

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

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<b>J.T., Appellant</b>	)	
	)	
<b>and</b>	)	<b>Docket No. 19-0096</b>
	)	<b>Issued: June 24, 2019</b>
<b>DEPARTMENT OF THE ARMY, ARMY</b>	)	
<b>CORPS OF ENGINEERS, Louisville, KY,</b>	)	
<b>Employer</b>	)	
_____	)	

*Appearances:*  
Alan J. Shapiro, Esq., for the appellant<sup>1</sup>  
Office of Solicitor, for the Director

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:  
PATRICIA H. FITZGERALD, Deputy Chief Judge  
ALEC J. KOROMILAS, Alternate Judge  
VALERIE D. EVANS-HARRELL, Alternate Judge

**JURISDICTION**

On October 16, 2018 appellant, through counsel, filed a timely appeal from an August 10, 2018 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days elapsed from OWCP's last merit decision, dated August 28, 2017, to the filing of this appeal, pursuant to the Federal Employees' Compensation Act<sup>2</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction over the merits of this case.

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<sup>1</sup> 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.

<sup>2</sup> 5 U.S.C. § 8101 *et seq.*

## 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 June 22, 2017 appellant, then a 53-year-old marine mechanic, filed an occupational disease claim (Form CA-2) alleging that he sustained work-related binaural hearing loss. He asserted that he worked every day around diesel engines, generators, air compressors, diesel welders, air arc machines, and cranes without having proper hearing protection. Appellant reported that he regularly worked 10-hour days, 4 to 7 days per week, but sometimes worked for 18 to 30 consecutive days. He indicated that he first became aware of his claimed condition and its relationship to his federal employment on December 19, 2006. Appellant did not stop work.<sup>3</sup> On the reverse side of the claim form appellant's immediate supervisor indicated that appellant first reported his claimed injury to him on December 19, 2006.

By development letter dated June 28, 2017, OWCP requested that appellant submit additional evidence in support of his claim, including a physician's opinion supported by a medical explanation as to how the reported work exposures caused or aggravated his claimed hearing loss. It provided an attached questionnaire for his completion, which posed various questions regarding his employment history and exposure to hazardous noise in both federal and nonfederal settings.<sup>4</sup> By separate letter of the even date, OWCP also requested that the employing establishment submit information regarding appellant's alleged exposure to workplace noise. It afforded both appellant and the employing establishment 30 days to respond.

Appellant submitted audiograms, which were administered between December 28, 2000 and March 12, 2013.<sup>5</sup> Most of the audiograms were signed by audiologists. Some of the audiograms contain notations indicating that appellant has bilateral middle and high frequency hearing loss.

By decision dated August 28, 2017, OWCP denied appellant's claim for work-related binaural hearing loss, finding that he had not established that the claimed injury and/or event(s) occurred, as alleged. It noted that he had not provided a clear description of the events or specific factors supporting that an injury occurred at work and therefore failed to establish the factual component of fact of injury. OWCP noted that appellant had not responded to its June 28, 2017 development letter.

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<sup>3</sup> Appellant also indicated that, while working on towboats, shop barges, and derricks around late 2005 to early 2006, he experienced ringing, hissing, and buzzing noises in his ears. He reported that these symptoms worsened and that he now had hearing loss with accompanying loud ringing noise in his ears.

<sup>4</sup> OWCP specifically requested appellant to, "List your employment history by [employing establishment,] job title, and inclusive dates. Include all employment (federal and nonfederal) as well as military service. For each job title, describe source(s) of noise, number of hours of exposure per day, and use of any safety devices to protect against noise exposure. State when and what type of safety devices were provided."

<sup>5</sup> Most of the audiograms were obtained in the offices of a private provider named "Corporate Services."

On July 27, 2018 appellant, through counsel, requested reconsideration of his claim and submitted additional evidence. A federal occupational health form entitled, “Audiogram History/Report,” was signed by a “nurse/technician” on January 23, 2017. In the section for current occupational noise, it was noted that appellant was exposed to steady noise from machinery for four days per week (8 to 10 hours per day) and intermittent noise from engines, air compressors, and generators for four days per week. The document indicated that he was also exposed to impulse noise from air arc machines and vibratory hammers for varying amounts of time and it was noted that he always used hearing protection at work.<sup>6</sup> Counsel also attached July 5, 2016 and January 17, 2018 audiograms, produced by an audiologist, which showed binaural hearing loss.

By decision dated August 10, 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 submitted was irrelevant or immaterial to the reason for the denial of his hearing loss claim, *i.e.*, his failure to provide a complete history of all employment and exposure to noise.

