United States Department of Labor
Employees' Compensation Appeals Board

T.H., Appellant	)	
and	)	**Docket No. 08-1441**
	)	**Issued: November 14, 2008**
TENNESSEE VALLEY AUTHORITY, ALLEN FOSSIL PLANT, Memphis, TN, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On April 15, 2008 appellant filed a timely appeal from a decision of the Office of Workers' Compensation Programs dated October 11, 2007 that denied his claim and a November 19, 2007 decision that denied his request for reconsideration. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether the Office properly found that appellant did not sustain a noise-induced hearing loss causally related to factors of his federal employment on or after April 18, 2002; and (2) whether the Office properly refused to reopen appellant's claim for further review of the merits pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On December 15, 2003 appellant, then a 66-year-old conveyer car dumper operator, filed a Form CA-2, occupational disease claim, alleging the noise exposure at work caused a loss of hearing. He did not stop work. Andrew Taylor, fuel handling supervisor, noted on the claim

form that appellant had previously received a schedule award for hearing loss under Office file number xxxxxx011.[1] The instant claim was adjudicated under file number xxxxxx775. With his claim appellant submitted a July 29, 2003 audiologic evaluation that demonstrated hearing loss with reliability rated as fair, an August 6, 2003 magnetic resonance imaging (MRI) scan of the brain that was negative for acoustic neuroma, and an October 8, 2003 employing establishment hearing conservation program report, noting that the most recent hearing test results were rejected following discussion with the attending physician.

By letters dated January 20, 2004, the Office asked that both appellant and the employing establishment submit additional information. On February 3, 2004 Mr. Taylor provided information regarding appellant's job duties and noise exposure. On February 5, 2004 appellant described his daily schedule, and stated that he wore ear protection at work. In February 2004, the Office referred appellant to Dr. Mary R. McCalla, Board-certified in otolaryngology, for a second opinion evaluation. Dr. McCalla was asked to provide an opinion as to whether appellant had sustained an increased hearing loss since April 18, 2002 and, if so, was it related to noise exposure at work. In a May 24, 2004 letter, she advised that on May 20, 2004 appellant had an acoustic emission test that demonstrated either a retracted tympanic membrane or bilateral mild or greater cochlear dysfunction bilaterally. A May 21, 2004 auditory brainstem response study provided results consistent with no greater than a moderately-severe high frequency sensorineural hearing loss, bilaterally. Reliability was judged to be good. Dr. McCalla stated that the results of an April 13, 2004 audiological evaluation demonstrated good reliability for the right ear and poor reliability on the left, advising that appellant's pure tone and speech thresholds were better than he was reporting and recommended that appellant have an additional audiogram. Copies of the testing results were attached. In a July 22, 2004 report, Dr. McCalla noted that appellant had a repeat audiogram on July 7, 2004. She stated that reliability to speech testing was fair, and appellant demonstrated significant improvement in his minimal response levels to pure tones for both ears compared to his previous hearing evaluation but that the speech recognition thresholds continued to be inconsistent with admitted pure tone thresholds for both ears. Dr. McCalla stated that the present results, coupled with his previous testing, suggested that appellant had some degree of high frequency cochlear hearing loss but his pure tone thresholds, especially to low frequency tones, were suspected to be better than his reporting for both ears. She concluded that, due to inconsistent behavior threshold responses, a determination of whether his hearing had significantly decreased since April 18, 2002 could not be made. Copies of the July 7, 2004 audiogram were attached.

On October 6, 2004 the Office referred appellant to Dr. John J. Shea, Jr., a Board-certified otolaryngologist, for a second opinion evaluation. In a report dated October 29, 2004, Dr. Shea advised that the present audiogram results were unreliable and insufficient to establish whether appellant's hearing loss had increased. He diagnosed sensory neural hearing loss and advised that the degree of loss or the cause of the loss was not determinable due to the unreliable hearing tests. Dr. Shea recommended hearing aids, and attached copies of an October 29, 2004 audiogram.

[1] The record contains audiological testing results dated April 18, 2002, a report from Dr. Robert Lowery, a Board-certified otolaryngologist, and an August 5, 2002 schedule award for a 31 percent binaural hearing loss.

By decision dated January 4, 2005, the Office denied appellant's hearing loss claim on the grounds that the medical evidence did not establish that he sustained a hearing loss on or after April 18, 2002 causally related to his federal employment. On January 14, 2005 appellant requested a hearing and submitted an unsigned audiogram dated June 22, 2005. At the hearing, held on October 20, 2005, he testified that he had seen Dr. Neal Beckford, and the hearing representative advised him to submit a new medical report supporting that he had additional hearing loss causally related to his employment. The record was held open for 30 days. By decision dated December 12, 2005, an Office hearing representative reviewed the audiograms of record and determined that the July 29, 2003 audiogram did not comport with Office procedures. He further found that, as both Dr. McCalla and Dr. Shea were unable to provide an opinion regarding the extent of appellant's hearing loss because the results of their audiometric testing were unreliable, appellant failed to establish that he had a hearing loss after April 18, 2002 causally related to noise exposure while in the performance of duty, and affirmed the January 4, 2005 decision.

