



Appellant submitted a report dated February 22, 2005 from Dr. M. Coyle Shea, a Board-certified otolaryngologist, who diagnosed a decrease in hearing in the left ear and a complete loss of hearing in the right ear. The record also contains an audiogram performed for Dr. Shea.

By decision dated September 23, 2005, the Office denied appellant's claim after finding that the noise level surveys from the employing establishment did not establish that he was exposed to noise levels over 85 decibels. Appellant requested an oral hearing which was held on June 28, 2006. In a decision dated September 8, 2006, the Office hearing representative set aside the September 23, 2005 decision. He noted that the Office did not require noise exposure over 85 decibels. The hearing representative found that appellant had established noise exposure due to his federal employment and remanded the case for development of the medical evidence.

On November 15, 2006 the Office referred appellant, together with a statement of accepted facts, to Dr. James O. Fordice, a Board-certified otolaryngologist, for an evaluation to determine whether he had a work-related hearing loss. The Office noted in the statement of accepted facts that appellant was totally deaf in the right ear due to Meniere's disease. Dr. Fordice evaluated appellant on December 7, 2006 and obtained an audiogram. He noted appellant's history of Meniere's disease in his right ear with multiple surgeries. Dr. Fordice diagnosed sensorineural hearing loss on the left side due to noise exposure in the course of his federal employment. He recommended hearing aids on the left side and noise protection.

The December 7, 2006 audiogram performed for Dr. Fordice revealed speech discrimination scores of 35 decibels on the left. The audiologist noted that appellant's tinnitus might interfere with tone detection. Testing for the left ear at the frequencies of 500, 1,000, 2,000 and 3,000 cycles per second revealed decibel losses of 35, 50, 45 and 50, respectively.

On December 29, 2006 an Office medical adviser reviewed Dr. Fordice's report and the audiometric test results. He concluded that appellant was entitled to a schedule award for a 30 percent monaural impairment for hearing loss in the left ear. The Office medical adviser noted that appellant had nonemployment-related Meniere's disease in the right ear.

On January 4, 2007 the Office accepted that appellant sustained sensorineural hearing loss in the left ear due to factors of his federal employment. On January 17, 2007 appellant filed a claim for a schedule award. By decision dated February 13, 2007, the Office granted appellant a schedule award for a 30 percent monaural impairment of the left ear. It found no impairment of the right ear. The period of the award ran for 15.6 weeks, from December 7, 2006 to March 26, 2007.

On February 15, 2007 appellant requested reconsideration. He argued that he had lost 30 percent of his total ability to hear which was greater than a monaural loss because of his total deafness in the right ear. Appellant specified that he was not claiming compensation for the hearing loss in his right ear.

In a decision dated March 21, 2007, the Office denied appellant's request for reconsideration under section 8128 Federal Employees' Compensation Act after finding that he did not raise a substantive legal argument or submit new and relevant evidence.

## LEGAL PRECEDENT -- ISSUE 1

The schedule award provision of the Act<sup>1</sup> provides for compensation to employees sustaining permanent loss, or loss of use, of specified members of the body. The Act, however, does not specify the manner in which the percentage loss of a member shall be determined. The method used in making such determination is a matter which results in the sound discretion of the Office. For consistent results and to ensure equal justice, the Board has authorized 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*, (5<sup>th</sup> ed. 2001) (A.M.A., *Guides*), has been adopted by the Office for evaluating schedule losses and the Board has concurred in such adoption.<sup>2</sup>

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

## ANALYSIS -- ISSUE 1

The Office medical adviser properly applied the Office's standardized procedures to the December 7, 2006 audiogram by Dr. Fordice.<sup>8</sup> Testing for the left ear at the frequencies of 500, 1,000, 2,000 and 3,000 cycles per second revealed decibel losses of 35, 50, 45 and 50, respectively. These decibel losses were totaled at 180 and divided by 4 to obtain the average hearing loss per cycle of 45. The average of 45 was then reduced by the 25 decibel fence to

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<sup>1</sup> 5 U.S.C. §§ 8101-8193.

<sup>2</sup> See 20 C.F.R. § 10.404; *Bernard A. Babcock, Jr.*, 52 ECAB 143 (2000).

<sup>3</sup> A.M.A., *Guides* at 250.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Reynaldo R. Lichtenberger*, 52 ECAB 462 (2001).

