U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MICHAEL KACHAYLO, JR. and DEPARTMENT OF THE ARMY, ARMY NATIONAL GUARD, Annville, PA

Docket No. 03-1438; Submitted on the Record;
Issued October 27, 2003

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issues are: (1) whether appellant is entitled to a schedule award for his hearing loss; and (2) whether the Office of Workers' Compensation Programs abused its discretion in refusing to reopen appellant's claim for a further review of the merits pursuant to 5 U.S.C. § 8128(a).

The Office accepted appellant's claim for a bilateral hearing loss. On September 25, 2002 appellant filed a claim for a schedule award. The Office referred appellant to a second opinion physician, Dr. Robert A. Marwick, a Board-certified otolaryngologist, for a hearing evaluation. In an undated report, which was received by the Office on September 18, 2002, Dr. Marwick diagnosed mild to severe bilateral high frequency sensorineural hearing loss, which was due to appellant's exposure at his federal employment.

By decision dated October 2, 2002, the Office denied appellant's claim, stating that appellant was not entitled to a schedule award because his hearing loss was not severe enough to be ratable.

By letter dated October 14, 2002, appellant requested reconsideration of the Office's decision. Appellant explained the history of his exposure to noise on the job, that he had difficulty hearing people talk, particularly females, whose voices are in the higher frequencies and he felt that the hearing test he was given on September 12, 2002 was not entirely valid. Appellant stated that he came across as "hearing" the words during the test when in fact he was merely lip reading. He stated that his hearing problem created difficulties in communicating with his wife and daughter.

By decision dated December 26, 2002, the Office denied appellant's request for reconsideration on the merits.

The Board finds that appellant is not entitled to a schedule award for his hearing loss.

The schedule award provision of the Federal Employees' Compensation Act[1] provides for compensation to employees sustaining permanent impairment from loss or loss of use of specified members of the body. The Act's compensation schedule specifies the number of weeks of compensation to be paid for the permanent loss of use of specified members, functions and organs of the body. The Act does not, however, specify the manner by which the percentage loss of a member, function, or organ shall be determined. The method used in making such a determination is a matter that rests in the sound discretion of the Office.[2] 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.[3]

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*).[4] 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.[5] 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.[6] The remaining amount is multiplied by 1.5 to arrive at the percentage of monaural loss.[7] 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 loss.[8] The Board has concurred in the Office's adoption of this standard for evaluating hearing loss.[9]

In his September 23, 2002 report, the district medical adviser reviewed the results of the most recent audiogram dated September 12, 2002. He totaled the frequency levels recorded at 500, 1,000, 2,000 and 3,000 cycles per second for the right ear, 10, 10, 10 and 25, respectively, at 55, which he divided by 4 to obtain the average hearing loss at those frequencies of 13.75. The district medical adviser subtracted the 25 decibel fence from 13.75 to obtain a hearing impairment of 0 in the right ear. He multiplied 0 by the established factor of 1.5 to obtain a 0 percent monaural hearing loss in the right ear.

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[1] 5 U.S.C. § 8107 *et seq.*

[2] *Arthur E. Anderson*, 43 ECAB 691, 697 (1992); *Danniel C. Goings*, 37 ECAB 781, 783 (1986).

[3] *Marco A. Padilla*, 51 ECAB 202, 205 (1999); *Arthur E. Anderson, supra* note 2 at 697.

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

[5] *Id*.

[6] *Id*.

[7] *Id*.

[8] *Id.*

[9] *Donald E Stockstad*, 53 ECAB _____ (Docket No. 01-1570, issued January 23, 2002); *petition for recon. granted (modifying prior decision)*, Docket No. 01-570 (issued August 13, 2002).

The district medical adviser totaled the decibels loses at the applicable frequencies for the left ear, 10, 10, 10 and 30, at 60, which he divided by 4 to obtain the average hearing loss at those frequencies of 15. He subtracted the 25 decibel fence from 15 to obtain a hearing impairment of 0 in the left ear. The district medical adviser multiplied 0 by the established factor of 1.5 to obtain a 0 percent monaural loss in the left ear. He multiplied the zero percent loss in one ear by five, added the zero percent loss in the other ear and divided the sum by six to calculate appellant's binaural hearing loss at zero percent. The Board finds that the district medical adviser applied the proper standards to the September 12, 2003 audiogram results and properly determined that appellant had a zero percent binaural loss. Although the September 12, 2002 audiogram shows a severe hearing loss at frequencies above 3,000 cycles per second, the A.M.A., *Guides* (5th ed. 2001) only measure a hearing loss from 500 to 3,000 cycles per second. Thus, appellant may not be compensated under the Act for his hearing loss above 3,000 cycles per second.

The Board finds that Office properly refused to reopen appellant's claim for a further review of the merits pursuant to 5 U.S.C. § 8128(a).

To require the Office to reopen a case for merit review under section 8128(a) of the Act, the Office's regulations provide that the application for reconsideration, including all supporting documents, must set forth arguments and contain evidence that either: (1) shows that the Office erroneously applied or interpreted a specific point of law; (2) advances a relevant legal argument not previously considered by the Office; or (3) constitutes relevant and pertinent new evidence not previously considered by the Office.[10] A timely request for reconsideration may be granted if the Office determines that the employee has presented evidence and/or arguments that meets at least one of the standards described in section 10.606(b)(2).[11]

In this case, in his request for reconsideration, appellant stated that he was having trouble hearing, particularly women and that the September 12, 2002 hearing test was invalid. Appellant, however, did not present any supporting evidence that the hearing test was invalid. Appellant did not show that the Office erroneously interpreted or applied a specific point of law and did not present a relevant legal argument or relevant and pertinent new evidence not previously considered by the Office. The Office, therefore, properly denied appellant's request for reconsideration without a merit review of the claim.

[10] Section 10.606(b)(2) (i-iii).

[11] Section 10.608(a).

The decisions dated December 26 and October 2, 2002 of the Office of Workers' Compensation Programs are affirmed.

Dated, Washington, DC
October 27, 2003

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member