United States Department of Labor
Employees' Compensation Appeals Board

W.B., Appellant	)	
and	)	**Docket No. 08-14**
	)	**Issued: April 15, 2008**
U.S. POSTAL SERVICE, HERITAGE STATION, Schenectady, NY, 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 October 1, 2007 appellant filed a timely appeal from a January 10, 2007 merit decision of a hearing representative of the Office of Workers' Compensation Programs' granting a schedule award for hearing loss and denying a schedule award for loss of taste and smell. He also appeals an August 20, 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 and over the August 20, 2007 nonmerit decision.

ISSUES

The issues are: (1) whether appellant has more than a four percent impairment of the left ear; (2) whether he is entitled to a schedule award for loss of taste and smell; and (3) whether the Office properly denied appellant's request for reconsideration of the merits of his claim under 5 U.S.C. § 8128.

FACTUAL HISTORY

On January 23, 2002 appellant, then a 52-year-old letter carrier, sustained injury when he slipped on ice and hit his head. The Office accepted the claim for a skull fracture with subdural hemorrhage and neural hearing loss.[1] Appellant stopped work on January 23, 2002 and returned to his usual employment on May 29, 2002.

On June 24, 2002 appellant filed a claim for a schedule award. In a report dated November 24, 2002, Dr. Mohan Potluri, Board-certified in emergency medicine, attributed appellant's difficulties with smell, taste and hearing to his January 2002 work injury. An audiologist performed an audiological evaluation on February 20, 2004. He diagnosed mild to moderate hearing loss bilaterally and recommended hearing aids. On March 18, 2004 Dr. Paul E. Spurgas, a Board-certified neurosurgeon, opined that appellant's loss of smell, taste and hearing was causally related to his skull fracture and subdural hematoma.

The Office referred appellant to Dr. Edward C. Brandow, a Board-certified otolaryngologist, for an otologic and audiological evaluation. On September 17, 2004 Dr. Brandow performed an otological evaluation and obtained audiometric testing. Audiometric testing performed at the frequency levels of 500, 1,000, 2,000 and 3,000 cycles per second (cps) revealed losses in the right ear of 10, 20, 20 and 30 decibels and in the left ear of 10, 30, 30 and 40 decibels. Dr. Brandow diagnosed bilateral and high-tone sensorineural hearing loss. He noted that appellant also had a loss of smell and taste. Dr. Brandow attributed the hearing loss and lack of smell to his employment injury. He concluded that appellant had a four percent impairment due to hearing loss in the left ear and no ratable impairment of the right ear.

On September 23, 2004 appellant asserted that Dr. Brandow performed a very cursory examination and appeared unsure of the purpose of the evaluation. In a letter dated July 14, 2005, he noted that the schedule award regulations included the tongue as a scheduled member.

By decision dated December 15, 2005, the Office denied appellant's claim for a schedule award for loss of smell and taste. On December 27, 2005 appellant requested an oral hearing.

On January 14, 2006 an Office medical adviser reviewed the audiograms dated February 26, 2002, February 20 and September 17, 2004. He selected that the September 17, 2004 audiogram performed for Dr. Brandow as the basis for the schedule award determination as it was the most recent. The Office medical adviser stated: "The rationale is that after head trauma a portion of the hearing loss may be due to labyrinthine concussion and hearing improvement can occur over a period of time due to resolution of edema and due to neural repair." He noted that the February 20, 2004 audiogram did not provide the actual audiogram numbers for speech reception and discrimination scores. Based on the September 17, 2004

[1] An audiological evaluation on February 26, 2002 revealed high frequency hearing loss. In a decision dated January 31, 2003, the Office denied appellant's claim for hearing loss. On September 23, 2003 an Office hearing representative set aside the January 31, 2003 decision and instructed the Office to further develop whether he sustained hearing loss due to his January 23, 2002 work injury. On January 6, 2004 Dr. Gerald S. Freifeld, a Board-certified neurosurgeon, who provided a second opinion evaluation, determined that appellant sustained hearing loss due to his work injury.

audiogram, the Office medical adviser concluded that appellant had 3.75 percent impairment of the left ear. He found no impairment of the right ear. The Office medical adviser calculated the percentage of binaural hearing loss as .625 percent.

