United States Department of Labor
Employees' Compensation Appeals Board

ROBERT L. WILLIAMS, Appellant	)	
and	)	**Docket No. 04-2243**
	)	**Issued: February 22, 2005**
DEPARTMENT OF THE NAVY, NORFOLK NAVAL AIR STATION, Norfolk, VA, Employer	)	

Appearances:
Robert L. Williams, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chairman
WILLIE T.C. THOMAS, Alternate Member
MICHAEL E. GROOM, Alternate Member

JURISDICTION

On September 15, 2004 appellant filed a timely appeal from an August 24, 2004, nonmerit decision of the Office of Workers' Compensation Programs denying his request for reconsideration, and a merit decision dated March 8, 2004 which found that appellant had not sustained a ratable hearing loss. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the schedule award issue and the Office's nonmerit decision denying appellant's request for reconsideration.

ISSUES

The issues are: (1) whether appellant has established that he sustained a ratable hearing loss entitling him to a schedule award; and (2) whether the Office properly refused to reopen appellant's case for further review of the merits pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On October 29, 2003 appellant, then a 62-year-old retired mechanical parts repairer/engine mechanic, filed an occupational disease claim alleging that his hearing loss was

caused by factors of his federal employment;[1] Office File No. 06-2098927. In support of his claim, appellant submitted employing establishment audiograms, audiogram test results and treatment notes. He also submitted a statement providing a history of noise exposure in his military and federal employment. Appellant was last exposed to noise in July 2002, when he worked for the employing establishment. He previously filed a claim with the Office for a hearing loss on October 10, 1992; Office File No. 25-0435035. He submitted a January 20, 1995 Office decision in that case, which found that he sustained an employment-related hearing loss. However, the extent of hearing loss was not ratable and he was not entitled to a schedule award.

On December 4, 2003 the Office referred appellant together with his medical records, a statement of accepted facts and questions to be addressed, to Dr. Alan S. Keyes, a Board-certified otolaryngologist, for a second opinion medical evaluation. He evaluated appellant on December 18, 2003 and submitted a medical report of the same date providing a diagnosis of sensorineural hearing loss due to noise exposure from appellant's federal civilian employment. A December 18, 2003 audiogram performed by an audiologist, accompanied Dr. Keyes' report. Testing of the right ear at frequency levels of 500, 1,000, 2,000 and 3,000 cycles per second (cps) revealed decibel losses of 10, 10, 10 and 30, respectively and in the left ear decibel losses of 10, 10, 15 and 25, respectively.

On February 6, 2004 an Office medical adviser reviewed the medical evidence and found that appellant reached maximum medical improvement on December 18, 2003. Appellant had a zero percent binaural sensorineural hearing loss for schedule award purposes.

By decision dated March 8, 2004, the Office accepted appellant's claim for bilateral sensorineural hearing loss. The Office, however, found that appellant did not sustain a ratable hearing loss based on the A.M.A., *Guides* (5th ed. 2001). The Office determined that appellant was not entitled to a schedule award under the Act.

In an undated letter, received by the Office on August 2, 2004, appellant requested reconsideration on the grounds that he was submitting new information. He stated that his military career spanned over 20 years from 1960 to 1981 and his civil service career spanned over 20 years, totaling 40 years. He further stated that, during these years, he worked on jet engines in the test cell and aircraft. Appellant related that he performed 85 percent of his duties in close proximity to the jet engine while the engine was operating at 80 to 90 percent of its power. He stated that during communication he could not hear clear enough to determine what was being spoken to him and that the damage caused muffled hearing.

In an August 24, 2004 decision, the Office denied appellant's request for reconsideration since it neither raised substantive legal questions nor included new and relevant evidence and, thus, it was insufficient to warrant a merit review of its prior decision.

[1] Appellant retired from the employing establishment effective October 30, 2003.

