

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

F.H., Appellant

and

**DEPARTMENT OF THE ARMY, CORPS OF
ENGINEERS, Memphis, TN, Employer**

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**Docket No. 07-624
Issued: June 1, 2007**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

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

JURISDICTION

On January 11, 2007 appellant filed a timely appeal from the Office of Workers' Compensation Programs' October 3, 2006 merit decision concerning his entitlement to schedule award compensation for hearing loss and a November 16, 2006 nonmerit decision denying his request for further review of the merits of his claim. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over these decisions.

ISSUES

The issues are: (1) whether appellant met his burden of proof to establish that he has more than a 29 percent binaural hearing loss for which he received schedule award compensation; and (2) whether the Office properly denied appellant's request for further review of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On October 14, 2005 appellant, then a 54-year-old crane operator, filed an occupational disease claim alleging that he sustained hearing loss due to exposure to hazardous noise at work since 1974, including noise from stream machines with winches, generators, air compressors and engines.

In December 2005, the Office referred appellant to Dr. Edgar Franklin, a Board-certified otolaryngologist, for otologic and audiologic testing. On December 8, 2005 Dr. Franklin determined that appellant had a bilateral sensorineural hearing loss due to exposure to noise. 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, 25, 45 and 55 respectively. Testing for the left ear at the frequency levels of 500, 1,000, 2,000 and 3,000 cycles per second revealed decibel losses of more than 100 at these frequency levels which Dr. Franklin identified as NR or no reaction. He noted that appellant reported having hearing loss in the left ear since serving in Vietnam. On December 13, 2005 an Office district medical adviser determined that appellant had a 15 percent binaural hearing loss. He did not include any rating for the left ear.

The Office accepted that appellant had a noise-induced bilateral hearing loss. In a February 24, 2006 decision, the Office granted appellant a schedule award for a 15 percent binaural hearing loss. The award ran from December 5, 2005 to February 18, 2006.

Appellant requested a review of the written record by an Office hearing representative. In a decision dated and finalized July 10, 2006, the Office hearing representative set aside the February 24, 2006 decision and remanded the case to the Office for further development. The hearing representative determined that the Office should have included hearing loss of appellant's left ear in the calculation of binaural hearing loss because, when determining the amount of a schedule award for a member of the body that sustained an employment-related permanent impairment, preexisting impairments of the body are to be included. He directed the Office to request that Dr. Franklin provide a supplemental report which evaluated appellant's left and right hearing losses.

On August 24, 2006 Dr. Franklin stated that the hearing loss of appellant's right ear was 15 percent, the hearing loss of his left ear was 100 percent and the binaural hearing loss was 29.2 percent. On September 25, 2006 the Office district medical adviser concluded that appellant had a 29 percent binaural hearing loss. He noted that, under the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (5th ed. 2001), if hearing loss at a given frequency level is more than 100 decibels then the figure of 100 decibels should be used in hearing loss calculations.

By an October 3, 2006 award of compensation, the Office granted appellant a schedule award for an additional 14 percent binaural hearing loss such that he was compensated for his total binaural hearing loss of 29 percent.¹

¹ Appellant received a total of 58 weeks of compensation.

By letter dated October 22, 2006, appellant requested reconsideration and argued that he was rated for a 100 percent hearing loss in his left ear but only received an award for a 14 percent hearing loss in his left ear.

In a November 16, 2006 decision, the Office denied appellant's request for further review of the merits of his claim.

LEGAL PRECEDENT -- ISSUE 1

The schedule award provision of the Federal Employees' Compensation Act² and its implementing regulation³ 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 A.M.A., *Guides* has been adopted by the implementing regulation as the appropriate standard for evaluating schedule losses.⁴

The Office evaluates industrial hearing loss in accordance with the standards contained in the A.M.A., *Guides*.⁵ Using the frequencies of 500, 1,000, 2,000 and 3,000 cps, the losses at each frequency are added up and averaged.⁶ Then, the "fence" of 25 decibels is deducted because, as 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.⁷ The remaining amount is multiplied by a factor of 1.5 to arrive at the percentage of monaural hearing loss.⁸ 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.⁹ If hearing loss at a given frequency level is more than 100 decibels or beyond the range of the audiometer the level should be taken as 100 for hearing loss calculations.¹⁰ The Board has concurred in the Office's adoption of this standard for evaluating hearing loss.¹¹ It is well established that, in determining the amount of a schedule award

² 5 U.S.C. § 8107.

³ 20 C.F.R. § 10.404 (1999).

⁴ *Id.*

⁵ A.M.A., *Guides* 224-25 (4th ed. 1993); A.M.A., *Guides* at 226-51 (5th ed. 2001).

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ A.M.A., *Guides* 247.

