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LESLIE M. MAHIN, Appellant)	
)	
and)	Docket No. 04-555
)	Issued: February 12, 2004
DEPARTMENT OF ENERGY, WESTERN)	
AREA POWER ADMINISTRATION,)	
Bismarck, ND, Employer)	
)	

Case Submitted on the Record

Office of Solicitor, for the Director

Before:

JURISDICTION

ISSUES

The issues are: (1) whether appellant has more than a 15 percent binaural hearing loss and more than a 5 percent binaural hearing loss due to tinnitus, for which he received schedule awards; and; (2) whether the Office properly refused to reopen appellant's case for further consideration of the merits of his claim under 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On May 22, 2001 appellant, then a 61-year-old construction inspector/representative, filed an occupational disease claim for hearing loss caused by noise exposure in the course of his federal employment. The Office accepted the claim for a binaural hearing loss.

On February 5, 2002 the Office referred appellant to Dr. Bruce H. Allen, a Board-certified otolaryngologist, for audiometric testing and otologic evaluation. Dr. Allen submitted a report detailing his examination on February 19, 2002 with an accompanying audiogram made on the same day. He provided an impression of bilateral sensorineural hearing loss with nerve deafness with recruitment for poor understanding in background noise situations. An audiogram performed February 19, 2002, reflected testing at the frequency levels of 500, 1,000, 2,000 and 3,000 cycles per second (cps) and revealed the following: right ear decibels 35, 30, 30 and 45; left ear decibels 35, 35, 35 and 40. Dr. Allen opined that the audiogram demonstrated a bilateral symmetric sensorineural hearing loss due in part to noise exposure during appellant's federal employment.

On March 28, 2002 an Office medical adviser reviewed Dr. Allen's report and audiometric test results and concluded that appellant had a 15 percent binaural sensorineural hearing loss caused or aggravated by his federal employment. He noted that appellant's date of maximum medical improvement was February 19, 2002 the date of Dr. Allen's examination.

On April 5, 2002 appellant filed a Form CA-7, claim for compensation, requesting a schedule award for his hearing loss.

In an April 18, 2002 decision, the Office granted a schedule award for a 15 percent binaural loss of hearing. The period of the award ran from February 19 to September 16, 2002.

In a letter, which the Office received on March 31, 2003 appellant requested reconsideration on the basis that his hearing loss also caused severe tinnitus. Copies of medical reports diagnosing tinnitus and a history of tinnitus were provided. On July 9, 2003 an Office medical adviser reviewed the new medical evidence along with the report of Dr. Allen and opined that a schedule award for an additional five percent should be added to compensate for appellant's binaural tinnitus. In a July 11, 2003 decision, the Office modified the April 18, 2002 decision, to include an additional five percent schedule award for the inclusion of tinnitus. On July 18, 2003 the Office granted a five percent schedule award for tinnitus. The period of the award ran from September 17 to November 25, 2002.

In an August 11, 2003 letter, appellant requested reconsideration alleging that the permanent impairment from his binaural hearing loss and resulting tinnitus impacted his daily quality of life. By decision dated November 12, 2003, the Office denied appellant's request for merit review on the basis that the argument submitted was irrelevant and insufficient to warrant a merit review of the prior decisions.

LEGAL PRECEDENT -- ISSUE 1

The schedule award provision of the Act¹ and its implementing regulation² set forth the number of weeks of compensation payable to employees sustaining permanent impairment from loss or loss of use, of schedule members of functions of the body. However, the Act does not specify the manner, in which the percentage of loss shall be determined. For consistent result 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 American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) has been adopted by the implementing regulation as the appropriate standard for evaluating schedule loss.³

The Office evaluates industrial hearing loss in accordance with the standards contained in the A.M.A., *Guides*.⁴ Using the frequencies of 500, 1,000, 2,000 and 3,000 cps, the losses at each frequency are added up and averaged.⁵ 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.⁶ The remaining amount is multiplied by a factor of 1.5 to arrive at the percentage of monaural hearing loss.⁷ 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.⁸ The Board has concurred in the Office’s adoption of this standard for evaluating hearing loss.⁹

ANALYSIS -- ISSUE 1

In reviewing appellant’s February 19, 2002 audiogram, the frequency levels recorded at 500, 1,000, 2,000 and 3,000 cps for the left ear reveal decibel losses of 35, 35, 35 and 40, respectively, for a total of 145 decibels. When divided by 4, the result is an average hearing loss of 36.25 decibels. The average loss of 36.25 is reduced by 25 decibels to equal 11.25, which when multiplied by the established factor of 1.5, resulted in a 16.875 percent monaural hearing loss for the left ear. Testing for the right ear at the frequency levels of 500, 1,000, 2,000 and

¹ 5 U.S.C. § 8107.

² 20 C.F.R. § 10.404 (2002).

³ *Id.*

⁴ A.M.A., *Guides* at 250 (5th ed. 2001).

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ *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).

