

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MARION E. McCLENTON and DEPARTMENT OF THE AIR FORCE,
AIR EDUCATION & TRAINING COMMAND, COLUMBUS AIR FORCE BASE, MS

*Docket No. 03-1198; Submitted on the Record;
Issued August 20, 2003*

DECISION and ORDER

Before ALEC J. KOROMILAS, COLLEEN DUFFY KIKO,
DAVID S. GERSON

The issues are: (1) whether appellant has more than a six percent binaural hearing loss for which he received a schedule award; and (2) whether the Office of Workers' Compensation Programs properly refused to reopen appellant's case for further review of the merits of his claim under 20 C.F.R. § 10.608.

On June 25, 2002 appellant, then a 56-year-old pest controller, filed an occupational disease claim for hearing loss. He stated that he first became aware of his employment-related hearing loss on March 26, 2002. Appellant explained that during years of working in civil engineering he was required to work on and near runways and engine cells and that aircraft noise impacted his hearing even though he wore recommended ear noise protection devices.

Appellant submitted audiograms from October 1986 to August 9, 2002. In an August 9, 2002 report, a staff audiologist noted that appellant had mild to moderate sensorineural hearing loss bilaterally.

On September 13, 2002 the Office referred appellant to Dr. Robert J. Sciacca, a Board-certified otolaryngologist, for an audiogram and otologic examination. He examined appellant on October 3, 2002 and diagnosed a mild to severe high frequency sensorineural hearing loss bilaterally, which he attributed to appellant's employment exposure. The record contains an audiogram dated October 3, 2002. In a report dated October 11, 2002, the Office medical adviser determined that appellant had a six percent bilateral sensorineural hearing loss.

On October 17, 2002 the Office accepted appellant's claim for bilateral hearing loss. On October 24, 2002 he filed a claim for a schedule award. On November 13, 2002 the Office awarded appellant a six percent schedule award for hearing loss in both ears. By letter dated January 17, 2003, he requested reconsideration. In a decision dated February 27, 2003, the Office denied appellant's reconsideration request.

The Board finds that appellant has no more than a six percent binaural hearing loss.

The schedule award provision of the Federal Employees' Compensation Act¹ provides for compensation to employees sustaining permanent impairment from loss or loss of use of specified members of the body. The Act's compensation schedule specifies the number of weeks of compensation to be paid for the permanent loss of use of specified members, functions and organs of the body. 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 that 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 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* (A.M.A., *Guides*).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 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 1.5 to arrive at the percentage of monaural 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 loss.⁸ The Board has concurred in the Office's adoption of this standard for evaluating hearing loss.⁹

In a report dated October 11, 2002, the Office medical adviser reviewed the results of the most recent audiogram dated October 3, 2002. He determined that the frequency levels recorded at 500, 1,000, 2,000 and 3, 000 cycles per second of the left ear, 20, 25, 35 and 60, respectively, totaled 140, which divided by 4 yielded the average hearing loss at those frequencies of 35 decibels. The Office medical adviser reduced the 35 decibels by the 25 decibel "fence" to equal 10. He then multiplied 10 by the established factor of 1.5 to obtain a monaural loss in the left ear of 15 percent. The Office medical adviser totaled the decibel losses at the applicable frequencies for the right ear, 20, 20, 20 and 50 respectively, at 110, which he divided by 4 to obtain the

¹ 5 U.S.C. §§ 8101-8193.

² *Arthur E. Anderson*, 43 ECAB 691, 697 (1992); *Danniel C. Goings*, 37 ECAB 781, 783 (1986).

³ *Marco A. Padilla*, 51 ECAB 202, 205 (1999).

⁴ A.M.A., *Guides* 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); *petition for recon. granted* (modifying prior decision), Docket No. 01-1570 (issued August 13, 2002).

average hearing loss at those frequencies of 27.50. He subtracted the 25 decibel fence from 27.5 to obtain a hearing impairment of 2.5 in the right ear. The Office medical adviser multiplied 2.5 by the established factor of 1.5 to obtain a 3.75 percent monaural loss in the right ear. To determine the binaural loss, the 3.75 percent loss of the right ear was multiplied by 5 to total 18.75 and was then added to the loss of the left ear of 15 to equal 33.75. This total was then divided by 6 to arrive at 5.6, which was rounded up to 6 for a total binaural loss of six percent.

The Board finds that the Office medical adviser applied the proper standards to the October 3, 2002 audiogram results and properly determined that appellant had a six percent bilateral hearing loss. He has not submitted any evidence showing that his hearing loss exceeded that percentage.

The Board further finds that the Office properly refused to reopen appellant's case for further review of the merits of his claim 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) constituting relevant and pertinent new evidence not previously considered by the Office.¹⁰ 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.¹¹

Appellant's January 17, 2003 request for reconsideration neither alleged nor demonstrated that the Office erroneously applied or interpreted a specific point of law. Additionally, he did not advance 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). With respect to the third requirement, constituting relevant and pertinent new evidence not previously considered by the Office, appellant did not submit any new medical evidence with his January 17, 2003 request for reconsideration. While he requested that the Office review his medical evidence to determine if the hearing loss evaluation data had been calculated correctly, he did not submit any additional medical evidence with his request for reconsideration. Accordingly, appellant is not entitled to a review of the merits of his claim based on the third requirement under section 10.606(b)(2).

As appellant is not entitled to a review of the merits of his claim pursuant to any of the three requirements under section 10.606(b)(2), the Board finds that the Office properly denied appellant's January 17, 2003 request for reconsideration.

¹⁰ 20 C.F.R. § 10.606(b)(2) (1999).

¹¹ 20 C.F.R. § 10.608(b) (1999).

The decisions of the Office of Workers' Compensation Programs dated February 27, 2003 and November 13, 2002 are hereby affirmed.¹²

Dated, Washington, DC
August 20, 2003

Alec J. Koromilas
Chairman

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

¹² The Board notes that the record on appeal contains evidence that the Office received after it issued the February 27, 2003 decision denying reconsideration. The Board lacks jurisdiction to review this evidence for the first time on appeal. 20 C.F.R. § 501.2(c); *see James C. Campbell*, 5 ECAB 35, 36 n. 2 (1952).