U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of LARRY D. SEABURG and DEPARTMENT OF THE NAVY, PUGET SOUND NAVAL SHIPYARD, Bremerton, WA

Docket No. 00-1575; Submitted on the Record;
Issued September 7, 2001

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issues are: (1) whether appellant sustained a ratable hearing loss entitling him to receive a schedule award under 5 U.S.C. § 8107; and (2) whether the Office of Workers' Compensation Programs, by its February 22, 2000 decision, abused its discretion by denying appellant's request for further merit review under 5 U.S.C. § 8128(a).

On February 3, 1999 appellant, then a 38-year-old sandblaster, filed occupational disease and schedule award claims alleging that he sustained hearing loss and ringing in his ears causally related to factors of his federal employment. He asserted that he first related his hearing loss to his federal employment on November 4, 1997. On the reverse side of the occupational disease claim form, appellant's supervisor noted that appellant stopped work on February 3, 1999.[1]

Appellant submitted an undated statement in which he described his employment-related noise exposure and job duties. He also submitted hearing conservation data dated January 9, 1997 to February 22, 1999.

The Office referred appellant to Dr. James C. Rockwell, a Board-certified otolaryngologist, for a second opinion examination. In a May 20, 1999 report, Dr. Rockwell noted appellant's noise exposure history and stated that he worked as a sandblaster from 1989 to February 1999. Appellant reported to Dr. Rockwell that during that period he was exposed to daily noise and wore ear protection but noises were occasionally extremely loud and painful. He also reported that he first noticed his hearing loss in 1992 and that it worsened until 1997. Appellant stated that he developed tinnitus in 1997 and that it was present about 90 percent of the time.

Dr. Rockwell noted that he reviewed appellant's audiograms dated 1996, 1997 and 1998 and opined that they were essentially identical to the audiogram performed on May 20, 1999. He

[1] The record indicates that appellant's temporary appointment expired on February 3, 1999.

diagnosed mild to moderate binaural high-frequency sensorineural hearing loss. Dr. Rockwell found that appellant's hearing loss was causally related to his federal employment.

Dr. Rockwell concluded that, according to the American Medical Association, *Guides to the Evaluation of Permanent Impairment*, (4th ed. 1995), appellant's hearing loss did not amount to a permanent impairment. However, he found that appellant's tinnitus would account for a maximum five percent permanent impairment.

An accompanying May 20, 1999 audiogram, reviewed by Dr. Rockwell, showed the following decibel losses at the 500, 1,000, 2,000 and 3,000 Hertz (Hz) frequency levels: 10, 10, 5 and 30 for the right ear; and 15, 5, 5 and 25 for the left ear.

By decision dated June 9, 1999, the Office accepted appellant's claim for hearing loss but denied his schedule award claim on the grounds that the medical evidence of record failed to establish that, under the A.M.A., *Guides*, he sustained a ratable loss.

By letter dated June 14, 1999, appellant requested an oral hearing before an Office hearing representative.

At the November 15, 1999 hearing, appellant testified that his tinnitus began in 1996 or 1997 and had continued since then. He described his work-related noise exposure and stated that he was issued hearing protection; however, the noise was not totally eliminated. Appellant described his tinnitus as a high-pitched buzzing, ringing noise present 89 percent of the time. He stated that his tinnitus occasionally interrupted his sleep and he described it as "annoying." Appellant noted that prior to February 3, 1999, he had been exposed to loud noise for about 10 years. He testified that his physicians advised that treatment for his tinnitus was unavailable.

In a statement dated June 11, 1999, appellant argued that his tinnitus was caused by his employment-related hearing loss and, therefore, he was entitled to receive a schedule award. He noted that his condition was annoying and made life harder. Appellant stated that he was unable to hear his television at a normal volume, he regularly asked people to repeat themselves during conversation and he heard a constant ringing noise. He argued that his tinnitus caused a five percent permanent impairment.

By decision dated January 26, 2000, the Office hearing representative affirmed the Office's June 9, 1999 decision on the grounds that the medical evidence of record failed to establish that appellant sustained a ratable hearing loss.

By letter dated February 4, 2000, appellant requested reconsideration of the Office hearing representative's January 26, 2000 decision. To support his request, appellant submitted a narrative statement in which he argued that he sustained permanent, employment-related hearing loss and tinnitus and; therefore, was entitled to receive a schedule award. He stated that although his hearing loss was not ratable, his tinnitus was work related, thereby entitling him to a schedule award for a five percent permanent impairment.

By decision dated February 22, 2000, the Office denied appellant's reconsideration request on the grounds that the evidence submitted to support his request was repetitive and did not warrant further merit review.

The Board finds that appellant did not sustain a ratable hearing loss entitling him to receive a schedule award.