By decision dated June 1, 2006, the Office granted appellant a schedule award for a four percent permanent impairment of the left ear.[2] The period of the award ran for 2.08 weeks from September 17 to October 1, 2004.

On June 28, 2006 appellant requested an oral hearing on the June 1, 2006 decision. He challenged the finding that he had no hearing loss in the right ear and noted that the record contained other audiograms. Appellant questioned the use of Dr. Brandow's opinion and also questioned why he had a loss only in one ear given that the Office authorized bilateral hearing aids. At the hearing, held on October 25, 2006, he noted that a tongue's function was taste and speech. Appellant argued that he was entitled to a schedule award for half of his tongue as he could no longer taste. In an accompanying statement, he argued that he was entitled to a schedule award for both ears. Appellant indicated that he was submitting a June 20, 2006 audiogram from Marilyn Frantsovl.[3]

In a decision dated January 10, 2007, an Office hearing representative affirmed the December 15, 2005 and June 1, 2006 decisions. She found that there was no evidence to support that appellant had an impairment to a scheduled member beyond the four percent hearing loss in the left ear.

On May 21, 2007 appellant requested reconsideration. He argued that Dr. Brandow did not perform an examination and did not review any of the medical records except for the opinion of Dr. Freifield, a prior referral physician.[4] Appellant contended that Dr. Brandow did not apply the American Medical Association, *Guides to the Evaluation of Permanent* Impairment, (A.M.A., *Guides*) (5th ed. 2001). He maintained that the Office ignored the 2006 hearing evaluation he submitted from Ms. Frantsovl. Appellant reiterated that the tongue was listed as a scheduled member under the regulations and that half of the tongue's function was taste.

By decision dated August 20, 2007, the Office denied appellant's request for reconsideration after finding that his arguments were repetitious and thus insufficient to reopen his case for merit review. The Office noted that he reiterated arguments raised previously in his hearing request.

[2] The Office indicated that it gave appellant an award for a four percent impairment rather than a three and three quarters percent impairment due to computer limits; however, it is proper to round percentages to the nearest whole number. Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.3b (June 2003).

[3] Ms. Frantsovl performed the September 17, 2004 audiometric evaluation for Dr. Brandow. The record does not contain a 2006 audiogram from Ms. Frantsovl.

[4] Dr. Freifield provided an opinion on January 6, 2004 that appellant's hearing loss was related to his employment.

LEGAL PRECEDENT -- ISSUE 1

The schedule award provision of the Federal Employees' Compensation Act[5] 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 A.M.A., *Guides* has been adopted by the Office for evaluating schedule losses 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 cps the losses at each frequency are added up and averaged.[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]

ANALYSIS -- ISSUE 1

The Office accepted that appellant sustained a skull fracture, subdural hematoma and bilateral hearing loss due to a January 23, 2002 work injury. On June 24, 2002 he filed a claim for a schedule award. The Office referred appellant to Dr. Brandow for an audiological and otologic evaluation. In a report dated September 17, 2004, Dr. Brandow diagnosed bilateral sensorineural hearing loss and interpreted an audiogram obtained on that date as revealing four percent hearing loss on the left and no ratable hearing loss on the right.

On January 14, 2006 an Office medical adviser applied the Office's standardized procedures to the September 17, 2004 audiogram by Dr. Brandow. Audiometric testing for the left ear at the frequencies of 500, 1,000, 2,000 and 3,000 cps revealed decibel losses of 10, 30, 30 and 40, respectively. The Office medical adviser totaled the decibel losses at 110 and divided by 4 to obtain the average hearing loss per cycle of 27.5. He then reduced the average of 27.5 by

[5] 5 U.S.C. §§ 8101-8193.

[6] *See* 20 C.F.R. § 10.404; *Bernard A. Babcock, Jr.*, 52 ECAB 143 (2000).

[7] A.M.A., *Guides* 250.

[8] *Id*.

[9] *Id*.

[10] *Id*.

[11] *Reynaldo R. Lichtenberger*, 52 ECAB 462 (2001).

the 25 decibel fence to equal 2.5 decibels for the right ear.[12] The Office medical adviser multiplied the 2.5 by 1.5 to find a 3.75 percent loss for the right ear.

