United States Department of Labor
Employees' Compensation Appeals Board

G.P., Appellant	)	
and	)	**Docket No. 06-2129**
	)	**Issued: March 8, 2007**
DEPARTMENT OF THE AIR FORCE, ROBINS AIR FORCE BASE, Warner Robins, GA, Employer	)	

Appearances:
Appellant, 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
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On September 21, 2006 appellant filed a timely appeal from a July 25, 2006 decision by the Office of Workers' Compensation Programs that denied reconsideration of a June 28, 2006 schedule award for hearing loss in the right ear and a June 23, 2006 nonmerit decision and a May 10, 2006 schedule award decision for hearing loss in appellant's left ear. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the appeal.

ISSUES

The issues are: (1) whether appellant sustained more than a 26 percent hearing loss in his left ear, for which he received a schedule award; (2) whether appellant has a ratable hearing loss in his right ear; (3) whether the Office properly denied further merit review of the June 23, 2006 request for reconsideration; and (4) whether the Office properly denied merit review in response to appellant's July 25, 2006 request for reconsideration.

FACTUAL HISTORY

On September 1, 2005 appellant, then a 60-year-old aircraft sheet metal mechanic, filed an occupational disease claim alleging that he developed bilateral hearing loss in the performance of duty. He did not stop work.

On September 12, 2005 the Office requested additional information concerning appellant's claim.

Appellant worked at the employing establishment beginning in 1982 and was exposed to noise from various sources. He submitted an August 9, 2005 medical report from Dr. A. Daniel Toland, a Board-certified otolaryngologist, who stated that he was diagnosed with bilateral hearing loss and that his current working environment exposed him to loud noise. Appellant also submitted an April 18, 2005 audiogram which reflected testing at the 500, 1,000, 2,000 and 3,000 Hertz (Hz) levels and revealed the following decibel losses: 30, 20, 15 and 25 for the right ear and 40, 40, 45 and 30 for the left ear. He also submitted an audiogram conducted on October 4, 2005, which reflected testing at the 500, 1,000, 2,000 and 3,000 Hz levels and revealed the following decibel losses: 20, 20, 15 and 30 decibels for the right ear, and 45, 30 unrecorded, and 40 for the left ear. The audiogram was not certified by a physician.

A noise survey conducted for the employing establishment on August 8, 2005 revealed that appellant worked in a hazardous noise area and was exposed to noise from band saws, pneumatic rivet guns, pneumatic impact wrenches, pneumatic ratchets, pneumatic drills, pneumatic sanders and pneumatic vacuums. The survey noted that the employing establishment approved use of hearing protection devices for employees in hazardous noise areas beginning in 2001. The employing establishment submitted an October 12, 2005 report from an employing establishment audiologist, who stated that appellant had been hired with a medically-related hearing loss caused by an ear disease. The employing establishment noted that appellant's left ear condition improved with surgery in 1997. The employing establishment also submitted a chronological audiogram compiled by its audiologist, who tracked appellant's hearing loss from the time he was hired through April 2005.

On January 24, 2006 the Office referred appellant to Dr. Kenneth Walker, a Board-certified otolaryngologist for a second opinion medical evaluation.

In a February 13, 2006 report, Dr. Walker noted examining appellant on February 7, 2006. He diagnosed bilateral sensorineural hearing loss. Dr. Walker noted that appellant was exposed to noise from machinery and that the noise exposure was sufficient in intensity and duration to have caused appellant's hearing loss. He opined that appellant's hearing loss was consistent with noise exposure and "due, at least in part, to noise exposure during his federal employment." An audiogram performed on Dr. Walker's behalf on February 7, 2006, which reflected testing at the 500, 1,000, 2,000 and 3,000 Hz levels, revealed the following decibel losses: 25, 20, 15 and 35 decibels for the right ear, and 45, 35, 45 and 45 for the left ear.

On February 22, 2006 the Office accepted appellant's claim for bilateral sensorineural hearing loss.

On February 24, 2006 an Office medical adviser reviewed Dr. Walker's audiometric test results and concluded that appellant had a 0 percent hearing loss in the right ear and a 26.25 percent hearing loss in the left ear. The medical adviser also concurred that appellant's hearing loss was sensorineural. Appellant's date of maximum medical improvement was February 7, 2006, the date that the audiogram was performed. The medical adviser also recommended that hearing aids be authorized.

On March 1, 2006 appellant submitted a claim for a schedule award.

In a May 10, 2006 decision, the Office granted appellant a schedule award for a 26 percent hearing loss in his left ear. The period of the award ran from February 7 through May 12, 2006.