The Federal Employees' Compensation Act schedule award provisions set forth the number of weeks' compensation to be paid for permanent loss of use of the members of the body that are listed in the schedule.[2] The Act, however, does not specify the manner in which the percentage loss of a member shall be determined. The method used in making such a determination is a matter, which rests in the sound discretion of the Office.[3] However, as a matter of administrative practice, the Board has stated: "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 uniform standards applicable to all claimants."[4]

The Office by regulation, 20 C.F.R. § 10.404, evaluates industrial hearing loss in accordance with the standards contained in the A.M.A., *Guides* (4th ed. rev., 1995). Using the frequencies of 500, 1,000, 2,000 and 3,000 Hz, the losses at each frequency are added up and averaged.[5] 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.[6] The remaining amount is multiplied by a factor of 1.5 to arrive at the percentage of monaural hearing loss.[7] 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.[8]

In addition to the standard by which it computes the actual percentage of hearing loss, the Office has set forth requirements for the medical evidence used in evaluating hearing loss. The requirements, contained in the Federal (FECA) Procedure Manual, provide that the claimant undergo audiological evaluation and otological examination, that the audiological testing precede the otological examination and be performed by different individuals, that the audiologist and otolaryngologist be certified, and that audiological testing equipment meet calibration requirements established by the American Speech and Hearing Association.[9] Further, the procedure manual requires that audiometric testing include both bone conduction and pure tone air conduction thresholds, speech reception thresholds and monaural discrimination scores.[10]

[2] 5 U.S.C. § 8107.

[3] *Richard Larry Enders*, 48 ECAB 184 (1996); *Danniel C. Goings*, 37 ECAB 781, 783 (1986).

[4] *See Richard Larry Enders*, *supra* note 3 at 186.

[5] A.M.A., *Guides* 224 (4th ed. rev., 1995).

[6] *Id.*

[7] *Id.*

[8] *Id.*

[9] Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.0700.4(b) Exhibit 3 (October 1990).

[10] *Id.*

Additionally, the otolaryngologist's report must include the date and hour of examination, the date and hour of the employee's last exposure to loud noise, a rationalized medical opinion regarding the relationship between hearing loss and employment-related noise exposure, and a statement regarding the reliability of the test.[11]

In the present case, the Office properly found that appellant did not sustain a ratable hearing loss. Under the A.M.A., *Guides*, Dr. Rockwell's May 20, 1999 findings show that appellant's total right ear decibel loss is 55. That total is divided by 4 to obtain a 13.75 average decibel loss for the right ear. The 13.75 decibel average is then reduced by 25, as discussed above, which results in a 0 percent monaural loss for the right ear. Appellant's total left ear decibel loss is 50, which when divided by 4 results in 12.5 average decibel loss for the left ear. The 12.5 decibel average is reduced by 25, as discussed above, which results in a 0 percent left ear monaural hearing loss. The Office correctly applied the A.M.A., *Guides* and found that appellant did not sustain a ratable hearing loss and, therefore, is not entitled to receive a schedule award.

On appeal, appellant argues that although he did not sustain a ratable hearing loss, he is entitled to receive a schedule award for his tinnitus condition because it was caused by his federal employment. While the A.M.A., *Guides* allow for an award for tinnitus under disturbances of vestibular function, there is insufficient medical evidence to establish that appellant's tinnitus was caused or contributed to by his federal employment noise exposure and that it caused or contributed to a ratable hearing loss. Further, no medical evidence of dysequilibrium or evidence that appellant cannot perform his usual activities of daily living was presented.[12] Appellant would be entitled to compensation if it were established that his tinnitus resulted in a loss of wage-earning capacity; however, there is no evidence of record that appellant sustained a loss of wage-earning capacity as a result of his tinnitus condition.

The Board further finds that the Office, by its February 22, 2000 decision, did not abuse its discretion by denying appellant's request for further merit review under 5 U.S.C. § 8128(a).

In order to grant a claimant's reconsideration request, the claimant must show that the Office erroneously applied or interpreted a point of law, advance a new legal argument supporting his claim not previously considered by the Office, or submit relevant and pertinent new evidence not previously considered by the Office.[13] Where such evidence and arguments are present, it is well established under Board precedent that the Office must reopen a case for further merit review.[14] Section 10.608(b) of the Office's regulations provides that when an application for review of the merits of a claim does not meet at least one of those requirements, the Office will deny the application for review without reviewing the merits of the claim.[15] The

[11] *Id.*

[12] *See Charles H. Potter*, 39 ECAB 645 (1988).

[13] 20 C.F.R. § 10.606(b)(2).

[14] *Helen E. Tschantz*, 39 ECAB 1382, 1385 (1988).

[15] 20 C.F.R. § 10.608(b).

submission of evidence or argument which repeats or duplicates evidence or argument already considered by the Office does not constitute a basis for reopening a case for further review on the merits.[16]

In its February 22, 2000 decision, the Office properly denied appellant's reconsideration request because he did not show that the Office erroneously applied or interpreted a point of law, advance a new legal argument supporting his claim not previously considered by the Office, or submit relevant and pertinent new evidence not previously considered by the Office. Appellant did not submit any medical evidence to support his request. He merely described his condition and argued that he was entitled to receive a schedule award. Therefore, his request for reconsideration did not satisfy the criteria in section 10.606(b) of the regulations to require a merit review.

The February 22 and January 26, 2000 decisions of the Office of Workers' Compensation Programs are hereby affirmed.

Dated, Washington, DC
September 7, 2001

Michael J. Walsh
Chairman

David S. Gerson
Member

Willie T.C. Thomas
Member

[16] *David E. Newman*, 48 ECAB 305, 308 (1997)*; see Eugene F. Butler*, 36 ECAB 393, 398 (1984).