

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

K.C., Appellant

and

**DEPARTMENT OF THE AIR FORCE,
FAIRCHILD AIR FORCE BASE, WA, Employer**

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**Docket No. 06-637
Issued: August 8, 2006**

Appearances:
K.C., pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

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

JURISDICTION

On January 23, 2006 appellant filed a timely appeal from the Office of Workers' Compensation Programs' December 23, 2005 nonmerit reconsideration decision and a merit decision of March 16, 2005, which accepted the conditions of binaural noise-induced hearing loss and bilateral tinnitus but denied a schedule award as there was no ratable hearing loss. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the schedule award and the nonmerit issue.

ISSUES

The issues are: (1) whether appellant has met his burden of proof in establishing 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 of his claim pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On March 27, 2004 appellant, then a 64-year-old heavy equipment operator, filed an occupational disease claim alleging that he developed tinnitus in both ears due to factors of his

federal employment. He first realized that his condition was caused or aggravated by his employment on November 25, 2003. The record contains audiograms dated 1996 to 2003 conducted as part of annual examinations for the employing establishment. Appellant submitted a detailed description of his noise exposure during the course of his federal employment.

By letter dated July 22, 2004, the Office referred appellant to Dr. Charles Benage, a Board-certified otolaryngologist, for a second opinion medical evaluation. He evaluated appellant on September 21, 2004 and submitted a medical report diagnosing bilateral noise-induced hearing loss due to noise exposure in appellant's federal civilian employment, but with a zero percent binaural hearing loss. Dr. Benage also diagnosed bilateral tinnitus, which he opined was due to appellant's temporomandibular joint dysfunction. A September 21, 2004 audiogram performed by an audiologist accompanied Dr. Benage's 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 5, 10, 10 and 25 respectively and in the left ear decibel losses of 10, 10, 20 and 50 respectively.

In a November 8, 2004 report, Lesly Loiseau, a clinical audiologist, opined that, based on appellant's hazardous noise exposure history and normal magnetic resonance imaging (MRI) scans, appellant's bilateral tinnitus was caused by noise exposure in his federal employment. A hearing aid with built-in tinnitus maskers was recommended.

In a November 19, 2004 report, Dr. Chad D. McCormick, an otolaryngologist, noted appellant's medical and occupational history and presented his examination findings. He opined that appellant's hearing loss and tinnitus was consistent with a history of chronic noise exposure. A hearing aid with a built-in tinnitus masker was recommended.

On December 3, 2004 an Office medical adviser reviewed the medical evidence and found that appellant reached maximum medical improvement on September 21, 2004. The Office medical adviser agreed that appellant had a bilateral sensorineural hearing loss but, based on the September 21, 2004 audiogram, found a zero percent binaural sensorineural hearing loss for schedule award purposes. The Office medical adviser further opined that appellant's occupational noise exposure may have contributed in part to appellant's tinnitus.

The Office found a conflict of medical opinion between Dr. Benage, the second opinion physician and Dr. McCormick, appellant's treating physician, regarding the etiology of appellant's tinnitus. By letter dated February 23, 2005, it referred appellant, together with a statement of accepted facts, a list of questions and the medical record, to Dr. Thomas Beaton, a Board-certified otolaryngologist, for an impartial medical evaluation. In a March 8, 2005 report, Dr. Beaton opined that appellant's tinnitus was secondary to his work-related bilateral high-tone sensorineural hearing loss.

By decision dated March 16, 2005, the Office accepted appellant's claim for bilateral sensorineural hearing loss and tinnitus. It found that appellant did not sustain a ratable hearing loss based on the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (hereinafter A.M.A., *Guides*) (5th ed. 2001). Therefore, appellant was not entitled to a schedule award. The Office further found that the weight of the medical evidence established that tinnitus maskers might be of benefit and authorized the purchase of such devices.

In a letter dated March 25, 2005, appellant requested reconsideration of the Office's March 16, 2005 decision. He argued that he should be compensated for both his hearing loss and tinnitus condition which the Office accepted. A statement from appellant's wife was also provided.

By decision dated April 14, 2005, the Office denied appellant's request for reconsideration without a merit review.

Appellant subsequently filed an appeal before the Board. On April 25, 2005 the Board received appellant's appeal, which was assigned Docket No. 2005-1124. By decision dated September 14, 2005, the Board issued an Order Remanding Case as the case record was not received.¹ The Board directed the Office to reconstruct the case record and to issue an appropriate decision in order to fully protect appellant's appeal rights.

On December 23, 2005 the Office reissued the April 14, 2005 decision. Evidence received after the Office's April 14, 2005 decision and prior to the Office's December 23, 2005 decision, included: a March 10, 2004 MRI scan; a copy of a March 25, 2005 audiogram; a May 3, 2005 prescription note from Dr. Beaton diagnosing bilateral tinnitus maskers; a May 2, 2005 report from Yancie J. Kidd, an audiologist; and medical reports dated November 19, 2004 and March 25, 2005 from Dr. McCormick.

LEGAL PRECEDENT -- ISSUE 1

The schedule award provision of the Act² and its implementing regulation³ sets 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 specifies 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

¹ Docket No. 2005-1124 (issued September 14, 2005).

² 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 301 (2002); *petition for recon., granted (modifying prior decision)*, Docket 01-1570 (issued August 13, 2002).

