

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

R.J., Appellant	)	
	)	
and	)	Docket No. 24-0316
	)	Issued: April 25, 2024
DEPARTMENT OF THE NAVY, PUGET	)	
SOUND NAVAL SHIPYARD, Bremerton, WA,	)	
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  
VALERIE D. EVANS-HARRELL, Alternate Judge

**JURISDICTION**

On February 2, 2024 appellant filed a timely appeal from a September 12, 2023 nonmerit decision of the Office of Workers’ Compensation Programs (OWCP). As more than 180 days has elapsed from the last merit decision dated May 23, 2023 to the filing of this appeal, pursuant to the Federal Employees’ Compensation Act<sup>1</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction over 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).

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

## **FACTUAL HISTORY**

On November 3, 2021 appellant, then a 64-year-old crane operator, filed an occupational disease claim (Form CA-2) alleging that he developed bilateral hearing loss due to factors of his federal employment, including exposure to occupational noise. He noted that he first became aware of his condition and realized its relation to his federal employment on May 18, 2021. Appellant was last exposed to the conditions alleged to have caused his hearing loss on September 16, 2020.

In support of his claim, appellant submitted hearing conservation audiograms performed throughout his federal employment through May 21, 2021. OWCP also received a narrative statement recounting appellant's work history by an employing establishment supervisor.

By decision dated April 19, 2022, OWCP denied appellant's claim, finding that he failed to establish the implicated employment factors. It concluded, therefore, that the requirements had not been met to establish an injury as defined by FECA.

On April 28, 2022 appellant requested an oral hearing before a representative of OWCP's Branch of Hearings and Review.

By decision dated July 20, 2022, OWCP's hearing representative found appellant had established the implicated factors of his federal employment and remanded the case for referral to a Board-certified otolaryngologist.

On August 8, 2022 OWCP referred appellant, along with a statement of accepted facts (SOAF), and the medical record, to Dr. Julie A. Gustafson, a Board-certified otolaryngologist, serving as a second opinion physician, to determine the nature, extent, and causal relationship of appellant's hearing loss.

In a September 14, 2022 report, Dr. Gustafson reviewed the SOAF, and the medical record. She indicated that there was no other relevant history or condition related to appellant's hearing loss. A September 14, 2022 audiogram indicated testing at the frequencies of 500, 1,000, 2,000, and 3,000 Hertz (Hz) which revealed losses at 10, 10, 30, and 55 decibels (dBs) for the right ear, respectively, and 5, 10, 35, and 55 dBs for the left ear, respectively. Dr. Gustafson noted that appellant's ears, tympanic membranes, and canals were normal. She diagnosed tinnitus and bilateral noise-induced hearing loss. A September 14, 2022 completed Tinnitus Handicap Inventory (THI) yielded a score of zero percent. Dr. Gustafson related that appellant's tinnitus had no effect on his daily activities. Dr. Gustafson concluded that appellant's work exposures were of sufficient intensity to have caused his hearing loss. She recommended hearing aids.

On October 7, 2022 OWCP referred the medical record and SOAF to Dr. Jeffrey M. Israel, a Board-certified otolaryngologist serving as an OWCP district medical adviser (DMA), to determine the extent of appellant's hearing loss and permanent impairment due to his employment-related noise exposure.

In a report dated October 24, 2022, Dr. Israel reviewed Dr. Gustafson's examination report and concurred that the June 2, 2022 audiogram revealed no hearing loss. He opined that appellant's patterns were suggestive of sensorineural hearing loss due at least in part to noise-

induced work-related acoustic trauma. Dr. Israel applied the audiometric data to OWCP's standard for evaluating hearing loss under the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*,<sup>2</sup> (A.M.A., *Guides*) and determined that appellant sustained a right monaural loss of 1.875 percent, a left monaural loss of 1.875 percent, and a binaural hearing loss of 1.9 percent. He averaged appellant's right ear hearing levels of 10, 10, 30, and 55 dBs at 500, 1,000, 2,000, and 3,000 Hz, respectively, by adding the hearing loss at those 4 levels then dividing the sum by 4, which equaled 26.25. After subtracting the 25 dB fence, Dr. Israel multiplied the remaining 1.25 balance by 1.5 to calculate 1.875 percent right ear monaural hearing loss. He then averaged appellant's left ear hearing levels 5, 10, 25, and 55 dBs at 500, 1,000, 2,000, and 3,000 Hz, respectively, by adding the hearing loss at those four levels then dividing the sum by four, which equaled 26.25. After subtracting the 25 dB fence, Dr. Israel multiplied the remaining 1.25 balance by 1.5 to calculate 1.875 percent left ear monaural hearing loss. He then calculated 1.9 percent binaural hearing loss by multiplying the right ear loss of 1.88 percent by five, adding the 1.88 percent left ear loss, and dividing this sum by six. Dr. Israel opined that he concurred with Dr. Gustafson's calculations and finding of zero percent impairment for tinnitus. He recommended yearly audiograms, use of noise protection, and hearing aids for hearing loss. Dr. Israel also determined that appellant had reached maximum medical improvement (MMI) on September 14, 2022, the date of the most recent audiogram and Dr. Gustafson's examination.

