United States Department of Labor
Employees' Compensation Appeals Board

G.O., Appellant	)	
and	)	**Docket No. 07-1383**
	)	**Issued: October 17, 2007**
DEPARTMENT OF THE NAVY, PUGET SOUND NAVAL SHIPYARD, Bremerton, WA, Employer	)	

Appearances:
Cathy Deno, for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On April 25, 2007 appellant, through his representative, filed a timely appeal of the Office of Workers' Compensation Programs' merit decision dated May 16, 2006 finding that he was not entitled to a schedule award due to his employment-related loss of hearing and a nonmerit decision dated April 5, 2007. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the both the merit and nonmerit issues in this case.

ISSUES

The issues are: (1) whether appellant has a ratable loss of hearing entitling him to a schedule award; and (2) whether the Office properly declined to reopen his claim for consideration of the merits in accordance with 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On August 6, 2001 appellant, then a 51-year-old welder, filed an occupational disease claim, alleging that he developed hearing loss due to factors of his federal employment. He

stated that he was exposed to grinding, carbon arcing, needle guns, chipping, ventilation blowers and steel hammering in the performance of duty. Appellant stated that he utilized the ear protection provided by the employing establishment.

Appellant provided the audiograms from the employing establishment health program dated 1973 to 2001. The employing establishment provided noise exposure data for appellant from 1973 to 2001.

The Office referred appellant for a second opinion evaluation on December 28, 2001. In a report dated February 11, 2002, Dr. Gerald Randolph, a Board-certified otolaryngologist, noted appellant's employment-related noise exposure and diagnosed bilateral high frequency neurosensory hearing loss. He noted that appellant had hearing loss in 1973 when he began working at the employing establishment, but stated that the increase in his hearing loss was greater than would be expected from presbycusis alone. Dr. Randolph stated that appellant's audiogram revealed hearing loss with an audiometric configuration compatible with hearing loss due to past noise exposure. The audiogram demonstrated testing at 500, 1,000, 2,000 and 3,000 hertz and the right ear exhibited hearing thresholds at 10, 5, 10 and 40 decibels, respectively while the left ear exhibited hearing thresholds of 10, 5, 10 and 50 decibels, respectively. Dr. Randolph found that appellant had no ratable loss of hearing but recommended hearing aids.

The Office medical adviser reviewed the medical evidence on March 12 and August 6, 2002 and found that appellant did not have a ratable loss of hearing for schedule award purposes. The losses at the frequencies of 500, 1,000, 2,000 and 3,000 cycles per second were added and averaged and the "fence of 25 decibels was deducted.[1] The remaining amount was multiplied by 1.5 to arrive at the percentage of monaural hearing loss. For levels recorded in the left ear of 10, 5, 10 and 50, this formula derives 0 percent monaural loss and for levels recorded in the right ear of 10, 5, 10 and 40, the above formula derives 0 percent monaural loss. The Office medical adviser authorized hearing aids.

Appellant requested a schedule award on February 3, 2005. By decision dated April 7, 2005, the Office denied his request for a schedule award as his hearing loss was not severe enough to be considered ratable. The Office further denied hearing aids. In a letter dated May 23, 2005, it stated that, although appellant did not have a ratable hearing loss for schedule award purposes, he was entitled to medical treatment of his hearing loss including hearing aids.

Appellant submitted a report dated June 2, 2005 from an audiologist requesting new hearing aids for him due to an increased loss of hearing. The Office authorized the hearing aids on June 9, 2005.

By decision dated May 16, 2006, the Office found that appellant did not have a ratable hearing loss entitling him to a schedule award.

[1] The American Medical Association, *Guides to the Evaluation of Permanent Impairment* points out that the loss below an average of 25 decibels is deducted as it does not result in impairment in the ability to hear everyday sounds under everyday listening conditions.

Appellant requested a schedule award on February 15, 2007. He requested that the Office reconsider his claim for a schedule award on March 14, 2007. Appellant resubmitted the result of audiometric testing from June 26, 1973 to 2001. He submitted additional audiograms from the employing establishment dated 2002 to 2007.

By decision dated April 5, 2007, the Office declined to reopen appellant's claim for consideration of the merits finding that he failed to submit relevant new evidence.

LEGAL PRECEDENT -- ISSUE 1

The schedule award provision of the Federal Employees' Compensation Act[2] and its implementing regulation[3] set forth the number of weeks of compensation payable to employees sustaining permanent impairment from loss, or loss of use, of scheduled members or functions of the body. However, the Act does not specify the manner in which the percentage of loss shall be determined. 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. The A.M.A., *Guides* has been adopted by the implementing regulation as the appropriate standard for evaluating schedule losses.