¹¹ *Donald Stockstad*, 53 ECAB 301 (2002); *petition for recon., granted (modifying prior decision)*, Docket No. 01-1570 (issued August 13, 2002).

for a member of the body that sustained an employment-related permanent impairment, preexisting impairments of the body are to be included.¹²

ANALYSIS -- ISSUE 1

On September 25, 2006 the Office medical adviser reviewed the otologic and audiologic testing performed on appellant by Dr. Franklin, a Board-certified otolaryngologist and applied the Office's standardized procedures to this evaluation. Testing for the right ear at the frequency levels of 500, 1,000, 2,000 and 3,000 cps revealed decibel losses of 15, 25, 45 and 55 respectively. These decibel losses were totaled at 140 decibels and were divided by 4 to obtain the average hearing loss of 35 decibels. This average loss was then reduced by 25 decibels (25 decibels being discounted as discussed above) to equal 10 which was multiplied by the established factor of 1.5 to compute a 15 percent hearing loss in the right ear. For the frequency levels of 500, 1,000, 2,000 and 3,000 cps in the left ear, decibel losses of 100 were used for each level.¹³ These decibel losses total 400 decibels and when divided by 4 result in an average hearing loss of 100 decibels. This average loss when reduced by 25 decibels (25 decibels being discounted as discussed above) equals 75, which when multiplied by the established factor of 1.5 equals 112.5, which would translate into a 100 percent hearing loss in the right ear. To compute the binaural hearing loss, the lesser loss in the right ear, 15 percent, is multiplied by the established factor of 5 and added to the 100 percent loss in the left ear. This sum is divided by the established factor of 6 to equal 29.17, which when rounded down to the nearest whole figure equals a 29 percent binaural hearing loss.

On appeal, appellant contends that the schedule award he received was not adequate compensation for his binaural hearing loss. The schedule award provision of the Act provides for compensation to employees sustaining permanent impairment from loss of use of specified members of the body.¹⁴ The Act establishes a maximum of 200 weeks of compensation as the award for total binaural hearing loss.¹⁵ A partial loss of hearing is compensated at a proportionate rate.¹⁶ Appellant's award of compensation for a 29 percent binaural hearing loss entitled appellant to 29 percent of 200 weeks of compensation or 58 weeks of compensation. The record indicates that he has already received this amount of compensation. Because appellant has been fully compensated for the binaural hearing loss and his condition has not worsened since that time under the Office's standards for evaluating hearing loss, he is not entitled to any additional compensation.

¹² *Howard P. Lane*, 36 ECAB 107, 108-09 (1984).

¹³ The medical adviser properly included hearing loss of appellant's left ear in the calculation of binaural hearing loss because, when determining the amount of a schedule award for a member of the body that sustained an employment-related permanent impairment, preexisting impairments of the body are to be included. He also properly noted that if hearing loss at a given frequency level is more than 100 decibels, as is the case for appellant at the relevant levels, the level should be taken as 100 for hearing loss calculations. *See supra* notes 11 and 12 and accompanying text.

¹⁴ 5 U.S.C. § 8107(c).

¹⁵ *Id.* at § 8107(c)(13)(B).

¹⁶ *Id.* at § 8107(c)(19).

LEGAL PRECEDENT -- ISSUE 2

To require the Office to reopen a case for merit review under section 8128(a) of the Act,¹⁷ the Office's regulation provides that the evidence or argument submitted by 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.¹⁸ To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant also must file his application for review within one year of the date of that decision.¹⁹ 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 on the merits.²⁰ 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.²¹

ANALYSIS -- ISSUE 2

In support of his October 22, 2006 reconsideration request, appellant argued that he was rated for a 100 percent hearing loss in his left ear but only received an award for a 14 percent hearing loss in his left ear. The advancement of this argument would not require reopening of appellant's claim for further review of the merits because his argument does not present a legal contention with a reasonable color of validity. He argues that he received incorrect schedule award compensation based on the hearing loss rating for his left ear. However, appellant did not receive schedule award compensation based on hearing loss ratings for each ear, but rather received such compensation based on a rating for binaural hearing loss which combined the hearing loss for each ear according to the formula described above.

Appellant has not established that the Office improperly denied his request for further review of the merits of its October 3, 2006 decision under section 8128(a) of the Act, because the argument he submitted did not show that the Office erroneously applied or interpreted a specific point of law, advance a relevant legal argument not previously considered by the Office or constitute relevant and pertinent new evidence not previously considered by the Office.

¹⁷ 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).

¹⁸ 20 C.F.R. § 10.606(b)(2).

¹⁹ *Id.* at § 10.607(a).

²⁰ *Id.* at § 10.608(b).

²¹ *John F. Critz*, 44 ECAB 788, 794 (1993).

CONCLUSION

The Board finds that appellant did not meet his burden of proof to establish that he has more than a 29 percent binaural hearing loss for which he received schedule award compensation. The Board further finds that the Office properly denied appellant's request for further review of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' November 16 and October 3, 2006 decisions are affirmed.

Issued: June 1, 2007
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