

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

A.B., Appellant)

and)

DEPARTMENT OF VETERANS AFFAIRS,)
OKLAHOMA CITY MEDICAL CENTER,)
Oklahoma City, OK, Employer)

Docket No. 23-1172
Issued: February 9, 2024

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 September 16, 2023 appellant filed a timely appeal from a July 13, 2023 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days has elapsed from the last merit decision, dated April 22, 2022, 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 her claim, pursuant to 5 U.S.C. § 8128(a).

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On July 2, 2019 appellant, then a 46-year-old physician, filed an occupational disease claim (Form CA-2) alleging bilateral partial hearing loss due to factors of her federal employment. She explained that she had been reassigned to a modified position at the south information desk during mid-2016 to mid-2017, and from February 2018 to the present. Appellant indicated that the location was generally noisy as it was near the entrance in a high traffic area which exposed her to “higher” noise levels. She indicated that she first became aware of the condition on March 31, 2017, and she subsequently became aware of the relationship of it to her employment on June 17, 2019.² On the reverse side of the claim form, the employing establishment indicated that appellant first reported her condition on June 26, 2019 and her last date of exposure was July 2, 2019.

In a letter dated June 18, 2019, Dr. John W. Ellis, a Board-certified family medicine physician, indicated that he evaluated appellant and her medical records. Appellant related that she was assigned to a different duty location from mid-2016 through mid-2017 due to developing carpal tunnel syndrome, and the noise level in this location was very loud due to other work activities and a construction site at the employing establishment. An audiogram dated June 11, 2019 revealed decreased hearing, which Dr. Ellis noted was “typical” of noise-induced hearing loss. Dr. Ellis diagnosed noise-induced hearing loss and opined that appellant’s employment factors and work duties contributed to, aggravated, and/or caused her condition. He further opined that the noise level was so high (at a level of 90 to 95 decibels) that it caused a release of nitrous oxide resulting in deterioration of the hearing cells. Dr. Ellis also noted that a hearing loss with the greatest loss at 6,000 Hertz (Hz) is typical of noise-induced hearing loss.

On January 27, 2020 OWCP referred appellant, the medical record, a statement of accepted facts (SOAF), and a series of questions to Dr. Richard Dawson, a Board-certified otolaryngologist serving as second opinion physician, regarding the extent and cause of appellant’s conditions.

In a February 13, 2020 report, Dr. Dawson reviewed the SOAF, appellant’s history of injury, and medical course. He diagnosed appellant with bilateral sensorineural hearing loss but opined that her hearing loss was “not part of any noise exposure” related to her federal employment. Dr. Dawson further noted that the workplace exposure, except for the construction site noise, was “not sufficient” as to intensity in order to have caused the loss in question.

On March 2, 2020 OWCP referred the medical record and SOAF to Dr. Jeffrey Israel, a Board-certified otolaryngologist serving as an OWCP district medical adviser (DMA), to determine the extent of appellant’s alleged hearing loss from employment-related noise exposure.

On March 10, 2020 Dr. Israel reviewed Dr. Dawson’s report and 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*,³ (A.M.A., *Guides*) and

² A subsequent Form CA-2 page indicated that appellant first became aware of the condition on March 31, 2019.

³ A.M.A., *Guides* (6th ed. 2009).

determined that appellant sustained a right monaural loss of 39.375 percent, a left monaural loss of 45 percent, and a binaural hearing loss of 40.3 percent. He indicated that it was “difficult” to believe that appellant’s hearing loss was solely due to her alleged work-related noise exposure but noted that “we will never know for sure” as there was no audiogram to reference prior to her employment. Dr. Israel opined that the evidence was “suggestive” of hearing loss “due at least in part” to noise-induced work-related acoustic trauma.

