

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

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L.R., Appellant

and

DEPARTMENT OF HOMELAND SECURITY,  
U.S. CUSTOMS AND BORDER PROTECTION,  
Calexico, CA, Employer  
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**Docket No. 22-0690  
Issued: October 20, 2022**

*Appearances:*  
*Appellant, pro se*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

ALEC J. KOROMILAS, Chief Judge  
JANICE B. ASKIN, Judge  
JAMES D. MCGINLEY, Alternate Judge

**JURISDICTION**

On March 31, 2022 appellant filed a timely appeal from a November 30, 2021 merit decision and a December 22, 2021 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>1</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

**ISSUES**

The issues are: (1) whether appellant has met his burden of proof to establish a medical condition causally related to the accepted factors of his federal employment; 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).

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<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

## **FACTUAL HISTORY**

On August 25, 2021 appellant, then a 60-year-old borderpatrol agent, filed an occupational disease claim (Form CA-2) alleging that he sustained tinnitus and hearing loss as a result of “32½ years of quarterly weapons qualifications.” He indicated that he first became aware of his claimed injury and first realized its relationship to his federal employment on July 26, 2021. Appellant noted that since his retirement from the employing establishment he had not experienced any other “hearing stress incidents” to which he could attribute his claimed condition. He advised that the onset of symptoms had occurred gradually over time, but had been “more acute of late.” Appellant further noted, “Do not have specific dates of possible exposure or hearing stress incidents.”<sup>2</sup> On the reverse side of the form, a supervisor indicated that appellant had been retired from the employing establishment since January 31, 2018 and that he first reported the claimed condition to a supervisor on July 26, 2021.

In an October 5, 2021 development letter, OWCP notified appellant of the deficiencies of his claim.<sup>3</sup> It advised him of the type of factual and medical evidence needed and provided a questionnaire for his completion. OWCP afforded appellant 30 days to submit the necessary evidence. Appellant did not respond within the afforded period.

By decision dated November 30, 2021, OWCP denied appellant’s occupational disease claim, finding that the factual evidence of record was insufficient to establish that the employment incident occurred as alleged. It concluded, therefore, that the requirements had not been met to establish an injury as defined by FECA.

On December 13, 2021 appellant requested reconsideration of the November 30, 2021 decision.

In support of his reconsideration request, appellant submitted a November 24, 2021 report and audiometry test from Christopher M. Beltran, a licensed hearing instrument specialist, who detailed the hearing evaluation he conducted on that date.

By decision dated December 22, 2021, OWCP denied appellant’s request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

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

An employee seeking benefits under FECA<sup>4</sup> 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 with the applicable time

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<sup>2</sup> Regarding the provision of medical evidence in support of his claim, appellant indicated on the form, “Due to past [COVID-19] pandemic stay at home edicts, I have not scheduled an appointment with an audiologist yet but plan to in near future.”

<sup>3</sup> In response to the submitted claim materials, OWCP indicated, in part, “Evidence is not sufficient to establish that you actually experienced the employment factor(s) alleged to have caused injury.”

<sup>4</sup> *Supra* note 1.

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>5</sup> These are the essential elements of every compensation claim regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.<sup>6</sup>

To establish that an injury was sustained in the performance of duty in an occupational disease claim, a claimant must submit the following: (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 identified employment factors.<sup>7</sup>

Causal relationship is a medical question that requires rationalized medical opinion evidence to resolve the issue.<sup>8</sup> A physician's opinion on whether there is causal relationship between the diagnosed condition and the implicated employment factor(s) must be based on a complete factual and medical background.<sup>9</sup> Additionally, the physician's opinion must be expressed in terms of a reasonable degree of medical certainty, and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and appellant's specific employment factor(s).<sup>10</sup>

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

The Board finds that appellant has not met his burden of proof to establish a medical condition causally related to the accepted factors of his federal employment.

As noted above, to establish that an occupational disease was sustained while in the performance of duty, a claimant must submit a factual statement identifying employment factors alleged to have caused or contributed to the presence or occurrence of the disease or condition.<sup>11</sup> In his Form CA-2, appellant provided only vague and limited information about the factor or factors of his federal employment, which he believed to be responsible for his claimed tinnitus and hearing loss in that he only generally referenced, without elaboration, "quarterly weapons qualifications" over the prior 32½ years. OWCP advised appellant of the deficiencies in the factual

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<sup>5</sup> *E.S.*, Docket No. 18-1580 (issued January 23, 2020); *M.E.*, Docket No. 18-1135 (issued January 4, 2019); *C.S.*, Docket No. 08-1585 (issued March 3, 2009); *Bonnie A. Contreras*, 57 ECAB 364 (2006).

<sup>6</sup> *E.S.*, *id.*; *S.P.*, 59 ECAB 184 (2007); *Joe D. Cameron*, 41 ECAB 153 (1989); *Elaine Pendleton*, 40 ECAB 1143 (1989).

<sup>7</sup> *R.G.*, Docket No. 19-0233 (issued July 16, 2019). *See also Roy L. Humphrey*, 57 ECAB 238, 241 (2005); *Ruby I. Fish*, 46 ECAB 276, 279 (1994); *Victor J. Woodhams*, 41 ECAB 345 (1989).

