



## **FACTUAL HISTORY**

On January 13, 2003 appellant, then 54-year-old crane operator, filed a notice of occupational disease alleging that he was first aware of his binaural hearing loss on February 1, 1979 and that it was caused by his employment on January 1, 1982. He stated that he was not aware that he should file a claim for hearing loss by his employing establishment. The employing establishment noted that appellant first reported his condition on January 14, 2003 and that he was exposed to noise while in the performance of duty.

The record includes audiogram test results from 1987 to 2002, appellant's health record, a March 23, 2003 summary report from the employing establishment concerning his work history from 1967 to the present and a copy of appellant's administrative record.

On March 25, 2003 appellant filed a claim for a schedule award. On April 8, 2003 the Office referred him, a copy of his medical records, a statement of accepted facts and a number of questions to an Office medical consultant to determine the causal relationship of his federal employment and his claim for hearing loss, including whether he required hearing aids for either ear.

In a report dated May 5, 2003, Dr. Meredith Pang, a Board-certified otolaryngologist, stated that she reviewed appellant's audiograms which revealed bilateral mild-moderate high frequency hearing loss in 1978 and a slight progression over time. She reviewed audiograms taken on May 5, 2003 and advised that they revealed a work-related right mild low frequency and severe high-frequency and left severe high frequency sensorineural hearing loss. The audiograms test results were attached. Dr. Pang noted that the audiogram was performed by a certified audiologist and that the audiometer was calibrated on January 22, 2003.

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 15, 20, 35 and 70, respectively. Testing for the left ear at the frequency levels of 500, 1,000, 2,000 and 3,000 cycles per second revealed decibel losses of 10, 15, 15 and 60. On May 12, 2003 the Office referred appellant's medical record to an Office medical adviser for review. In a report dated June 6, 2003, the Office medical adviser applied the Office's standardized procedures to Dr. Pang's evaluation. He totaled the decibel losses of 15, 20, 35 and 70 in the right ear at 140 decibels and divided by 4 to obtain the average hearing loss of 35 decibels. This average was then reduced by 25 decibels to 10 decibels, which was multiplied by the established factor of 1.5 to compute a 15 percent hearing loss in the right ear. The Office medical adviser then totaled the decibel losses of 10, 15, 15 and 60 in the left ear at 100 decibels and divided by 4 to obtain the average hearing loss of 25 decibels. This average was then reduced by 25 decibels to equal 0 decibels which was then multiplied by the established factor of 1.5 to compute a 0 percent hearing loss in the left ear. The Office medical adviser recommended hearing aids for the right ear.

In a decision dated July 2, 2003, the Office accepted appellant's bilateral high frequency sensorineural hearing loss and a hearing aid for the right ear.

By letter dated July 10, 2003, appellant requested reconsideration for hearing aids for his left ear. By letter dated July 30, 2003, the Office advised him that its July 30, 2003 decision authorized only a right ear hearing aid.

On August 8, 2003 the Office granted appellant a schedule award for 15 percent impairment of his right ear. The award would run for 7.8 weeks, from May 5 to June 28, 2003. On August 27, 2003 appellant requested reconsideration of the Office schedule award. He submitted audiogram data dated August 18 and 19, 2003 and copies of his medical record including an October 9, 2001 report. That report related his history of an incident at home two weeks prior, in which he blacked out for a few seconds. Appellant was diagnosed with benign positional vertigo.

By decision dated September 9, 2003, the Office denied appellant's request for reconsideration of its July 30, 2003 decision denying a schedule award for left ear impairment on the grounds that the evidence failed to show that the Office erroneously applied or interpreted a specific point of law, to advance a relevant legal argument not previously considered by the Office or to submit relevant and pertinent new evidence not previously considered by the Office.

### **LEGAL PRECEDENT -- ISSUE 1**

The schedule award provision of the Federal Employees' Compensation Act<sup>1</sup> and its implementing regulation<sup>2</sup> 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 American Medical Association, *Guides to the Evaluation of Permanent Impairment* (5<sup>th</sup> ed. 2001) has been adopted by the implementing regulation as the appropriate standard for evaluating schedule losses.<sup>3</sup>

The Office evaluates industrial hearing loss in accordance with the standards contained in the A.M.A., *Guides*.<sup>4</sup> 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.<sup>5</sup> 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.<sup>6</sup> The remaining

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<sup>1</sup> 5 U.S.C. § 8107.

<sup>2</sup> 20 C.F.R. § 10.404.

<sup>3</sup> *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).

