United States Department of Labor
Employees' Compensation Appeals Board

ERNEST W.S. CHANG, JR., Appellant	)	
	)	**Docket No. 05-1052**
and	)	**Issued: July 22, 2005**
DEPARTMENT OF THE ARMY,	)	
Schofield Barracks, HI, Employer	)	

Appearances:
Ernest W.S. Chang, Jr., pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On April 11, 2005 appellant filed a timely appeal of an August 25, 2004 nonmerit decision of the Office of Workers' Compensation Programs, denying his request for reconsideration. Because more than one year has elapsed between the last merit decision dated May 27, 2003 and the filing of this appeal on April 11, 2005 the Board lacks jurisdiction to review the merits of his claim pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2).

ISSUE

The issue is whether the Office properly refused to reopen appellant's claim for further review of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On September 10, 2002 appellant, then a 59-year-old maintenance mechanic supervisor, filed an occupational disease claim alleging that on March 25, 1982 he first realized that his hearing loss was caused by exposure to noisy machinery while working at the employing establishment. By letter dated September 16, 2002, the Office advised him of the factual and medical evidence needed to establish his claim. By letter of the same date, the Office requested

that the employing establishment submit factual and medical evidence regarding appellant's claim.

The employing establishment submitted audiograms and audiogram test results which covered the period March 25, 1982 through October 9, 2001. The employing establishment concurred with appellant's statement that he was currently exposed to noisy equipment at work, due to a ban saw, table saw, an overhead saw and a mortis machine. The employing establishment stated that a noise survey had been requested and that appellant was exposed six to eight hours per day, five days a week. All employees were issued earplugs and/or earmuffs as required and appellant was scheduled to retire on September 28, 2002.

By letter dated January 30, 2003, the Office referred appellant together with medical records and a statement of accepted facts to Dr. Meredith K.L. Pang, a Board-certified otolaryngologist, for a referral medical examination. She submitted a February 13, 2003 medical report which diagnosed bilateral mild low and severe high frequency sensorineural hearing loss. Dr. Pang opined that appellant's hearing loss was caused or aggravated by employment-related noise exposure. A February 13, 2003 audiogram performed by Deborah S. Suzuki, an audiologist accompanied Dr. Pang's report. Testing of the right ear at frequency levels of 500, 1,000, 2,000 and 3,000 cycles per second revealed decibel losses of 15, 25, 25 and 75, respectively and in the left ear decibel losses of 10, 25, 25 and 80, respectively.

By letter dated February 21, 2003, the Office accepted appellant's claim for binaural hearing loss. On March 14, 2003 an Office medical adviser reviewed Dr. Pang's February 13, 2003 report and audiogram results. He concurred with her finding that appellant had a bilateral high frequency sensorineural hearing loss causally related to noise exposure at the employing establishment. The Office medical adviser found that appellant reached maximum medical improvement on February 13, 2003 and concluded that he had a 15 percent binaural hearing loss and authorized a hearing aid.

In a letter dated March 27, 2003, the Office advised appellant that his claim was accepted and advised him to complete and submit a claim (Form CA-7) for payment of a schedule award. In response, he filed a Form CA-7 on April 25, 2003.

By decision dated May 27, 2003, the Office granted appellant a schedule award for a 15 percent binaural hearing loss or 30 weeks from February 13 through May 17, 2003. The Office found that he reached maximum medical improvement on February 13, 2003 the date of the last audiogram.

In a March 1, 2004 letter, appellant advised the Office that he wished to appeal the May 27, 2003 decision. He contended that his hearing impairment adversely affected his ability to obtain employment and to perform his daily activities. In a response letter dated March 31, 2004, the Office advised appellant to exercise the appeal rights that accompanied the May 27, 2003 decision.

By letter dated May 20, 2004, appellant requested that his claim for permanent partial hearing loss in both ears be "reconsidered." He addressed his difficulty in obtaining information to support his claim. Appellant argued that it was the government's burden of proof to establish

that his hearing loss was not caused by his employment. He questioned why the period of compensation began on February 13, 2003 when it was documented that his hearing loss began or was first noted on March 25, 1982. Appellant requested that the Office define the term date of maximum medical improvement as his hearing loss began in 1982 and was getting progressively worse. He discussed his exposure to noise while working for the employing establishment. Appellant contended that the employing establishment was negligent in failing to advise him to file a claim for his hearing loss earlier. He also contended that the employing establishment neglected to implement a noise conservation program at the first sign of his hearing problem.

In a June 21, 2004 letter, the Office advised appellant about the time restrictions associated with the appeal rights which included a request for a hearing, reconsideration or an appeal to the Board. The Office further advised that the statue of limitations had run on all three appeal rights and that he had the burden of proof to establish the timeliness of his appeal. In a June 29, 2004 letter, appellant contended that he had properly followed the procedure for requesting reconsideration. He argued that his March 1 and May 20, 2004 requests were filed within the one-year time limitation.

