

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of RONALD L. HOLSTON and DEPARTMENT OF THE ARMY,
U.S. ARMY TRAINING DOCTRINE COMMAND, Fort Knox, KY

*Docket No. 98-792; Submitted on the Record;
Issued October 6, 1999*

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
BRADLEY T. KNOTT

The issue is whether the Office of Workers' Compensation Programs abused its discretion by refusing to reopen appellant's claim for a merit review on October 8, 1997.

On September 28, 1994 appellant, then a 47-year-old carpenter, filed a notice of occupational disease alleging that he developed a binaural hearing loss due to noise exposure in his federal employment. In support of his claim, appellant has submitted various audiological reports indicating a binaural loss of hearing as well as documents supporting noise exposure in the course of his federal employment.

By letter dated February 27, 1995, the Office referred appellant, together with a statement of accepted facts, for audiologic and otologic evaluation by Dr. Samuel Cooper, a Board-certified otolaryngologist. Dr. Cooper submitted an undated form report which diagnosed appellant with sensorineural hearing loss above 2,000 hertz; noted that appellant's first hearing examination performed for the federal employment on May 30, 1972 was normal; and found that the sensorineural hearing loss was due to noise exposure in the course of appellant's federal employment. Accompanying this report is an audiogram performed by audiologist William J. Brown on March 13, 1995 and indicates testing at 500, 1,000, 2,000 and 3,000 hertz. Testing for the right ear at the relevant frequencies revealed decibel losses of 5, 10, 5 and 30 for a total of 50, which was divided by 4 for an average hearing loss of 12.5 decibels; the average was reduced by the fence of 25 (the first 25 decibels were discounted as discussed above) to arrive at 0 or no ratable loss of hearing in the right ear.¹ Testing for the left ear at the same frequencies revealed decibel losses of 10, 15, 15 and 45 decibels respectively for a total of 85. This figure was divided by 4, for an average hearing loss of 21.25 decibels; the average was reduced by the

¹ See American Medical Association, *Guides to the Evaluation of Permanent Impairment* 224 (fourth edition 1993).

fence of 25 (the first 25 decibels were discounted) to arrive at 0 or no ratable loss of hearing in the left ear.²

The Office accepted that appellant's hearing loss was related to his federal employment. A district medical adviser reviewed appellant's March 13, 1995 audiogram and applied the Office's standardized procedure to calculate a noise-induced, high frequency sensorineural binaural hearing loss, which was determined to be neither ratable nor compensable.

On May 1, 1995 the Office issued a decision accepting appellant's claim for a binaural hearing loss due to his federal employment noise exposure. The Office found that appellant's hearing loss was not severe enough to be considered ratable and denied appellant's claim for a schedule award and/or additional medical benefits.

In an undated letter stamped received by the Office on April 10, 1996, appellant requested reconsideration of the Office's May 1, 1995 decision and submitted a March 28, 1996 audiogram from an unidentifiable audiologist.

In a September 30, 1996 merit decision on reconsideration, the Office denied appellant's request for reconsideration on the grounds that the evidence submitted in support of the reconsideration request was insufficient to warrant modification of the May 1, 1995 decision. The Office found that although the district medical adviser reviewed appellant's March 28, 1996 audiogram, this audiogram was still determined to be neither ratable nor compensable.

In a letter dated September 29, 1997, appellant requested reconsideration of the Office's September 30, 1996 merit decision on reconsideration. In this letter, appellant indicated that he was now being represented by counsel and enclosed a copy of the Office's September 30, 1996 decision for review. The record, however, does not contain a notice of appearance as counsel for appellant in this matter.

In a October 8, 1997 nonmerit decision on reconsideration, the Office denied appellant's second request for reconsideration on the grounds that appellant neither submitted new or relevant evidence not previously considered, nor presented legal contentions not previously considered in this case.³

The Board finds that the Office did not abuse its discretion by refusing to reopen appellant's claim for review of the merits on October 8, 1997.

Under section 8128(a) of the Act,⁴ the Office has the discretion to reopen a case for review on the merits. The Office must exercise this discretion in accordance with the guidelines

² *Id.*

³ The Board's jurisdiction to consider and decide appeals from final decisions of the Office extends only to those final decisions issued within one year prior to the filing of the appeal. As appellant filed his appeal dated January 5, 1998, with the Board on January 9, 1998, the only decision properly before the Board is the October 8, 1997 nonmerit decision on reconsideration. Thus, the Board lacks jurisdiction to review either the Office's September 30, 1996 or May 1, 1995 decisions. 20 C.F.R. § 501.3(d)(2).

⁴ 5 U.S.C. § 8128(a).

set forth in section 10.138(b)(1) of the implementing federal regulations,⁵ which provides that a claimant may obtain review of the merits of the claim by:

“(i) Showing that the Office erroneously applied or interpreted a point of law, or

“(ii) Advancing a point of law or a fact not previously considered by the Office,
or

“(iii) Submitting relevant and pertinent evidence not previously considered by the Office.”

Section 10.138(b)(2) provides that any application for review of the merits of the claim which does not meet at least one of the requirements listed in paragraphs (b)(1)(i) through (iii) of this section will be denied by the Office without review of the merits of the claim.⁶

Although appellant requested reconsideration of the Office’s September 30, 1996 decision on reconsideration, he merely noted that he had retained the services of an attorney to represent him in this matter. However, the Office did not receive any additional medical evidence to support appellant’s request for reconsideration. The Board notes that no further communication was received from either appellant or his newly retained counsel with regard to when or if the Office should expect the delivery of any additional medical evidence in support of his request for merit review of the September 30, 1996 decision. As appellant did not present any new and relevant evidence not previously considered and did not raise any legal contentions not previously considered to support his request for reconsideration, the Board finds that the Office, in its October 8, 1997 decision, did not abuse its discretion in refusing to reopen the September 30, 1996 decision for further merit review.⁷ As appellant has not, by the submission of medical evidence, raised a substantial question as to the correctness of the Office’s September 30, 1996 decision, he has failed to establish clear evidence of error and the Office did not abuse its discretion in denying a merit review of his claim. The Office, therefore, properly declined to reopen appellant’s claim for review on the merits.

⁵ 20 C.F.R. § 10.138(b)(1).

⁶ 20 C.F.R. § 10.138(b)(2).

⁷ The Board notes that on appeal appellant filed additional evidence. The Board’s jurisdiction on appeal is limited to a review of the evidence which was in the case record before the Office at the time of its final decision; *see* 20 C.F.R. § 501.2(c). The Board may not review new evidence on appeal which was not considered by the Office in the decision. Therefore, the Board is precluded from reviewing this evidence.

The decision of the Office of Workers' Compensation Programs dated October 8, 1997 is hereby affirmed.

Dated, Washington, D.C.
October 6, 1999

Michael J. Walsh
Chairman

David S. Gerson
Member

Bradley T. Knott
Alternate Member