

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

C.H., Appellant)	
)	
and)	Docket No. 22-0703
)	Issued: September 15, 2022
DEPARTMENT OF VETERANS AFFAIRS,)	
VETERANS BENEFITS ADMINISTRATION,)	
Muskogee, OK, Employer)	
)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
JANICE B. ASKIN, Judge

JURISDICTION

On April 8, 2022 appellant filed a timely appeal from an October 18, 2021 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days has elapsed from the last merit decision, dated September 29, 2020, to the filing of this appeal, pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3 the Board lacks jurisdiction to review 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).

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

This case has previously been before the Board.² The facts and circumstances as set forth in the Board's prior decision are incorporated herein by reference. The relevant facts are as follows.

On November 16, 2018 appellant, then a 53-year-old claims examiner, filed an occupational disease claim (Form CA-2) alleging that he developed hearing loss due to factors of his federal employment. He explained that on September 22, 2018 two printers next to his work area powered up at the same time, making a loud noise, which resulted in ringing and loss of hearing in his left ear. Appellant noted that he first became aware of his condition and realized its relation to his federal employment on September 22, 2018. He stopped work on September 22, 2018 and returned on September 24, 2018.

In a November 26, 2018 development letter, OWCP informed appellant of the deficiencies of his claim. It advised him of the type of factual and medical evidence needed to establish his claim and provided a questionnaire for his completion. In a separate letter of even date, OWCP requested that the employing establishment provide comments from a knowledgeable supervisor regarding the accuracy of appellant's allegations. It afforded both parties 30 days to respond.

In a December 10, 2018 report, Dr. Dwayne Atwell, a Board-certified otolaryngologist, noted that on September 22, 2018 appellant experienced loud noise exposure at work which resulted in significant hearing loss in his left ear and tinnitus without vertigo. He provided a history indicating that on November 8, 2018 he observed mild, old scarring of tympanic membranes bilaterally and that an audiogram revealed asymmetrical neurosensory loss in appellant's left ear. Dr. Atwell noted that he had reviewed appellant's November 11, 2018 magnetic resonance imaging (MRI) scan, which revealed a normal temporal bone, no evidence of an internal auditory canal tumor, and overall normal results. He found that appellant's audiologic testing and MRI scan demonstrated unilateral hearing loss secondary to noise trauma on September 22, 2018. Dr. Atwell recommended hearing conservation and a repeat audiogram in six months or sooner if otologic changes occurred.

Appellant responded to OWCP's development questionnaire on November 11, 2018. He attributed his hearing loss and tinnitus to the loud noise that two printers made when powering up from sleep mode at the exact same time. Appellant denied any previous hearing loss or noise exposure.

On February 19, 2019 OWCP referred appellant, along with a statement of accepted facts (SOAF) and the medical record, to Dr. Richard Dawson, a Board-certified otolaryngologist, for a second opinion evaluation in order to determine the extent and degree of appellant's hearing loss and its relationship to his work-related noise exposure.

In a March 8, 2019 report, Dr. Dawson reviewed the SOAF and medical records and noted that appellant disagreed with the SOAF with regard to the location of the printers. Appellant clarified that one printer was located two feet away from his left ear. He reported that on

² Docket No. 19-1315 (issued March 16, 2020).

September 22, 2018 two printers turned on simultaneously, which appellant claimed caused ringing and hearing loss in his left ear, and that he had not experienced any changes since that incident. Dr. Dawson opined that the workplace exposure may have been sufficient in intensity and duration, but probably did not cause the loss in question as there was no loss on the other side. He reviewed appellant's audiogram and indicated that audiometric testing was not valid. Dr. Dawson further found that, due to the normal hearing in the right ear and abnormal hearing in the left, the results were not consistent with typical noise exposure and requested additional testing to eliminate the possibility of a tumor in the left ear. Additionally, he opined that appellant's tinnitus was not due to noise exposure encountered in his federal employment.

By decision dated April 12, 2019, OWCP denied appellant's claim, finding that the medical evidence of record was insufficient to establish causal relationship.

On May 29, 2019 appellant timely appealed to the Board. By decision dated March 16, 2020,³ the Board remanded the case for further development of the medical evidence.

On July 13, 2020 OWCP referred appellant, a SOAF, and a list of questions to Dr. Gregg S. Govett, a Board-certified otolaryngologist, for a second opinion examination.

In an August 4, 2020 report, Dr. Govett noted appellant's history of injury and reviewed additional audiological testing. He found that appellant's sensorineural hearing loss and tinnitus were not due to his accepted employment exposure. Dr. Govett noted that appellant's noise exposure was not hazardous by definition and that given his medical history of diabetes, coronary artery disease, and hypertension, his sudden left ear loss of hearing was related to his preexisting medical conditions and not employment-related noise exposure.

