U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of RICHARD J. COPA and DEPARTMENT OF THE ARMY, ARMY NATIONAL GUARD, St. Paul, MN

Docket No. 03-239; Submitted on the Record;
Issued October 3, 2003

DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON, WILLIE T.C. THOMAS

The issues are: (1) whether appellant has established a binaural hearing loss of more than two percent, for which he had received a schedule award; and (2) whether the Office of Workers' Compensation Programs properly refused to reopen appellant's case for merit review under 5 U.S.C. § 8128(a).

On July 18, 2000 appellant, then a retired federal mechanic, filed an occupational disease claim alleging that his binaural hearing loss was caused by his federal employment. Appellant stated that he first became aware of his condition and first realized that it was caused by employment on September 26, 1985. The employing establishment indicated that appellant retired effective July 1, 2000.

On October 25, 2000 the employing establishment submitted a copy of appellant's position description and hearing tests conducted during his employment.

On November 15, 2000 the Office advised appellant that he would be referred to a consultant to determine whether his binaural hearing loss was related to his employment and, if so, whether any impairment existed as a result of the binaural hearing loss.

In a report dated December 21, 2000, Dr. Oleg Froymovich, a Board-certified otolaryngologist, submitted an audiogram and stated that appellant had borderline mild to moderate hearing loss at high frequencies bilaterally and that he would benefit from hearing aids. In a report dated January 26, 2001, the Office medical adviser reviewed Dr. Froymovich's report and recommended a two percent binaural hearing loss. The physician checked a box "no" indicating that hearing aids were not authorized.

By decision dated August 7, 2001, the Office accepted appellant's binaural hearing loss. The Office also indicated that hearing aids were not authorized. By decision dated October 31, 2001, the Office awarded appellant a schedule award for a two percent impairment for binaural hearing loss.

On July 29, 2002 appellant requested reconsideration and submitted a copy of the December 2000 audiogram as well as reports dated June 29, 1973, April 16, 1989 and December 4, 1994, that included audiometer readings.

By decision dated August 14, 2002, the Office denied reconsideration.

The Board finds that appellant has no more than a two percent binaural hearing loss, for which he had received a schedule award.

The schedule award provisions of the Federal Employees' Compensation Act[1] and its implementing regulation set forth the number of weeks of compensation to be paid for permanent loss, or loss of use of the members of the body listed in the schedule. However, the Act does not specify the manner in which the percentage of loss of a member shall be determined. The method used in making such determination is a matter which rests in the sound discretion of the Office. The Board has held, however, that for consistent results and to ensure equal justice under the law to 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.[2]

The Office evaluates industrial hearing loss in accordance with the standards contained in the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).[3] Using the frequencies of 500, 1,000, 2,000 and 3,000 cycles per second, the losses at each frequency are added up and averaged. Then the "fence" of 25 decibels is deducted because, as the A.M.A., *Guides* points out, losses below 25 decibels result in no impairment in the ability to hear everyday speech under everyday conditions. The remaining amount is multiplied by a factor of 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 formula for monaural loss; the lesser loss is multiplied by five, then added to the greater loss and the total is divided by six to arrive at the amount of the binaural hearing loss. The Board has concurred in the Office's adoption of this standard for evaluating hearing loss.[4]

In this case, in a report dated January 26, 2001, the Office medical adviser reviewed the results of the most recent audiogram dated December 21, 2000. He determined that on the December 21, 2000 audiogram the frequency levels recorded at 500, 1,000, 2,000 and 3,000 cycles per second of the right ear, 20, 10, 20 and 60 decibels respectively, totaled 110 which divided by 4 yielded the average hearing loss at those frequencies of 27.50 decibels. The Office medical adviser reduced the average by the 25 decibel fence to equal 2.50. He then multiplied 2.50 by the established factor of 1.5 to obtain a monaural loss of the right ear of 3.75 percent. The Office medical adviser totaled the decibel losses at the above-mentioned frequencies for the left ear, 10, 15, 20 and 60 decibels respectively, at 105, which he divided by 4 to obtain the average hearing loss at these frequencies of 26.25 decibels. He subtracted the 25 decibel fence

[1] 5 U.S.C. §§ 8101-8193.

[2] *Bernard A. Babcock, Jr*., 52 ECAB 143 (2000).