In a letter received on August 7, 2007, appellant requested reconsideration and submitted additional medical evidence including the unsigned June 22, 2005 audiogram, a May 9, 2007 audiological evaluation summary signed by Mark Everingham, an audiologist, a May 9, 2007 distortion product otoacoustic emissions (DPOAE) report, and an undated evoked potential report. In an August 16, 2007 report, an Office medical adviser stated that the evidence submitted did not support additional hearing loss related to federal work, noting that the June 22, 2005 and May 9, 2007 studies did not conform to Office standards. The Office medical adviser concluded that there was insufficient evidence of record to accurately determine appellant's hearing capacity and recommended a second opinion evaluation by an otolaryngologist. By decision dated October 11, 2005, the Office denied modification of the prior decisions.

On November 28, 2007 appellant again requested reconsideration and resubmitted the June 22, 2005 and May 9, 2007 studies and the undated evoked potential study. He also submitted a history and physical dated April 27, 2007 in which Dr. Christopher J. Hall, a Board-certified otolaryngologist, noted that appellant was seen for evaluation of bilateral hearing loss. Dr. Hall provided physical examination findings and diagnosed hearing loss and subjective tinnitus. He advised that the audiogram and speech-to-noise ratio findings were inconsistent and therefore a precise level could not be determined. A May 9, 2007 MRI scan of the head demonstrated mild atrophy and scattered areas of old white matter stroke. In an October 25, 2007 letter, Dr. John M. Hodges, Board-certified in otolaryngology, advised that audiological testing demonstrated bilateral sensorineural hearing loss with poor word recognition, normal middle ear mobility bilaterally, and communication deficit relative to the hearing loss. He advised that any opinion concerning the etiology would be conjecture.

By decision dated November 19, 2007, the Office denied appellant's reconsideration request on the grounds that the evidence submitted was either duplicative or irrelevant.

LEGAL PRECEDENT -- ISSUE 1

A schedule award can be paid only for a condition related to an employment injury. The claimant has the burden of proving that the condition for which a schedule award is sought is

causally related to his or her employment.[2] Section 8107 of the Federal Employees' Compensation Act[3] specifies the number of weeks of compensation to be paid for permanent loss of use of specified members, functions and organs of the body.[4] 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 which rests in the sound discretion of the Office. 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.[5] The Office evaluates industrial hearing loss in accordance with the standards contained in the A.M.A., *Guides*.[6] Using the frequencies of 500, 1,000, 2,000 and 3,000 cycles per second, the losses at each frequency are added and averaged.[7] The "fence" of 25 decibels is then 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.[8] The remaining amount is multiplied by a factor of 1.5 to arrive at the percentage of monaural hearing loss.[9] 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.[10] The Board has concurred in the Office's adoption of this standard for evaluating hearing loss.[11] The Board has long recognized that if a claimant's employment-related hearing loss worsens in the future, he or she may apply for a schedule award for any ratable impairment.[12]

Office procedures set forth requirements for the type of medical evidence used in evaluating hearing loss. These include that the employee 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

[2] *Veronica Williams*, 56 ECAB 367 (2005).

[3] 5 U.S.C. §§ 8101-8193.

[4] *Id.* at § 8107(c).

[5] *Renee M. Straubinger*, 51 ECAB 667 (2000).

[6] American Medical Association, *Guides to the Evaluation of Permanent Impairment* (5th ed. 2001); *Joseph Lawrence, Jr.*, 53 ECAB 331 (2002).

[7] A.M.A., *Guides* 250.

[8] *Id*.

[9] *Id*.

[10] *Id*.

[11] *Horace L. Fuller*, 53 ECAB 775 (2002).

[12] *Tommy R. Martin*, 56 ECAB 273 (2005); *Linda T. Brown*, 51 ECAB 115 (1999).

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 include both bone conduction and pure-tone air conduction thresholds, speech reception thresholds and monaural discrimination scores; and that the otolaryngologist's report 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.[13] A physician conducting an otologic examination 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.[14]

ANALYSIS -- ISSUE 1

The Board finds that, as the record in this case supports, under file number xxxxxx011, appellant established that he sustained a bilateral employment-related sensorineural hearing loss for which he received a schedule award for 31 percent impairment. In December 2003, he filed the instant claim, alleging that his hearing loss had worsened.

A claimant retains the right to file a claim for an increased schedule award based on new exposure or on medical evidence indicating that the progression of an employment-related condition, without new exposure to employment factors, has resulted in a greater permanent impairment than previously calculated.[15] In this case, appellant filed a claim for an increased hearing loss and submitted additional evidence. This claim, therefore, should have been adjudicated by the Office as a claim for an increased schedule award under file number 062043011 and not as a new claim.