⁶ A.M.A., *Guides* 250.

⁷ *Id.*

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

Regarding tinnitus, the A.M.A., *Guides* states:

“Tinnitus in the presence of unilateral or bilateral hearing impairment may impair speech discrimination. Therefore, add up to five percent for tinnitus in the presence of measurable hearing loss if the tinnitus impacts the ability to perform the activities of daily living.”¹²

ANALYSIS -- ISSUE 1

Dr. Benage, an Office referral physician, examined appellant and submitted a report dated September 21, 2004. He found that appellant 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 September 21, 2004 audiogram obtained by Dr. Benage. Testing of the right ear at frequency levels of 500, 1,000, 2,000 and 3,000 cps revealed decibel losses of 5, 10, 10 and 25, respectively for a total of 50 decibels. When divided by 4, the result is an average hearing loss of 12.5 decibels. The average loss of 12.5 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, 20 and 50, respectively, for a total of 90 decibels. When divided by 4, the result is an average hearing loss of 22.5 decibels. The average loss of 22.5 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 Office medical adviser applied the proper standards to the findings in Dr. Benage's September 21, 2004 report and accompanying audiogram. This resulted in a zero percent binaural hearing loss in the right and left ears, which is not ratable for schedule award purposes. There is no other audiogram of record, reviewed by a physician, supporting a ratable hearing loss.

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

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

¹² A.M.A., *Guides* 246.

The Office accepted that appellant's tinnitus condition was work related. The A.M.A., *Guides* provide provides that tinnitus, in the presence of unilateral or bilateral hearing impairment, may impair speech discrimination and provides for up to a five percent rating for tinnitus, in the presence of measurable hearing loss, if the tinnitus impacts the ability to perform activities of daily living.¹³ In this case, however, appellant's hearing loss is not ratable. Consequently, appellant is not entitled to a schedule award for tinnitus since he does not have a ratable hearing loss.

The Board notes that there is no other medical evidence of record which establishes that appellant has a ratable hearing loss.

LEGAL PRECEDENT -- ISSUE 2

Section 10.606(b)(2) of Title 20 of the Code of Federal Regulations provide that a claimant may obtain review of the merits of the claim by either: (1) showing that the Office erroneously applied or interpreted a specific point of law; (2) advancing a relevant legal argument not previously considered by the Office; or (3) submitting relevant and pertinent new evidence not previously considered by the Office.¹⁴ Section 10.608(b) provides that, when an application for review of the merits of a claim does not meet at least one of the three requirements enumerated under section 10.606(b)(2), the Office will deny the application for reconsideration without reopening the case for a review on the merits.¹⁵ When reviewing an Office decision denying a merit review, the function of the Board is to determine whether the Office properly applied the standards set forth at section 10.606(b)(2) to the claimant's application for reconsideration and any evidence submitted in support thereof.¹⁶

ANALYSIS -- ISSUE 2

The Office's merit decision denied appellant's schedule award on the basis that he did not establish a ratable hearing loss. In his March 25, 2005 reconsideration request, appellant contended that he should be compensated for his bilateral hearing loss and tinnitus conditions. The Office denied the reconsideration request, without a merit review, in its April 14, 2005 decision. As noted the Board's September 14, 2005 order directed the Office to reconstruct the case record and to issue an appropriate decision that protected appellant's appeal rights.

The Board notes that the record contains additional new evidence which was submitted after the April 14, 2005 decision and prior to the Office's December 23, 2005 decision. However, the Office did not consider the newly submitted evidence prior to issuing the December 23, 2005 decision, which reissued the April 14, 2005 decision.

¹³ A.M.A., *Guides* 246; *Juan A. Trevino*, 54 ECAB 356 (2003).

¹⁴ 20 C.F.R. § 10.606(b)(2) (1999).

¹⁵ 20 C.F.R. § 10.608(b) (1999).

¹⁶ *Annette Louise*, 54 ECAB 783 (2003).

The Board's jurisdiction over a case is limited to reviewing the evidence that was before the Office at the time of its final decision.¹⁷ As the Board's decisions are final as to the subject matter appealed, it is crucial that all relevant evidence that was properly submitted to the Office prior to the time of issuance of its final decision be addressed by the Office.¹⁸ In this instance, the Office did not consider the evidence received after its April 14, 2005 decision and prior to issuance of its December 23, 2005 decision. As the Office failed to consider the new evidence submitted before its December 23, 2005 decision, the case will be remanded for a proper review of the evidence and issuance of an appropriate final decision.

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 finds, however, that the Office improperly refused to reopen appellant's case for further review of the merits of his claim under 5 U.S.C. § 8128(a) as additional evidence was submitted.

ORDER

IT IS HEREBY ORDERED THAT the March 16, 2005 decision is affirmed. The December 23, 2005 decision of the Office of Workers' Compensation Programs is set aside and the case remanded for further proceedings consistent with this decision.

Issued: August 8, 2006
Washington, DC

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

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

¹⁷ 20 C.F.R. § 501.2(c); *see Thomas L. Agee*, 56 ECAB ____ (Docket No. 05-335, issued April 19, 2005).

¹⁸ 20 C.F.R. § 501.6(c); *see William A. Couch*, 41 ECAB 548 (1990).