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

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| **P.F., Appellant** | ) | |
| **and** | ) | **Docket No. 07-730** |
| | ) | **Issued: August 22, 2007** |
| **DEPARTMENT OF THE NAVY,** | ) | |
| **Kings Bay, GA, Employer** | ) | |

*Appearances:*
*Appellant, pro se*
*Office of Solicitor,* for the Director

*Case Submitted on the Record*

## DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

### ***JURISDICTION***

On January 22, 2007 appellant filed a timely appeal of the December 7, 2006 schedule award decision of the Office of Workers' Compensation Programs and January 12, 2007 decision which denied further merit review. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d), the Board has jurisdiction over the merit and nonmerit issues.

### ***ISSUES***

The issues are: (1) whether appellant has more than a two percent hearing loss of the left ear, for which he received a schedule award; and (2) whether the Office properly refused to reopen his case for further review of the merits of his claim under 5 U.S.C. § 8128(a).

### ***FACTUAL HISTORY***

On May 10, 2006 appellant, then a 37-year-old sand blaster, filed an occupational disease claim alleging that his hearing loss was caused by factors of his federal employment. He did not

stop work. Appellant's work history, employing establishment audiograms and medical records accompanied the claim.[1]

By letter dated October 17, 2006, the Office referred appellant, together with the medical record and a statement of accepted facts,[2] to Dr. R. Michael R. Loper, a Board-certified otolaryngologist, for a second opinion evaluation to include an audiogram. In an October 24, 2006 report, Dr. Loper noted appellant's history of injury and treatment and conducted an examination. He advised that audiometric data from December 2004 revealed a slight loss in the left ear restricted to six kilohertz (KHz) and noted that the right ear was within normal limits. Dr. Loper determined that appellant had findings which revealed a mild loss of 40 decibels and two to eight KHz in excess of that expected for presbycusis and noted that his workplace exposure was sufficient in intensity to cause the loss. He diagnosed bilateral noise-induced neurosensory high frequency loss due to his noise exposure in the federal employment and recommended bilateral hearing aids and hearing conservation. Dr. Loper also submitted results of audiometric testing performed by a certified audiologist on October 24, 2006. The results included that testing for the right ear at the frequency levels of 500, 1,000, 2,000 and 3,000 cycles per second (cps) revealed decibel losses of 15, 20, 30 and 35. Dr. Loper also noted that testing for the left ear at the frequency levels of 500, 1,000, 2,000 and 3,000 cps revealed decibel losses of 5, 25, 35 and 40 decibels.

In a November 2, 2006 report, the Office medical adviser applied the Office's standardized procedures to the October 24, 2006 audiogram. He determined that appellant had zero percent monaural hearing loss for the right ear. The Office medical adviser then followed the same procedure on the left ear and found 1.88 percent monaural hearing loss for the left ear which he rounded up to 2 percent. He found that appellant had a left monaural hearing loss of two percent. The Office medical adviser did not recommend hearing aids.

By decision dated December 7, 2006, the Office granted appellant a schedule award for a two percent impairment of the left ear. The award ran for 1.04 weeks from October 24 to 31, 2006.

On January 5, 2007 the Office received appellant's December 15, 2006 request for reconsideration. Appellant disagreed with the Office's decision, noting that it was based on the most recent audiograms as opposed to earlier audiograms. He questioned the time frame of the award commencing on October 24, 2006. Appellant enclosed copies of the previously submitted

[1] The record reflects that appellant was in the military from August 1979 to August 1982 as a canon crewman in the filed artillery division with noise exposure to include standard readings for cannon fire of 160 decibels with a reduction of up to 35 decibels with earplugs. Additionally, appellant submitted employing establishment audiograms dated June 20 and July 11, 2000 and June 21, 2001. These audiograms did not show a ratable hearing loss.

[2] The record reflects that appellant worked for the employing establishment from June 1985 to March of 2002 as an industrial sandblaster/painter and cannon crewman and was currently employed as a paint shop supervisor. The Office indicated that a noise study was not available but that the standard decibels for noise exposure due to sandblasting was reported to be up to 112 decibels. The Office indicated that earplugs were used which could be assumed to be at 90 to 97 decibels and appellant was exposed to noise on a continuous basis from 8 to 12 hours a day for 5 days a week.

audiograms. He enclosed a copy of a previous claim which was accepted for a "foreign body left finger."

By decision dated January 12, 2007, the Office denied appellant's request for reconsideration on the grounds that it neither raised substantial legal questions nor included new and relevant evidence and was insufficient to further warrant review.

## ***LEGAL PRECEDENT -- ISSUE 1***

The schedule award provision of the Federal Employees' Compensation Act[3] and its implementing regulation[4] set forth the number of weeks of compensation payable to employees sustaining permanent impairment from loss or loss of use, of scheduled members or functions of the body. However, the Act does not specify the manner in which the percentage of loss shall be determined. For consistent results and to ensure equal justice under the law to all claimants, good administrative practice necessitates the use of a single set of tables so that there may be uniform standards applicable to all claimants. The American Medical Association, *Guides to the Evaluation of Permanent Impairment* (5th ed. 2001), has been adopted by the implementing regulation as the appropriate standard for evaluating schedule losses.[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 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]

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[3] 5 U.S.C. § 8107.

[4] 20 C.F.R. § 10.404.

[5] *Id.*

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

[7] *Id.*

[8] *Id.*

[9] *Id.*

[10] *Id.*

[11] *Donald E. Stockstad*, 53 ECAB 310 (2002), *petition for recon. granted* (modifying prior decision), Docket No. 01-1570 (issued August 13, 2002).