Nonetheless, the Board finds that appellant has not established that he has an additional employment-related hearing loss that would entitle him to an increased schedule award because the record does not contain sufficient medical evidence to establish his claim. As explained above, Office procedures set forth very specific requirements for the type of medical evidence used in evaluating hearing loss.[16] The record in this case does not contain reliable audiologic testing to measure the degree of appellant's hearing loss. The audiograms dated July 29, 2003 and June 22, 2005 do not comport with Office procedures which mandate that the equipment used for testing meets established protocol, includes the date and hour of examination, the date of appellant's last exposure to loud noise and to be accompanied by a rationalized medical opinion.[17]

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[13] *See* Federal (FECA) Procedure Manual, Part 3 -- Requirements for Medical Reports, *Special Conditions*, Chapter 3.600.8(a) (September 1995); *Luis M. Villanueva*, 54 ECAB 666 (2003).

[14] *Luis M. Villanueva, id.*

[15] *Tommy R. Martin, supra* note 12.

[16] *Supra* note 13.

[17] *Id.*

While the studies dated April 13, July 7 and October 29, 2004 conducted for Dr. McCalla and Dr. Shea comport with the procedural requirements of the Office, both physicians advised that the study results were unreliable, and they could not determine the degree of appellant's hearing loss or whether it was employment related. Appellant therefore did not establish that he is entitled to an increased schedule award.[18]

LEGAL PRECEDENT -- ISSUE 2

Section 8128(a) of the Act vests the Office with discretionary authority to determine whether it will review an award for or against compensation, either under its own authority or on application by a claimant.[19] Section 10.608(a) of the Code of Federal Regulations provides that a timely request for reconsideration may be granted if the Office determines that the employee has presented evidence and/or argument that meets at least one of the standards described in section 10.606(b)(2).[20] This section provides that the application for reconsideration must be submitted in writing and set forth arguments and contain evidence that either: (i) shows that the Office erroneously applied or interpreted a specific point of law; or (ii) advances a relevant legal argument not previously considered by the Office; or (iii) constitutes relevant and pertinent new evidence not previously considered by the Office.[21] Section 10.608(b) provides that when a request for reconsideration is timely but fails to meet at least one of these three requirements, the Office will deny the application for reconsideration without reopening the case for a review on the merits.[22]

ANALYSIS -- ISSUE 2

In his October 29, 2007 request for reconsideration, appellant merely checked a form report that he was requesting reconsideration. He therefore did not allege or demonstrate that the Office erroneously applied or interpreted a specific point of law, or 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).[23]

With respect to the third above-noted requirement under section 10.606(b)(2), with his October 29, 2007 reconsideration request, appellant submitted duplicates of audiological studies previously of record. Evidence or argument that repeats or duplicates evidence previously of

[18] Appellant retains the right to file a claim for an increased schedule award based on new exposure or on medical evidence indicating that the progression of an employment-related condition, without new exposure to employment factors, has resulted in a greater permanent impairment than previously calculated. *Tommy R. Martin, supra* note 12.

[19] 5 U.S.C. § 8128(a).

[20] 20 C.F.R. § 10.608(a).

[21] 20 C.F.R. § 10.608(b)(1) and (2).

[22] 20 C.F.R. § 10.608(b).

[23] 20 C.F.R. § 10.606(b)(2).

record has no evidentiary value and does not constitute a basis for reopening a case.[24] The head MRI scan is irrelevant to the merit issue in this case, *i.e.*, whether appellant established that he had an increased hearing loss causally related to noise exposure at work. Appellant also submitted an April 27, 2007 report in which Dr. Hall diagnosed hearing loss and tinnitus but advised that the audiogram and speech-to-noise ratio were inconsistent and therefore he could not determine a precise hearing level. His report would therefore not be considered pertinent new evidence. Similarly, Dr. Hodges merely diagnosed bilateral sensorineural hearing loss with poor word recognition but did not furnish an audiogram to support his diagnoses and advised that any opinion on etiology would be conjecture. The Board has held that the submission of evidence that does not address the particular issue involved in a case does not constitute a basis for reopening the claim.[25]

Appellant therefore did not submit relevant and pertinent new evidence not previously considered by the Office, and the Office properly denied his reconsideration request by its November 19, 2007 decision.

CONCLUSION

The Board finds that appellant did not establish an increased hearing loss causally related to factors of his federal employment, and that the Office properly refused to reopen appellant's case for further consideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

[24] *J.P.*, 58 ECAB ____ (Docket No. 06-1274, issued January 29, 2007).

[25] *Id*.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated November 19 and October 11, 2007 be affirmed.

Issued: November 14, 2008
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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