



## **ISSUES**

The issues are: (1) whether appellant has met his burden of proof to establish an injury in the performance of duty; and (2) 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 December 18, 2017 appellant, then a 58-year-old electrician, filed an occupational disease claim (Form CA-2) alleging that he developed hearing loss and tinnitus as a result of employment-related noise exposure. He noted that he first became aware of his condition on November 11, 1998. Appellant reported that he worked around high voltage transformers and high pressure air operated breakers for extended periods of time which caused a decline in his hearing. He noted no other activities which exposed him to loud noises. Appellant reported that he had previously filed a hearing loss claim<sup>3</sup> and had hoped his condition would stabilize, but instead it continued to decline.

By development letter dated January 3, 2018, OWCP requested additional factual information from appellant, including information regarding his employment history, when he related his hearing loss to conditions of employment, and all nonoccupational exposure to noise. It also requested that he provide medical documentation pertaining to any prior treatment he received for ear or hearing problems. OWCP further noted that OWCP File No. xxxxxx338 remained open and if he was claiming increased impairment for hearing loss, he should submit a claim for compensation form (Form CA-7) under that claim with supporting medical evidence establishing increased impairment. By separate letter of even date, it requested that the employing establishment provide further information pertaining to appellant's claim for occupational noise exposure. No further evidence was received.

By decision dated February 20, 2018, OWCP denied appellant's claim finding that the evidence of record was insufficient to establish that an injury occurred as alleged, as he neither responded to its January 3, 2018 development letter, nor provided evidence in support of his claim.

On March 1, 2018 appellant requested reconsideration of the February 20, 2018 OWCP decision. The request consisted only of a fax cover sheet, a copy of the February 20, 2018 decision, and the appeal request form. No evidence was received.

By decision dated March 9, 2018, OWCP denied appellant's request for reconsideration, finding that he neither raised substantive legal questions nor submitted relevant and pertinent new evidence.

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<sup>3</sup> The Board notes that appellant has a prior occupational disease claim which OWCP accepted for bilateral sensorineural hearing loss on December 28, 2004 under OWCP File No. xxxxxx338. On February 15, 2005 appellant received a schedule award for 13 percent permanent impairment of loss of hearing in both ears. The claim remains open for medical benefits. The record before the Board contains no other information pertaining to appellant's prior hearing loss claim.

### **LEGAL PRECEDENT -- ISSUE 1**

An employee seeking benefits under FECA has the burden of proof to establish the essential elements of his or her claim, including the fact that the individual is an employee of the United States within the meaning of FECA, that the claim was filed within the applicable time limitation, that an injury was sustained while in the performance of duty as alleged, and that any disability or specific condition for which compensation is claimed is causally related to the employment injury.<sup>4</sup> These are the essential elements of every compensation claim regardless of whether the claim is predicated on a traumatic injury or occupational disease.<sup>5</sup>

In order to determine whether an employee actually sustained an injury in the performance of duty, OWCP begins with an analysis of whether fact of injury has been established. Generally, fact of injury consists of two components which must be considered in conjunction with one another. The first component to be established is that the employee actually experienced the employment incident which is alleged to have occurred.<sup>6</sup> The second component is whether the employment incident caused a personal injury and generally can be established only by medical evidence.

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

### **ANALYSIS -- ISSUE 1**

The Board finds that appellant has not met his burden of proof to establish an injury in the performance of duty.

Appellant must establish all of the elements of his claim in order to prevail. He must provide a factual statement identifying the employment factors alleged to have caused the employment injury before OWCP can review the medical evidence to determine whether an employment-related medical condition has been diagnosed.

The Board finds that appellant has not provided adequate detail to establish that he experienced employment-related noise exposure following his previously accepted injury.<sup>8</sup> On his Form CA-2 appellant generally stated that exposure to high voltage transformers and high pressure

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<sup>4</sup> Gary J. Watling, 52 ECAB 278 (2001); Elaine Pendleton, 40 ECAB 1143, 1154 (1989).

<sup>5</sup> Michael E. Smith, 50 ECAB 313 (1999).

<sup>6</sup> Elaine Pendleton, *supra* note 4.

<sup>7</sup> See Roy L. Humphrey, 57 ECAB 238, 241 (2005); Ruby I. Fish, 46 ECAB 276, 279 (1994).

