



days of issuance and is not subject to further review.<sup>2</sup> As there is no merit decision by OWCP issued within 180 days of the filing of this appeal, pursuant to the Federal Employees' Compensation Act<sup>3</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).

### **FACTUAL HISTORY**

This case has previously been before the Board.<sup>4</sup> The facts and circumstances as set forth in the Board's prior decisions are incorporated herein by reference. The relevant facts are as follows.

On June 8, 2017 appellant, then a 46-year-old criminal investigator and firearms instructor, filed a traumatic injury claim (Form CA-1) alleging that hazardous noise during employment-related firearms training on May 26, 2017 caused constant ringing in his left ear that had not abated after seven days.

Appellant submitted medical evidence. In a June 29, 2017 report, Dr. Mario G. Alinea, an attending Board-certified family practitioner, noted appellant's complaints of left-sided hearing loss and tinnitus after exposure to firearms noise on a shooting range. He obtained an audiogram on June 29, 2017. At the frequency levels of 500, 1,000, 2,000, and 3,000 Hertz (Hz) in the right ear, appellant exhibited decibel (dB) losses of 10, 15, 10, and 20, respectively. Testing at the same frequency levels for the left ear revealed dB losses of 20, 30, 20, and 40, respectively. Tympanometry was within normal limits bilaterally. Dr. Alinea diagnosed left-sided sensorineural hearing loss with tinnitus. He explained that, based on appellant's history and clinical findings, he was "unclear if this hearing loss [was] attributable to firearms noise exposure on a more probable than not basis." Dr. Alinea remarked that, as most occupational noise exposures were symmetric, hearing loss was typically bilateral.

In a June 29, 2017 form report, Dr. Alinea diagnosed tinnitus and sensorineural hearing loss. He checked a box marked "Yes," indicating his support for a causal relationship between the diagnosed conditions and exposure to firearms noise at work. Dr. Alinea also completed a duty status report (Form CA-17) on June 29, 2017 in which he checked a box marked "Yes" in support of causal relationship.

By decision dated July 27, 2017, OWCP accepted that appellant's participation in the May 26, 2017 firearms practice occurred as alleged, but denied the claim, finding that the medical

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<sup>2</sup> 20 C.F.R. § 501.6(d); *see S.M.*, Docket No. 19-1961 (issued January 28, 2021); *P.S.*, Docket No. 18-0718 (issued October 26, 2018); *T.B.*, Docket No. 15-0001 (issued July 1, 2015); *C.M.*, Docket No. 15-0471 (issued April 27, 2015).

<sup>3</sup> 5 U.S.C. § 8101 *et seq.*

<sup>4</sup> Docket No. 19-0952 (issued November 5, 2019); Docket No. 17-1755 (issued March 9, 2018).

evidence of record did not provide medical rationale in support of causal relationship between the diagnosed sensorineural hearing loss condition and the accepted May 26, 2017 employment incident. Appellant then appealed to the Board.<sup>5</sup>

By decision issued March 9, 2018,<sup>6</sup> the Board affirmed OWCP's July 27, 2017 decision, finding that appellant did not meet his burden of proof to establish that his left-sided hearing loss and tinnitus were causally related to the accepted May 26, 2017 employment incident.

On August 7, 2018 appellant, through counsel, requested a telephonic hearing of OWCP's July 27, 2017 decision before a representative of OWCP's Branch of Hearings and Review.

By decision dated August 14, 2018, an OWCP hearing representative denied appellant's request for a telephonic hearing. She indicated to counsel that the final decision on the issue was the Board's March 9, 2018 decision, and that OWCP's Branch of Hearing and Review did not have jurisdiction to review final decisions of the Board. As such, appellant was not entitled to a hearing as a matter of right. OWCP's hearing representative exercised her discretion and further denied the hearing request for the reason that the issue in the case could equally well be addressed by requesting reconsideration and submitting new evidence establishing an employment-related injury.

On March 6, 2019 appellant, through counsel, requested reconsideration and submitted additional evidence.

