

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of EDWARD T. WHITEHEAD and DEPARTMENT OF THE NAVY,
NAVAL AVIATION DEPOT, Cherry Point, NC

*Docket No. 02-937; Submitted on the Record;
Issued October 11, 2002*

DECISION and ORDER

Before ALEC J. KOROMILAS, DAVID S. GERSON,
A. PETER KANJORSKI

The issues are: (1) whether appellant has more than a four percent binaural hearing loss for which he received a schedule award; and (2) whether the Office of Workers' Compensation Programs abused its discretion in refusing to reopen appellant's claim for further review of the merits of his claim under 5 U.S.C. § 8128(a).

On September 19, 2000 appellant, then a 59-year-old aircraft worker, filed a claim for a hearing loss which he attributed to his exposure to noise in his federal employment. His claim was accepted by the Office for a bilateral sensorineural hearing loss. Following development of the medical evidence, the Office issued a schedule award on July 19, 2001 for a four percent permanent binaural hearing loss, which equated to a total of eight weeks of compensation. By letter dated August 13, 2001, appellant requested reconsideration, and in a decision dated December 14, 2001, the Office denied appellant's request for reconsideration on the grounds that appellant's request neither raised substantive legal questions nor included new and relevant evidence, and, therefore, was insufficient to warrant review of the prior decision.

The Board has duly reviewed the case record and finds that appellant has no more than a four percent permanent binaural hearing loss.

Section 8107 of the Federal Employees' Compensation Act specifies the number of weeks of compensation to be paid for permanent loss of use of specified members, functions and organs of the body.¹ The Act does not, however, specify the manner by which the percentage loss of a member, function or organ shall be determined. The method used in making such a determination is a matter which rests in the sound discretion of the Office.² 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

¹ 5 U.S.C. § 8107(c).

² See *Danniel C. Goings*, 37 ECAB 781 (1986); *Richard Beggs*, 28 ECAB 387 (1977).

all claimants.³ The Office evaluates industrial hearing loss in accordance with the standards contained in the American Medical Association, *Guides to the Evaluation of Permanent Impairment*.⁴ 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.⁵ Then, the “fence” of 25 decibels (dBs) is deducted because, as the A.M.A., *Guides* points out, losses below 25 dBs 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 The Board has concurred in the Office’s adoption of this standard for evaluating hearing loss.⁹ In the present case, the Office referred appellant for audiological examination and audiometric evaluation to Dr. Walter Sabiston, a Board-certified otolaryngologist. In a February 21, 2001 report, Dr. Sabiston stated that audiometric testing performed on February 19, 2001 revealed bilateral, symmetrical sensorineural hearing loss due to occupational noise exposure. He further stated that appellant was not a candidate for hearing aids at that time, but might be a candidate in the future. The audiometric test results obtained for Dr. Sabiston revealed the following decibel losses at the 500, 1,000, 2,000 and 3,000 frequency levels: right ear of 10, 20, 25 and 55 dBs; left ear of 15, 15, 15 and 65 dBs.

On March 2, 2001 an Office medical adviser reviewed Dr. Sabiston’s findings and applied the Office’s standardized procedures to the February 19, 2001 audiogram. The losses at the frequencies of 500, 1,000, 2,000 and 3,000 cycles per second were added up and averaged and the “fence” of 25 dBs was deducted. The remaining amount was multiplied by 1.5 to arrive at the percentage of monaural hearing loss. Testing for the right ear revealed hearing thresholds levels of 10, 20, 25 and 55 dBs. These losses total 110 for an average of 27.5 dBs. Reducing this average by 25 dBs (as discussed earlier) leaves a balance of 2.5 dBs, which, when multiplied by 1.5, results in a 3.75 percent hearing loss. Testing for the left ear revealed hearing threshold levels of 15, 15, 15 and 65 dBs. These losses total 110 for an average of 27.5 dBs. Reducing this average by 25 dBs (as discussed earlier) leaves a balance of 2.5 dBs, which, when multiplied by 1.5, results in a 3.75 percent hearing loss. The Office medical adviser then multiplied the 3.75 percent loss in the left ear by 5, added it to the 3.75 percent loss in the right ear and divided the sum by 6 which equals 3.75, which he rounded up to 4 percent in accordance with Office procedures.

³ *Henry L. King*, 25 ECAB 39 (1973); *August M. Buffa*, 12 ECAB 324 (1961).

⁴ A.M.A., *Guides* at 250 (5th ed. 2001).

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ *Donald E. Stockstad*, 53 ECAB ____ (Docket No. 01-1570, issued January 23, 2002).

Under the Act, the maximum award for binaural hearing loss is 200 weeks of compensation.¹⁰ Since the binaural hearing loss in this case is 4 percent, appellant would be entitled to 4 percent of 200 weeks or 8 weeks of compensation. The Office's July 19, 2001 decision awarded appellant eight weeks of compensation for a four percent binaural hearing loss.¹¹

The Board finds that the Office medical adviser properly applied the A.M.A., *Guides* to the audiometric findings reported by Dr. Sabiston.¹² There is no evidence that appellant has more than the four percent binaural hearing loss for which he received a schedule award.

On appeal, appellant also contends that he is entitled to compensation for tinnitus which he sustained as a result of exposure to hazardous noise during the course of his federal employment. However, the Board has repeatedly held that there is no basis for paying a schedule award for a condition such as tinnitus unless the evidence establishes that the condition caused or contributed to a ratable permanent loss of hearing.¹³ In addition, while the A.M.A., *Guides* also allows for an award for tinnitus under disturbances of vestibular function, no additional ratable permanent binaural hearing loss above the four percent for which appellant has already received a schedule award has been identified or documented, therefore, there is no medical evidence that tinnitus caused or contributed to a ratable hearing loss other than that for which compensation has already been received. Further, as no objective findings of disequilibrium or evidence that appellant cannot perform his usual activities of daily living were presented, appellant has not made a case for an award for tinnitus which causes disturbances of vestibular function.

