

**United States Department of Labor
Employees' Compensation Appeals Board**

ROGER A. MILLER, Appellant

and

**DEPARTMENT OF THE ARMY, ROCK
ISLAND ARSENAL, Rock Island, IL, Employer**

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**Docket No. 04-1921
Issued: December 17, 2004**

Appearances:
Roger A. Miller, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

COLLEEN DUFFY KIKO, Member
WILLIE T.C. THOMAS, Alternate Member
MICHAEL E. GROOM, Alternate Member

JURISDICTION

On July 26, 2004 appellant filed a timely appeal from merit decisions of the Office of Workers' Compensation Programs. On November 20, 2003 the Office issued a schedule award for a 4.4 percent binaural hearing loss which was affirmed by a hearing representative affirmed in a February 18, 2004 decision. Appellant also appeals the April 21, 2004 Office decision denying reconsideration. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether appellant had more than a 4.4 percent binaural hearing loss, for which he received a schedule award; and (2) whether the Office properly denied appellant's request for reconsideration pursuant to 5 U.S.C. § 8128(a). Appellant contends on appeal that he is entitled to more than the 4.4 percent binaural hearing loss for which he received a schedule award.

FACTUAL HISTORY

On January 3, 2003 appellant, then a 54-year-old die sinker, filed an occupational disease claim alleging that he sustained a hearing loss in both ears as a result of being exposed to loud noise in the shop everyday. In support of his claim, he submitted employment records, the results of a 1985 noise survey and prior audiograms.

The Office referred appellant to Dr. Ronald A. Vidal, a Board-certified otolaryngologist, for a second opinion. An audiogram was conducted under his supervision on August 18, 2003. Dr. Vidal determined that appellant sustained a binaural noise-induced sensorineural hearing loss due to his federal employment.

By letter dated October 7, 2003, the Office accepted appellant's claim for a binaural noise-induced hearing loss. The Office referred the results of the August 18, 2003 audiogram to an Office medical adviser for a determination as to the percent of appellant's impairment.

On October 10, 2003 appellant filed a claim for a schedule award.

On October 13, 2003 the Office medical adviser reviewed the August 18, 2003 audiogram. He noted that appellant had a hearing deterioration commensurate with his employment and that the date of maximum medical improvement was August 18, 2003. Applying the tables in the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (5th ed. 2001), the Office medical adviser determined that appellant had a 4.4 percent binaural hearing loss.

On October 17, 2003 Laura Kauth, an audiologist indicated that appellant was tested in her office on October 13, 2003 and that he requested a calculation of percentage of hearing loss pursuant to the Illinois Workers' Compensation Act. The audiologist indicated that appellant sustained a hearing loss in the right ear of 9.10 percent and a hearing loss in the left ear of 21.23 percent. The audiometric results accompanied this report.

By decision dated November 20, 2003, the Office granted appellant a schedule award for a 4.4 percent binaural loss of hearing. The award ran for 8.8 weeks from August 18 to October 18, 2003.

By letter dated November 24, 2003, appellant requested a written review of the written record.

In a decision dated February 18, 2004, an Office hearing representative affirmed the November 20, 2003 schedule award.

By letter dated March 14, 2004, appellant requested reconsideration, but submitted no further evidence.

By decision dated April 21, 2004, the Office denied further reconsideration.

LEGAL PRECEDENT -- ISSUE 1

The schedule award provision of the Federal Employees' Compensation Act¹ and its implementing regulation² set forth the number of weeks of compensation to be paid for permanent loss or loss of use, of the members of the body listed in the schedule. Where the loss of use is less than 100 percent, the amount of compensation is paid in proportion to the percentage of loss of use.³ However, neither the Act nor the regulations specify the manner in which the percentage of impairment shall be determined. For consistent results and to ensure equal justice for all claimants, the Office adopted the A.M.A., *Guides* as a standard for determining the percentage of impairment and the Board has concurred in such adoption.⁴

The Office evaluates industrial hearing loss in accordance with the standards contained in the A.M.A., *Guides*.⁵ Using the frequencies of 500, 1,000, 2,000 and 3,000 cycles per second (cps), the losses at each frequency are added up and averaged.⁶ 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.⁷ The remaining amount is multiplied by a factor of 1.5 to arrive at the percentage of monaural hearing loss.⁸ 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.⁹

