

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ROBERT AIU and DEPARTMENT OF JUSTICE,
DRUG ENFORCEMENT, Honolulu, HI

*Docket No. 02-1051; Submitted on the Record;
Issued December 24, 2002*

DECISION and ORDER

Before COLLEEN DUFFY KIKO, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issue is whether the refusal of the Office of Workers' Compensation Programs to reopen appellant's case for further consideration of the merits of his claim under 5 U.S.C. § 8128(a), constituted an abuse of discretion.

On April 20, 2000 appellant, then a 50-year-old criminal investigator, filed an occupational disease claim for compensation, Form CA-2, alleging that he sustained a hearing impairment in the course of his federal employment. He stated that he became aware of his illness and that it was caused or aggravated by his employment on March 6, 2000. On the reverse of the form, appellant's supervisor noted that appellant first reported his condition to him on March 6, 2000. He noted that March 31, 2000 was the last day appellant was exposed to the condition alleged to have caused his disease or illness.

In support of his claim, appellant submitted an employee statement. He noted that firearms training, proximity to helicopter noise and proximity to aircraft noise were the cause of his hearing impairment. Also attached was a report from Dr. Meredith Pang, a Board-certified otolaryngologist, who diagnosed appellant as having sustained a mild high frequency sensorineural hearing loss. The attached otolaryngology and audiological evaluations revealed bilateral mild symmetric high frequency sensorineural hearing loss with excellent speech discrimination.

By letter dated October 3, 2000, the Office referred appellant, the case record and a statement of accepted facts to Dr. Ronald P. Peroff, a Board-certified otolaryngologist for otologic and audiologic evaluations.

In a letter dated October 10, 2000, appellant, *inter alia*, requested a schedule award pursuant to his claim.

On October 27, 2000 Dr. Peroff performed an otologic evaluation of appellant and an audiometric test was conducted on his behalf. The testing revealed at frequency levels of 500,

1,000, 2,000 and 3,000 cycles per second the following: right ear -- 10, 15, 20 and 50 decibels; left ear -- 10, 10, 10 and 60 decibels.

In his report, Dr. Peroff stated that there “appears to be a direct response to noise exposure and the hearing loss.” He noted that appellant did not feel that he required amplification at the time; however, Dr. Peroff recommended that appellant be followed with yearly audiograms.

The audiogram completed on October 31, 2000 on Dr. Kenneal Chun’s behalf, an audiologist, showed a mild sensorineural loss bilaterally and borderline normal thresholds. The speech discrimination was potentially excellent with no rollover in either ear at high frequency presentation level. Appellant was recommended to avoid noise and ototoxic drugs and to monitor hearing annually.

In a report dated February 4, 2001, an Office medical director reviewed the medical evidence of record. He applied the Office’s standardized procedures to the April 4, 2001 audiogram performed by Dr. Peroff. Testing for the right ear at 500, 1,000, 2,000 and 3,000 hertz revealed hearing threshold levels of 10, 15, 20 and 50 decibels respectively. These losses total 95 for an average of 23.75 decibels. Reducing this average by 25 decibels leaves a balance of zero decibels, meaning that no impairment is presumed to exist in appellant’s ability to hear, with his right ear, everyday sounds under everyday listening conditions.

Testing for the left ear at 500, 1,000, 2,000 and 3,000 Hz revealed hearing threshold levels of 1, 10, 10 and 60 decibels respectively. These losses total 90 for an average of 22.50 decibels. Reducing this average by 25 decibels leaves a balance of 0 decibels, meaning that no impairment is presumed to exist in appellant’s ability to hear, with his left ear, everyday sounds under everyday listening conditions. Applying the Office’s standardized guidelines to the October 31, 2000 findings, the medical director determined that appellant did not have a ratable hearing loss.

By decision dated February 20, 2001, the Office denied appellant’s claim on the grounds that he had “no compensable impairment secondary to his industrial bilateral hearing loss condition.”

On May 13, 2001 appellant requested reconsideration of the Office’s previous decision. He stated that “there is undisputed (by the Office) evidence and documentation” that shows that his hearing impairment was causally related to his federal employment.

By decision dated December 20, 2001, the Office denied modification of its previous decision. The Office stated that the information appellant submitted in support of his claim was immaterial and insufficient to warrant review of the prior decision.

The Board finds that the refusal of the Office to reopen appellant’s case for further consideration of the merits of his claim, pursuant to 5 U.S.C. § 8128(a), did not constitute an abuse of discretion.

The only decision before the Board on this appeal is the Office’s December 20, 2001 decision denying appellant’s application for a reconsideration of the Office’s February 20, 2001

merit decision. Because more than one year has elapsed between the issuance of the Office's February 20, 2001 merit decision and March 15, 2002, the date appellant filed his appeal with the Board, the Board lacks jurisdiction to review the February 20, 2001 decision.¹

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act, the Office's regulations provide that 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) submit relevant and pertinent new evidence not previously considered by the Office.² To be entitled to a merit review of an Office decision denying or termination a benefit, a claimant also must file his or her application for review within one year of the date of that decision.³ When a claimant failed to meet one of the above standards, the Office will deny the application for reconsideration without reopening the case for review on the merits.⁴

In the present case, the Office denied appellant's schedule award claim because his hearing loss was not ratable. His hearing loss was not substantial enough to meet the minimum guidelines for a compensable hearing loss. With his request for reconsideration, appellant did not submit any further medical evidence regarding the degree of his hearing loss. Appellant has not established that the Office abused its discretion in its December 20, 2001 decision under section 8128(a) of the Act, because he did not show that the Office erroneously applied or interpreted a specific point of law, advance a relevant legal argument not previously considered by the Office, or submit relevant and pertinent new evidence not previously considered by the Office.

¹ See 20 C.F.R. § 501.3(d)(2).

² 20 C.F.R. § 10.606(b)(2) (1999).

³ 20 C.F.R. § 10.607(a).

⁴ 20 C.F.R. § 10.608(b).

The December 20, 2001 decision of the Office of Workers' Compensation Programs is affirmed.

Dated, Washington, DC
December 24, 2002

Colleen Duffy Kiko
Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member