On August 13, 2020 OWCP requested a supplemental report from Dr. Govett addressing the necessity for additional diagnostic testing. Dr. Govett responded on August 25, 2020 and reviewed appellant's November 11, 2018 MRI scan, finding it normal. He determined that no additional diagnostic testing was necessary.

By decision dated September 29, 2020, OWCP denied appellant's claim, finding that the medical evidence of record was insufficient to establish hearing loss causally related to his accepted employment-related noise exposure.

On September 28, 2021 appellant requested reconsideration. He asserted that on September 22, 2018 he experienced a sudden sensorineural hearing loss in his left ear due to the sudden noise of two printers simultaneously powering on. Appellant argued that neither Dr. Dawson nor Dr. Govett opined with full certainty that the September 22, 2018 employment-related noise exposure did not cause his left hearing loss and tinnitus.

By decision dated October 18, 2021, OWCP denied appellant's request for reconsideration of the merit of his claim under 5 U.S.C. § 8128(a).

³ *Id.*

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 compensation at any time on his or her 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 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.⁵

A request for reconsideration must be received by OWCP within one year of the date of OWCP's decision for which review is sought.⁶ If it chooses to grant reconsideration, it 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 properly denied appellant's request for reconsideration of the merits of his claim, pursuant to 5 U.S.C. § 8128(a).

In his reconsideration request, appellant did not show that OWCP erroneously applied or interpreted a specific point of law and did not advance a new and relevant legal argument not previously considered. He alleged that the second opinion physicians, Drs. Dawson and Govett, did not opine with full certainty that his loss of hearing was unrelated to his accepted employment noise exposure. The Board finds, however, that this is not a relevant legal argument not previously considered by OWCP. Appellant's argument, therefore, is insufficient to warrant reopening of his

⁴ 5 U.S.C. § 8128(a); *see T.K.*, Docket No. 19-1700 (issued April 30, 2020); *L.D.*, Docket No. 18-1468 (issued February 11, 2019); *W.C.*, 59 ECAB 372 (2008).

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

⁶ *Id.* at § 10.607(a). The one-year period begins on the next day after the date of the original contested decision. 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.

⁷ *Id.* at § 10.608(a); *F.V.*, Docket No. 18-0230 (issued May 8, 2020); *see also M.S.*, 59 ECAB 231 (2007).

⁸ *Id.* at § 10.608(b); *B.S.*, Docket No. 20-0927 (issued January 29, 2021); *E.R.*, Docket No. 09-1655 (issued March 18, 2010).

claim for further merit review. Consequently, appellant was not entitled to a review of the merits based on the first and second above-noted requirements under 20 C.F.R § 10.606(b)(3).⁹

The Board further finds that appellant did not submit relevant and pertinent new evidence not previously considered by OWCP. Within his reconsideration request, appellant resubmitted his factual description of the events of September 22, 2018, which was previously of record and considered by OWCP in its September 29, 2020 decision. The Board has held that evidence or argument that repeats or duplicates evidence previously of record has no evidentiary value and does not constitute a basis for reopening a case.¹⁰ Thus, appellant is not entitled to a review based on the third above-noted requirement under 20 C.F.R. § 10.606(b)(3).¹¹

Accordingly, the Board finds that appellant has not met any of the requirements enumerated under 20 C.F.R. § 10.606(b)(3). Pursuant to 20 C.F.R. § 10.608, OWCP properly denied his request for reconsideration without reopening the case for review on the merits.¹²

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).

⁹ 20 C.F.R. § 10.606(b)(3); *S.K.*, Docket No. 22-0248 (issued June 27, 2022).

¹⁰ *C.L.*, Docket No. 20-0410 (issued October 29, 2020); *M.G.*, Docket No. 18-0654 (issued October 17, 2018); *D.K.*, 59 ECAB 141 (2007); *Kenneth R. Mroczkowski*, 40 ECAB 855 (1989); *Eugene F. Butler*, 36 ECAB 393 (1984).

¹¹ 20 C.F.R. § 10.606(b)(3); *see L.D.*, Docket No. 18-1468 (issued February 11, 2019); *K.F.*, Docket No. 19-1846 (issued November 3, 2020); *T.H.*, Docket No. 18-1809 (issued May 23, 2019); *Johnny L. Wilson*, Docket No. 98-2536 (issued February 13, 2001); *see also L.G.*, Docket No. 09-1517 (issued March 3, 2010); *C.N.*, Docket No. 08-1569 (issued December 9, 2008).

¹² *See D.R.*, Docket No. 18-0357 (issued July 2, 2018); *A.K.*, Docket No. 09-2032 (issued August 3, 2010); *M.E.*, 58 ECAB 694 (2007); *Susan A. Filkins*, 57 ECAB 630 (2006).

ORDER

IT IS HEREBY ORDERED THAT the October 18, 2021 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 15, 2022
Washington, DC

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

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board