On March 18, 2020 OWCP requested an addendum report from Dr. Israel for further clarification on the discrepancy between his report and Dr. Dawson’s. On March 25, 2020 Dr. Israel addressed his comment that it was “difficult” to believe that appellant’s hearing loss was solely due to her alleged work-related noise exposure. He indicated that he misstated his thinking and that he meant to say that it was difficult to believe that appellant’s hearing loss was not “at least in part” due to work-related noise exposure. Dr. Israel reiterated that “we will never know for sure” and he disagreed with Dr. Dawson that there was no relationship between appellant’s hearing loss and her employment. He noted that, even if her employment was a one percent contributing factor, it would still have some relationship to her hearing loss.

On July 1, 2020 OWCP referred appellant, along with a statement of accepted facts (SOAF) and the medical record to Dr. Gregg Govett, a Board-certified otolaryngologist, for an independent medical evaluation (IME) regarding the nature of appellant’s hearing loss.

In a July 29, 2020 report, Dr. Govett reviewed the SOAF, appellant’s history of injury, and medical evidence of record. He noted that appellant reiterated her injury history of hearing deterioration over the last three years, beginning in approximately 2017 when her duty location was moved for six months to an area of “hazardous noise” where a parking garage was being constructed. Dr. Govett compared the audiogram taken at this evaluation versus Dr. Dawson’s from February 2020 and noted further hearing loss. He diagnosed mild sensorineural hearing loss. Dr. Govett opined that the hearing loss was “not due to her federal employment” based on the “unreliability” of the audiogram. He compared pure tone averages against the speech reception thresholds and found that, while appellant had lost a significant amount of hearing over the last six months, her speech reception threshold had risen from the February 2020 audiogram whereas the pure tone averages fell. Further, appellant’s acoustic reflexes were found to be intact. Dr. Govett also noted that appellant had not complained of any tinnitus. He concluded that any significant hearing loss that appellant had was minor. To resolve the discrepancy in the audiograms, Dr. Govett recommended an audiogram brainstem response (ABR) test. He reiterated that he “does not feel” there is any “significant” hearing loss present in either ear.

On May 18, 2021 OWCP requested an addendum report from Dr. Govett for further clarification on whether his opinion on causal relationship had changed and whether he still recommended the ABR test.

By decision dated December 6, 2021, OWCP denied appellant’s occupational disease claim, finding that she had not established that her diagnosed bilateral partial hearing loss was causally related to the accepted factors of her federal employment.

On December 28, 2021 appellant was seen again by Dr. Govett who noted that appellant had undergone an ABR test. He applied the audiometric data taken at the current appointment to

OWCP's standard for evaluating hearing loss under the sixth edition of the A.M.A., *Guides*⁴ and determined that appellant sustained a right monaural loss of 26.25 percent, a left monaural loss of 18.75 percent, and a binaural hearing loss of 20 percent. No tinnitus was noted. Dr. Govett diagnosed bilateral sensorineural hearing loss and opined that it is "less likely than not" related to appellant's federal employment. He reiterated that the audiogram was unreliable. Dr. Govett further noted that several previous audiograms showed her hearing was significantly fluctuating.

On January 24, 2022 appellant requested reconsideration. In support of her reconsideration request, she submitted a narrative statement indicating Dr. Govett's report referenced auditory brainstem response test results, but OWCP had previously acknowledged it had not received these results. Appellant further argued that even a contributing work-related factor to her condition would be compensable.

On February 9, 2022 OWCP received a July 27, 2021 report from Dr. Govett, who noted his review of multiple audiograms dated February 2020, July 2020, and July 27, 2021 and advised that the current audiogram showed improvement in appellant's hearing loss. He also explained that there were significant discrepancies in the audiograms and that there was probably underlying normal hearing with minimal hearing loss. Dr. Govett also completed an outline for otologic evaluation wherein he indicated that appellant's workplace exposure was of sufficient intensity to have caused hearing loss, but that appellant had normal hearing, and her hearing loss was not due to her workplace exposure.

By decision dated April 22, 2022, OWCP denied modification of its December 6, 2021 decision. It related that Dr. Govett had recommended the ABR test to clarify the extent of her hearing loss and not to address causal relationship.

