United States Department of Labor
Employees' Compensation Appeals Board

B.H., Appellant	)	
and	)	**Docket No. 08-1922**
	)	**Issued: January 21, 2009**
DEPARTMENT OF THE INTERIOR, BUREAU OF LAND MANAGEMENT, Boise, ID, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On July 30, 2008 appellant filed a timely appeal from the Office of Workers' Compensation Programs' April 29, 2008 merit decision concerning his entitlement to schedule award compensation for hearing loss and the Office's June 18, 2008 nonmerit decision denying his request for further review of the merits of his claim. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2), the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether appellant met his burden of proof to establish that he has more than a 32 percent hearing loss, for which he received schedule awards; and (2) whether the Office properly denied appellant's request for further review of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

In late 1988, the Office accepted that appellant, then a 35-year-old motor vehicle operator, sustained an employment-related binaural sensorineural hearing loss due to exposure to

noise at work, including noise from jet engines and motor vehicles. It paid him schedule award compensation for a 17 percent binaural hearing loss. Appellant continued to work for the employing establishment and claimed that his continued exposure to hazardous noise at work had caused his hearing to worsen.[1]

The Office referred appellant to Dr. Arthur C. Jones, a Board-certified otolaryngologist, for otologic and audiologic testing. In reports dated March 8 and October 30, 2007, Dr. Jones diagnosed binaural sensorineural hearing loss and noted that appellant's hearing loss had progressively worsened over the years.[2] He indicated that this worsening was due to continued exposure to hazardous noise at work. Testing for the left ear at the frequency levels of 500, 1,000, 2,000 and 3,000 cps revealed decibel losses of 10, 50, 60 and 65 respectively and testing for the right ear at the frequency levels of 500, 1,000, 2,000 and 3,000 cps revealed decibel losses of 20, 45, 60 and 60 respectively.

On January 7, 2008 Dr. Morley Slutsky, a Board-certified occupational medicine physician who served as an Office medical adviser, reviewed the medical evidence of record including the evaluation of Dr. Jones. He calculated that appellant sustained a 31.9 percent binaural hearing loss which he rounded up to 32 percent.[3] In an April 17, 2008 letter, appellant argued that he should be compensated for a 60 percent binaural hearing loss. In an April 29, 2008 decision, the Office granted him an additional schedule award for a 15 percent binaural hearing loss such that he received schedule awards for a 32 percent binaural hearing loss. The award ran for 30 weeks from March 8 to October 3, 2007.

On June 4, 2008 appellant requested reconsideration of his claim. In a letter of the same date, he argued that he was entitled to receive schedule award compensation for a 60 percent binaural hearing. In a June 18, 2008 decision, the Office denied appellant's request for further review of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

LEGAL PRECEDENT -- ISSUE 1

The schedule award provision of the Federal Employees' Compensation Act[4] and its implementing regulation[5] 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

[1] Appellant submitted several audiograms dated between November 2003 and June 2006, but none of these audiograms were certified by a physician as accurate.

[2] Dr. Jones had performed testing on appellant on March 8, 2007 but the testing did not include evaluation at the 3,000 cycles per second (cps) level and he performed additional testing on October 30, 2007.

[3] Dr. Slutsky determined that appellant had a 31.875 monaural hearing loss in each ear.

[4] 5 U.S.C. § 8107.

[5] 20 C.F.R. § 10.404 (1999).

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 losses.[6]

The Office evaluates industrial hearing loss in accordance with the standards contained in the A.M.A., *Guides.*[7] Using the frequencies of 500, 1,000, 2,000 and 3,000 cps, the losses at each frequency are added up and averaged.[8] 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.[9] The remaining amount is multiplied by a factor of 1.5 to arrive at the percentage of monaural hearing loss.[10] 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.[11] The Board has concurred in the Office's adoption of this standard for evaluating hearing loss.[12]

ANALYSIS -- ISSUE 1

The Office medical adviser reviewed the otologic and audiologic testing performed on appellant by Dr. Jones, a Board-certified otolaryngologist, and properly applied the Office's standardized procedures to this evaluation. Testing for the left ear at the frequency levels of 500, 1,000, 2,000 and 3,000 cps revealed decibel losses of 10, 50, 60 and 65 respectively. These decibel losses were totaled at 185 decibels and were divided by 4 to obtain the average hearing loss of 46.25 decibels. This average loss was then reduced by 25 decibels (25 decibels being discounted as discussed above) to equal 21.25 which was multiplied by the established factor of 1.5 to compute a 31.875 percent hearing loss in the left ear. Testing for the right ear at the frequency levels of 500, 1,000, 2,000 and 3,000 cps revealed decibel losses of 20, 45, 60 and 60 respectively. These decibel losses were totaled at 185 decibels and were divided by 4 to obtain the average hearing loss of 46.25 decibels. This average loss was then reduced by 25 decibels (25 decibels being discounted as discussed above) to equal 21.25 which was multiplied by the established factor of 1.5 to compute a 31.875 percent hearing loss in the right ear. To compute the binaural hearing loss, Dr. Slutsky took the 31.875 loss in the left ear, multiplied it by the established factor of 5,[13]

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[6] *Id*.

