

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

J.J., Appellant

and

**DEPARTMENT OF DEFENSE, DEFENSE
LOGISTICS AGENCY, RED RIVER ARMY
DEPOT, Texarkana, TX, Employer**

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**Docket No. 07-1500
Issued: November 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
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On May 9, 2007 appellant filed a timely appeal of a December 13, 2006 merit decision of the Office of Workers' Compensation Programs, finding a four percent binaural hearing loss, for which he received a schedule award and an April 19, 2007 nonmerit decision, denying his request for reconsideration. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether appellant has more than a four percent binaural hearing loss, for which he received a schedule award; and (2) whether the Office properly denied appellant's request for a merit review of his claim pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On May 30, 2006 appellant, then a 60-year-old heavy mobile equipment operator, filed an occupational disease claim.¹ On May 15, 2000 he first realized that his hearing loss was caused by his federal employment. Appellant stated that he was exposed to constant loud noise eight hours per day at work. He related that he wore earplugs but they did not offer the necessary protection. Appellant was last exposed to loud noise at the employing establishment on May 30, 2006. He submitted audiograms performed by the employing establishment during the period June 3, 1975 to December 8, 2003. The employing establishment provided noise level data for various work areas.

By letter dated July 19, 2006, the Office requested that the employing establishment provide whether appellant was still exposed to hazardous noise, and if not, provide the date of his last exposure and the pay rate in effect on that date. In a letter dated July 21, 2006, the Office advised appellant that the evidence submitted was insufficient to establish his claim. It addressed the additional factual and medical evidence he needed to submit to establish his claim.

By letters dated July 28, 2006, the Office referred appellant, together with a statement of accepted facts to Dr. Thomas D. Burns, an audiologist, and Dr. Charles E. Hollingsworth, a Board-certified otolaryngologist,² for an audiological evaluation and an otologic examination.

In a July 26, 2006 letter, received by the Office on August 2, 2006, appellant stated that he first became aware of his hearing loss in May 2000 during a routine physical examination and hearing test. He stated that he was not exposed to loud noises outside of his employment, reiterating that his hearing loss was caused by his employment.

On August 16, 2006 Dr. Burns performed an audiogram. Testing of the right ear at frequency levels of 500, 1,000, 2,000 and 3,000 hertz (Hz) revealed decibel losses of 15, 10, 20 and 65, respectively and in the left ear decibel losses of 10, 10, 25 and 70, respectively.

In an August 16, 2006 report, Dr. Hollingsworth found that the earliest audiogram performed on June 3, 1975 revealed that appellant had normal hearing except for mild (25 to 30 decibels) loss from 4,000 Hz upwards while the most recent audiogram performed on August 16, 2006 revealed very mild low frequency sensorineural loss with normal mid-frequency hearing. He opined that appellant had severe bilateral high frequency sensorineural loss starting at 2,000 Hz that was caused by his employment. Utilizing the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) (5th ed. 2001), he determined that appellant had a 3.8 percent right monaural impairment and a 5.6 percent left monaural impairment which constituted a 4.1 percent binaural impairment. Hearing aids were not recommended, but Dr. Hollingsworth stated that appellant would probably need them within the next several years. Dr. Hollingsworth recommended proper ear protection as necessary and periodic evaluation.

¹ In November 2001 appellant filed a claim for hearing loss which was denied by the Office.

² The Board notes that Dr. Hollingsworth is also a Board-certified plastic surgeon.

On September 18, 2006 an Office medical adviser reviewed Dr. Burns' August 16, 2006 audiogram results and Dr. Hollingsworth's August 16, 2006 report. He determined that appellant reached maximum medical improvement on August 16, 2006. The medical adviser concluded that, in accordance with the A.M.A., *Guides*, appellant had a 5.6 percent impairment of the left ear and a 3.8 percent impairment of the right ear which constituted a 4 percent binaural hearing impairment. The medical adviser did not authorize hearing aids, noting that Dr. Hollingsworth did not recommend them.

By letter dated September 21, 2006, the Office accepted appellant's claim for binaural hearing loss. On November 14, 2006 he filed a claim for a schedule award.

In a decision dated December 13, 2006, the Office granted appellant a schedule award for a four percent binaural hearing loss. The period of the award was from November 14, 2005 to January 8, 2006. By letter dated January 26, 2007, appellant requested reconsideration. He questioned why the Office did not accord determinative weight to the findings of Dr. Kristin Lower, a Board-certified otolaryngologist, who had an audiogram performed and found that appellant needed hearing aids as a result of his work-related noise exposure. Appellant contended that Dr. Lower was better qualified as an otolaryngologist while Dr. Hollingsworth's business card indicated that he was a specialist in plastic and reconstructive head, neck and cosmetic surgery. He submitted duplicate copies of the Office medical adviser's September 18, 2006 report and the Office's December 13, 2006 decision.

By decision dated April 19, 2007, the Office denied appellant's request for reconsideration on the grounds that it neither raised substantive legal questions nor included new and relevant evidence and thus, it was insufficient to warrant a merit review of its prior decision.

LEGAL PRECEDENT -- ISSUE 1

The schedule award provision of the Federal Employees Compensation Act³ and its implementing regulation⁴ set 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.⁵ However, neither the Act nor the regulations specify 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.⁶

The Office evaluates industrial hearing loss in accordance with the standards contained in the A.M.A., *Guides*.⁷ Using the frequencies of 500, 1,000, 2,000 and 3,000 Hz the losses at each

³ 5 U.S.C. §§ 8101-8193; *see* 5 U.S.C. § 8107(c).