On May 13, 2022 OWCP received a report dated October 5, 2021 from Dr. Govett. Dr. Govett noted that appellant had undergone an ABR test on September 21, 2021 and that the results were suggestive of grossly normal hearing sensitivity with the exception of a possible loss at 4,000 Hz in the left ear. He also related that his opinion had not changed that appellant's hearing loss was not due to her federal employment. Dr. Govett further noted no significant hearing loss from the audiogram brainstem response test. OWCP also received a copy of his July 27, 2021 report.

On April 21, 2023 appellant requested reconsideration.

In support of her reconsideration request, appellant submitted a narrative statement reiterating opinions found in previously submitted medical reports on causal relationship. She related that hearing loss could also be caused by viral and bacterial infections, as well as psychosomatic conditions, which were accepted in OWCP File Nos. xxxxxx163 and xxxxxx716. Appellant argued that the medical reports did not rule out other factors that could cause hearing loss and noted that FECA only required work-related factors to contribute to the condition rather than being the most significant cause.

⁴ *Id.*

By decision dated July 13, 2023, OWCP denied appellant's request for reconsideration of the merits of her claim.

LEGAL PRECEDENT

Section 8128(a) of FECA does not entitle a claimant to review of an OWCP decision as a matter of right.⁵ OWCP has discretionary authority in this regard and has imposed certain limitations in exercising its authority.⁶ One such limitation is that the request for reconsideration must be received by OWCP within one year of the date of the decision for which review is sought.⁷ 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.⁸ 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.⁹

ANALYSIS

The Board finds that OWCP properly denied appellant's request for reconsideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

The Board finds that appellant 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, appellant is not entitled to further review of the merits of his claim based on either the first or second above-noted requirements under 20 C.F.R. § 10.606(b)(3).

On reconsideration, OWCP received an addendum report dated October 5, 2021 from Dr. Govett who indicated that his opinion had not changed that appellant's hearing loss was not due to her federal employment. Dr. Govett further noted no significant hearing loss reflected by the audiogram brainstem response test. OWCP also received a copy of Dr. Govett's July 27, 2021 report. The Board has held that the submission of evidence which duplicates or is

⁵ 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).

⁶ 20 C.F.R. § 10.607.

⁷ *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.

⁸ *Id.* at § 10.606(b)(3).

⁹ *Id.* at § 10.608(a), (b).

substantially similar to evidence already in the case record does not constitute a basis for reopening a case.¹⁰

Further, appellant submitted a narrative statement discussing medical reports from multiple physicians alleging that they had not ruled out causal relationship. This submission is not pertinent new evidence. Causal relationship is a medical question that requires rationalized medical opinion evidence to resolve the issue.¹¹ A lay opinion regarding causal relationship does not constitute probative medical evidence.¹² While appellant also related that her hearing loss could also be caused by viral and bacterial infections, as well as psychosomatic conditions, which were accepted in OWCP File Nos. xxxxxx163 and xxxxxx716, the Board notes that the current claim is for alleged hearing loss due to noise exposure. Therefore, appellant is not entitled to further review of the merits of her claim based on the third above-noted requirement under 20 C.F.R. § 10.606(b)(3).

The Board, accordingly, finds that appellant has not met 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 further finds that OWCP properly denied her request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

¹⁰ *B.S.*, Docket No. 20-0927 (issued January 29, 2021); *S.W.*, Docket No. 18-1261 (issued February 22, 2019); *E.M.*, Docket No. 09-39 (issued March 3, 2009); *Eugene F. Butler*, 36 ECAB 393, 398 (1984).

¹¹ *D.S.*, Docket No. 21-1388 (issued May 12, 2022); *I.J.*, Docket No. 19-1343 (issued February 26, 2020); *T.H.*, 59 ECAB 388 (2008); *Robert G. Morris*, 48 ECAB 238 (1996).

¹² *See E.H.*, Docket No. 19-0365 (issued March 17, 2021).

ORDER

IT IS HEREBY ORDERED THAT the July 13, 2023 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: February 9, 2024
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