3,000 cps revealed decibel losses of 35, 30, 30 and 45, respectively, for a total of 140 decibels. Utilizing the same above-noted formula resulted in a 15 percent monaural hearing loss for the right ear. The 15 percent hearing loss for the right ear, when multiplied by 5, yielded a product of 75. The 75 was then added to the 16.875 percent hearing loss for the left ear to obtain a total of 91.875. The 91.875 was then divided by 6, in order to calculate a binaural loss of hearing of 15.3 percent. Consequently, the evidence of record does not establish that appellant has greater than a 15 percent binaural loss of hearing.

Under the Act, the maximum award for binaural hearing loss is 200 weeks of compensation.¹⁰ Since the binaural hearing loss in this case is 15 percent, appellant would be entitled to 15 percent of 200 weeks or 30 weeks of compensation. Appellant's schedule award ran from February 19 through September 16, 2002, which equates to 30 weeks of compensation. The Office, therefore, properly determined the number of weeks of compensation, for which appellant is entitled under the schedule award.

The Office additionally compensated appellant five percent for his tinnitus condition. The A.M.A., *Guides* allow for compensation of 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.¹¹ As appellant had demonstrated a measurable hearing loss and that he has tinnitus, which impacts his daily living, the Office paid appellant a five percent schedule award for tinnitus. As five percent is the maximum allowable percentage, appellant has no greater than a five percent loss of hearing due to his tinnitus condition.¹² Appellant was awarded a 5 percent schedule award for tinnitus or 5 percent of 200 weeks or 10 weeks of compensation.¹³ Appellant's schedule award ran from September 17 through November 25, 2002, which equates to 10 weeks of compensation. The Office, therefore, properly determined the number of weeks of compensation, for which appellant is entitled under the schedule award for tinnitus.

LEGAL PRECEDENT -- ISSUE 2

Section 10.606(b)(2) of Title 20 of the Code of Federal Regulations provides that a claimant may obtain review of the merits of the claim by either: (1) showing that the Office erroneously applied or interpreted a specific point of law; (2) advancing a relevant legal argument not previously considered by the Office; or (3) submitting relevant and pertinent new evidence not previously considered by the Office.¹⁴ Section 10.608(b) provides that when an application for review of the merits of a claim does not meet at least one of the three requirements enumerated under section 10.606(b)(2), the Office will deny the application for

¹⁰ 5 U.S.C. § 8107(c)(13)(B).

¹¹ A.M.A., *Guides* at 246 (5th ed. 2001); *Juan Trevino*, 54 ECAB ____ (Docket No. 02-1602, issued January 17, 2003).

¹² *Id.*

¹³ *Id.*

¹⁴ 20 C.F.R. § 10.606(b)(2) (2003).

reconsideration without reopening the case for a review on the merits.¹⁵ When reviewing an Office decision denying a merit review, the function of the Board is to determine whether the Office properly applied the standards set forth at section 10.606(b)(2) to the claimant's application for reconsideration and any evidence submitted in support thereof.¹⁶

ANALYSIS -- ISSUE 2

In his letter requesting reconsideration, appellant reiterated that he had suffered employment-related hearing loss and tinnitus, which interfered with his daily quality of life. The Board notes, however, that both appellant's binaural sensorineural hearing loss and his tinnitus condition were fully evaluated by the Office in the issuance of the schedule awards. The A.M.A., *Guides* note at Chapter 11.2a that the award up to five percent for tinnitus accounts for changes in the ability to perform the activities of daily living. In this regard, appellant has received the maximum percentage allowed under the A.M.A., *Guides* for the impact of tinnitus on the quality of his daily life. There is no basis for a greater award.¹⁷ Therefore, appellant's August 11, 2003 request for reconsideration neither alleged nor demonstrated that the Office erroneously applied or interpreted a specific point of law, nor advanced 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).

With respect to the third requirement, submitting relevant and pertinent new evidence not previously considered by the Office, appellant did not submit any additional evidence with his request for reconsideration. Accordingly, appellant is not entitled to a review of the merits of his claim based on the third requirement under section 10.606(b)(2).

As appellant is not entitled to a review of the merits of his claim pursuant to any of the three requirements under section 10.606(b)(2), the Board finds that the Office properly refused to reopen appellant's case for further review of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

CONCLUSION

The Board finds that appellant has failed to establish that he has more than a 15 percent binaural loss of hearing and a 5 percent binaural hearing loss due to tinnitus, for which he received schedule awards. The Board further finds that the Office properly refused to reopen appellant's claim for a review on the merits.

¹⁵ 20 C.F.R. § 10.608(b) (2003).

¹⁶ *Annette Louise*, 54 ECAB ____ (Docket No. 03-335, issued August 26, 2003).

¹⁷ *Paul R. Reedy*, 45 ECAB 488 (1994).

ORDER

IT IS HEREBY ORDERED THAT the November 12 and July 11, 2003 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: February 12, 2004
Washington, DC

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member