Appellant requested reconsideration on June 8, 2006. He stated that he disagreed with the Office's determination of the award period and that he had impairment to his right ear. Appellant submitted two additional audiograms, dated May 18 and 23, 2006, respectively. The May 18 and 23, 2006 audiograms reflected testing at the 500, 1,000, 2,000 and 3,000 Hz levels and revealed identical decibel losses of: 25, 30, 20 and 40 for the right ear, and 40, 45, 50 and 45 for the left ear. There was no accompanying report from a physician who had reviewed the audiogram.

By decision dated June 23, 2006, the Office denied appellant's request for reconsideration without reviewing the merits of the claim. The Office noted that it was premature to raise the issue of a schedule award for his right ear, as no decision on a schedule award for the right ear had been issued.

On June 28, 2006 the Office issued a schedule award decision finding that appellant had zero percent hearing loss in his right ear.

On July 14, 2006 appellant requested reconsideration of the June 28, 2006 decision. He asserted that he had right ear hearing loss and requested that the Office refer him for another medical evaluation.

By decision dated July 25, 2006, the Office denied appellant's request for reconsideration without reviewing the merits of the claim.

LEGAL PRECEDENT -- ISSUES 1 and 2

The schedule award provision of the Federal Employees' Compensation Act[1] and its implementing regulation[2] 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,

[1] 5 U.S.C. § 8107.

[2] 20 C.F.R. § 10.404 (2002).

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* (A.M.A., *Guides*) has been adopted by the implementing regulation as the appropriate standard for evaluating schedule losses.[3]

The Office evaluates industrial hearing loss in accordance with the standards contained in the A.M.A., *Guides*.[4] Using the frequencies of 500, 1,000, 2,000 and 3,000 Hz, the losses at each frequency are added up and averaged.[5] 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.[6] The remaining amount is multiplied by a factor of 1.5 to arrive at the percentage of monaural hearing loss.[7] 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.[8] The Board has concurred in the Office's adoption of this standard for evaluating hearing loss.[9]

ANALYSIS -- ISSUE 1

In calculating appellant's hearing loss in the left ear, the Office medical adviser applied the Office's standardized procedures, noted above, to the February 7, 2006 audiogram performed for Dr. Walker. The February 7, 2006 audiogram recorded frequency levels at the 500, 1,000, 2,000 and 3,000 Hz levels and revealed decibel losses of 45, 35, 45 and 45 respectively for the left ear. The total decibel loss in the left ear is 170 Hz. When divided by 4, the result is an average hearing loss of 42.5 decibels. The average loss of 42.5 decibels is reduced by the "fence" of 25 decibels to equal 17.5 decibels, which when multiplied by the established factor of 1.5, results in a 26.25 percent monaural hearing loss for the left ear.

The maximum number of weeks of compensation for hearing loss in one ear is 52 weeks. The Office medical adviser found that the hearing loss in the right ear was 0 percent and the hearing loss in the left ear was 26.25 percent, which rounded to 26 percent.[10] Twenty-six percent of 52 weeks is 13.52 weeks of compensation, resulting in a total of 13.52 weeks of

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[3] *Id.*

[4] A.M.A., *Guides* at 250 (5th ed. 2001).

[5] *Id.*

[6] *Id.*

[7] *Id.*

[8] *Id.*

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

[10] The Office properly rounded the 26.25 percent down to 26 percent. Office procedures provide that fractions should be rounded down from .49 or up from .50. Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.4.b(2)(b) (March 2005).

compensation. There are no other current audiograms of record establishing a greater percentage of hearing loss in the left ear. The Board finds that the Office properly issued the schedule award for 26 percent hearing loss in the left ear.

On appeal, appellant questions the starting date of his schedule award, February 7, 2006, the date of Dr. Walker's examination. The Board has held that the period covered by a schedule award commences on the date of "maximum medical improvement," or the point at which appellant's condition has stabilized and will not improve further.[11] That determination is based on the medical evidence and the date is generally the date of the medical examination which determined the extent of the hearing loss.[12] In this case, the date of maximum medical improvement is based on the February 7, 2006 audiogram conducted for Dr. Walker. The Office properly began the schedule award on that date.

ANALYSIS -- ISSUE 2

In calculating appellant's hearing loss in the right ear, the Office medical adviser again applied the Office's standardized procedures, detailed above, to the audiogram performed for Dr. Walker. Testing for the right ear at the frequencies of 500, 1,000, 2,000 and 3,000 Hz revealed decibel losses of 25, 20, 15 and 35 decibels respectively, for a total of 95 decibels. When divided by 4, the result is an average hearing loss of 23.75 decibels. The average loss of 23.75 decibels is reduced by the "fence" of 25 decibels to equal -1.25 decibels, which when multiplied by the established factor of 1.5, results in a -1.875 percent monaural hearing loss for the right ear, rounded to 0 percent.

