

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

## **FACTUAL HISTORY**

On September 27, 2021 appellant, then a 49-year-old heavy mobile equipment mechanic, filed an occupational disease claim (Form CA-2) alleging that he developed hearing loss due to factors of his federal employment, including working around shop noise, hammering, air impacts, impact guns, chipping guns, and sledgehammers since 2008. He noted that he first became aware of his condition and realized its relation to his federal employment on August 13, 2021. Appellant did not stop work.

Appellant submitted an August 17, 2021 Notification of Personnel Action (Form SF-50), extending his appointment as a heavy mobile equipment mechanic not to exceed October 23, 2021.

In an October 1, 2021 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 factual questionnaire for his completion. OWCP afforded appellant 30 days to submit the necessary evidence.

Thereafter, appellant submitted a December 27, 2001 position description for a heavy mobile equipment mechanic and employing establishment audiograms dated October 6, 2014 and June 6, 2016, which included a reference audiogram dated October 4, 2007.

In a March 18, 2020 memorandum, the employing establishment provided past noise level data for appellant's position and work locations.

OWCP also received a May 13, 2021 unsigned audiogram. In a prescription of even date, Dr. Paul Whitt, a Board-certified otolaryngologist, indicated that he had removed wax from appellant's right ear.

In an August 13, 2021 visit summary, an audiologist noted that appellant was evaluated on that date for bilateral sensorineural hearing loss and bilateral tinnitus.

In an October 12, 2021 response to the development questionnaire, appellant related that he first noticed his hearing loss and related it to his work exposure during an annual audiogram on August 13, 2021. He noted that he was still exposed to hazardous noise at work, and that he has never had previous hearing problems. Appellant indicated that, from 2007 to the present, he was exposed to shop noise for 10 hours per day, including heavy duty impacts, and that he wore hearing protection as required.

On January 27, 2022 OWCP sent a second development letter to appellant, requesting that he provide his federal and nonfederal employment history and military service, if any. In a development letter of even date, it requested that the employing establishment provide additional information, including comments from a knowledgeable supervisor. OWCP afforded both parties 30 days to respond.

A January 27, 2022 response from the employing establishment noted that appellant worked Monday through Thursday for 10 hours per day, was required to wear hearing protection, and worked around shop noise, air hammers, air impacts, chipping guns, and sledgehammers.

In a February 2, 2022 response to the second development letter, appellant related that his nonfederal employment history included employment at an aluminum mill with use of machinery in 12-hour shifts, 4 days a week, and employment at a paper company with use of machinery in 10-hour shifts, 4 days a week. Both positions required earplugs or earmuffs, and he did not specify dates of employment.

By decision dated March 4, 2022, OWCP denied appellant's occupational disease claim, finding that the factual evidence of record was insufficient to establish that the noise exposure occurred as alleged. Consequently, it found that he had not met the requirements to establish an injury as defined by FECA.

On March 29, 2022 appellant requested reconsideration of the March 4, 2022 decision.

In an unsigned March 22, 2022 letter, the employing establishment related that it disagreed with OWCP's denial of appellant's occupational disease claim because he had been exposed to noise for 10 years including shop noise, hammering, air impacts, chipping guns, and sledgehammers. It provided employment history, and noted that he began working as a mechanic in 2008, worked exclusively in that role, and still occupied that position. Appellant was exposed to noise for 10 hours per day, four days per week, and wore hearing protection as required. The employing establishment indicated that he had no military service, no prior hearing issues or related medical conditions, and continued to be exposed to the same noise levels through the present day. It agreed that any hearing loss appellant acquired was due completely to the noise exposure in his federal work.

By decision dated June 24, 2022, OWCP denied appellant's request for reconsideration of the merits of his claim, pursuant to 5 U.S.C. § 8128(a).

On July 12, 2022 appellant requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review.

By decision dated August 5, 2022, OWCP denied appellant's request for a telephonic hearing as untimely under 5 U.S.C. § 8124, finding that the request was not made within 30 days of the March 4, 2022 decision. It further exercised its discretion and determined that the issue in this case could be addressed equally well by a request for reconsideration before OWCP, along with the submission of new evidence.