LEGAL PRECEDENT -- ISSUE 1

The schedule award provision of the Act[2] and its implementing regulation[3] 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.[4] However, neither the Act nor the regulation 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.[5]

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 cps 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]

ANALYSIS -- ISSUE 1

Dr. Keyes, examined appellant and submitted a report on December 18, 2003 finding that he sustained bilateral sensorineural hearing loss related to exposure to noise in the course of his federal employment. The Office medical adviser applied the Office's standardized procedures to the December 18, 2003 audiogram obtained by Dr. Keyes. Testing of the right ear at frequency levels of 500, 1,000, 2,000 and 3,000 cps revealed decibel losses of 10, 10, 10 and 30,

[2] 5 U.S.C. §§ 8101-8193; *see* 5 U.S.C. § 8107(c).

[3] 20 C.F.R. § 10.404.

[4] 5 U.S.C. § 8107(c)(19).

[5] 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 01-1570 (issued August 13, 2002).

[6] A.M.A., *Guides* 250.

[7] *Id.*

[8] *Id.*

[9] *Id.*

[10] *Id*.

[11] *See Donald E. Stockstad, supra* note 5.

respectively for a total of 60 decibels. When divided by 4, the result is an average hearing loss of 15 decibels. The average loss of 15 is reduced by the 25 decibel fence to equal 0, which, when multiplied by the established factor of 1.5, results in a 0 percent hearing loss for the right ear.

Testing of the left ear at the same above-noted frequency levels, revealed decibel losses of 10, 10, 15 and 25, respectively, for a total of 60 decibels. When divided by 4, the result is an average hearing loss of 15 decibels. The average loss of 15 decibels is reduced by the 25 decibel fence to equal 0, which, when multiplied by the established factor of 1.5, results in a 0 percent hearing loss for the left ear.

The Board finds that the Office medical adviser applied the proper standards to the findings in Dr. Keyes' December 18, 2003 report and accompanying audiogram. This resulted in a zero percent binaural hearing loss in the right and left ears, which is not ratable. Therefore, the hearing loss is not compensable for schedule award purposes.

The audiograms performed by the employing establishment and employing establishment audiometric results are not probative on the issue of appellant's entitlement to a schedule award as they are not accompanied by an otological evaluation.[12] These audiograms also do not offer an opinion on the issue of whether appellant's hearing loss was causally related to his federal employment. Similarly, the treatment notes submitted by appellant do not address a causal relationship between appellant's hearing loss and his federal employment. The audiograms and treatment notes are, therefore, insufficient to meet appellant's burden of proof.

LEGAL PRECEDENT -- ISSUE 2

To require the Office to reopen a case for merit review under section 8128 of the Act,[13] the Office's regulation provide that a claimant must: (1) show that the Office erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by the Office; or (3) submit relevant and pertinent new evidence not previously considered by the Office.[14] To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant also must file his or her application for review within one year of the date of that decision.[15] When a claimant fails to meet one of the above standards, the Office will deny the application for reconsideration without reopening the case for review of the merits.

[12] *See George L. Cooper*, 40 ECAB 296 (1988).

[13] 5 U.S.C. §§ 8101-8193. Under section 8128 of the Act, "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on her own motion or on application." 5 U.S.C. § 8128(a).

[14] 20 C.F.R. § 10.606(b)(1)-(2).

[15] *Id*. at § 10.607(a).

ANALYSIS -- ISSUE 2

Appellant requested reconsideration of the Office's March 8, 2004 decision on August 2, 2004. He addressed the length of his exposure to noise during his military and federal civilian employment and the extent of his hearing loss. He neither alleged nor demonstrated that the Office erroneously applied or interpreted a specific point of law. Additionally, appellant did not advance a relevant legal argument not previously considered by the Office. Further, he did not submit any relevant and pertinent new evidence in support of his request.

Appellant 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 submit relevant and pertinent new evidence not previously considered by the Office. It properly refused to reopen appellant's claim for a further review.

CONCLUSION

The Board finds that appellant has failed to establish that he sustained a ratable hearing loss entitling him to a schedule award. The Board further finds that the Office properly refused to reopen appellant's case for further review of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

ORDER

IT IS HEREBY ORDERED THAT the August 24 and March 8, 2004 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: February 22, 2005
Washington, DC

Alec J. Koromilas
Chairman

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member