In order to establish an employment-related hearing loss, the employee is required to undergo both audiometric and otologic examination; that the audiometric testing precede the otologic examination; that the audiometric testing be performed by an appropriately certified audiologist; that the otologic examination be performed by an otolaryngologist certified or eligible for certification by the American Academy of Otolaryngology; that the audiometric and otologic examination be performed by different individuals as a method of evaluating the reliability of the findings; that all audiological equipment authorized for testing meet the calibration protocol contained in the accreditation manual of the American Speech and Hearing Association; that the audiometric test results included both bone conduction and pure tone air conduction thresholds, speech reception thresholds and monaural discrimination scores; and that the otolaryngologist report must include: date and hour of examination, date and hour of employee's last exposure to loud noise, a rationalized medical opinion regarding the relation of the hearing loss to the employment-related noise exposure and a statement of the reliability of the tests.[4] The physician should be instructed to conduct additional tests or retests in those cases where the initial tests were inadequate or there is reason to believe the claimant is malingering.[5]

ANALYSIS -- ISSUE 1

In support of his claim for a loss of hearing after April 7, 2005, appellant submitted a report from an audiologist dated June 2, 2005 noting that he was no longer hearing well with his

[2] 5 U.S.C. § 8107.

[3] 20 C.F.R. § 10.404 (1999).

[4] *Raymond H. VanNett*, 44 ECAB 480, 482-483 (1993).

[5] Federal (FECA) Procedure Manual, Part 3 -- Medical, *Requirements for Medical Reports* Chapter 3.600.8.a.(3) (September 1994).

hearing aids. The audiologist stated that appellant had a severely sloping high frequency sensorineural hearing loss bilaterally. She requested new hearing aids for him. This report did not comport with the requirements to establish an employment-related loss of hearing as there was no accompanying examination and report from a Board-certified otolaryngologist. The Office properly denied appellant's claim for a schedule award on May 16, 2006 as he failed to submit the necessary medical evidence to establish a ratable hearing loss entitling him to a schedule award.

LEGAL PRECEDENT -- ISSUE 2

A claimant may seek an increased schedule award if the evidence establishes that she sustained an increased impairment at a later date causally related to the employment injury.[6] Even if the term reconsideration is used, when a claimant is not attempting to show error in the prior schedule award decision and submits medical evidence regarding a permanent impairment at a date subsequent to the prior schedule award decision, it should be considered a claim for an increased schedule award which is not subject to time limitations.[7]

ANALYSIS -- ISSUE 2

Appellant disagreed with the denial of his claim for a schedule award on May 16, 2006 and requested an additional schedule award on February 15, 2007. He further requested reconsideration of the May 16, 2006 decision on March 14, 2007. On April 5, 2007 the Office declined to reopen appellant's claim for consideration of the merits finding that he failed to submit relevant new evidence.

The Board has long recognized that, if a claimant's hearing loss worsens in the future due to the employment exposure, he may apply for an additional schedule award for any increased permanent impairment.[8] Although appellant submitted a form for reconsideration on March 14, 2007 as well as his February 15, 2007 schedule award request, he clearly indicated that he was providing new audiological evidence and wanted further review of the schedule award issue. He submitted audiogram results from 2002 through 2007. As the Office has not determined appellant's entitlement to a schedule award for his claimed increased hearing loss, this case will be remanded for further development consistent with the Office's procedures.

[6] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.7b (August 2002).

[7] *See Linda T. Brown*, 51 ECAB 115, 115-116 (1999). The Office issued a 1995 decision denying entitlement to a schedule award as no ratable impairment was established. Appellant requested that the Office reconsider in 1997, submitting a current report with a medical opinion that she had 25 percent impairment to the arms and legs. The Office determined that appellant submitted an untimely request for reconsideration that did not show clear evidence of error. The Board remanded the case for a merit decision.

[8] *Paul R. Reedy*, 45 ECAB 488, 490 (1994).

CONCLUSION

The Board finds that appellant had not submitted the necessary medical evidence to establish a ratable loss of hearing at the time of the Office's May 16, 2006 decision. It further finds that he requested a schedule award on February 15, 2007 due to his perceived additional loss of hearing and that the Office has not yet issued an appropriate final decision on this issue.

ORDER

IT IS HEREBY ORDERED THAT the May 16, 2006 decision of the Office of Workers' Compensation Programs is affirmed. The April 5, 2007 decision of the Office is set aside for further development consistent with this decision of the Board.

Issued: October 17, 2007
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board