

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ROGER D. WILLIAMS and DEPARTMENT OF THE ARMY,
CIVIL SERVICE DIVISION, Morehead City, NC

Docket No. 03-575; Submitted on the Record;
Issued July 28, 2003

DECISION and ORDER

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

The issues are: (1) whether appellant has more than a 19 percent binaural hearing loss, for which he received a schedule award; and (2) whether the refusal of the Office of Workers' Compensation Programs to reopen appellant's case for further reconsideration on April 17, May 16, June 3 and December 10, 2002, constituted an abuse of discretion.

On August 29, 1999 appellant, then a 60-year-old marine equipment mechanic, filed an occupational disease claim alleging work-related hearing loss. He did not stop working.

Appellant filed a claim for a schedule award on July 9, 2001. The Office thereafter referred him for an examination with Dr. Walter Sabiston, a Board-certified otolaryngologist, to determine the extent of the claimed hearing loss. He examined appellant on January 18, 2001 reviewed audiometric findings and diagnosed bilateral sensorineural hearing loss due to noise exposure in his federal employment. A district medical adviser reviewed the medical records for schedule award purposes and determined that appellant was entitled to a schedule award for a 19 percent bilateral hearing loss in accordance with the American Medical Association, *Guides to the Evaluation of Permanent Impairment*.¹

By decision dated November 2, 2001, the Office issued appellant a schedule award for a 19 percent bilateral hearing loss as a result of his work-related injury.

In a letter dated December 7, 2001, appellant through counsel requested reconsideration of the schedule award and submitted a report from Dr. William Bost, a Board-certified otolaryngologist, dated September 29, 1999. He reported that appellant underwent an audiological evaluation that day after presenting with decreased hearing due to his work-related noise exposure. Dr. Bost submitted a copy of the audiogram and reported his findings that appellant had a 35 percent loss of hearing in the right ear and 40 percent in the left.

¹ A.M.A., *Guides* (5th ed. 2001).

The Office requested that a district medical adviser review Dr. Bost's September 29, 1999 rating of appellant's hearing loss and noted that the physician made no reference to the A.M.A., *Guides* in his report. In an Office memorandum dated January 23, 2002, the district medical adviser determined that using the formula set forth in the A.M.A., *Guides* the results of the September 29, 1999 audiogram, were consistent with a bilateral schedule award of 17 percent, which was slightly less than that previously awarded.

By merit decision dated January 29, 2002, the Office found that the evidence submitted for reconsideration by Dr. Bost had no medical weight and was, therefore, insufficient to establish a conflict in medical opinion or vacate the prior decision of November 2, 2001.

In a letter dated April 2, 2002, appellant's counsel requested reconsideration and submitted a medical report dated February 5, 2002 from Dr. Bradley Brechtelsbauer, a Board-certified otolaryngologist. Appellant's counsel argued that if Dr. Brechtelsbauer's opinion was found to be in conflict with Dr. Sabiston's opinion, a third hearing loss evaluation should be arranged. Dr. Brechtelsbauer compared a January 31, 2002 audiogram, with the evaluation taken in September 1999 and indicated that appellant had some worsening of hearing loss. The physician concluded that based on criteria of the American Academy of Otolaryngology, appellant had a right-sided impairment of 28 percent and a left-sided impairment of 30 percent, with an overall hearing handicap of 28 percent.

By decision dated April 17, 2002, the Office denied appellant's request for merit review of the November 2, 2001 decision. The Office found upon limited review that the report from Dr. Brechtelsbauer did not cite to the A.M.A., *Guides* and actually relied upon the criteria of the American Academy of Otolaryngology in determining impairment, therefore, the report was substantially similar to the previous report submitted by Dr. Bost, as both fail to provide an impairment rating based on the A.M.A., *Guides*. The Office concluded, therefore, that the evidence submitted on reconsideration was cumulative and insufficient to warrant a merit review of the prior impairment rating.

In a letter dated May 6, 2002, appellant's counsel requested reconsideration and argued that the previously submitted medical report of Dr. Brechtelsbauer dated February 5, 2002, was competent medical evidence as the criteria used bore similarities and was, therefore, equivalent to the A.M.A., *Guides* and should be determined in conflict with Dr. Sabiston's January 18, 2001 report.

By decisions dated May 16 and June 3, 2002, the Office denied appellant's request for reconsideration on the grounds that the request neither raised substantive legal questions nor included new and relevant evidence to warrant a merit review of the prior decision.

In a letter dated October 28, 2002, appellant's counsel again requested reconsideration of the November 2, 2001 decision and submitted an October 16, 2002 audiogram and medical report from Dr. Dwight Grady, a Board-certified otolaryngologist. Appellant's counsel argued that the Office should refer appellant for an independent medical evaluation to determine his degree of hearing loss. In the October 16, 2002 report, Dr. Grady indicated that appellant's monaural impairment was calculated as 26.25 percent for the right ear and 31.88 percent for the left ear and that he had a hearing handicap of 27.18 percent. He noted that the 1979 A.M.A.,

Guides formula for determination of hearing handicap was used for calculating appellant's percentage of hearing loss.

By decision dated December 10, 2002, the Office again denied merit review of appellant's claim. The Office found that the report by Dr. Grady was immaterial in that it did not provide enough information to support that appellant had an impairment greater than 19 percent, nor did it support that there was a conflict of medical evidence, which required a referee examination.

The Board initially finds that appellant has not established that he has a bilateral hearing loss greater than 19 percent under the Office's standards, which would entitle him to an additional schedule award.

The schedule award provisions of the Federal Employees' Compensation Act² and its implementing regulation³ 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.⁴

The Office evaluates industrial hearing loss in accordance with the standards contained in the A.M.A., *Guides*.⁵ 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.⁶ 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.⁷ The remaining amount is multiplied by a factor of 1.5 to arrive at the percentage of monaural hearing loss.⁸ 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.⁹

² 5 U.S.C. § 8107.