ANALYSIS -- ISSUE 1

An Office medical adviser applied the Office's standardized procedures to the August 18, 2003 audiogram performed for Dr. Vidal.¹⁰ Testing for the right ear at the frequency levels of 500, 1,000, 2,000 and 3,000 cps revealed decibels losses of 10, 10, 20 and 70 respectively. These decibels were totaled at 110 and were divided by 4 to obtain an average hearing loss at those cycles of 27.5 decibels. The average of 27.5 decibels was then reduced by 25 decibels (the

¹ 5 U.S.C. § 8107(c)(13)(B).

² 20 C.F.R. § 10.404.

³ 5 U.S.C. § 8107(c)(19).

⁴ 20 C.F.R. § 10.404; *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, 2003).

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

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ The Board notes that the audiologist for Dr. Vidal calculated the hearing loss under the Illinois Workers' Compensation Act, not the A.M.A., *Guides*, as required.

first 25 decibels were discounted as discussed above) to equal 2.5, which was multiplied by the established factor of 1.5 to compute a 3.75 percent loss of hearing, which was rounded to 3.8 percent for the right ear. Testing for the left ear at the frequency levels of 500, 1,000, 2,000 and 3,000 cps revealed decibel losses of 10, 15, 30 and 65 respectively. These decibels were totaled at 120 and were divided by 4 to obtain the average hearing loss at those cycles of 30 decibels. The average of 30 decibels was then reduced by 25 decibels (the first 25 decibels were discounted as discussed above) to equal 5, which was multiplied by the established factor of 1.5 to compute a 7.5 percent hearing loss for the left ear. The Office medical adviser then multiplied the 3.8 percent loss in the right ear (the hearing impairment of the better ear) by five, then added it to the 7.5 percent loss in the left ear (the hearing impairment of the poor ear) and divided the sum by six to calculate appellant's binaural hearing loss at 4.4 percent.

Under the Act, the maximum award for binaural hearing loss is 200 weeks of compensation.¹¹ Since the binaural hearing loss in this case is 4.4 percent, appellant is entitled to 4.4 percent of 200 weeks or 8.8 weeks of compensation.¹²

LEGAL PRECEDENT -- ISSUE 2

To require the Office to reopen a case for merit review under section 8128(a) of the Act,¹³ the Office's regulation provides that the application for reconsideration, including all supporting documents, must set forth arguments and contain evidence that either: (1) shows that the Office erroneously applied or interpreted a specific point of law; or (2) advances a relevant legal argument not previously considered by the Office; or (3) constitutes relevant and pertinent new evidence not previously considered by the Office.¹⁴

ANALYSIS -- ISSUE 2

Appellant does not make any argument that the Office erroneously applied or interpreted a specific point of law or advance a relevant legal argument not previously considered by the Office. Furthermore, appellant did not submit any new evidence. Accordingly, the Board finds that as appellant did not show that the Office erroneously applied or interpreted a specific point of law, did not raise any substantive legal questions, and failed to submit any relevant and pertinent new evidence not previously considered by the Office, the Office properly denied appellant's request for reconsideration of the merits of his claim.

¹¹ 5 U.S.C. § 8107(c)(13)(B).

¹² The Board notes that in keeping with the Office's rounding out policy, the 4.4 percent binaural hearing loss is the equivalent of a 4.0 percent binaural hearing loss. See Federal (FECA) Procedure Manual, Part -- 3 Medical, *Schedule Awards*, Chapter 3.700.4b(2)(b) (September 1994) and FECA Program Memorandum No. 181 (issued November 26, 1974). This would result in 8.00 weeks of compensation. 5 U.S.C. § 8107(c)(13)(B).

¹³ 5 U.S.C. § 8128(a).

¹⁴ 20 C.F.R. § 10.606(b)(2)(i-iii).

CONCLUSION

The Board finds that appellant has no more than a 4.4 percent binaural hearing loss for which she received a schedule award. The Office properly denied her request for reconsideration.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated April 21 and February 18, 2004 and November 20, 2003 are affirmed.

Issued: December 17, 2004
Washington, DC

Colleen Duffy Kiko
Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member