

Dr. Benjamin Light, a Board-certified otolaryngologist, in order to determine if appellant had a hearing loss as a result of his federal employment. In a report dated May 20, 2004, he opined that appellant had a moderate high frequency sensorineural hearing loss bilaterally and tinnitus causally related to his federal employment. Dr. Light noted that audiometric testing was conducted on his behalf of May 17, 2004. Testing at the frequency levels of 500, 1,000, 2,000 and 3,000 cycles per second revealed the following: right ear air: 15, 15, 20 and 45 decibels; right ear bone: 10, 10, 25 and 45 decibels; left ear air: 25, 25, 20 and 50 decibels; and left ear bone: 15, 20, 25 and 40 decibels.

On May 28, 2004 the Office accepted appellant's claim for bilateral hearing loss.

On July 21, 2004 the Office medical adviser reviewed Dr. Light's report and the audiometric test of May 17, 2004. The medical adviser applied the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) (5th ed. 2001) and determined that appellant had no ratable hearing loss in his right ear and an eight percent hearing loss in his left ear.¹

By decision dated August 11, 2004, the Office granted appellant a schedule award for an eight percent monaural (left ear) loss of hearing, consisting of 4.16 weeks of compensation for the period May 17 through June 15, 2004.

By letter dated March 7, 2005, appellant requested reconsideration. Appellant contended that he was entitled to compensation for a bilateral hearing loss and that the employing establishment prejudiced his claim by delaying the audiometric examination. In support of his request, he submitted a duplicate of Dr. Light's report from May 20, 2004. Appellant also submitted a February 24, 2005 form authorizing a hearing aid and a graph and a report from an audiogram conducted on February 18, 2005.

By decision dated November 25, 2005, the Office issued a decision denying appellant's claim for reconsideration without conducting a merit review.

LEGAL PRECEDENT

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act, the Office's regulations provide 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

¹ The Office evaluates industrial hearing loss in accordance with the A.M.A., *Guides*. *David W. Ferrall*, 56 ECAB ___ (Docket No. 04-2142, issued February 23, 2005). Applying the A.M.A., *Guides*, the Office medical adviser totaled the decibel losses at the frequencies of 500, 1,000, 2,000 and 3,000 cycles per second for the right ear (air) at 95, which he divided by 4 to obtain the average decibels of 23.75 in the right ear. The Office medical adviser subtracted the 25 decibels fence from 23.75 and determined that appellant did not have a ratable loss in his right ear. With regard to the left ear, the Office took the decibel losses at the aforementioned frequencies, added the amounts for a total of 120, which he divided by 4 for an average 30. He subtracted the 25 decibel fence to equal an amount of 5, which he multiplied by the established factor of 1.5 to obtain a monaural loss in the left ear of 7.5 percent, which he rounded up to 8 percent.

of law; (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.²

The Office procedure manual provides that this Board will accept appeals filed up to one year from the date of the last merit decision. When a reconsideration decision is delayed beyond 90 days and the delay jeopardizes the claimant's right to review of the merits of the case by the Board, the Office should conduct a merit review; *i.e.*, the basis of the original decision and any new evidence should be considered and, if there is no basis to change the original decision, an order denying modification (rather than denying the application for review) should be prepared.³

ANALYSIS

On August 11, 2004 the Office issued a schedule award based on an eight percent loss of hearing to appellant's left ear. By letter dated March 7, 2005, appellant requested reconsideration. The Office denied appellant's request for reconsideration without conducting a merit review on November 25, 2005.

Although section 501.3(d) of the Board's *Rules of Procedure* provides that an appellant must file a request for review of a final Office decision with the Board within 90 days of its issuance,⁴ the Board will accept appeals filed up to one year from the date of the last merit decision.⁵ The last merit decision in this case was issued on August 11, 2004 and appellant filed a request for reconsideration on March 7, 2005. However, the Office did not issue its decision on reconsideration until November 25, 2005, which was eight months after appellant filed his request for reconsideration. The Board finds that this was more than a 90-day delay and, as such, jeopardized appellant's right to have the Board review the merits of his claim.⁶ Therefore, the Office should have issued another merit decision in order to protect appellant's appeal rights.⁷ As the Office did not do so, the November 25, 2005 decision denying merit reconsideration is vacated and this case is remanded for the Office to reconsider all of the evidence and issue a merit decision in the above-captioned case.

CONCLUSION

The Office abused its discretion when it failed to conduct a review of the merits of appellant's claim pursuant to 5 U.S.C. § 8128(a).

² 20 C.F.R. § 10.606(b)(2)(iii).

³ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.9 (January 2004); *see also Janice M. Hatcher*, 55 ECAB ____ (Docket No. 03-1934, issued December 5, 2003); *Carlos Tola*, 42 ECAB 337 (1991).

⁴ *See* 20 C.F.R. § 501.3(d).

⁵ *See* 20 C.F.R. § 501.3(d)(2).

⁶ *See Janice M. Hatcher*, *supra* note 3.

⁷ *See supra* note 3.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated November 25, 2005 is vacated and this case is remanded for further consideration consistent with this opinion.

Issued: August 2, 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