



On March 27, 2007 the Office referred appellant to Dr. Kenneth J. Walker, an otolaryngologist, for an otologic examination and audiometric testing.

On April 20, 2007 Dr. Walker provided findings on physical examination and the results of audiometric testing. The physical examination and tympanograms were normal. Hearing test results revealed binaural high-frequency hearing loss caused, in part, by industrial noise exposure. Audiometric testing performed on April 12, 2007 by a certified audiologist revealed, at the frequency levels of 500, 1,000, 2,000 and 3,000 cycles per second (cps): left ear decibel losses of 5, 15, 35 and 45; and right ear decibel losses of 5, 5, 10 and 55. The report shows that audiometric testing equipment was last calibrated on May 11, 2006. Dr. Walker recommended the use of binaural hearing instruments (hearing aids).

On April 27, 2007 Dr. A.E. Anderson, an Office medical adviser, totaled the decibel losses of 5, 15, 35 and 45 in the left ear for the frequency levels of 500, 1,000, 2,000 and 3,000 cps at 100 decibels and divided by 4 to obtain the average hearing loss of 25 decibels. This average was then reduced by 25 decibels to equal 0 decibels and multiplied by the established factor of 1.5 to compute 0 percent impairment in the left ear. Dr. Anderson totaled the losses of 5, 5, 10 and 55 in the right ear at 75 decibels and divided by 4 to obtain the average hearing loss of 18.75 decibels. This average was then reduced by 25 decibels to equal 0 which was multiplied by the established factor of 1.5 to compute 0 percent monaural hearing loss in the right ear.<sup>1</sup>

By decision dated May 1, 2007, the Office accepted appellant's claim for binaural hearing loss.

Appellant requested on December 19, 2007 authorization for hearing aids and on December 27, 2007, the Office authorized the purchase of binaural hearing aids for appellant's accepted hearing loss.

By decision dated September 9, 2008, the Office denied appellant's claim for a schedule award for bilateral hearing loss on the grounds that the medical evidence established that his hearing loss was not severe enough to be compensable. It further noted that "the weight of the medical evidence establishes that you would not benefit from hearing aides and your claim for additional medical benefits is also denied."

On May 19, 2009 appellant requested reconsideration. He stated that, after his claim was accepted and the Office paid for two hearing aids, he filed a claim for a schedule award for the hearing loss he had suffered. Appellant disputed the Office's statement that he no longer would benefit from hearing aids and cited as an example of improvement that he did not need to turn up the volume on his television set as high as when he had his hearing aids.

By decision dated May 29, 2009, the Office denied appellant's request for reconsideration without considering the merits.

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<sup>1</sup> See Federal (FECA) Procedural Manual, Part 2 -- Claims, *Schedule Award and Permanent Disability Claims*, Chapter 2.808.6(d) (October 2005) (these procedures contemplate that, after obtaining all necessary medical evidence, the file should be routed to an Office medical adviser for an opinion concerning the nature and percentage of impairment in accordance with the A.M.A., *Guides*, with the medical adviser providing rationale for the percentage of impairment specified, especially when there is more than one evaluation of the impairment present).

## LEGAL PRECEDENT

Section 8128(a) of the Federal Employees' Compensation Act<sup>2</sup> does not entitle a claimant to a review of an Office decision as a matter of right. This section vests the Office with discretionary authority to determine whether it will review an award for or against compensation.<sup>3</sup> The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a).<sup>4</sup>

To require the Office to reopen a case for merit review under section 8128(a) of the Act,<sup>5</sup> 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.<sup>6</sup> To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant also must file his or her application for review within one year of the date of that decision.<sup>7</sup> 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.<sup>8</sup>

## ANALYSIS

Appellant did not show that the Office erroneously applied or interpreted a specific point of law nor did he submit relevant and pertinent new evidence not previously considered by the Office. Appellant's argument in support of his request for reconsideration disagreed with the Office's determination that his hearing loss was not severe enough to be ratable and noted that he did have a considerable improvement in his hearing with the use of hearing aides. As he did not advance a relevant legal argument not previously considered, the Office properly denied his request for reconsideration of the denial of his schedule award claim. The Office did not abuse its discretion in denying his request for reconsideration of his schedule award claim.

On appeal, appellant contends that he has a ratable hearing loss. Lay individuals are not competent to render a medical opinion.<sup>9</sup> Therefore, his opinion that he has a ratable hearing loss is of no probative value.

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<sup>2</sup> 5 U.S.C. §§ 8101-8193.

<sup>3</sup> *Id.* at § 8128(a).

<sup>4</sup> *Annette Louise*, 54 ECAB 783, 789-90 (2003).

<sup>5</sup> Under section 8128(a) of the Act, "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on [his or her] own motion or on application." 5 U.S.C. § 8128(a).

<sup>6</sup> 20 C.F.R. § 10.606(b)(2).

<sup>7</sup> *Id.* at § 10.607(a).

<sup>8</sup> *Id.* at § 10.608(b).

<sup>9</sup> *See Robert J. Krstyen*, 44 ECAB 227 (1992).

Appellant also contested the Office's September 9, 2008 denial of further medical benefits for his accepted binaural hearing loss on the grounds that the weight of the medical evidence established that he would not benefit from hearing aids. He stated that his hearing had improved with the use of hearing aids and cited, as an example of improvement, that he did not need to turn up the volume on his television set as high as when he did not have hearing aids. The record shows that the Office authorized the purchase of hearing aids in December 2007 and that Dr. Walker recommended hearing aids in his report. The Board finds that the Office has not addressed this aspect of the case. The case will be remanded for a determination as to whether medical benefits for appellant were properly terminated.

**CONCLUSION**

The Board finds that the Office did not abuse its discretion in denying appellant's request for reconsideration of his schedule award claim. The case is remanded for further development on the issue of termination of medical benefits for his accepted hearing loss.

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated May 29, 2009 is affirmed as to the issue of entitlement to a schedule award issue. It is set aside as to the issue of medical benefits and remanded for further action consistent with this decision.

Issued: July 12, 2010  
Washington, DC

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge  
Employees' Compensation Appeals Board

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