³ 20 C.F.R. § 10.404 (1999).

⁴ *Id.*

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

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

The Board has concurred in the Office's adoption of this standard for evaluating hearing loss.¹⁰

The Office based its November 2, 2001 schedule award on an April 11, 2001 report of an Office medical adviser who reviewed the audiogram ordered by Dr. Sabiston and calculated that appellant had a 19 percent binaural hearing loss according to the standards of the A.M.A., *Guides*. Testing for the right ear at frequencies of 500, 1,000, 2,000 and 3,000 cycles per second revealed decibel losses of 15, 20, 50 and 65 decibels respectively for a total of 150 decibels. These losses were divided by 4 for an average hearing loss of 37.50 decibels. The average was reduced by 25 decibels (the first 25 decibels are deducted, as explain above) to equal 12.50 decibels, which was multiplied by 1.5 to arrive at a 18.75 percent loss for the right ear. Testing for the left ear at the same frequencies revealed decibel losses of 10, 15, 65 and 70 decibels, respectively for a total of 160 decibels. These losses were divided by 4 for an average hearing loss of 40.00 decibels. The average was reduced by 25 decibels (as explained above) to equal 15 decibels, which was multiplied by 1.5 to arrive at a 22.50 percent loss for the left ear. The Office medical adviser then multiplied the 18.75 percent loss in the right ear by 5, added it to the 22.50 percent loss in the left ear and divided the sum by 6 to calculate appellant's binaural loss at 19.38 percent, which he rounded out to a 19 percent binaural loss. The Office medical adviser properly determined that appellant's binaural hearing loss was 19 percent.

On reconsideration, appellant submitted a report and audiogram from Dr. Bost dated September 29, 1999, who found that he had a 35 percent loss of hearing in the right ear and 40 percent in the left. The Office medical adviser reviewed Dr. Bost's September 29, 1999 rating of appellant's hearing loss and initially noted that the physician made no reference to the A.M.A., *Guides* and then noted that his audiogram showed that appellant had a bilateral hearing loss of 17 percent. Appellant has not submitted evidence establishing that his hearing loss was greater than 19 percent.

The Board further finds that the refusal of the Office to reopen appellant's case for further reconsideration in decisions dated April 17, May 16, June 3 and December 10, 2002, did not constitute an abuse of discretion.

To require the Office to reopen a case for merit review under section 8128(a) of the Act,¹¹ the Office's regulations provide that a claimant must: (1) show that the Office erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by the Office; or (3) submit relevant and pertinent new evidence not previously considered by the Office.¹² To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant must also file his application for review within one year of the date of that decision.¹³ When a claimant fails to meet one of the above standards, it is

¹⁰ *Donald E. Stockstad*, 53 ECAB __ (Docket No. 01-1570, issued January 23, 2002), *petition for recon. granted (modifying prior decision)*, Docket No. 01-1570 (issued August 13, 2002).

¹¹ 5 U.S.C. §§ 8101-8193. 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 her own motion or on application." 5 U.S.C. § 8128(a).

¹² 20 C.F.R. §§ 10.606(b)(2).

¹³ 20 C.F.R. § 10.607(a).

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.¹⁴

In this case, appellant, through counsel requested reconsideration of the January 29, 2002 merit decision, affirming the November 2, 2001 schedule award on four occasions. On April 2, 2002 appellant's counsel submitted medical reports dated January 31 and February 5, 2002 from Dr. Brechtelsbauer, who determined using the criteria of the American Academy of Otolaryngology that appellant had a bilateral hearing impairment of 28 percent. Appellant's counsel again requested reconsideration on May 6, 2002 and argued that because the American Academy of Otolaryngology criteria was the generally accepted medical standard and identical to the A.M.A., *Guides*, Dr. Brechtelbauer's report should be considered competent medical evidence. His counsel then requested reconsideration on October 28, 2002 and submitted an October 16, 2002 audiogram and medical report from Dr. Grady, who determined, according to the 1979 A.M.A., *Guides* that appellant's hearing handicap was 27.18 percent. The Office denied a merit review of the case on all four occasions on April 17, May 16, June 3 and December 10, 2002, finding that the evidence submitted was either cumulative or failed to raise substantive legal questions or include new and relevant evidence to the issue at hand.

The Board finds that the report submitted by Dr. Brechtelsbauer, which relied upon the hearing loss criteria set forth by the American Academy of Otolaryngology is irrelevant, as it has no bearing on the issue of whether appellant has more than a 19 percent bilateral hearing loss in accordance with the A.M.A., *Guides*, the appropriate standard for evaluating schedule losses. Furthermore, the argument raised that because the American Academy of Otolaryngology's standard is identical to that of the A.M.A., *Guides*, Dr. Brechtelsbauer's hearing loss rating derived there from, should be given weight is immaterial evidence to require further investigation by the Office of appellant's work-related hearing loss. The Board also notes that Dr. Grady's October 16, 2002 report meets the subsection (iii) requirement of relevant and pertinent new evidence described in section 10.606(b)(2) and is sufficient to require the Office to reopen appellant's claim.

As appellant's request for reconsideration meets at least one of the three criteria for obtaining a merit review of his claim, the case must be remanded for a merit review.

¹⁴ *Joseph W. Baxter*, 36 ECAB 228, 231 (1984).

The decision of the Office of Workers' Compensation Programs dated January 29, 2002 is hereby affirmed; the decision of the Office dated December 10, 2002 is hereby set aside and the case remanded for a merit review.

Dated, Washington, DC
July 28, 2003

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member