<sup>8</sup> *W.M.*, Docket No. 14-1853 (issued May 13, 2020); *T.H.*, 59 ECAB 388, 393 (2008); *Robert G. Morris*, 48 ECAB 238 (1996).

<sup>9</sup> *M.V.*, Docket No. 18-0884 (issued December 28, 2018).

<sup>10</sup> *Id.*; *Victor J. Woodhams*, *supra* note 7.

<sup>11</sup> *See supra* note 7.

aspect of his claim and provided him an opportunity to rectify these deficiencies. On October 5, 2021 OWCP provided him a questionnaire for his completion. However, appellant did not respond to OWCP's request for additional information within the afforded period. Therefore, his claim remains vague with respect to the nature of the specific factor or factors of his federal employment, which he believed caused or aggravated the claimed occupational conditions. For these reasons, the Board finds that OWCP properly denied appellant's claim due to deficiencies in the factual aspect of the claim.

As there is no evidence of record to substantiate his medical condition is causally related to the accepted factors of his federal employment, as alleged, the Board finds that appellant has not met his burden of proof.

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

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

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 compensation at any time on his or her own motion or on application.<sup>12</sup>

To require OWCP to reopen a case for merit review pursuant to FECA, the claimant must provide evidence or an argument which: (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>13</sup>

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>14</sup> If it chooses to grant reconsideration, it reopens and reviews the case on its merits.<sup>15</sup> If the request is timely but fails to meet at least one of the

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<sup>12</sup> 5 U.S.C. § 8128(a); *see L.D.*, Docket No. 18-1468 (issued February 11, 2019); *V.P.*, Docket No. 17-1287 (issued October 10, 2017); *D.L.*, Docket No. 09-1549 (issued February 23, 2010); *W.C.*, 59 ECAB 372 (2008).

<sup>13</sup> 20 C.F.R. § 10.606(b)(3); *see M.S.*, Docket No. 18-1041 (issued October 25, 2018); *L.G.*, Docket No. 09-1517 (issued March 3, 2010); *C.N.*, Docket No. 08-1569 (issued December 9, 2008).

<sup>14</sup> *Id.* at § 10.607(a). The one-year period begins on the next day after the date of the original contested decision. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4 (September 2020). 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.

<sup>15</sup> *Id.* at § 10.608(a); *see D.C.*, Docket No. 19-0873 (issued January 27, 2020); *M.S.*, 59 ECAB 231 (2007).

requirements for reconsideration, OWCP will deny the request for reconsideration without reopening the case for review on the merits.<sup>16</sup>

The Board has held that the submission of evidence or argument, which repeats or duplicates evidence or argument already in the case record<sup>17</sup> and the submission of evidence or argument, which does not address the particular issue involved does not constitute a basis for reopening a case.<sup>18</sup>

### 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).

On December 13, 2021 appellant filed a timely request for reconsideration of a November 30, 2021 decision.<sup>19</sup> The Board finds, however, that he did not submit evidence and/or argument establishing that OWCP erroneously applied or interpreted a specific point of law, or advance a relevant legal argument not previously considered by OWCP. Accordingly, the Board finds that appellant is not entitled to a review of the merits based on either the first or second requirement under 20 C.F.R. § 10.606(b)(3).

On reconsideration, appellant submitted a November 24, 2021 report and audiometry test from Mr. Beltran, a licensed hearing instrument specialist, who detailed the hearing evaluation he conducted on that date. While this evidence is new, it is not relevant because it does not directly address the underlying issue of the present case, *i.e.*, whether appellant submitted sufficient factual evidence to establish a factor of his federal employment. The submission of this evidence does not warrant a review of appellant's claim on the merits because 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>20</sup> As appellant failed to provide relevant and pertinent new evidence, he is not entitled to a merit review based on the third requirement under 20 C.F.R. § 10.606(b)(3).

The Board accordingly finds that appellant did not meet any of the requirements of 20 C.F.R. § 10.606(b)(3). 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 a medical condition causally related to the accepted factors of his federal employment. The Board further

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<sup>16</sup> *Id.* at § 10.608(b); *see T.V.*, Docket No. 19-1504 (issued January 23, 2020); *E.R.*, Docket No. 09-1655 (issued March 18, 2010).

<sup>17</sup> *N.L.*, Docket No. 18-1575 (issued April 3, 2019); *Eugene F. Butler*, 36 ECAB 393, 398 (1984).

<sup>18</sup> *M.K.*, Docket No. 18-1623 (issued April 10, 2019); *Edward Matthew Diekemper*; 31 ECAB 224, 225 (1979).

<sup>19</sup> *See J.F.*, Docket No. 16-1233 (issued November 23, 2016).

<sup>20</sup> *See id.*

finds that OWCP properly 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 November 30 and December 22, 2021 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: October 20, 2022  
Washington, DC

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

Janice B. Askin, Judge  
Employees' Compensation Appeals Board

James D. McGinley, Alternate Judge  
Employees' Compensation Appeals Board