[3] A.M.A., *Guides* at 250 (5th ed. 2001).

[4] *Jerome L. Simpson*, 54 ECAB ___ (Docket No. 02-1465, issued October 4, 2002).

from 26.25 decibels to obtain a hearing impairment of 1.25 decibels in the left ear. The Office medical adviser multiplied 1.25 by the established factor 1.5 to obtain a monaural hearing loss in the left ear of 1.87 percent. The Office medical adviser then multiplied 1.87 by 5, added it to the 3.75 percent monaural loss in the right ear and divided the sum by 6 to obtain a binaural hearing loss of 2 percent.

The Board finds that the Office medical adviser properly used the applicable standards of the A.M.A., *Guides* to determine that appellant had no more than a two percent binaural hearing loss causally related to his federal employment.

The Board further finds that the Office properly refused to reopen appellant's case for merit review under 5 U.S.C. § 8128(a).

Section 8128(a) of the Act[5] vests the Office with discretionary authority to determine whether it will review an award for or against compensation:

> "The Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application. The Secretary, in accordance with the facts found on review may --
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> (1) end, decrease, or increase the compensation awarded; or
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> (2) award compensation previously refused or discontinued."[6]

Under 20 C.F.R. § 10.606(b)(2), a claimant may obtain review of the merits of his claim, by showing that the Office erroneously applied or interpreted a specific point of law, by advancing a relevant legal argument not previously considered by the Office, or by submitting relevant and pertinent new evidence not previously considered by the Office.[7]

Section 10.608(b) provides that when an application for reconsideration fails to meet at least one of the requirements in section 10.606(b)(2), the Office will deny the application without reopening the case for merit review.[8] Evidence that repeats or duplicates evidence has no evidentiary value and does not constitute a basis for reopening a case.[9] Evidence or argument that does not address the particular issue does not constitute a basis for reopening a case.[10]

Appellant's July 29, 2002 request for reconsideration neither alleged nor demonstrated that the Office erroneously applied or interpreted a specific point of law. Additionally, appellant

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[5] 5 U.S.C. §§ 8101-8193.

[6] 5 U.S.C. § 8128(a).

[7] 20 C.F.R. § 10.606(b)(2) (1999).

[8] 20 C.F.R. § 10.608(b) (1999).

[9] *David J. McDonald*, 50 ECAB 185 (1998).

[10] *Linda I. Sprague*, 48 ECAB 386 (1997).

did not advance a relevant legal argument not previously considered by the Office. Consequently, appellant is not entitled to a review of the merits of his claim based on the first and second above-noted requirements under section 10.606(b)(2).

With respect to the third requirement, submitting relevant and pertinent new evidence not previously considered by the Office, appellant submitted a December 12, 2000 audiogram report, from Dr. Froymovich and a physical profile, physical examination and audiograms reports dated June 29, 1973, April 16, 1989 and December 4, 1994 and Dr. Froymovich's report had been submitted previously. The Board has found that evidence that repeats or duplicates evidence already in the case record has no evidentiary value and does not constitute a basis for reopening a case.[11] Appellant's reports dated 1973, 1989 and 1994, taken in conjunction with evaluation for work in those respective years do not contain a medical opinion showing that the audiograms were interpreted. The actual audiograms that supported the reported findings were not submitted. Therefore, the figures recorded in the various examinations cannot be evaluated or verified in the absence of the actual audiograms. Thus, the evidence is new but not relevant or pertinent for determining whether appellant has a greater binaural hearing loss than two percent, which the Office had awarded previously. Because these reports are irrelevant, they are sufficient to require the Office to reopen appellant's claim for merit review.[12]

As appellant is not entitled to a review of the merits of his claim pursuant to any of the three requirements under section 10.606(b)(2), the Board finds that the Office properly denied appellant's request for reconsideration.

[11] *Freddie Mosley*, 54 ECAB ___ (Docket No. 02-1915, issued December 19, 2002).

[12] *Annette Louise*, 54 ECAB _____ (Docket No. 03-445, issued August 26, 2003).

The decisions of the Office of Workers' Compensation Programs dated August 14, 2002 and October 31, 2001 are hereby affirmed.

Dated, Washington, DC
October 3, 2003

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member