U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of STEVEN D. CHAUSSEE and DEPARTMENT OF THE NAVY, Bremerton, WA

Docket No. 02-1828; Submitted on the Record;
Issued December 19, 2002

DECISION and ORDER

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

The issues are: (1) whether appellant has met his burden of proof in establishing that he sustained a loss of hearing causally related to noise exposure in his federal employment; and (2) whether the Office of Workers' Compensation Programs abused its discretion by denying appellant's request for further merit review under 5 U.S.C. § 8128(a).

On January 23, 2001 appellant, then a 46-year-old supervisor/production controller, filed a claim for hearing loss. He stated that he became aware of the hearing loss on December 15, 1994 and related it to his employment on July 15, 2000.

In support of his claim, appellant submitted an undated statement and copies of his medical records, including an audiologist evaluation taken on January 3, 2001.

The Office referred appellant to Dr. James C. Rockwell, a Board-certified otolaryngologist, for a second opinion examination.

In a June 11, 2001 report, Dr. Rockwell noted appellant's noise exposure history and stated: he worked from 1967 through 1970, as a helicopter mechanic; from 1970 through 1980, he worked for the Puget Sound Naval Shipyard in Bremerton, Washington, as an outside mechanic and states that he had daily excess noise exposure due to being surrounded by grinders, chippers and needle guns; from 1980 to the present, appellant worked at Bangor Submarine Base in Bangor,Washington; from 1980 to 1987, he worked as a production controller; and from 1987 to the present, he has worked in a supervisory role in an office environment with no excess noise exposure. The physician indicated that appellant stated that he was never compulsive with wearing hearing protection. He stated that appellant's main complaint was that of tinnitus, which developed tinnitus in 1994 when he was only 45 years of age and that, at times, his tinnitus keeps him up at night. For the most part, Dr. Rockwell indicated that appellant was able to get by with bilateral ringing. He stated that appellant did not have any problems with vertigo, was not a hunter, did not use guns recreationally and did not have a history of chronic ear infections as a young child. Dr. Rockwell noted that he reviewed appellant's audiogram dated

June 11, 2001. He diagnosed chronic bilateral tinnitus and moderate to moderately severe high-frequency sensorineural hearing loss. Dr. Rockwell found that appellant's hearing loss was causally related to his federal employment. He concluded that, according to the American Medical Association, *Guides to the Evaluation of Permanent Impairment*, (A.M.A., *Guides*) (5th ed. 2001), appellant's hearing loss did not amount to a permanent impairment. However, he found that appellant's tinnitus would account for a four percent binaural hearing loss.

An accompanying June 11, 2001 audiogram, reviewed by Dr. Rockwell, showed the following decibel losses at the 500, 1,000, 2,000 and 3,000 hertz frequency levels: 10, 10, 10 and 15 for the right ear; and 5, 5, 0 and 10 for the left ear.

The Office accepted appellant's claim for bilateral tinnitus on June 29, 2001.

On July 16, 2001 appellant requested a schedule award.

By letter dated December 21, 2001, the Office requested clarification from Dr. Rockwell regarding the condition of bilateral tinnitus.

In an addendum report dated January 2, 2002, Dr. Rockwell amended his findings in relation to the 5th edition of the A.M.A., *Guides*[1] He noted that, after reviewing Table 11.2A, patients that had otherwise normal findings, were not entitled to any award for impairment with respect to tinnitus.

By decision dated January 16, 2002, the Office found that appellant had no compensable impairment secondary to his industrial bilateral tinnitus condition.

By letter dated April 10, 2002, appellant requested reconsideration.[2] In support of his request, appellant disagreed that tinnitus was not ratable if there was no measurable rating and stated that he was not offered a chance to relate the impact of tinnitus on his daily living. He offered that the Office had failed to correctly state the available evidence from his case and misinterpreted the medical evidence in reaching their decision. He argued that the examining physician who performed his second pinion examination provided contradictory evidence based upon a misinterpretation of the A.M.A., *Guides*.[3]

By decision dated May 13, 2002, the Office denied appellant's reconsideration request on the grounds that the evidence submitted to support his request was immaterial insufficient to warrant further merit review.

The Board finds that appellant did not meet his burden of proof to establish that he sustained a ratable loss of hearing causally related to noise exposure in his federal employment.

[1] A.M.A., *Guides* (5th ed. 2001).

[2] Appellant actually titled his request as an appeal, however, the Office developed the request as one for reconsideration.

[3] *See supra* note 1.