In a February 22, 2019 report, Dr. John J. Simmer, a Board-certified otolaryngologist, noted the accepted May 26, 2017 employment incident and subsequent treatment. He related appellant's complaints of constant left-sided tinnitus interfering with sleep. Dr. Simmer reviewed an audiogram obtained by Stefanie M. Allan, an audiologist, which demonstrated a mild or borderline hearing loss in the left ear at frequencies greater than 2,000 Hz, and a borderline hearing loss on the right at 3,000 Hz and from 6,000 to 8,000 Hz. He diagnosed sensorineural hearing loss of the left ear with interval improvement since 2017, restricted hearing in the right ear, and tinnitus of the left ear. Dr. Simmer opined that loud noise exposure was a recognized cause of sensorineural hearing loss and tinnitus, which could occur as an acute event "with exposure to extreme loud noise or can be gradual with frequent, regular exposure to loud noise." He further noted that the temporal relationship of onset of appellant's symptoms to presence on the firing range would suggest loud noise exposure as the source of appellant's condition.

In a February 25, 2019 report, Dr. Nancy A. Becker, an osteopathic physician Board-certified in otolaryngology, noted appellant's account of a 2004 employment incident in which he was exposed to firearms noise and lost hearing in his left ear for one month. Appellant had a second episode in May 2017 when the employing establishment changed to a short barrel assault

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<sup>5</sup> During the pendency of the prior appeal, appellant submitted a July 17, 2017 report by Dr. Sepehr Oliaei, a Board-certified otolaryngologist. Dr. Oliaei noted a history of gradual onset of bilateral hearing loss, and that appellant had constant exposure to loud noise in his work as a firearms instructor. He obtained an audiogram demonstrating normal hearing in the right ear, and a mild sloping-to-moderate sensorineural hearing loss from 1,000 through 8,000 Hz in the left ear. Dr. Oliaei diagnosed tinnitus, noise-induced hearing loss, and sensorineural hearing loss in the left ear.

<sup>6</sup> Docket No. 17-1755 (issued March 9, 2018).

weapon with a louder report than previous firearms used. He experienced bilateral tinnitus which abated on the right after one week. Appellant posited that noise reverberating from trees on the left side of the shooting range caused more severe tinnitus on the left. A February 25, 2019 audiogram demonstrated a 5 to 10 dB conductive hearing loss on the left and a sensorineural hearing loss on the left. Tympanometry was within normal limits bilaterally. Dr. Becker diagnosed left conductive hearing loss, left sensorineural hearing loss, left tinnitus, chronic rhinitis, and a eustachian tube dysfunction. She opined that the eustachian tube dysfunction “might be accounting for part of the conductive hearing loss.”

By decision dated March 11, 2019, OWCP denied modification of its July 27, 2017 decision. Appellant, through counsel, then appealed to the Board.

During the pendency of the prior appeal, appellant submitted additional medical evidence. In a June 12, 2019 report, Dr. Becker opined that there was a “direct relationship between him having excellent hearing on previous physicals and then having a sensorineural hearing loss in the left ear after his accident in May 2017.” Appellant also had tinnitus. Dr. Becker noted that causal relationship was further supported by appellant’s medical history and the February 25, 2019 audiogram. She noted that she agreed with Dr. Simmer that loud noise exposure was recognized as a cause of sensorineural hearing loss and tinnitus. “The left sensorineural hearing loss on” the February 25, 2019 audiogram “with normal audiograms previous to his first episode of noise exposure supports this.” Dr. Becker opined that appellant would benefit from a hearing aid in his left ear.

Appellant also submitted an audiogram dated July 15, 2019, obtained by a registered nurse whose signature is illegible. At the frequency levels of 500, 1,000, 2,000, and 3,000 Hz in the right ear, appellant exhibited dB losses of 15, 15, 15, and 25, respectively. Testing at the same frequency levels for the left ear revealed dB losses of 25, 35, 30, and 60, respectively. The nurse totaled the decibel losses in the left ear to equal 150 and divided the result by four to equal 37.5. Subtracting the fence of 25 decibels left a balance of 12.5, multiplied by a factor of 1.5 to equal an 18.75 percent monaural hearing loss in the left ear.

By decision issued November 5, 2019, the Board affirmed OWCP’s March 11, 2019 decision, finding that the medical evidence of record did not contain sufficient rationale supporting causal relationship between the accepted May 26, 2017 employment incident and the claimed left-sided hearing loss and tinnitus to meet appellant’s burden of proof.

On November 7, 2019 appellant, through counsel, requested reconsideration. He contended that Dr. Becker’s June 12, 2019 report was sufficient to vacate the prior decision. Counsel also provided a copy of the July 15, 2019 audiogram.

By decision dated February 4, 2020, OWCP denied appellant's request for reconsideration.<sup>7</sup>

### **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>8</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>9</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>10</sup> If it chooses to grant reconsideration, it reopens and reviews the case on its merits.<sup>11</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>12</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).