In support of his request for a schedule award for right ear hearing loss, appellant submitted a May 18, 2006 audiogram. However, the audiogram was not certified by a physician. The Board has previously held that, although an Office medical adviser, who is a physician, may review any audiogram submitted to the record,[13] the Office does not have to review every uncertified audiogram which has not been prepared in connection with an examination by a medical specialist.[14] It is appellant's burden to submit a properly certified audiogram for review.[15] The Office properly used the audiogram that was prepared in conjunction with the examination performed by Dr. Walker to determine that appellant did not have a ratable right ear hearing loss.

LEGAL PRECEDENT -- ISSUES 3 and 4

Under section 8128 of the Federal Employees' Compensation Act, the Office has discretion to grant a claimant's request for reconsideration and reopen a case for merit review.

[11] *See Marie J. Born*, 27 ECAB 623 (1976).

[12] *See James L. Thomas*, 31 ECAB 1088 (1980).

[13] *Henry T. Scott*, 27 ECAB 444 (1976); *see Joshua A. Holmes*, 42 ECAB 231 (1990).

[14] *See Alfred Avelar*, 26 ECAB 426 (1975).

[15] *See Joshua A. Holmes*, *supra* note 13.

Section 10.606(b)(2) of the implementing federal regulations provides guidance for the Office in using this discretion.[16] The regulations provide that the Office should grant a claimant merit review when the claimant's request for reconsideration and all documents in support thereof:

> "(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 Office]."[17]

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.[18] 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.[19]

ANALYSIS -- ISSUE 3

The Board finds that the Office properly denied merit review of the May 10, 2006 decision finding that appellant had 26 percent hearing loss in his left ear, as appellant's request for reconsideration did not meet the criteria cited as precedent.

In support of his request for reconsideration of the Office's May 10, 2006 schedule award for his left ear, appellant submitted additional audiograms, a June 5, 2005 note from audiologist, M. Shea White and an August 9, 2005 report from Dr. Toland. The report from Dr. Toland is repetitive, as appellant submitted the same report on September 27, 2005.[20] The audiograms and note from Ms. White did not require the Office to review the merits of the case because Ms. White is not a physician.[21] Therefore, the report does not constitute medical evidence. The

[16] 20 C.F.R. § 10.606(b)(2) (1999).

[17] *Id.*

[18] 20 C.F.R. § 10.608(b) (1999).

[19] *Annette Louise*, 54 ECAB 783 (2003).

[20] *See Eugene F. Butler*, 36 ECAB 393, 398 (1984) (where the Board held that material which is repetitious or duplicative of that already in the case record is of no evidentiary value in establishing a claim and does not constitute a basis for reopening a case).

[21] *See* 5 U.S.C. § 8101(2). This subsection defines the term "physician." *See also Charley V.B. Harley*, 2 ECAB 208, 211 (1949) (where the Board held that medical opinion, in general, can only be given by a qualified physician).

audiograms are not certified by a physician and there is no requirement that the Office review an uncertified audiogram.[22]

Appellant also contended that he was improperly denied a schedule award for hearing loss to his right ear. However, this contention did not establish that the Office erroneously applied or interpreted a specific point of law nor did it advance a relevant legal argument not previously considered by the Office. The Office's May 10, 2006 decision did not purport to adjudicate appellant's entitlement to a schedule award for right ear hearing loss.

Finally, the Office was not required to reopen the case for merit review in response to appellant's arguments concerning the start date of his schedule award. The Board has previously held that, while the 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.[23] Although appellant had not previously advanced an argument concerning the period of his schedule award, his assertions on that point had no reasonable color of validity as the Office properly began the schedule award period for appellant's left ear on the date of maximum medical improvement, February 7, 2006.[24] The Office properly denied appellant's reconsideration request.

ANALYSIS -- ISSUE 4

The Board finds that appellant did not submit evidence, nor did he advance a new argument in connection with his request for reconsideration of the Office's June 28, 2006 decision. Appellant merely submitted a statement in which he questioned the Office medical adviser's finding that he had a zero percent hearing loss in the right ear, arguing that his claim had been accepted for "bilateral" hearing loss. The Board notes that the fact that he has an accepted hearing loss in each ear does not establish that the extent of his right ear hearing loss is ratable. Accordingly, appellant's request did not meet any of the above listed three requirements for obtaining a merit review and the Office was not required to perform a merit review of appellant's claim. The Board finds that the Office properly denied appellant's request for reconsideration.

CONCLUSION

The Board finds that appellant has not established that he has a ratable right ear hearing loss or that he has more than a 26 percent hearing loss in his left ear. The Office also properly denied appellant's requests for reconsideration without conducting a merit review.

[22] *See supra* notes 13-15.

[23] *See John F. Critz*, 44 ECAB 788, 794 (1993).

[24] *See supra* note 12.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated July 23, June 28 and 23 and May 10, 2006 are affirmed.

Issued: March 8, 2007
Washington, DC

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

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

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