U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of TERRY S. LAROQUE and DEPARTMENT OF THE NAVY, PUGET SOUND NAVAL SHIPYARD, Bremerton, WA

Docket No. 00-2033; Submitted on the Record;
Issued April 26, 2001

DECISION and ORDER

Before DAVID S. GERSON, A. PETER KANJORSKI,
PRISCILLA ANNE SCHWAB

The issue is whether the refusal of the Office of Workers' Compensation Programs to reopen appellant's case for further consideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a) constituted an abuse of discretion.

The Board has duly reviewed the case record and finds that the Office acted within its discretion in denying appellant's request for review.

The only decision before the Board in this appeal is the Office's decision dated March 7, 2000 denying appellant's application for review. As more than one year elapsed between the date of the Office's most recent merit decision issued on December 15, 1998 and the date of appellant's appeal, May 23, 2000, the Board lacks jurisdiction to review the merits of appellant's claim.[1]

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act,[2] the Office's regulations provide that an application for reconsideration must set forth arguments 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.[3] When a claimant fails to meet one of the above standards, it is a matter of discretion on the part of the Office whether to reopen a case for further consideration under section 8128(a) of the Act.[4] To be entitled to merit review of an Office

[1] 20 C.F.R. § 501.3(d).

[2] Under section 8128 of the Act, "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application." 5 U.S.C. § 8128(a).

[3] 20 C.F.R. § 10.606(b).

[4] *Carol Cherry*, 47 ECAB 658 (1996).

decision denying or terminating a benefit, a claimant must also file his or her application for review within one year of the date of that decision.[5]

On May 13, 1998 appellant, then a 49-year-old insulator, filed an occupational disease claim alleging that he sustained hearing loss as a result of exposure to hazardous noise while in the performance of duty.

On November 10, 1998 the Office referred appellant, together with a statement of accepted facts, to Dr. Gerald G. Randolph, a Board-certified otolaryngologist, for an audiologic and otologic evaluation. In a report dated November 25, 1998, he stated that appellant had a binaural high frequency neurosensory hearing loss with speech reception thresholds of 15 decibels in the right ear and 10 decibels in the left ear. Dr. Randolph also reviewed a 1982 preemployment audiogram which revealed bilateral high frequency neurosensory hearing loss somewhat more severe in the left ear. An audiogram on November 25, 1998 indicated that testing at 500, 1,000, 2,000 and 3,000 hertz revealed losses in the right ear of 10, 10, 15 and 35 decibels respectively, and losses in the left ear of 5, 10, 15 and 35 decibels.

An Office medical adviser, on December 11, 1998, reviewed appellant's November 25, 1998 audiogram and applied the Office's standard procedures to calculate hearing loss in both ears. Testing for the right ear at 500, 1,000, 2,000 and 3,000 hertz revealed hearing threshold levels of 10, 10, 15 and 35 decibels respectively. These losses total 70 for an average of 17.5 decibels. Reducing this average by 25 decibels leaves a balance of 0 decibels, meaning that no ratable impairment is presumed to exist in appellant's ability to hear with his right ear.[6] Testing for the left ear at 500, 1,000, 2,000 and 3,000 hertz revealed hearing threshold levels of 5, 10, 15 and 35 decibels respectively. These losses total 65 for an average of 14.25 decibels. Reducing this average by 25 decibels leaves a balance of 0 decibels, meaning that no ratable impairment is presumed to exist in appellant's ability to hear with his left ear.[7]

By decision dated December 15, 1998, the Office advised appellant that his claim for a hearing loss due to his employment-related noise exposure was accepted and that high frequency hearing aids were authorized. However, the Office found that appellant was not entitled to a schedule award because the medical evidence of record failed to establish that he sustained a ratable hearing loss.

By undated letter received by the Office on December 14, 1999, appellant requested reconsideration.

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[5] 20 C.F.R. § 10.607.

[6] In a September 17, 1998 medical report, an Office medical adviser noted that appellant had a preexisting high frequency hearing loss which was "more likely than not" aggravated by his work-related exposure, but which was not ratable for the purpose of determining a schedule award.

[7] As a matter of administrative practice and to ensure consistent results to all claimants, the Office has adopted and the Board has approved use of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) as the uniform standard applicable to all claimants. *See Henry L. King*, 25 ECAB 39, 44 (1973).

By nonmerit decision dated March 7, 2000, the Office denied appellant's request for review of the decision on the grounds that the evidence submitted in support of his request was repetitive and therefore insufficient to warrant a merit review.

Appellant's evidence submitted in support of his request for reconsideration included copies of Hear Center audiograms taken in 1995 and 1997 and a report dated February 1, 1998 and received by the Office on December 14, 1999 from a Hear Center audiologist who stated that appellant's audiogram tests revealed a zero percent hearing loss impairment. Neither of these audiograms nor the audiologist's report is relevant to appellant's claim inasmuch as the audiograms were not reviewed by a physician and thus have no probative value.[8] Consequently, the evidence submitted by appellant did not meet the requirements set forth at section 10.606. For these reasons, the Office's refusal to reopen the case for a merit review did not constitute an abuse of discretion.

The March 7, 2000 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC
April 26, 2001

David S. Gerson
Member

A. Peter Kanjorski
Alternate Member

Priscilla Anne Schwab
Alternate Member

[8] Under the Act an audiologist is not considered to be a physician. Section 8101(2) defines "physician" as including "surgeons, podiatrists, dentists, clinical physiologists, optometrists, chiropractors and osteopathic practitioners within the scope of their practice as defined by State law." The Board notes that this definition omits any mention of audiologists and consequently, the audiologist's report does not constitute probative medical evidence in this case. 5 U.S.C. § 8101(2).