The schedule award provisions of the Federal Employees' Compensation Act[4] and its implementing regulation[5] set forth the number of weeks of compensation payable to employees sustaining permanent impairment from loss, or loss of use, of scheduled members or functions of the body. However, the Act does not specify the manner in which the percentage of loss shall be determined. 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. The A.M.A., *Guides* (5th ed. 2001), has been adopted by the implementing regulation as the appropriate standard for evaluating schedule losses.

The Office evaluates industrial hearing loss in accordance with the standards contained in the A.M.A., *Guides.*[6] Using the frequencies of 500, 1,000, 2,000 and 3,000 cycles per second, the losses at each frequency are added up and averaged.[7] 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.[8] The remaining amount is multiplied by a factor of 1.5 to arrive at the percentage of monaural hearing loss.[9] 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.[10] The Board has concurred in the Office's adoption of this standard for evaluating hearing loss.[11]

In the present case, the Office accepted that on June 29, 2001 appellant sustained bilateral tinnitus. By decision dated January 16, 2002, the Office found that appellant's hearing loss was not severe enough to be considered ratable. On June 11, 2001 Dr. Rockwell applied the Office's standardized procedures to the evaluation.[12] He indicated that testing for the left ear at frequency levels of 500, 1,000, 2,000 and 3,000 cycles per second revealed decibel losses of 5, 5, 0 and 10 respectively. These decibel losses were totaled to 20 decibels and were divided by four to obtain the average hearing loss of 5 decibels. This average loss was then reduced by 25 decibels (25 decibels being discounted as discussed above) to equal a negative figure which indicates no ratable hearing loss in the left ear. Testing for the right ear at the frequency levels of 500, 1,000, 2,000 and 3,000 cycles per second revealed decibel losses of 10, 10, 10 and 15 respectively. These decibel losses were totaled at 45 decibels and were divided by 4 to obtain

[4] 5 U.S.C. § 8107.

[5] 20 C.F.R. § 10.404 (1999).

[6] A.M.A., *Guides* at 250 (5th ed. 2001).

[7] *Id.*

[8] *Id.*

[9] *Id.*

[10] *Id.*

[11] *Donald E. Stockstad*, 53 ECAB ___ (Docket No. 01-1570, issued January 23, 2002).

[12] *Donald A. Larson*, 41 ECAB 947, 951 (1990).

the average hearing loss of 11.25 decibels. This average was then reduced by 25 decibels (25 decibels being discounted as discussed above) to equal a negative figure, which indicates that appellant does not have a ratable hearing loss in his right ear. Dr. Rockwell found that appellant did have tinnitus in both ears and gave appellant a four percent binaural hearing loss.

However, upon being informed of the procedures with respect to tinnitus, Dr. Rockwell provided an addendum dated January 2, 2002 and concluded that appellant was not entitled to the award for tinnitus per the A.M.A., *Guides*, as he had no ratable hearing impairment.[13] The Board finds that Dr. Rockwell properly used the appropriate standards of the A.M.A., *Guides* to calculate that appellant was not entitled to a schedule award.[14]

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*[15] allow for an award of an additional five percent for tinnitus in the presence of unilateral or bilateral hearing impairment, where it may impair speech discrimination, this only applies in the presence of measurable hearing loss if the tinnitus impacts the ability to perform activities of daily living.[16] As appellant had no ratable impairment, he was not entitled to an additional award for his tinnitus.

Appellant has not provided any probative medical evidence that he has any ratable hearing loss.

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 appellant's reconsideration request, he 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.[17] 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.[18] 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.[19] The submission of

[13] The record reflects that the state of Washington, allows an award of tinnitus for state workers' compensation claims, however, the 5th edition of the A.M.A., *Guides*, clearly explains the situations that would entitle an award in relation to tinnitus.

[14] The record reflects that the Office medical adviser concurred that appellant's hearing was within normal range on June 21, 2002.

[15] *Supra* note 1 at 246.

[16] *Id.*

[17] 20 C.F.R. § 10.606(b)(2).

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

[19] 20 C.F.R. § 10.608(b).

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.[20]

In its May 13, 2002 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 for tinnitus and argued that the Office coerced Dr. Rockwell to change his mind regarding the tinnitus rating. However, he did not provide any evidence to support his allegation. Further, he did not provide any medical evidence to show that he was entitled to an additional 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.[21]

The May 13 and January 16, 2002 decisions of the Office of Workers' Compensation Programs are hereby affirmed.

Dated, Washington, DC
December 19, 2002

Michael J. Walsh
Chairman

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

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

[21] *See supra* note 17.