed pumps, and steam leaks.

In a report dated May 17, 2017, Dr. Motto reviewed the results of audiometric testing and diagnosed severe high frequency sensorineural hearing loss beginning at 2,000 hertz (Hz). He opined that appellant's hearing loss had not resulted from noise exposure during the course of his federal employment. Dr. Motto advised that the demonstrated hearing loss suggested hypertension as a cause.

Dr. Motto, in a supplemental report dated July 17, 2017, advised that noise-induced hearing loss could be viewed as either the amount of hearing loss that occurred during employment or the

³ 5 U.S.C. § 8101 *et seq.*

amount that exceeded normal hearing loss. He related that the fact that appellant “used to shoot guns” and was right handed explained the asymmetry in his hearing loss at 2,000 Hz. Dr. Motto advised that hearing loss resulting from noise exposure normally showed improvement above 8,000 Hz, which was not demonstrated in this case. He concluded that appellant’s hearing loss had not resulted from noise exposure.

By decision dated August 7, 2017, OWCP denied appellant’s occupational disease claim. It found that Dr. Motto’s opinion constituted the weight of the evidence and established that appellant’s hearing loss was unrelated to the accepted factors of his federal employment.

On July 2, 2018 appellant, through counsel, requested reconsideration. He contended that Dr. Motto’s brief report referenced that he shot guns, but without demonstrating an awareness that the shot guns had been provided by the employing establishment as a part of his work duties. Counsel asserted that an enclosed June 11, 2018 evaluation from Dr. David S. Fortune, a Board-certified otolaryngologist, established that appellant sustained a ratable bilateral hearing loss and tinnitus causally related to factors of his federal employment. He also contended that an October 12, 2017 statement from appellant demonstrated that he had no significant noise exposure other than using shotguns during the course of his employment.

By decision dated July 31, 2018, OWCP denied appellant’s request for reconsideration as he had not raised an argument or submitted evidence sufficient to warrant reopening his case for further merit review under section 8128(a). It noted that, while counsel had referenced an attached report from Dr. Fortune, he had not submitted additional evidence in support of his reconsideration request.

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.⁴

To require OWCP to reopen a case for merit review pursuant to FECA, the claimant must provide evidence or an argument 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.⁵

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.⁶ If OWCP chooses to grant reconsideration, it

⁴ *Id.* at § 8128(a).

⁵ 20 C.F.R. § 10.606(b)(3); *see also B.W.*, Docket No. 18-1259 (issued January 25, 2019).

⁶ *Id.* at § 10.607(a). For merit decisions issued on or after August 29, 2011, a request for reconsideration must be received by OWCP within one year of OWCP’s decision for which review is sought. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4 (February 2016). Timeliness is determined by the document receipt date of the request for reconsideration as indicated by the received date in the integrated Federal Employees’ Compensation System (iFECS). *Id.* at Chapter 2.1602.4b.

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

ANALYSIS

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

On reconsideration counsel asserted that Dr. Motto, in evaluating appellant's hearing loss, referred to his shooting guns without explaining whether he had engaged in this activity as part of his federal employment duties. Appellant maintained that he had used an eight gauge shotgun to shoot boiler clinkers in the course of his employment. The employing establishment did not specifically address the accuracy of this aspect of his work duties and it is not set forth in the SOAF.

Reopening a claim for merit review does not require a claimant to submit all evidence that may be necessary to discharge his burden of proof.⁹ If OWCP should determine that the new evidence submitted lacks probative value, it may deny modification of the prior decision, but only after it has reviewed the case on the merits.¹⁰

The Board finds that appellant has advanced a legal argument that is relevant, not previously considered, and pertinent to the issue of whether he has established hearing loss causally related to factors of his federal employment. OWCP did not address Dr. Motto's finding that appellant's asymmetrical hearing loss was related to shooting guns or make a specific finding regarding whether his use of guns occurred in the course of his federal employment. Appellant is, thus, entitled to a review of the merits of his claim under section 10.606(b)(3)(ii) of OWCP's regulations.¹¹ The case will be remanded to OWCP to conduct a merit review of the claim, followed by an appropriate decision.

CONCLUSION

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

⁷ *Id.* at § 10.608(a); *see also* *M.S.*, Docket No. 18-1041 (issued October 25, 2018).

⁸ *Id.* at § 10.608(b); *A.C.*, Docket No. 17-1616 (issued November 27, 2018).

⁹ *See K.S.*, Docket No. 18-1022 (issued October 24, 2018).

¹⁰ *Id.*

¹¹ *J.W.*, Docket No. 14-0825 (issued September 4, 2014).

ORDER

IT IS HEREBY ORDERED THAT the July 31, 2018 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this opinion of the Board.

Issued: April 1, 2019
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