¹⁰ 5 U.S.C. § 8107(c)(13)(B).

¹¹ It is well established that if calculations based on the monaural hearing loss would result in greater compensation, then the monaural hearing loss calculations should be used. FECA Program Memorandum No. 181 (issued November 26, 1974); *see Joseph J. Tillo*, 39 ECAB 1345, 1348 (1988). The maximum number of weeks of compensation for hearing loss in one ear is 52 weeks. 5 U.S.C. § 8107(c)(13)(A). The Office medical adviser found that the hearing loss was 3.75 percent in each ear. Using the Office procedure of rounding to the next whole number, the monaural losses are four percent in each ear. FECA Program Memorandum No. 49 (issued May 1, 1967); *See Federal (FECA) Procedure Manual*, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.4(b) (November 1998). Four percent of 52 weeks is 2.08 weeks of compensation for each ear, resulting in a total of 4.16 weeks of compensation. As this is less than the eight weeks of compensation for binaural hearing loss, the Office properly used the binaural formula as the basis for its award.

¹² The Board notes that the record also contains the results of additional annual audiometric testing performed in connection with appellant's employment, the most recent of which was performed on November 16, 1999 by audiologist Barbara J. Kirk. This audiometric test revealed the following decibel losses at the 500, 1,000, 2,000 and 3,000 frequency levels: right ear of 10, 20, 20 and 45 decibels; left ear of 5, 15, 10 and 60 decibels. However, applying the Office's formula to these hearing levels yields a lesser hearing loss for each ear. Therefore, the Office medical adviser properly applied the Office's formula to Dr. Sabiston's more recent findings; *see Stacey L. Walker*, 48 ECAB 353 (1997).

¹³ *Richard Larry Enders*, 48 ECAB 184 (1996).

Appellant would be entitled to compensation if it were established that his tinnitus resulted in a loss of wage-earning capacity.¹⁴ However, there is no indication in the record that appellant sustained a loss of wage-earning capacity as a result of his tinnitus.

Because appellant has not demonstrated that his tinnitus caused or contributed to a ratable hearing loss other than that for which he has already been compensated, and because appellant has not established that his tinnitus has caused vestibular function disturbances or a loss of wage-earning capacity, there is no basis for paying appellant a schedule award for tinnitus.

The Board further finds that the Office properly exercised its discretion in refusing to reopen appellant's case for merit review under 20 C.F.R. § 10.608.

Section 10.606(b)(2) of Title 20 of the Code of Federal Regulations provides that a claimant may obtain review of the merits of the claim by either: (1) showing that the Office erroneously applied or interpreted a specific point of law; (2) advancing a relevant legal argument not previously considered by the Office; or (3) submitting relevant and pertinent new evidence not previously considered by the Office.¹⁵ Section 10.608(b) provides that when an application for reconsideration does not meet at least one of the three requirements enumerated under section 10.606(b)(2), the Office will deny the application for reconsideration without reopening the case for a review on the merits.¹⁶

In his letter requesting reconsideration, appellant reiterated that he had suffered employment-related hearing loss and tinnitus which interfered with his ability to communicate and lessened his quality of life. Appellant also asserted that he had been informed by Dr. Sabiston that he might need hearing aids in the future. The Board notes, however, that both appellant's bilateral sensorineural hearing loss and his tinnitus were fully evaluated by the Office second opinion physician and fully considered by the Office prior to the issuance of the schedule award. In addition, the Board has long recognized that, if a claimant's employment-related hearing loss worsens in the future, the claimant may apply for an additional schedule award for any increased permanent impairment. A claimant may be entitled to an award for an increased hearing loss, even after exposure to hazardous noise has ceased, if causal relationship is supported by the medical evidence.¹⁷ Therefore, appellant's August 13, 2001 request for reconsideration neither alleged nor demonstrated that the Office erroneously applied or interpreted a specific point of law, nor advanced a relevant legal argument not previously considered by the Office. Consequently, appellant is not entitled to a review of the merits of his claim based on the first and second above-noted requirements under section 10.606(b)(2). In addition, while appellant's request for reconsideration noted that new evidence supporting his allegations was enclosed, the only evidence received by the Office consisted of duplicates of evidence already contained in the record, namely a November 16, 1999 report from otolaryngologist Ms. Kirk, and a receipt for treatment from the office of Dr. Sabiston, the Office

¹⁴ *Richard Larry Enders, supra* note 13; *John T. Bradley*, 25 ECAB 348 (1974).

¹⁵ 20 C.F.R. § 10.606(b)(2) (1999).

¹⁶ 20 C.F.R. § 10.608(b) (1999).

¹⁷ *Paul R. Reedy*, 45 ECAB 488 (1994).

referral physician. Material which is repetitious or duplicative of that already in the case record is of no evidentiary value and does not constitute a basis for reopening a claim.¹⁸ Consequently, appellant is not entitled to a review of the merits of his claim based on the third above-noted requirement under section 10.606(b)(2).

Inasmuch as appellant has failed to show that the Office erroneously applied or interpreted a point of law, to advance a point of law or fact not previously considered by the Office or to submit relevant and pertinent evidence not previously considered by the Office, the Office properly refused to reopen appellant's claim for a review on the merits.

The decisions of the Office of Workers' Compensation Programs dated December 14 and July 19, 2001 are affirmed.

Dated, Washington, DC
October 11, 2002

Alec J. Koromilas
Member

David S. Gerson
Alternate Member

A. Peter Kanjorski
Alternate Member

¹⁸ *Norman W. Hanson*, 40 ECAB 1160 (1989).