[7] A.M.A., *Guides* 224-25 (4th ed. 1993); A.M.A., *Guides* at 245-54 (5th ed. 2001).

[8] *Id.*

[9] *Id*.

[10] *Id*.

[11] *Id*.

[12] *Donald Stockstad*, 53 ECAB 301 (2002); *petition for recon. granted (modifying prior decision)*, Docket No. 01-1570 (issued August 13, 2002).

[13] The formula provides that the lesser hearing loss is multiplied by the factor of five, but given that appellant's hearing loss was equal in each ear it was immaterial which hearing loss Dr. Slutsky chose to multiply by the factor of five.

and added this figure to the 31.875 percent loss in the right ear. This sum was divided by the established factor of 6 to calculate a 31.9 percent binaural hearing loss which was rounded up to 32 percent.

On appeal, appellant contends that the schedule award he received was not adequate compensation for his binaural hearing loss. The schedule award provision of the Act provides for compensation to employees sustaining permanent impairment from loss of use of specified members of the body.[14] The Act establishes a maximum of 200 weeks of compensation as the award for total binaural hearing loss.[15] A partial loss of hearing is compensated at a proportionate rate,[16] so appellant's award of compensation for a total 32 percent binaural hearing loss entitled him to 32 percent of 200 weeks of compensation, or 64 weeks of compensation. The record indicates that appellant has already received this amount of compensation.[17] Because appellant has been fully compensated for his 32 percent binaural hearing loss and his condition has not worsened since that time under the Office's standards for evaluating hearing loss, he is not entitled to any additional compensation.[18]

LEGAL PRECEDENT -- ISSUE 2

To require the Office to reopen a case for merit review under section 8128(a) of the Act,[19] the Office's regulations provide that the evidence or argument submitted by 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) constitute relevant and pertinent new evidence not previously considered by the Office.[20] To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant also must file his application for review within one year of the date of that decision.[21] When a claimant fails to meet one of the above standards, the Office will deny the application for reconsideration without reopening the case for review on the merits.[22] The Board has held that the submission of evidence

[14] 5 U.S.C. § 8107(c).

[15] *Id.* at § 8107(c)(13)(B).

[16] *Id.* at § 8107(c)(19).

[17] Appellant already received compensation for a 17 percent binaural hearing loss prior to receiving an additional award for a 15 percent binaural hearing loss.

[18] Appellant would not receive greater compensation for his 31.875 percent monaural loss in each ear. This is because total monaural hearing loss only entitles a claimant to 52 weeks of compensation for each ear. Calculating appellant's entitlement to compensation due to his partial monaural loss (multiplying his 31.875 percent monaural loss in each ear times 52 weeks) and adding the resultant figures would not yield greater compensation than calculating his binaural hearing loss. *See* 5 U.S.C. § 8107(c)(13)(A).

[19] 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).

[20] 20 C.F.R. § 10.606(b)(2).

[21] *Id.* at § 10.607(a).

[22] *Id.* at § 10.608(b).

or argument which repeats or duplicates evidence or argument already in the case record does not constitute a basis for reopening a case.[23]

ANALYSIS -- ISSUE 2

In support of his June 4, 2008 reconsideration request, appellant submitted a letter in which he argued that he was entitled to receive schedule award compensation for a 60 percent binaural hearing. The advancement of this claim would not require reopening his claim for review on the merits because he had previously submitted this argument to the Office and the Board has held that the submission of evidence or argument which repeats or duplicates evidence or argument already in the case record does not constitute a basis for such a reopening.[24]

Appellant has not established that the Office improperly denied his request for further review of the merits of its April 29, 2008 decision under section 8128(a) of the Act, because he did not submit evidence or argument showing that the Office erroneously applied or interpreted a specific point of law, advancing a relevant legal argument not previously considered by the Office, or constituting relevant and pertinent new evidence not previously considered by the Office.

CONCLUSION

The Board finds that appellant did not meet his burden of proof to establish that he has more than a 32 percent hearing loss, for which he received schedule awards. The Board further finds that the Office properly denied his request for further review of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

[23] *Eugene F. Butler*, 36 ECAB 393, 398 (1984); *Jerome Ginsberg*, 32 ECAB 31, 33 (1980).

[24] *Id.*

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' June 18 and April 29, 2008 decisions are affirmed.

Issued: January 21, 2009
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board