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<sup>7</sup> OWCP actually referred to the Board's November 5, 2019 decision. However, OWCP has no jurisdiction to review a Board decision. The decisions and orders of the Board are final as to the subject matter appealed and such decisions and orders are not subject to review, except by the Board. *See* 20 C.F.R. § 501.6(d). Appellant had 30 days from the date of the Board's June 14, 2018 decision to file a petition for reconsideration with this Board of its decision. *Id.* at § 501.7. *See also* *C.M.*, Docket No. 19-1211 (issued August 5, 2020); *B.B.*, Docket No. 14-0464 (issued June 4, 2014).

<sup>8</sup> 5 U.S.C. § 8128(a); *see L.D.*, Docket No. 18-1468 (issued February 11, 2019); *see also 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>9</sup> 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).

<sup>10</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 (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). Chapter 2.1602.4b.

<sup>11</sup> *Id.* at § 10.608(a); *see also A.F.*, Docket No. 19-1832 (issued July 21, 2020); *M.S.*, 59 ECAB 231 (2007).

<sup>12</sup> *Id.* at § 10.608(b); *J.B.*, Docket No. 20-0145 (issued September 8, 2020); *Y.K.*, Docket No. 18-1167 (issued April 2, 2020); *E.R.*, Docket No. 09-1655 (issued March 18, 2010).

The Board finds that appellant has not alleged or demonstrated that OWCP erroneously applied or interpreted a specific point of law. Moreover, appellant has not advanced a relevant legal argument not previously considered. Counsel asserted that appellant had submitted uncontroverted medical evidence sufficient to warrant further development. He further asserted that the newly submitted June 12, 2019 report from Dr. Becker and July 15, 2019 audiogram were sufficient to vacate OWCP's prior decision. Causal relationship, however, is a medical issue that must be addressed by relevant medical evidence.<sup>13</sup> Counsel's lay opinion is not relevant to the underlying issue in this case, which is whether the medical evidence establishes that appellant sustained an employment-related left-sided hearing loss and tinnitus. Consequently, appellant is not entitled to a review of the merits of his claim based on the first and second above-noted requirements under 20 C.F.R. § 10.606(b)(3).<sup>14</sup>

The Board further finds that appellant has not provided any relevant and pertinent new evidence not previously considered. Appellant submitted a June 12, 2019 report from Dr. Becker, who diagnosed left-sided hearing loss and tinnitus. She opined that these conditions were related to work factors based on the date of onset and expressed agreement with Dr. Simmer's opinion that exposure to loud noise could cause sensorineural hearing loss and tinnitus. While this report is new, it is substantially similar to Dr. Becker's February 25, 2019 report previously of record, which also described the onset of left-sided hearing loss and tinnitus following exposure to loud noise while at work. Providing additional evidence that either duplicates or is substantially similar to evidence already of record does not constitute a basis for reopening a case.<sup>15</sup> Appellant also submitted a July 15, 2019 audiogram in support of her request for reconsideration. This report, however, is irrelevant as it does not address the underlying issue of causal relationship. The Board has held that the submission of evidence that does not address the underlying issue involved does not constitute a basis for reopening a case.<sup>16</sup> As appellant did not 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).<sup>17</sup>

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.<sup>18</sup>

On appeal counsel contends that OWCP failed to give due deference to the findings of appellant's physicians and failed to adjudicate the claim in accordance with the proper standard of causation. As explained above, the Board lacks jurisdiction over the merits of this case and appellant's November 7, 2019 is insufficient to warrant further merit review.

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<sup>13</sup> *A.G.*, Docket No. 20-0290 (issued June 24, 2020).

<sup>14</sup> *A.G., id.; C.B.*, Docket No. 18-1108 (issued January 22, 2019).

<sup>15</sup> *See G.J.*, Docket No. 20-0071 (issued July 1, 2020); *V.Q.*, Docket No. 19-1309 (issued January 3, 2020).

<sup>16</sup> *T.T.*, Docket No. 19-1624 (issued October 28, 2020).

<sup>17</sup> *See T.W.*, Docket No. 18-0821 (issued January 13, 2020).

<sup>18</sup> *J.B., supra* note 12; *D.G.*, Docket No. 19-1348 (issued December 2, 2019).

**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).

**ORDER**

**IT IS HEREBY ORDERED THAT** the February 4, 2020 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: February 12, 2021  
Washington, DC

Janice B. Askin, Judge  
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Alternate Judge  
Employees' Compensation Appeals Board

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