United States Department of Labor
Employees' Compensation Appeals Board

JOSEPH F. SILVA, Appellant	)	
and	)	**Docket No. 04-417**
	)	**Issued: March 31, 2004**
DEPARTMENT OF THE NAVY, MARINE CORP MAINTENACE CENTER, Barstow, CA, Employer	)	

Appearances:
Joseph F. Silva, pro se
Office of the Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Alternate Member
WILLIE T.C. THOMAS, Alternate Member
MICHAEL E. GROOM, Alternate Member

JURISDICTION

On December 4, 2003 appellant filed a timely appeal from the Office of Workers' Compensation Programs' schedule award decisions dated November 10, August 25 and July 30, 2003. Under 20 C.F.R. §§ 501(c) and 501.3, the Board has jurisdiction over schedule award.

ISSUES

The issues are: (1) whether appellant has established that he has greater than a 6 percent permanent hearing loss in his left ear, for which he received a schedule award; (2) whether the Office properly abused its discretion by refused to reopen appellant's case for reconsideration of his claim under 5 U.S.C. § 8128(a); and (3) whether the Office properly denied his request for an oral hearing.

FACTUAL HISTORY

Appellant, a retired 55-year-old heavy mobile equipment mechanic, filed a claim for benefits on August 23, 2002 alleging he sustained a hearing loss caused by factors of his federal employment. He became aware that his injury was causally related to his employment in January 1986. Appellant was employed with the employing establishment from February 18, 1974 until February 17, 2000, when he retired. He was exposed to loud noise produced by running machinery, power tools, air hammers, air guns, drill presses, drill motors and running engines.

On March 18, 2003 the Office referred appellant and a statement of accepted facts to Dr. Montra Kanok, a Board-certified otolaryngologist, for an audiologic and otologic evaluation.

In a report dated May 9, 2003, Dr. Kanok noted findings on audiological evaluation based on an April 15, 2003 audiogram. At the frequencies of 500, 1,000, 2,000, and 3,000 hertz, the following thresholds were reported: right ear -- 10, 5, 10 and 15 decibels: left ear -- 10, 10, 20 and 75 decibels.

In a memorandum dated June 13, 2003, an Office medical adviser reviewed Dr. Kanok's audiogram results and calculations and determined that appellant had a six percent monaural hearing loss of the left ear. The Office accepted that appellant sustained bilateral noise-induced hearing loss and bilateral tinnitus.

On July 30, 2003 the Office granted appellant a schedule award for a 6 percent hearing loss of his left ear for the period April 15 to May 6, 2003, for a total of 3.12 weeks of compensation.

On August 7, 2003 appellant requested reconsideration of the Office's July 30, 2003 decision. By decision dated August 25, 2003, the Office denied appellant's application for review on the grounds that it neither raised substantive legal questions, nor included new and relevant evidence sufficient to require the Office to review its prior decision.

On September 4, 2003 appellant requested a hearing before an Office hearing representative. By decision dated November 10, 2003, the Office denied appellant's request. The Office found that, because he had previously requested reconsideration, he was not entitled to a hearing as a matter of right. The Office exercised its discretion and determined that the issue in the case could be adequately addressed by appellant requesting reconsideration from the district office and submitting evidence not previously considered.

LEGAL PRECEDENT -- ISSUE I

The schedule award provision of the Federal Employees' Compensation Act provide for compensation to employees sustaining impairment from loss or loss of use of, specified members of the body.[1] The Act, however, does not specify the manner in which the percentage loss of a

[1] 5 U.S.C. § 8107.

member shall be determined. The method used in making such determination is a matter which rests in the sound discretion of the Office.[2] For consistent results and to ensure equal justice, the Board has authorized 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* has been adopted by the Office as a standard for evaluation of scheduled losses and the Board has concurred in such adoption.[3]

Under the A.M.A., *Guides*, hearing loss is evaluated by determining decibel loss at the frequency levels of 500, 1,000, 2,000 and 3,000 hertz. The losses at each frequency are added up and averaged and a "fence" of 25 decibels is deduced since, as the A.M.A., *Guides* point out, losses below 25 decibels result in no impairment in the ability to hear everyday speech in everyday conditions.[4] Then the remaining amount is multiplied by 1.5 to arrive at the percentage loss of monaural 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 binaural hearing loss.[5]