<sup>8</sup> P.J., Docket No. 15-1816 (issued December 23, 2015).

air operated breakers for extended periods caused a decline in his hearing. The record reflects that appellant has previously filed an occupational disease claim pertaining to employment-related noise exposure which was accepted by OWCP for bilateral sensorineural hearing loss under OWCP File No. xxxxxx338. With regard to the present occupational disease claim, he failed to describe, with dates, specific continued work-related noise exposure to which he is attributing to his current tinnitus and hearing loss.<sup>9</sup>

By letter dated January 3, 2018, OWCP requested that appellant describe the factual circumstances of his injury and provided a questionnaire for his completion. Appellant neither responded to the questionnaire, nor provided evidence in support of his claim. As such, the record does not contain an explanation as to the type of noise, decibel level, or hours of exposure., nor does it contain a description of appellant's employment duties on specific dates following his first accepted hearing loss claim or how his federal employment exposed him additional factors of hazardous noise. The only explanation provided pertaining to his work-related noise exposure was the generalized and vague statement noted in his Form CA-2. By failing to describe the work-related noise exposure and circumstances surrounding the alleged injury, appellant has not met his burden of proof to establish that the occupational exposure occurred as alleged.<sup>10</sup>

The Board, therefore, finds that he has failed to meet his burden of proof.<sup>11</sup>

Appellant may submit additional evidence, together with a written request for reconsideration, to OWCP within one year of the Board's merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

### **LEGAL PRECEDENT -- ISSUE 2**

To require OWCP to reopen a case for merit review under FECA section 8128(a), OWCP regulations provide that the evidence or argument submitted by a claimant must: (1) show that OWCP erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by OWCP; or (3) constitute relevant and pertinent new evidence not previously considered by OWCP.<sup>12</sup> Section 10.608(b) of OWCP regulations provide that when an application for reconsideration does not meet at least one of the three requirements enumerated under section 10.606(b)(3), OWCP will deny the application for reconsideration without reopening the case for a review on the merits.<sup>13</sup>

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<sup>9</sup> *M.L.*, Docket No. 14-1208 (issued September 29, 2014).

<sup>10</sup> *P.T.*, Docket No. 14-0598 (issued August 5, 2014).

<sup>11</sup> Upon return of the case file OWCP should administratively combine the current file with OWCP File No. xxxxxx338, with File No. xxxxxx338 designated as the master file, as OWCP has already accepted occupational hearing loss as an accepted condition.

<sup>12</sup> *D.K.*, 59 ECAB 141 (2007).

<sup>13</sup> *K.H.*, 59 ECAB 495 (2008).

## ANALYSIS -- ISSUE 2

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).

The issue presented on appeal was whether appellant met any of the requirements of 20 C.F.R. § 10.606(b)(3), requiring OWCP to reopen the case for review of the merits of the claim. In his application for reconsideration, appellant did not show that OWCP erroneously applied or interpreted a specific point of law, and he did not advance a new and relevant legal argument not previously considered. Consequently, he is not entitled to review of the merits of his claim based on the first and second above-noted requirements under 20 C.F.R. § 10.606(b)(3).<sup>14</sup>

The underlying issue on appeal involved whether appellant was exposed to employment-related noise in the performance of duty. Appellant's reconsideration request does not provide greater detail pertaining to whether his occupational noise exposure occurred in the manner alleged. Furthermore, he failed to submit any relevant and pertinent new evidence in support of his request for reconsideration.<sup>15</sup> Rather, he simply resubmitted OWCP's February 20, 2018 decision along with his appeal request form. Material which is duplicative of that already contained in the case record does not constitute a basis for reopening a case.<sup>16</sup>

The Board accordingly finds that appellant did not meet any of the requirements of 20 C.F.R. § 10.606(b)(3). Appellant 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 submit relevant and pertinent new evidence not previously considered. Pursuant to 20 C.F.R. § 10.608, OWCP properly denied merit review.

## CONCLUSION

The Board finds that appellant has not met his burden of proof to establish an injury in the performance of duty. The Board also finds that OWCP properly denied his request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

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<sup>14</sup> *C.B.*, Docket No. 08-1583 (issued December 9, 2008).

<sup>15</sup> *M.C.*, Docket No. 14-0021 (issued March 11, 2014); *M.H.*, Docket No. 13-2051 (issued February 21, 2014).

<sup>16</sup> See *Kenneth R. Mroczkowski*, 40 ECAB 855 (1989).

**ORDER**

**IT IS HEREBY ORDERED THAT** the March 9 and February 20, 2018 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: January 29, 2019  
Washington, DC

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

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

Alec J. Koromilas, Alternate Judge  
Employees' Compensation Appeals Board