U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DAVID R. WATKINS and DEPARTMENT OF THE NAVY, NAVAL AIR WARFARE CENTER, Indianapolis, IN

Docket No. 98-643; Submitted on the Record;
Issued October 25, 1999

DECISION and ORDER

Before WILLIE T.C. THOMAS, BRADLEY T. KNOTT, A. PETER KANJORSKI

The issues are: (1) whether appellant has more than a two percent hearing loss in the left ear for which he received a schedule award; and (2) whether the Office of Workers' Compensation Programs abused its discretion in refusing to reopen appellant's claim for merit review under 5 U.S.C. § 8128.

On September 14, 1993 appellant, then a 48-year-old industrial specialist, filed an occupational disease claim alleging that he sustained hearing loss due to noise exposure in his federal employment. The Office accepted appellant's claim for bilateral noise-induced hearing loss but, in a decision dated June 24, 1996, found that the hearing loss was not sufficient to be ratable for purposes of a schedule award.

Appellant requested a hearing, which the Office denied by decision dated August 28, 1996, as untimely. Appellant subsequently requested reconsideration and submitted in support of his request an audiogram dated August 19, 1996 and an accompanying medical report dated August 30, 1996 from Dr. James D. Miner, a Board-certified otolaryngologist. The Office determined that a conflict in medical opinion existed between Dr. Miner and Dr. Jeffrey L. Wilson, an otolaryngologist and Office referral physician, on the issue of whether appellant had a ratable hearing impairment. The Office referred appellant to Dr. Robert McQuiston, a Board-certified otolaryngologist, to resolve the conflict in medical opinion.

Based on Dr. McQuiston's December 19, 1996 audiogram and medical report, in a decision dated January 23, 1997, the Office vacated its June 24, 1996 decision. By decision dated January 27, 1997, the Office granted appellant a schedule award for a two percent hearing loss in his left ear. In a decision dated October 8, 1997, a hearing representative affirmed the Office's January 27, 1997 decision.

By letter dated October 30, 1997, appellant requested reconsideration of his claim. In a decision dated November 12, 1997, the Office found that the evidence submitted in support of

appellant's request for reconsideration was repetitious and thus insufficient to warrant review of the prior decision.

The Board has duly reviewed the case record and finds that appellant has no more than a two percent hearing loss in the left ear for which he received a schedule award.

Under section 8107 of the Federal Employees' Compensation Act,[1] and section 10.304 of the implementing federal regulations,[2] schedule awards are payable for permanent impairment of specified body members, functions or organs. However, neither the Act nor the regulations specify the manner in which the percentage of impairment shall be determined. For consistent results and to ensure equal justice under the law for all claimants, good administrative practice necessitates the use of a single set of tables so that there may be uniform standards applicable to all claimants. The American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed. 1993) have been adopted by the Office, and the Board has concurred in such adoption, as an appropriate standard for evaluating schedule losses.[3]

Where there exists a conflict in medical opinion and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, is entitled to special weight.[4] In a report dated December 19, 1996, Dr. McQuiston, the Board-certified otolaryngologist and impartial medical examiner, found that appellant had "some hearing loss related to noise exposure" and recommended hearing aids. Dr. McQuiston indicated that he had reviewed audiograms since 1978, listed findings on examination and performed an audiological evaluation. The Board finds that Dr. McQuiston's opinion is sufficiently probative to merit the special weight accorded a referee examiner. The Office thus properly applied the A.M.A., *Guides* to the December 19, 1996 audiogram obtained by Dr. McQuiston,

According to the A.M.A., *Guides*, the losses at the frequencies of 500, 1,000, 2,000 and 3,000 cycles per second are added up, averaged, and the "fence" of 25 decibels is deducted.[5] The remaining amount is multiplied by 1.5 to arrive at the percentage of monaural hearing loss. The binaural loss is determined by calculating the loss in each ear using the aforementioned formula for monaural loss. The lesser loss is then multiplied by five and added to the greater loss. This amount is then divided by six to arrive at the total binaural hearing loss.[6]

[1] 5 U.S.C. § 8107.

[2] 20 C.F.R. § 10.304.