ANALYSIS -- ISSUE I

An Office medical adviser applied the Office's standardized procedures to the April 15, 2003 audiogram obtained by Dr. Kanok, a Board-certified otolaryngologist.[6] According to the Office's standardized procedures, testing at frequency levels of 500, 1,000, 2,000 and 3,000 hertz revealed hearing loss in the right ear of 10, 5, 10 and 15 decibels respectively. These decibels totaled 40 decibels and, divided by 4, obtained an average hearing loss of 10 decibels. The average of 10 decibels, when reduced by 25 decibels (the first 25 decibels are discounted as discussed above), equals 0 decibels, which, when multiplied by the established factor of 1.5 totals a zero percent hearing loss in the right ear. Testing for the left ear at the frequency levels of 500, 1,000, 2,000 and 3,000 hertz revealed decibel losses of 10, 10, 20 and 75 respectively. These totaled 115 decibels, which, when divided by 4, obtains an average hearing loss of 28.75 decibels. The average of 28.75 decibels, reduced by 25 decibels (the first 25 decibels discounted as discussed above), equals 3.75, which, when multiplied by the established factor of 1.5 amounts to a 5.6 percent hearing loss in the left ear. The Office medical adviser rounded up the 5.6 percent loss to find a total 6 percent impairment in the left ear.

The Board notes that the Office medical adviser properly used the applicable standards of the A.M.A., *Guides* to determine that appellant has a 6 percent total hearing loss in his left ear, causally related to his federal employment. The Board, therefore, affirms the July 30, 2003

[2] *Danniel C. Goings*, 37 ECAB 781, 783 (1986); *Richard Beggs*, 28 ECAB 387, 390-91 (1977).

[3] 20 C.F.R. § 10.404 (1999).

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

[5] *Id. See also Danniel C. Goings, supra* note 2.

[6] The record contains several audiograms obtained by the employing establishment, but none of these were certified by a physician as accurate. The Board has held that, if an audiogram is prepared by an audiologist it must be certified by a physician as being accurate before it can be used to determine the percentage of hearing loss. *Joshua A. Holmes*, 42 ECAB 231, 236 (1990).

Office decision, finding that appellant is entitled to a schedule award of no greater than a six percent permanent hearing loss in the left ear.

LEGAL PRECEDENT -- ISSUE 2

Under 20 C.F.R. § 10.606(b), a claimant may obtain review of the merits of his or her claim by; showing that the Office erroneously applied or interpreted a specific point of law; by advancing a relevant legal argument not previously considered by the Office; or by submitting relevant and pertinent evidence not previously considered by the Office.[7] Evidence that repeats or duplicates evidence already in the case record has no evidentiary value and does not constitute a basis for reopening a case.[8]

ANALYSIS -- ISSUE 2

In the present case, appellant did not show that the Office erroneously applied or interpreted a specific point of law. He did not advance a relevant legal argument not previously considered by the Office. Appellant did not submit relevant and pertinent evidence not previously considered by the Office. He did not submit any evidence or argument in connection with his August 7, 2003 reconsideration request. Thus, the request did not contain any new and relevant evidence or argument for the Office to review. The Board finds that the Office properly refused to reopen appellant's claim for reconsideration on the merits.

LEGAL PRECEDENT -- ISSUE 3

Section 8124(b)(1) of the Act provides that a claimant is entitled to a hearing before an Office representative, when a request is made within 30 days after issuance of and Office final decision.[9] A claimant is not entitled to a hearing if the request is not made within 30 days of the date of issuance of the decision as determined by the postmark of the request or if the claimant has previously submitted a reconsideration request.[10] The Office has discretion, however, to grant or deny a request for hearing notwithstanding the fact that the claimant has already requested reconsideration. In such a case, the Office will determine whether a discretionary hearing should be granted or, if not, will so advise the claimant with reasons.

ANALYSIS -- ISSUE 3

In the present case, because appellant had already requested reconsideration following the Office's July 30, 2003 schedule award decision, he was not entitled to a hearing as a matter of right.[11] The Office considered whether to grant a discretionary hearing and correctly advised

[7] 20 C.F.R. § 10.606(b)(1); *see generally* 5 U.S.C. § 8128(a).

[8] *Howard A. Williams*, 45 ECAB 853 (1994).

[9] 5 U.S.C § 8124(b)(1).

[10] 20 C.F.R. § 10.616(a).

[11] *Id*.

appellant that he could pursue his claim by submitting additional evidence through the reconsideration process. The Board finds that the Office properly exercised its discretion in denying appellant's request for a hearing.

CONCLUSION

The Board finds that appellant has no more than a six percent permanent hearing loss in his left ear, for which he received a schedule award. The Office properly refused to reopen appellant's case for further reconsideration on the merits of his claim under 5 U.S.C. § 8128(a). The Office did not abuse its discretion by denying appellant's request for a hearing before an Office hearing representative.

ORDER

IT IS HEREBY ORDERED THAT the November 10, August 25 and July 30, 2003 decisions of the Office of Workers' Compensation Programs be affirmed.

Issued: March 31, 2004
Washington, DC

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member