## ***ANALYSIS -- ISSUE 1***

The Office referred appellant to Dr. Loper who examined appellant and obtained an audiogram on October 24, 2006. Dr. Loper determined that appellant's hearing loss was employment related.

An Office medical adviser reviewed this audiogram on November 2, 2006 to determine the extent of appellant's hearing loss. The frequency levels, for the right ear, recorded at 500, 1,000, 2,000 and 3,000 cps revealed decibel losses of 15, 20, 30 and 35 respectively, for a total of 100 decibels. This figure, when divided by 4, results in an average hearing loss of 25 decibels. The average of 25 decibels was then reduced by 25 decibels, which resulted in a 0 percent monaural hearing loss of the right ear. Testing for the left ear at the frequency levels of 500, 1,000, 2,000 and 3,000 cps revealed decibel losses of 5, 25, 35 and 40 decibels respectively, for a total loss of 105 decibels which, when divided by 4, results in an average 26.25 decibels. When reduced by the 25 decibel fence, this result in 1.25 which is then multiplied by the factor of 1.5 which results in a 1.875 percent monaural hearing loss rounded up to 2 percent, of the left ear.[12] The medical adviser properly applied the Office's standardized procedures in determining that appellant had a two percent left ear hearing loss and a nonratable right ear hearing loss. There are no other audiograms that conform with the Office's standards for evaluating hearing loss which show a greater impairment.

Appellant's concern on appeal was the date on which the period of the schedule award began. In hearing loss cases, the period covered by a schedule award commences on the date of the medical examination and audiogram upon which the Office based the schedule award.[13] This is generally referred to as the date of maximum medical improvement (MMI). Moving the period of the award back in time will not gain appellant additional compensation. Section 8107 of the Act provides only a finite amount of compensation for permanent impairment.[14] Appellant is entitled to 1.04 weeks of compensation for the hearing loss in his left ear based on Dr. Loper's medical examination and audiogram performed on October 24, 2006, the date of MMI which is the appropriate date for the commencement of the schedule award.

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[12] *See Marco A. Padilla*, 51 ECAB 202 (1999); Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter, 3.700.3.b. (October 1990) (the policy of the Office is to round the calculated percentage of impairment to the nearest whole point).

[13] *See generally Franklin L. Armfield*, 28 ECAB 445 (1977) (discussing when the period of the award should begin in hearing loss cases); *Mark A. Holloway*, 55 ECAB 321 (2004) (determination of whether MMI has been reached is based on the probative medical evidence of record and is usually considered to the date of the evaluation by the attending physician which is accepted as definitive by the Office.)

[14] Under section 8107 of the Act, 52 weeks of compensation is provided for the complete loss of hearing in one ear, while 200 weeks of compensation is provided for the complete loss of hearing in both ears. Partial losses are compensated proportionately. This means that appellant is entitled to 1.04 weeks of compensation for the hearing loss in his left ear (52 times 2 percent) and no compensation for the hearing loss in his right ear (52 times 0). The hearing loss in his right ear, while measurable, is unratable because the average loss is below the fence of 25 decibels and is considered to have no impairment in its ability to hear everyday sounds under everyday conditions.

Appellant also alleged that the most recent audiograms were considered in lieu of his earlier audiograms. However, as noted, there are no other audiograms that conform with the Office's standards for evaluating hearing loss which show a greater impairment.

## ***LEGAL PRECEDENT -- ISSUE 2***

Under section 8128(a) of the Act,[15] 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 regulations, 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
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> (iii) Constitutes relevant and pertinent new evidence not previously considered by the [the Office]."[16]

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.[17]

## ***ANALYSIS -- ISSUE 2***

Appellant disagreed with the Office's schedule award decision and requested reconsideration on December 15, 2006. The underlying issue on reconsideration was whether he had more than a two percent hearing loss in his left ear. However, appellant did not provide any relevant or pertinent new evidence to the issue of whether he had greater than a two percent hearing loss in the left ear.

He submitted copies of his previously submitted audiograms. 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.[18] Appellant did not provide any relevant and pertinent new evidence to establish that he sustained more than a two percent hearing loss of the left ear.

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[15] 5 U.S.C. § 8128(a).

[16] 20 C.F.R. § 10.606(b).

[17] 20 C.F.R. § 10.608(b).

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

Appellant also submitted copies of a previous claim for his left finger and paperwork related to Office decisions and social security benefits. While he questioned why earlier audiograms were not used, appellant did not provide additional new relevant evidence showing that the schedule award was improper. Submission of evidence that does not address the particular issue involved does not constitute a basis for reopening a case.[19]

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.[20]

## ***CONCLUSION***

The Board finds that appellant is entitled to no more than the two percent hearing loss of the left ear for which he received for a schedule award. The Board also 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).

[19] *Robert P. Mitchell*, 52 ECAB116 (2000); *Jacqueline M. Nixon-Steward*, 52 ECAB 140 (2000); *Alan G. Williams*, 52 ECAB 180 (2000).

[20] The Board notes that appellant submitted evidence subsequent to the January 12, 2007 Office decision. The Board cannot consider this evidence, however, as its review of the case is limited to the evidence of record which was before the Office at the time of its final decision. 20 C.F.R. § 501.2(c). Appellant, however, retains the right to file a claim for an increased schedule award based on medical evidence indicating that the progression of an employment-related condition, without new exposure to employment factors, has resulted in a greater permanent impairment than previously calculated. *Linda T. Brown*, 51 ECAB 115 (1999).

## ***ORDER***

**IT IS HEREBY ORDERED THAT** the January 12, 2007 and December 7, 2006 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: August 22, 2007
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

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

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board