In a August 25, 2004 decision, the Office denied appellant's request for reconsideration without a merit review of his claim on the grounds that the evidence submitted was irrelevant in nature.

LEGAL PRECEDENT

To require the Office to reopen a case for merit review under section 8128 of the Federal Employees' Compensation Act,[1] the Office's regulations 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) constitute relevant and pertinent new evidence not previously considered by the Office.[2] 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.[3] 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.[4]

ANALYSIS

The Office accepted appellant's claim and found that he had a 15 percent binaural loss of hearing. The relevant issue is whether he has established that he has more than a 15 percent binaural hearing loss, for which he already received a schedule award. Appellant contended that his hearing loss interfered with his ability to obtain employment and to perform his daily

[1] 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).

[2] 20 C.F.R. § 10.606(b)(1)-(2).

[3] *Id*. at § 10.607(a).

[4] 20 C.F.R. § 10.608(b).

activities and the employing establishment failed to timely inform him about filing a hearing loss claim. Although these arguments are new, as they were not made before the Office at the time of its May 27, 2003 decision, they are not relevant to the issue underlying the schedule award. Appellant's arguments do not provide any relevant information as to whether he has more than a 15 percent binaural hearing loss.[5] Similarly, his description of his employment-related noise exposure does not address the relevant issue in this case and, therefore, does not warrant a merit review of appellant's claim.[6]

Appellant asserts that it is the employing establishment's burden of proof to establish that his hearing loss was not caused by his employment. This argument is not pertinent as appellant's claim was accepted by the Office and he is in receipt of benefits under the Act it remains appellant's burden of proof to submit rationalized medical evidence which establishes that he has more than a 15 percent binaural hearing loss caused by exposure to noise while working at the employing establishment.

Appellant's primary contention disputes the period of compensation awarded by the Office under the schedule award. Under the Act, the maximum award for binaural hearing loss is 200 weeks of compensation.[7] Since appellant's accepted binaural hearing loss in this case was 15 percent, he was entitled to 15 percent of 200 weeks or 30 weeks of compensation. Further, a schedule award begins to run on the date when an employee's condition reaches maximum medical improvement, which means that the physical condition of the injured member of the body has stabilized and will not improve any further.[8] This is based on the medical evidence of record. The date of maximum medical improvement is to be used as the date for commencing the payment of the schedule award.[9] In this case, the Office found that appellant reached maximum medical improvement on February 13, 2003, the date of the report of Dr. Pang, on which his claim was accepted. His award under the schedule was proper. Appellant contended that his hearing loss impacted daily activities and affected his ability for employment. However, it is well established that factors such as employability or limitations on daily activities do not go into the calculation of a schedule award.[10] The Office has not adjudicated the issue of whether appellant's hearing loss has resulted in any loss of wage-earning capacity. For this reason, his contentions on reconsideration are not relevant to the issue of the extent of hearing loss granted under the schedule award.

Appellant's contention that the employing establishment failed to implement a noise conservation program is repetitious of his previous argument that the employing establishment

[5] *John F. Critz*, 44 ECAB 788, 794 (1993) (finding that, while a reopening of a case may be predicated solely on a legal premise not previously considered, such reopening is not required where the legal contention does not have a reasonable color of validity).

[6] *Edward Matthew Diekemper*, 31 ECAB 224-25 (1979).

[7] 5 U.S.C. § 8107(c)(13)(B).

[8] *See Margaret E. Grigsby*, 27 ECAB 138 (1975).

[9] *See Walter Lee Nichols*, 27 ECAB 209 (1975).

[10] *See James A. Castagno*, 53 ECAB 782 (2002); *Lela M. Shaw*, 51 ECAB 372 (2002).

failed to provide hearing protection. The Board has held that the submission of evidence or argument which repeats or duplicates that already in the case record does not constitute a basis for reopening a case.[11] As such, appellant's contention is insufficient to warrant further merit review of his claim.

Appellant has not shown that the Office erroneously applied or interpreted a specific point of law or advanced a relevant legal argument not previously considered by the Office. Further, he failed to submit relevant and pertinent new evidence not previously considered by the Office. As appellant did not meet any of the necessary regulatory requirements, the Board finds that he was not entitled to a merit review.[12]

CONCLUSION

The Board finds that the Office properly refused to reopen appellant's claim 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 25, 2004 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 22, 2005
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

[11] *Edward W. Malaniak*, 51 ECAB 279 (2000).

[12] *See James E. Norris*, 52 ECAB 93 (2000).