⁴ 20 C.F.R. § 10.404.

⁵ 5 U.S.C. § 8107(c)(19).

⁶ 20 C.F.R. § 10.404.

⁷ A.M.A., *Guides* 250.

frequency are added up and averaged.⁸ 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.⁹ The remaining amount is multiplied by a factor of 1.5 to arrive at the percentage of monaural hearing loss.¹⁰ 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.¹¹ The Board has concurred in the Office's adoption of this standard for evaluating hearing loss.¹²

ANALYSIS -- ISSUE 1

Dr. Hollingsworth, the second opinion specialist, examined appellant and submitted a report on August 16, 2006, finding that he sustained bilateral sensorineural hearing loss causally related to noise exposure in the course of his federal employment. The Board finds that Dr. Hollingsworth properly determined that appellant sustained a four percent permanent binaural hearing loss. He reviewed Dr. Burn's August 16, 2006 audiogram results and determined that appellant sustained a 3.8 percent right monaural impairment and a 5.6 percent left monaural impairment which constituted a 4.1 percent binaural impairment based on the A.M.A., *Guides*. Dr. Hollingsworth did not recommend hearing aids at that time, but stated that appellant would probably need them within the next several years. He, however, recommended proper ear protection as necessary and periodic evaluation.

The Office medical adviser reviewed Dr. Hollingsworth's report. He applied the Office's standardized procedures to the August 16, 2006 audiogram performed by Dr. Burns. Testing of the right ear at frequency levels of 500, 1,000, 2,000 and 3,000 Hz revealed decibel losses of 15, 10, 20 and 65, respectively for a total of 110 decibels. When divided by 4, the result is an average hearing loss of 27.5 decibels. The average loss of 27.5 is reduced by 25 decibels to equal 2.5, which, when multiplied by the established factor of 1.5, results in a 3.8 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, 25 and 70, respectively, for a total of 115 decibels. When divided by 4, the result is an average hearing loss of 28.75 decibels. The average loss of 28.75 decibels is reduced by 25 decibels to equal 3.75, which, when multiplied by the established factor of 1.5, results in a 5.6 percent hearing loss for the left ear. The lesser loss of 3.8 is multiplied by 5, then added to the greater loss of 5.6 and the total is divided by 6 to arrive at the amount of the binaural hearing loss of 4 percent. The Board finds that the Office medical adviser properly applied the Office's standards to the findings stated in Dr. Burn's August 16, 2006 audiogram. Further, the four percent impairment rating provided by the medical adviser is consistent with

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² See *Donald E. Stockstad*, 53 ECAB 301 (2002); *petition for recon. granted (modifying prior decision)*, Docket No. 01-1570 (issued August 13, 2002).

Dr. Hollingsworth's findings. Thus, the Board finds that Dr. Hollingsworth and the medical adviser provided reasoned opinions that appellant has a four percent binaural hearing loss under the A.M.A., *Guides*.

As appellant did not submit any medical evidence supporting more than a four percent permanent binaural hearing loss, the Board finds that there is no basis on which to grant a schedule award for more than a four percent binaural hearing loss under the Office's standardized procedures.

LEGAL PRECEDENT -- ISSUE 2

To require the Office to reopen a case for merit review under section 8128 of the Act,¹³ the Office's regulation provide that 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.¹⁴ To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant also must file his or her application for review within one year of the date of that decision.¹⁵ 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 of the merits.

ANALYSIS -- ISSUE 2

On January 26, 2007 appellant disagreed with the Office's December 13, 2006 decision, which granted him a schedule award for a four percent binaural hearing loss. The relevant issue in this case is whether he has more than a four percent binaural hearing loss. However, appellant did not provide any relevant or pertinent new evidence to the issue of whether he had greater than a four percent binaural hearing loss.

Appellant submitted the Office medical adviser's September 18, 2006 report and the Office's December 13, 2006 decision. While he questioned why the Office did not accord determinative weight to Dr. Lower's opinion that he required hearing aids due to his employment-related hearing loss as she was better qualified than Dr. Hollingsworth, appellant did not provide additional new relevant evidence showing that he was entitled to a schedule award for more than a four percent binaural hearing loss. As noted by the Board, Dr. Hollingsworth is a Board-certified otolaryngologist and thus, possesses the same professional qualifications as Dr. Lower. Further, submission of evidence that does not address the particular issue involved does not constitute a basis for reopening a case for merit review.¹⁶

¹³ 5 U.S.C. §§ 8101-8193. 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).

¹⁴ 20 C.F.R. § 10.606(b)(1)-(2).

¹⁵ *Id.* at § 10.607(a).

¹⁶ *Robert P. Mitchell*, 52 ECAB 116 (2000); *Jacqueline M. Nixon-Steward*, 2 ECAB 140 (2000); *Alan G. Williams*, 52 ECAB 180 (2000).

The evidence submitted by appellant does not satisfy the third criterion noted above, for reopening a claim for merit review. Further, he has not shown that the Office erroneously applied or interpreted a specific point of law or advanced a relevant legal argument not previously considered by the Office. As appellant did not meet any of the necessary regulatory requirements, the Board finds that the Office properly denied merit review.¹⁷

CONCLUSION

The Board finds that appellant has no more than a four percent binaural hearing loss, for which he received a schedule award. The Board further finds that the Office properly denied appellant's request for a merit review of his claim pursuant to 5 U.S.C. § 8128(a).

ORDER

IT IS HEREBY ORDERED THAT the April 19, 2007 and December 13, 2006 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: November 1, 2007
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

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

¹⁷ See *James E. Norris*, 52 ECAB 93 (2000).