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

Section 8128(a) of FECA does not entitle a claimant to review of an OWCP decision as a matter of right.<sup>2</sup> OWCP has discretionary authority in this regard and has imposed certain limitations in exercising its authority.<sup>3</sup> One such limitation is that the request for reconsideration

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<sup>2</sup> This section provides in pertinent part: "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on [his/her] own motion or on application." 5 U.S.C. § 8128(a).

<sup>3</sup> 20 C.F.R. § 10.607.

must be received by OWCP within one year of the date of the decision for which review is sought.<sup>4</sup> A timely application for reconsideration, including all supporting documents, must set forth arguments and contain evidence that either: (i) shows that OWCP erroneously applied or interpreted a specific point of law; (ii) advances a relevant legal argument not previously considered by OWCP; or (iii) constitutes relevant and pertinent new evidence not previously considered by OWCP.<sup>5</sup> When a timely application for reconsideration does not meet at least one of the above-noted requirements, OWCP will deny the request for reconsideration without reopening the case for a review on the merits.<sup>6</sup>

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

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).

To require merit review, it is not necessary that the new evidence be sufficient to discharge appellant's burden of proof. Instead, the requirement pertaining to the submission of evidence in support of reconsideration only specifies that the evidence be relevant and pertinent and not previously considered by OWCP.<sup>7</sup> If OWCP determines that the new evidence lacks probative value, it may deny modification of its prior decision, but only after the case has been reviewed on the merits.<sup>8</sup>

In its March 4, 2022 decision, OWCP denied appellant's claim on the basis that he had not submitted evidence which established the factual element of his claim. On reconsideration, appellant submitted a March 22, 2022 letter in which the employing establishment provided employment history and noted that he began working at the employing establishment as a mechanic in 2008, was exposed to workplace noise for 10 hours per day, four days per week, and wore hearing protection as required. The employing establishment related that he had been exposed to noise for 10 years, including shop noise, hammering, air impacts, chipping guns, and sledgehammers. It indicated that appellant had no military service, no prior hearing issues or related medical conditions, and continued to be exposed to the same noise levels through the present day. The employing establishment expressed its agreement that any hearing loss he acquired was due completely to the noise exposure he experienced in his federal work. This letter addresses the underlying issue of the present case, *i.e.*, whether appellant has established exposure

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<sup>4</sup> *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 (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>5</sup> *Id.* at § 10.606(b)(3).

<sup>6</sup> *Id.* at § 10.608(a), (b).

<sup>7</sup> *See L.J.*, Docket No. 22-0348 (issued April 28, 2023); *J.M.*, Docket No. 21-1208 (issued February 6, 2023); *D.M.*, Docket No. 17-0038 (issued June 8, 2017).

<sup>8</sup> *See D.C.*, Docket No. 18-0082 (issued July 12, 2018); *D.W.*, Docket No. 15-1225 (issued February 22, 2016); *C.M.*, Docket No. 14-1887 (issued May 6, 2015).

to noise at work as alleged. It, therefore, constitutes relevant and pertinent new evidence that was not previously considered.<sup>9</sup> Thus, the Board finds that the submission of this evidence requires reopening of appellant's claim for merit review pursuant to the third requirement of 20 C.F.R. § 10.606(b)(3).<sup>10</sup>

Consequently, the Board will set aside OWCP's June 24, 2022 decision and remand the case for an appropriate merit decision on appellant's claim.<sup>11</sup>

### **CONCLUSION**

The Board finds that OWCP improperly denied appellant's request for reconsideration of the merits of his claim.

### **ORDER**

**IT IS HEREBY ORDERED THAT** the August 5 and June 24, 2022 decisions of the Office of Workers' Compensation Programs are set aside and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: November 7, 2023  
Washington, DC

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

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

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

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<sup>9</sup> See *J.T.*, Docket No. 19-0096 (issued June 24, 2019); *D.C.*, Docket No. 18-0082 (issued July 12, 2018); *E.L.*, Docket No. 16-0371 (April 13, 2016).

<sup>10</sup> 20 C.F.R. § 10.606(b)(3); see also *F.K.*, Docket No. 21-0998 (issued December 29, 2021); *J.T.*, Docket No. 20-1301 (issued July 28, 2021); *M.J.*, Docket No. 20-1067 (issued December 23, 2020).

<sup>11</sup> In light of the Board's disposition of Issue 1, Issue 2 is rendered moot.