By decision dated October 27, 2022, OWCP accepted the claim for binaural sensorineural hearing loss.

By decision dated December 21, 2022, OWCP granted appellant a schedule award for two percent binaural hearing loss. The period of the award was for four weeks and ran from September 14 through October 11, 2022.

On May 22, 2023 appellant requested reconsideration of the December 21, 2022 decision. In an attached May 22, 2023 letter, appellant related that he had been experiencing a continual ringing and white noise in both ears since approximately 2006. Appellant downloaded his own tinnitus inventory, which he indicated he had completed on the conservative side.

By decision dated May 23, 2023, OWCP expanded the acceptance of appellant's claim to include bilateral tinnitus. It denied an additional schedule award for tinnitus as the medical evidence of record from Dr. Gustafson and Dr. Israel, the DMA, found that appellant had zero percent permanent impairment due to tinnitus.

By decision dated May 23, 2023, OWCP denied modification of the December 21, 2022 schedule award determination.

On September 1, 2023 appellant requested reconsideration. In a letter dated August 21, 2023, he asserted that he explained to Dr. Gustafson that his tinnitus was a constant disruption in his hearing and life.

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<sup>2</sup> A.M.A., *Guides* (6<sup>th</sup> ed. 2009).

By decision dated September 12, 2023, OWCP denied appellant's request for reconsideration of the merits of his claim, pursuant to 5 U.S.C. § 8128(a).

### **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 own motion or on application.<sup>3</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>4</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>5</sup> If it chooses to grant reconsideration, it reopens and reviews the case on its merits.<sup>6</sup> 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.<sup>7</sup>

### **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).

Appellant did not show that OWCP erroneously applied or interpreted a specific point of law and did not advance a relevant legal argument not previously considered by OWCP.

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<sup>3</sup> 5 U.S.C. § 8128(a).

<sup>4</sup> 20 C.F.R. § 10.606(b)(3).

<sup>5</sup> *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 (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>6</sup> *Id.* at § 10.608(a); *see also P.C.*, Docket No. 23-1152 (issued January 19, 2024); *W.R.*, Docket No. 22-0051 (issued August 9, 2022); *F.V.*, Docket No. 18-0239 (issued May 8, 2020); *M.S.*, 59 ECAB 231 (2007).

<sup>7</sup> *Id.* at § 10.608(b); *P.C., id.; Y.K.*, Docket No. 18-1167 (issued April 2, 2020); *E.R.*, Docket No. 09-1655 (issued March 18, 2010).

Therefore, it properly determined that his request did not warrant a review of the merits of the claim based on the first and second requirements of 20 C.F.R. § 10.606(b)(3).<sup>8</sup>

Appellant also did not submit any relevant and pertinent new evidence. In a letter dated August 21, 2023, he asserted that he explained to Dr. Gustafson that his tinnitus was a constant disruption in his hearing and life. As this letter repeated appellant's allegations already in the case record, it is cumulative and does not constitute relevant and pertinent new evidence. The Board has held that the submission of evidence or argument, which repeats or duplicates evidence or argument already in the record does not constitute a basis for reopening a claim.<sup>9</sup> Therefore, he is not entitled to a merit review based on the third requirement under 20 C.F.R. § 10.606(b)(3).<sup>10</sup> Consequently, OWCP properly determined that appellant's request did not warrant a review of the merits of the claim based on the third requirement of 20 C.F.R. § 10.606(b)(3).

As appellant has not met any of the regulatory requirements under 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 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>8</sup> See *M.C.*, Docket No. 18-1278 (issued March 7, 2019); see also *S.M.*, Docket No. 17-1899 (issued August 3, 2018).

<sup>9</sup> *S.F.*, Docket No. 18-0516 (issued February 21, 2020); *James W. Scott*, 55 ECAB 606, 608n.4 (2004); *Eugene F. Butler*, 36 ECAB 393, 398 (1984).

<sup>10</sup> See *T.W.*, Docket No. 18-0821 (issued January 13, 2020).

**ORDER**

**IT IS HEREBY ORDERED THAT** the September 12, 2023 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 25, 2024  
Washington, DC

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

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

Valerie D. Evans-Harrell, Alternate Judge  
Employees' Compensation Appeals Board