[3] *James J. Hjort*, 45 ECAB 595 (1994).

[4] *Leanne E. Maynard*, 43 ECAB 482 (1992).

[5] The A.M.A., *Guides* states that a loss below an average of 25 dB is deducted as it does not result in an impairment in the ability to hear everyday sounds under everyday listening conditions; *see* A.M.A., *Guides* at 224.

[6] *Id.*

The Office medical adviser applied the Office's standardized procedures to the December 19, 1996 audiogram. Testing for the right ear at the frequency levels of 500, 1,000, 2,000 and 3,000 cycles per second revealed decibel losses of 20, 20, 25 and 35, respectively. These decibels were totaled at 100 and divided by 4 to obtain the average hearing loss of 25 decibels. The average loss was reduced by the 25 decibels fence to equal 0, which was multiplied by the established factor 1.5 to compute a 0 percent monaural loss for the right ear.

Testing for the left ear at the frequency levels of 500, 1,000, 2,000 and 3,000 cycles per second revealed losses of 25, 20, 25 and 35 decibels, respectively. These decibels were totaled at 105 and divided by 4 to obtain the average hearing loss of 26.25 decibels. The average loss was reduced by the 25 decibels fence to equal 1.25, which was multiplied by the established factor 1.5 to compute a 1.875 percent monaural loss for the left ear, which when rounded equaled a two percent loss of hearing in the left ear. The Office thus correctly determined that appellant sustained a two percent monaural loss of hearing in the left ear causally related to factors of his federal employment.

Subsequent to the Office's decision, appellant submitted a report dated August 28, 1996 from Dr. Steven F. Isenberg, a Board-certified otolaryngologist. However, Dr. Isenberg based his findings on the August 19, 1996 audiogram obtained by Dr. Miner, which created the conflict in medical opinion resolved by Dr. McQuiston. Thus, Dr. Isenberg's report is insufficient to overcome the special weight accorded to Dr. McQuiston as impartial medical specialist.

The Board further finds that the Office did not abuse its discretion in refusing to reopen appellant's case for merit review under section 8128.

The Office has issued regulations regarding its review of decisions under section 8128(a) of the Federal Employees' Compensation Act. Under 20 C.F.R. § 10.138(b)(1), a claimant may obtain review of the merits of his claim by written request to the Office identifying the decision and the specific issue(s) within the decision which claimant wishes the Office to reconsider and the reasons why the decision should be changed and by:

"(i) Showing that the Office erroneously applied or interpreted a point of law, or

"(ii) Advancing a point of law or fact not previously considered by the Office, or

"(iii) Submitting relevant and pertinent evidence not previously considered by the Office."[7]

Section 10.138(b)(2) provides that any application for review of the merits of the claim which does not meet at least one of the requirements listed in paragraphs (b)(1)(i) through (iii) of this section will be denied by the Office without review of the merits of the claim.[8] Evidence that repeats or duplicates evidence already in the case record has no evidentiary values and does

[7] 20 C.F.R. § 10.138(b)(1).

[8] *See* 20 C.F.R. § 10.138(b)(2).

not constitute a basis for reopening a case.[9] Evidence that does not address the particular issue involved also does not constitute a basis for reopening a case.[10]

In support of his request for reconsideration, appellant resubmitted reports from Dr. Isenberg dated February 10 and August 28, 1997. As this evidence duplicated evidence already contained in the case record and previously considered by the Office, it did not constitute a basis for reopening appellant's case for merit review under 20 C.F.R. § 10.138.[11] Appellant, therefore, has not shown that the Office erroneously applied or interpreted a point of law or fact, or submitted relevant and pertinent evidence not previously considered by the Office.

The decisions of the Office of Workers' Compensation Programs dated November 12 and October 8, 1997 are hereby affirmed.

Dated, Washington, D.C.
October 25, 1999

Willie T.C. Thomas
Alternate Member

Bradley T. Knott
Alternate Member

A. Peter Kanjorski
Alternate Member

[9] *Daniel Deparini*, 44 ECAB 657 (1993).

[10] *Id.*

[11] *Richard L. Ballard*, 44 ECAB 146 (1992).