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

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| **J.D., Appellant** | ) | |
| **and** | ) | **Docket No. 06-265** |
| | ) | **Issued: August 15, 2006** |
| **U.S. POSTAL SERVICE, POST OFFICE, Memphis, TN, Employer** | ) | |

*Appearances:*
*Russell J. Johnson, Esq.*, for the appellant
*Miriam D. Ozur, Esq.*, for the Director

Oral Argument June 20, 2006

## DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge

### ***JURISDICTION***

On November 10, 2005 appellant filed a timely appeal from the Office of Workers' Compensation Programs' decision dated August 11, 2005, denying his request for further merit review of his claim. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2), the Board has jurisdiction over this nonmerit decision.

### ***ISSUE***

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

### ***FACTUAL HISTORY***

On March 4, 1997 appellant, then a 42-year-old tractor trailer operator, filed a traumatic injury claim alleging that on that date the tractor he was driving exploded. He noted that his neck hurt and he experienced ringing in his ears. Appellant stopped work on March 5, 1997. The Office accepted appellant's claim for postconcussion syndrome of the head, left ear tinnitus

and authorized a brain magnetic resonance imaging (MRI) scan. The Office continued to develop appellant's claim and appellant received appropriate compensation benefits.[1]

In a June 24, 1999 report, Dr. Neal Beckford, a Board-certified otolaryngologist, opined that appellant could return to eight hours of duty a day; however, he could not operate heavy machinery. He advised that appellant's tinnitus had not resolved and was probably permanent in nature.

On September 17, 2001 appellant filed a claim for a schedule award.

In an October 5, 2001 report, an Office medical recommended a second opinion evaluation for hearing loss and tinnitus, including an opinion regarding the impact if any of appellant's tinnitus on his activities of daily living. By letter dated November 1, 2001, the Office referred appellant for a second opinion examination, to Dr. Edgar Franklin, a Board-certified otolaryngologist.

In a November 19, 2001 report, Dr. Franklin noted appellant's history of injury and conducted an examination. He explained that the first audiometric test was not very reliable as the findings were inconsistent with appellant's hearing and conversation. Dr. Franklin noted that a second test was conducted and appellant's hearing was in the normal range, with some high tone drop off, which was sensorineural in nature. He reported findings and noted that the present audiogram was only slightly worse than one taken four days after the accident. Dr. Franklin opined that appellant had a 0 percent hearing loss in the right ear and a 3.8 percent hearing loss in the left ear, which converted to a binaural hearing impairment of .63 percent of the whole person or impairment of 0 percent. He advised that appellant did not have hearing loss of the left ear due to tinnitus and that it did not impact his activities of daily living. Dr. Franklin diagnosed normal to mild sensorineural hearing loss in both ears and a component of tinnitus in the left ear. He opined that appellant's sensorineural hearing loss was not due to noise exposure encountered in appellant's federal employment and opined that the hearing loss pattern was not typical of noise loss and hearing loss was insignificant. He also indicated that no treatment was needed.

In a January 23, 2002 decision, the Office found that his hearing loss was not severe enough to be considered ratable and he was not entitled to a schedule award.

On February 22, 2002 appellant requested a hearing, which was held on December 6, 2002.

On May 7, 2002 the Office received a September 13, 2001 report from Dr. Lloyd E. Robinson, Board-certified in family medicine. He noted that appellant did not meet the threshold for a disability rating. However, Dr. Robinson explained that "in conjunction with his persistent headaches, he is rated a 14 percent impairment of the whole person according to Table 13.3 on [p]age 312" of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).

[1] On September 25, 1997 appellant accepted a limited-duty position for four hours a day. On December 3, 1997 appellant's limited duty was increased to eight hours per day.

In a March 24, 2003 report, Dr. Robinson advised that appellant had hearing loss as a result of his acoustic trauma. He referred to the A.M.A., *Guides* and noted that decimal sum hearing loss calculations for the right ear were equal to 225 and 245 for the left. Dr. Robinson opined that this corresponded to a 48.1 percent binaural hearing loss pursuant to Table 11-3, page 250. He indicated that this was equal to a 17 percent impairment of the whole person. Dr. Robinson further advised that appellant had persistent tinnitus, which would account for another five percent pursuant to section 11.2A on page 246 of the A.M.A., *Guides*. He noted that this would equate to 22 percent impairment to the body as a whole.

By decision dated April 7, 2003, an Office hearing representative affirmed the Office's January 23, 2002 decision. The Office hearing representative noted that an impairment of up to five percent for tinnitus could be awarded under the A.M.A., *Guides;* however, it could only be added if a measurable hearing loss was present. The Office hearing representative found that appellant did not establish a ratable hearing loss.

On May 16, 2003 the Office received a February 21, 2003 cranial MRI scan read by Dr. David Buechner, a Board-certified diagnostic radiologist, as negative. He advised that there were no internal auditory canal or cerebellopintine angle abnormalities.

In an April 6, 2004 request for reconsideration, appellant's representative made numerous contentions, which included that the Office hearing representative afforded the second opinion physician more credibility than the treating physician. Counsel argued that the Office hearing representative tried to limit appellant's claim to hearing loss, when he also had accepted conditions of tinnitus and concussion and was entitled to a schedule award.