<sup>4</sup> *Id.* at 250.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

amount is multiplied by a factor of 1.5 to arrive at the percentage of monaural hearing loss.<sup>7</sup> 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.<sup>8</sup> The Board has concurred in the Office's adoption of this standard for evaluating hearing loss.<sup>9</sup>

### **ANALYSIS -- ISSUE 1**

In this case, the Office medical adviser properly applied the Office's standardized procedures to the May 5, 2003 audiogram performed by Dr. Pang. Testing for the left ear at frequency levels of 500, 1,000, 2,000 and 3,000 cycles per second revealed decibel losses of 10, 15, 15 and 60 decibels respectively. These decibel losses were totaled at 100 decibels and divided by 4 to obtain the average hearing loss at those cycles of 25 decibels. The average of 25 decibels was then reduced by 25 decibels to equal zero decibels for the left ear. The medical evidence thus, reveals that, after applying the relevant standards of the A.M.A., *Guides*, appellant has a zero percent monaural hearing loss in his left ear which the Office properly found.

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 15, 20, 35 and 70 respectively. These decibel losses were totaled at 140 decibels and were divided by 4 to obtain the average hearing loss 35 decibels. This average was then reduced by 25 decibels (25 decibels being discounted as discussed above) to equal 10 decibels, which was multiplied by the established factor of 1.5 to compute a 15 percent hearing loss in the right ear.

The Board finds that the Office medical adviser correctly applied the procedures in the A.M.A., *Guides* and the Office's procedure manual to the audiometric testing results obtained for Dr. Pang and determined that appellant had no ratable hearing loss of the left ear and a 15 percent hearing loss of the right ear.

### **LEGAL PRECEDENT -- ISSUE 2**

Section 8128(a) of the Act vests the Office with discretionary authority to determine whether it will review an award for or against compensation.<sup>10</sup> Section 10.608(a) of the Code of Federal Regulations provide that a timely request for reconsideration may be granted if the Office determines that the employee has presented evidence and/or argument that meets at least

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<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Id. supra* note 3.

<sup>10</sup> 5 U.S.C. § 8128(a) (“[t]he Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application.”)

one of the standards described in section 10.606(b)(2).<sup>11</sup> The application for reconsideration must be submitted in writing and set forth arguments and contain evidence that either: (i) shows that the Office erroneously applied or interpreted a specific point of law; or (ii) advances a relevant legal argument not previously considered by the Office; or (iii) constitutes relevant and pertinent new evidence not previously considered by the Office.<sup>12</sup> Section 10.608(b) provides that, when a request for reconsideration is timely, but fails to meet at least one of these three requirements, the Office will deny the application for reconsideration without reopening the case for a review of the merits.<sup>13</sup>

### ANALYSIS -- ISSUE 2

In support of his request for reconsideration, appellant submitted audiogram data dated August 18 and 19, 2003. The Office's procedures require that medical evidence used to evaluate hearing loss meet certain standards. These standards include audiological testing by a certified audiologist on properly calibrated equipment and a medical examination performed by a Board-certified otolaryngologist.<sup>14</sup> However, the evidence submitted on reconsideration did not meet these requirements and are insufficient to reopen appellant's claim. Further, his claim was not accepted for vertigo and his evidence noting benign positional vertigo is irrelevant to this claim. The Board finds that appellant's arguments are insufficient to constitute a basis for reopening this case.<sup>15</sup> He failed to show that the Office erred in interpreting the law and the regulation under the Act and has not advanced any relevant legal argument, nor previously considered by the Office. Furthermore, he did not submit relevant and pertinent new evidence. Inasmuch, as appellant failed to meet any of the three requirements for reopening his claim for merit review, the Office properly denied his reconsideration request.<sup>16</sup>

### CONCLUSION

The Board finds that appellant has failed to establish that he sustained a ratable hearing loss of his left ear or more than 15 percent impairment of the right ear causally related to factors of his federal employment. The Office properly refused to reopen his claim for further merit review.<sup>17</sup>

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<sup>11</sup> 20 C.F.R. § 10.608(a) (1999).

<sup>12</sup> 20 C.F.R. § 10.606(b)(1)-(2) (1999).

<sup>13</sup> 20 C.F.R. § 10.608(b) (1999).

<sup>14</sup> See Federal (FECA) Procedure Manual, Part 4 -- Medical Management, *Hearing Loss*, Chapter 4.300.7 (May 1991).

<sup>15</sup> *James R. Bell*, 52 ECAB 414 (2001).

<sup>16</sup> *Id.*

<sup>17</sup> The Board notes that the Office failed to respond to appellant's request for a left ear hearing aid. The Office accepted binaural hearing loss and thus, appellant would be entitled under 5 U.S.C. § 8103 to medical benefits for his claimed hearing loss.

**ORDER**

**IT IS HEREBY ORDERED THAT** the decisions of the Office of Workers' Compensation Programs dated September 9, August 8 and July 30, 2003 be affirmed.

Issued: July 8, 2004  
Washington, DC

David S. Gerson  
Alternate Member

Willie T.C. Thomas  
Alternate Member

Michael E. Groom  
Alternate Member