

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JAMES A. ENGLAND and DEPARTMENT OF THE ARMY,
TOOELE ARMY DEPOT, Tooele, Utah

*Docket No. 96-1858; Submitted on the Record;
Issued June 9, 1998*

DECISION and ORDER

Before DAVID S. GERSON, MICHAEL E. GROOM,
BRADLEY T. KNOTT

The issue is whether the Office of Workers' Compensation Programs abused its discretion by refusing to reopen appellant's claim for review of the merits.

The Board has duly reviewed the case on appeal and finds that the Office abused its discretion by refusing to reopen appellant's claim for review of the merits.

This case has previously been on appeal before the Board. In a decision dated October 3, 1995, the Board found that appellant had no more than a 28 percent loss of hearing in his right ear for which he received a schedule award.¹ The Board noted that appellant had submitted an additional audiogram which was neither signed by a physician nor accompanied by a physician's report. The Board noted that an audiogram must be certified by a physician as being accurate before it can be used to determine the percentage of loss of hearing.²

Following the Board's October 3, 1995 decision, appellant requested reconsideration from the Office and submitted additional evidence. By decision dated May 1, 1996, the Office refused to reopen appellant's claim for consideration of the merits finding that he failed to raise substantive legal questions nor include new and relevant evidence.³

Section 10.138(b)(1) of the Code of Federal Regulations provides that a claimant may obtain review of the merits of the claim by: (1) showing that the Office erroneously applied or interpreted a point of law; or (2) advancing a point of law or a fact not previously considered by the Office; or (3) submitting relevant and pertinent evidence not previously considered by the Office.⁴ Section 10.138(b)(2) provides that when an application for review of the merits of a

¹ Docket No. 94-808

² *Joshua A. Holmes*, 42 ECAB 231, 236 (1990).

³ Following the Office's May 1, 1996 decision, appellant submitted additional new evidence to the Office. As the Office did not consider this evidence in reaching a final decision, the Board may not review it for the first time on appeal; *see* 20 C.F.R. § 501.2(c).

⁴ 20 C.F.R. § 10.138(b)(1).

claim does not meet at least one of these three requirements, the Office will deny the application for review without reviewing the merits of the claim.⁵

In support of his request for reconsideration, appellant submitted a report dated October 25, 1995 from Dr. Jerry W. Sonkens, a Board-certified otolaryngologist. Dr. Sonkens stated that he had examined an August 30, 1993 audiogram by Brenda M. Sahr-Bennett, a clinically certified audiologist. He stated, "I certify that those testing results are accurate."⁶

Appellant had previously attempted to establish that he is entitled to a schedule award for more than 28 percent loss of hearing in his right ear. In support of his claim, he submitted the August 30, 1993 audiogram which the Board found was not accompanied by a physician's report or signature and that, therefore, could not establish appellant's claim. Appellant, in support of his reconsideration request, submitted a physician's report certifying that the audiogram was accurate. Therefore, this report is relevant new evidence regarding the issue for which the Board denied appellant's claim and the Office abused its discretion by refusing to reopen appellant's claim for review of the merits.

The decision of the Office of Workers' Compensation Programs dated May 1, 1996 is hereby set aside and remanded for further development consistent with this opinion.

Dated, Washington, D.C.
June 9, 1998

David S. Gerson
Member

Michael E. Groom
Alternate Member

Bradley T. Knott
Alternate Member

⁵ 20 C.F.R. § 10.138(b)(2).

⁶ The Board notes that the August 30, 1993 audiogram indicates that Dr. Sonkens is one of the physicians associated with the practice.