### **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.<sup>7</sup>

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.<sup>8</sup> If OWCP determines that, at least one of these requirements is met, it reopens and reviews the case on its merits.<sup>9</sup> If the request is timely, but fails to meet at least one of the requirements for reconsideration, it will deny the request for reconsideration without reopening the case for review on the merits.<sup>10</sup> To be timely, a request for reconsideration must be received by OWCP within one year of the date of OWCP’s decision for which review is sought.<sup>11</sup> The Board has held that the submission of evidence or argument which does not address the particular issue involved does not constitute a basis for reopening a case.<sup>12</sup>

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<sup>6</sup> In the section for current nonoccupational noise, the form indicated that appellant was exposed to noise from power tools and lawn equipment for two hours per month, and that hearing protection was always used.

<sup>7</sup> 5 U.S.C. § 8128(a).

<sup>8</sup> 20 C.F.R. § 10.606(b)(3); *see also* *M.S.*, Docket No. 18-1041 (issued October 25, 2018); *C.N.*, Docket No. 08-1569 (issued December 9, 2008).

<sup>9</sup> *Id.* at § 10.608(a); *see also* *C.K.*, Docket No. 18-1019 (issued October 24, 2018).

<sup>10</sup> *Id.* at § 10.608(b); *E.R.*, Docket No. 09-1655 (issued March 18, 2010).

<sup>11</sup> *Id.* at § 10.607(a).

<sup>12</sup> *M.K.*, Docket No. 18-1623 (issued April 10, 2019); *Edward Matthew Diekemper*, 31 ECAB 224-25 (1979).

## 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 July 27, 2018 appellant filed a timely request for reconsideration of OWCP's August 28, 2017 denial decision,<sup>13</sup> but he did not show that OWCP erroneously applied or interpreted a specific point of law, or advance a relevant legal argument not previously considered by OWCP. 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>

However, the Board finds that appellant submitted relevant and pertinent new evidence not previously considered by OWCP, which entitles him to review of the merits of his claim based on the third above-noted requirement under 20 C.F.R. § 10.606(b)(3).<sup>15</sup>

In support of his timely request for reconsideration, appellant submitted an "Audiogram History/Report" which was signed by a nurse/technician on January 23, 2017. In the section for current occupational noise, it was noted that: he was exposed to steady noise from machinery for four days per week (8 to 10 hours per day); intermittent noise from engines, air compressors, and generators for four days per week; and impulse noise from air arc machines and vibratory hammers for varying amounts of time. The form indicated that appellant always used hearing protection while at work. In the section for current nonoccupational noise, the form indicated that he was exposed to noise from power tools and lawn equipment for two hours per month, and that hearing protection was always used.

The Board finds that this document constitutes pertinent new and relevant evidence because it specifically addresses the underlying issue of this case, *i.e.*, whether appellant has submitted sufficient evidence to establish the factual component of fact of injury with respect to his claim for an employment-related hearing loss. By decision dated August 28, 2017, OWCP denied his claim because he failed to adequately respond to its request for a history of employment and exposure to hazardous noise with details about the types and number of hours of noise exposure per day. The January 23, 2017 Audiogram History/Report submitted by appellant in connection with his timely request for reconsideration provides factual information which is directly relevant to this matter.<sup>16</sup>

Thus OWCP's denial of appellant's request for review of the merits of his claim pursuant to 5 U.S.C. § 8128(a) constituted an abuse of discretion.<sup>17</sup> Consequently, the case must be

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<sup>13</sup> See *supra* note 11.

<sup>14</sup> See *supra* note 8.

<sup>15</sup> *Id.*

<sup>16</sup> Appellant also submitted July 5, 2016 and January 17, 2018 audiograms, which had been administered by an audiologist. The submission of this audiometric examination evidence, in and of itself, would not require reopening of appellant's claim for review on the merits because such evidence is not relevant to the above-noted underlying factual issue. See *supra* note 12.

<sup>17</sup> *M.P.*, Docket No. 17-1199 (issued March 1, 2018).

remanded for OWCP to conduct a merit review of the claim.<sup>18</sup> Following this and such other development as deemed necessary, OWCP shall issue an appropriate merit 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).

**ORDER**

**IT IS HEREBY ORDERED THAT** the August 10, 2018 decision of the Office of Workers' Compensation Programs is reversed, and the case is remanded to OWCP for further action consistent with this decision.

Issued: June 24, 2019  
Washington, DC

Patricia H. Fitzgerald, Deputy 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

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<sup>18</sup> *Id.*