<sup>8</sup> While the record contains a prior audiogram taken by Dr. Shea, there is insufficient information accompanying the audiogram to demonstrate that it met the Office's standards for audiograms used in the evaluation of permanent hearing impairments. See *Yolanda Librera (Michael Librera)*, 37 ECAB 388 (1986); Federal (FECA) Procedure Manual, Part 3 -- Medical, *Requirement for Medical Reports*, Chapter 3.600.8(a) (September 1994).

equal 20 decibels for the right ear.<sup>9</sup> The 20 decibels was multiplied by 1.5 resulting in a 30 percent loss for the right ear.

The Board finds that the Office medical adviser applied the proper standards to the findings in the December 7, 2006 report of Dr. Fordice and accompanying audiogram performed on his behalf. The result is a 30 percent monaural loss in the left ear. The Board further finds that the Office medical adviser properly relied upon the December 7, 2006 audiogram as it was part of Dr. Fordice's evaluation and met all the Office's standards.<sup>10</sup>

On appeal appellant noted that he had total hearing loss in his right ear at the time that he obtained his position with the employing establishment. He contended that the 30 percent loss of hearing in his left ear affected his "total ability to hear" and thus, he should be entitled to compensation for 30 percent of 160 weeks rather than 52 weeks. Appellant, however, must have an employment-related hearing loss in his right ear in order for it to be considered for a separate schedule award or as part of a binaural award.<sup>11</sup>

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

To require the Office to reopen a case for merit review under section 8128(a) of the Act,<sup>12</sup> the Office's regulations 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) submit relevant and pertinent new evidence not previously considered by the Office.<sup>13</sup> 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.<sup>14</sup> 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.<sup>15</sup>

The Board has held that the submission of evidence which repeats or duplicates evidence already in the case record does not constitute a basis for reopening a case.<sup>16</sup> The Board also has

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<sup>9</sup> The decibel "fence" is subtracted as it has been shown that the ability to hear everyday sounds under everyday listening conditions is not impaired when the average of the designated hearing levels is 25 decibels or less. *See* A.M.A., *Guides* at 250.

<sup>10</sup> *See* Federal (FECA) Procedure Manual, Part 3 -- Medical, *Requirement for Medical Reports*, Chapter 3.600.8(a) (September 1994).

<sup>11</sup> *See* *Bobbie F. Cowart*, 55 ECAB 746 (2004).

<sup>12</sup> 5 U.S.C. §§ 8101-8193. Section 8128(a) of the Act provides that "[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."

<sup>13</sup> 20 C.F.R. § 10.606(b)(2).

<sup>14</sup> 20 C.F.R. § 10.607(a).

<sup>15</sup> 20 C.F.R. § 10.608(b).

<sup>16</sup> *Arlesa Gibbs*, 53 ECAB 204 (2001); *James E. Norris*, 52 ECAB 93 (2000).

held that the submission of evidence which does not address the particular issue involved does not constitute a basis for reopening a case.<sup>17</sup> 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.<sup>18</sup>

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

In his request for reconsideration, appellant contended that he was entitled to an award for a 30 percent loss of his total ability to hear. He was deaf in his right ear due to Meniere's disease prior to working for the employing establishment. Appellant argued that he had lost 30 percent of his total hearing or 30 percent of 160 weeks rather than 30 percent of 52 weeks. The Office, however, did not accept his claim for hearing loss of the right ear. Thus, appellant's argument does not have a reasonable color of validity such that it would warrant reopening his case for merit review.<sup>19</sup>

Appellant 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 submit a pertinent new and relevant evidence not previously considered. As he did not meet any of the necessary regulatory requirements, appellant is not entitled to further merit review.

### **CONCLUSION**

The Board finds that appellant has no more than a 30 percent permanent impairment of the left ear. The Board further finds that the Office properly denied his request for merit review under 5 U.S.C. § 8128.

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<sup>17</sup> *Ronald A. Eldridge*, 53 ECAB 218 (2001); *Alan G. Williams*, 52 ECAB 180 (2000).

<sup>18</sup> *Vincent Holmes*, 53 ECAB 468 (2002); *Robert P. Mitchell*, 52 ECAB 116 (2000).

<sup>19</sup> *Elaine M. Borghini*, 57 ECAB \_\_\_\_ (Docket No. 05-1102, issued May 3, 2006).

**ORDER**

**IT IS HEREBY ORDERED THAT** the decisions of the Office of Workers' Compensation Programs dated March 21 and February 13, 2007 are affirmed.

Issued: September 20, 2007  
Washington, DC

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

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