On April 8, 2004 appellant's representative enclosed additional evidence which included June 17 and October 12, 1998 audiological evaluations from Dr. Beckford and an April 6, 2004 report from Dr. Robinson. Dr. Robinson advised that, in addition to hearing loss, appellant had persistent dizziness and headaches, which warranted a rating in a separate section of the A.M.A., *Guides.* He referred to Table 314[2] and determined that appellant would be in a Class 2, which would represent a 10 percent impairment of the whole person. He explained that appellant's historical and physical findings were already noted.

By decision dated June 15, 2004, the Office denied modification of its prior decisions. It found that the evidence did not support that appellant had a ratable hearing loss under Office standards. The Office explained that not all impairments were covered under the schedule award provisions of the Federal Employees' Compensation Act and that tinnitus could not be included as appellant was not found to have a ratable hearing loss.

On June 8, 2005 appellant requested a schedule award and submitted a September 13, 2001 report of Dr. Robinson and copies of his April 6 and 8, 2004 requests for reconsideration.

By letter dated June 14, 2005, appellant's representative requested reconsideration. He contended that the hearing officer improperly ignored appellant's accepted tinnitus and postconcussion syndrome and argued that appellant should receive a schedule award for his

[2] A.M.A., *Guides* 252.

tinnitus. Counsel stated that the Office medical adviser and second opinion physicians did not properly explain why appellant's physician's reports were "insufficient" and contended that appellant was entitled to an award because he was unable to return to his truck-driving profession.[3]

By decision dated August 11, 2005, the Office denied appellant's request for reconsideration without a review of the merits on the grounds that his request neither raised substantial legal questions nor included new and relevant evidence.

## ***LEGAL PRECEDENT***

Under section 8128(a) of the Act,[4] the Office may reopen a case for review on the merits in accordance with the guidelines set forth in section 10.606(b)(2) of the implementing federal regulation, which provides that a claimant may obtain review of the merits if the written application for reconsideration, including all supporting documents, sets forth arguments and contains evidence that:

> "(i) Shows that [the Office] erroneously applied or interpreted a specific point of law; or
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> "(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 [the Office]."[5]

Section 10.608(b) provides that any application for review of the merits of the claim which does not meet at least one of the requirements listed in section 10.606(b) will be denied by the Office without review of the merits of the claim.[6]

## ***ANALYSIS***

Appellant disagreed with the denial of his claim for a schedule award and requested reconsideration on June 14, 2005. The underlying issue on reconsideration is whether appellant is entitled to a schedule award for his accepted tinnitus condition. However, appellant did not provide any relevant or pertinent new evidence to the issue of whether he was entitled to a schedule award.

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[3] Appellant's representative also alleged that he was including an updated audiogram, which showed that appellant had a greater deficit. However, the record does not contain an updated audiogram showing a greater deficit.

[4] 5 U.S.C. § 8128(a).

[5] 20 C.F.R. § 10.606(b).

[6] *Id*.

In his request for reconsideration, appellant's representative repeated previous arguments which were addressed by the Office in its earlier decisions. He alleged that the hearing officer improperly ignored the findings with regard to appellant's accepted tinnitus and postconcussion syndrome. Furthermore, he alleged that appellant was entitled to an award for his tinnitus regardless of the fact that he did not have a ratable hearing loss and due to the fact that he was not able to return to his previous position as a truck driver. He also alleged that the Office medical adviser and second opinion physicians did not properly explain why appellant's physician's reports were "insufficient." However, the Board notes that these allegations were addressed by the Office in its April 7, 2003 and June 4, 2004 decisions. The submission of evidence which repeats or duplicates evidence that is already in the case record does not constitute a basis for reopening a case for merit review.[7] Appellant did not provide any relevant and pertinent new evidence to establish that he was entitled to a schedule award for his tinnitus.

The Office also received a copy of a September 13, 2001 report from Dr. Robinson, a copy of his April 6, 2004 request for reconsideration, a copy of his April 8, 2004 request for reconsideration and a copy of his request for a schedule award. However, this is merely duplicative evidence. As noted above, the submission of evidence which repeats or duplicates evidence that is already in the case record is not a basis for reopening a case for merit review. The Board further notes that Dr. Robinson advised that appellant "did not meet the threshold for a disability rating."

On appeal, appellant's representative referred to the case of *Charles G. Johnson*.[8] In *Johnson*, the Board remanded the case to the Office for review of audiograms, which were submitted with appellant's request for reconsideration to determine if they showed a ratable hearing loss and if so for consideration of appellant's entitlement to a schedule award, including additional impairment for tinnitus. In the present case, appellant never established that he had a ratable hearing loss under the protocols followed by the Office. Thus his arguments regarding appellant's entitlement to an award for tinnitus are not relevant and are repetitive as they have previously been considered. The Board notes that, while appellant's representative indicated that additional audiograms were submitted, the record does not contain any additional audiograms.

The evidence submitted by appellant on reconsideration does not satisfy the third criterion, noted above, for reopening a claim for merit review. He also has not shown that the Office erroneously applied or interpreted a specific point of law or advanced a relevant new argument not previously submitted. Therefore, the Office properly denied appellant's request for reconsideration.

## ***CONCLUSION***

The Board finds that the Office properly refused to reopen appellant's case for further review of the merits of his claim under 5 U.S.C. § 8128(a).

[7] *David J. McDonald*, 50 ECAB 185 (1998); *John Polito*, 50 ECAB 347 (1999); *Khambandith Vorapanya*, 50 ECAB 490 (1999).

[8] Docket No. 03-2176 (issued February 24, 2004).

## ***ORDER***

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated August 11, 2005 is affirmed.

Issued: August 15, 2006
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

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