

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of CLARENCE E. WEAVER and DEPARTMENT OF THE INTERIOR,
BUREAU OF RECLAMATION, Yuma, AZ

*Docket No. 03-236; Submitted on the Record;
Issued May 6, 2003*

DECISION and ORDER

Before ALEC J. KOROMILAS, COLLEEN DUFFY KIKO,
DAVID S. GERSON

The issues are: (1) whether appellant has more than a nine percent monaural hearing loss; and (2) whether the Office of Workers' Compensation Programs properly denied appellant's July 8, 2002 request for reconsideration.

On December 13, 2000 appellant, then a 56-year-old truck driver/equipment operator, filed a claim alleging that he sustained a hearing loss in the performance of his duties. The Office accepted his claim for hearing loss due to hazardous noise levels.

Dr. Theodore Mazer, a Board-certified otolaryngologist and Office referral physician, interviewed and examined appellant on March 30, 2001. He reviewed the available medical records, including previous audiograms and the statement of accepted facts.¹ Appellant reported tinnitus in quiet settings, which was not pulsatile in nature and which did not affect his sleep or daily function in any significant way. Dr. Mazer diagnosed high-frequency sensorineural hearing loss, long duration, with work-related noised-induced exacerbation.

Audiometric testing on March 30, 2001 at 500, 1,000, 2,000 and 3,000 cycles per second revealed decibel losses of 20, 10, 20 and 30 for the left ear and 15, 20, 25 and 65 decibels for the right. The audiologist reported that the reliability of the results was good and described appellant's speech discrimination scores as excellent.

On June 8, 2001 an Office medical consultant reviewed the audiometric findings obtained for Dr. Mazer and calculated that appellant had no ratable hearing loss in the left ear and a nine percent hearing loss in the right.

¹ Dr. Mazer noted that appellant had given markedly varying reports of hearing throughout the last 15 years "and what appears to be a clearly exaggerated report of January of 2001." He noted that the results of audiometric testing performed on March 30, 2001 were better than those obtained two months earlier: "This raises some issue with intentional exaggeration of reports, along with the fluctuation seen over the preceding years."

On November 15, 2001 the Office issued a schedule award for a nine percent permanent monaural hearing loss.

Appellant requested reconsideration on July 8, 2002. He requested that hearing tests in 1993 be used as a base line. He stated that no preemployment hearing tests were conducted, complained of a lack of communication with the Office and asked for higher monetary compensation for his hearing loss. Appellant submitted a letter from the National Personnel Records Center regarding his military medical records; a copy of an audiogram obtained on January 31, 1983; an abstract of his federal service and medical record; and a time line of events.

In a decision dated September 16, 2000, the Office denied appellant's request for reconsideration. The Office found that the evidence submitted in support of the request was immaterial and insufficient to warrant a review of the prior decision.

The Board finds that appellant has no more than a nine percent monaural hearing loss, for which he received a schedule award.

The Office evaluates industrial hearing loss in accordance with the standards contained in the American Medical Association, *Guides to the Evaluation of Permanent Impairment*.² 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. 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 sounds under everyday conditions. The remaining amount is multiplied by a factor of 1.5 to arrive at the percentage of monaural hearing loss. 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.³ The Board has concurred in the Office's adoption of this standard for evaluating hearing loss.⁴

According to the most recent audiometric testing, obtained on March 30, 2001, appellant's hearing thresholds were 20, 10, 20 and 30 decibels in the left ear and 15, 20, 25 and 65 decibels in the right. These total 80 and 125 decibels, respectively, for averages of 20 and 31.25. Subtracting the "fence" of 25 decibels leaves 0 and 6.25 decibels.⁵ Multiplying by 1.5 to

² A.M.A., *Guides* at 250 (5th ed. 2001).

³ *Id.*

⁴ *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).

⁵ Because appellant's average hearing threshold in the right ear is over 25 decibels, he is considered to have an impairment in that ear in the ability to hear everyday sounds under everyday conditions, but only to the extent that the average exceeds 25 decibels.

determine monaural impairment yields percentage losses of 0 in the left ear and 9.375 in the right, which rounds to 9.⁶

Appellant's most recent audiometric testing, which is reported to be reliable, shows that he suffers no binaural hearing loss. He does, however, have a nine percent hearing loss in the right ear. The compensation schedule under the Federal Employees' Compensation Act specifies a maximum of 52 weeks of compensation payable for the total loss of hearing in one ear,⁷ and the schedule compensates partial loss of hearing at a proportionate rate.⁸ Thus, compensation for a 9 percent monaural hearing loss is 9 percent of 52 weeks, or 4.68 weeks of compensation, which the Office awarded.

The fifth edition of the A.M.A., *Guides* provides that tinnitus in the presence of unilateral or bilateral hearing impairment may impair speech discrimination: "Therefore, add up to five percent for tinnitus in the presence of measurable hearing loss if the tinnitus impacts the ability to perform activities of daily living."⁹

Appellant is not entitled to an increased award based on tinnitus. He related to Dr. Mazer that he had tinnitus in quiet settings, which was not pulsatile in nature and which did not affect his sleep or daily function in any significant way. Further, the audiologist reported that appellant's speech discrimination scores were excellent. The Board will affirm the November 15, 2001 schedule award.

The Board also finds that the Office properly denied appellant's July 8, 2002 request for reconsideration.

The Act provides that the Office may review an award for or against compensation upon application by an employee (or his or her representative) who receives an adverse decision. The employee shall exercise this right through a request to the district Office. The request, along with the supporting statements and evidence, is called the "application for reconsideration."¹⁰

An employee (or representative) seeking reconsideration should send the application for reconsideration to the address as instructed by the Office in the final decision. The application for reconsideration, including all supporting documents, must be in writing and 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

⁶ Percentages should not be rounded until the final percent for award purposes is obtained. Fractions should be rounded down from .49 or up from .50. Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.4.b(2) (September 1994).

⁷ 5 U.S.C. § 8107(c)(13)(A).

⁸ *Id.* at § 8107(c)(19).

⁹ A.M.A., *Guides* at 246 (5th ed. 2001).

¹⁰ 20 C.F.R. § 10.605 (1999).

considered by the Office; or (3) constitutes relevant and pertinent new evidence not previously considered by the Office.¹¹

A timely request for reconsideration may be granted if the Office determines that the employee has presented evidence and/or argument that meet at least one of these standards. If reconsideration is granted, the case is reopened and the case is reviewed on its merits. Where the request is timely but fails to meet at least one of these standards, the Office will deny the application for reconsideration without reopening the case for a review on the merits.¹²

Appellant's July 8, 2002 request for reconsideration meets none of the criteria for obtaining a merit review of his case. So-called base line and preemployment audiograms are relevant only when determining whether exposure to hazardous levels of noise in federal employment caused or contributed to the employee's current hearing loss. This is no longer an issue in appellant's case because the Office accepts such a causal relationship. The 1993 audiogram that appellant wants as a base line and the 1983 audiogram he submitted with his request for reconsideration have no bearing on his 2001 schedule award, which the Office properly based on recent and reliable audiometric testing. Appellant's other submissions are also irrelevant.

Because appellant's July 8, 2002 request for reconsideration fails to meet at least one of the standards for obtaining a merit review of his claim, the Board will affirm the Office's September 16, 2002 decision.

The September 16, 2002 and November 15, 2001 decisions of the Office of Workers' Compensation Programs are affirmed.

Dated, Washington, DC
May 6, 2003

Alec J. Koromilas
Chairman

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

¹¹ *Id.* at § 10.606.

¹² *Id.* at § 10.608.