Audiometric testing for the right ear at the frequencies of 500, 1,000, 2,000 and 3,000 cps revealed decibel losses of 10, 20, 20 and 30, respectively. The Office medical adviser totaled the decibel losses at 80 and divided by 4 to obtain the average hearing loss per cycle of 20. He then reduced the average of 20 by the 25 decibel fence to find 0, which he multiplied by 1.5 to find no ratable impairment of the right ear. The Office medical adviser calculated the binaural loss by adding the 0 percent loss of the right ear to the 3.75 percent loss of the left ear, which he divided by 6 to find a .625 percent binaural hearing loss.

The Board finds that the Office medical adviser applied the proper standards to the findings in the September 17, 2004 audiogram prepared on behalf of Dr. Brandow. He explained that he utilized the September 17, 2004 audiogram as it was the most recent. The Office medical adviser noted that hearing loss due to brain injuries potentially improved as swelling decreased. He properly relied upon the September 17, 2004 audiogram as it was the most recent and met all the Office's standards.[13] The result is a 4 percent monaural loss in the left ear and no ratable hearing loss for the right ear.[14]

On appeal, appellant contends that Dr. Brandow did not perform a sufficient examination. He has not, however, submitted any evidence in support of his contention.

LEGAL PRECEDENT -- ISSUE 2

The schedule award provision of the Act[15] and its implementing federal regulations,[16] 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 for all claimants, the Office has adopted the A.M.A., *Guides* as the uniform standard applicable to all claimants.[17] Office

[12] 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* 250.

[13] *See* Federal (FECA) Procedure Manual, Part 3 -- Medical, *Requirement for Medical Reports*, Chapter 3.600.8(a) (September 1994).

[14] Appellant has a .625 or 1 percent rounded, binaural hearing loss. Under the Act, the maximum award for binaural hearing loss is 200 weeks of compensation and for monaural loss is 52 weeks of compensation. 5 U.S.C. § 8107. Since the binaural hearing loss in this case is 1 percent, appellant would be entitled to 1 percent of 200 weeks, or 2 weeks of compensation. As he received 2.08 weeks of compensation for his monaural loss, 4 percent of 52 weeks, the Office properly based his schedule award on the monaural hearing loss calculations. *See Reynaldo R. Lichtenberger*, *supra* note 11.

[15] 5 U.S.C. § 8107.

[16] 20 C.F.R. § 10.404.

[17] *Id*. at § 10.404(a).

procedures direct the use of the fifth edition of the A.M.A., *Guides*, issued in 2001, for all decisions made after February 1, 2001.[18]

No schedule award is payable for a member, function or organ of the body that is not specified in the Act or in the implementing regulations. The Act identifies members such as the arm, leg, hand, foot, thumb and finger, functions as loss of hearing and loss of vision and organs to include the eye.[19] Section 8107(c)(22) provides for the payment of compensation for permanent loss of "any other important external or internal organ of the body as determined by the Secretary of Labor." The Secretary of Labor has made such a determination and pursuant to the authority granted in section 8107(c)(22), added the breast, kidney, larynx, lung, penis, testicle, ovary, uterus and tongue to the schedule.[20]

ANALYSIS -- ISSUE 2

The Office accepted appellant's claim for a skull fracture, subdural hematoma and hearing loss. In a report dated November 25, 2002, Dr. Potluri related his loss of hearing, smell and taste to his employment injury. In a report dated March 18, 2004, Dr. Spurgas attributed appellant's lack of smell and taste to his January 23, 2002 head trauma. He requested a schedule award for his loss of smell and taste.

No schedule award is payable for a member, function or organ of the body not specified in the Act or in the implementing regulations.[21] The Act identifies members such as the arm, leg, hand, foot, thumb and finger, organs to include the eye and functions as loss of hearing and loss of vision.[22] Section 8107(c)(22) of the Act provides for the payment of compensation for permanent loss of "any other important external or internal organ of the body as determined by the Secretary of Labor.[23] The Secretary of Labor has made such a determination, and pursuant to the authority granted in section 8107(c)(22), added the breast, kidney, larynx, lung, penis, testicle, ovary, uterus and tongue to the schedule.[24] While the tongue is listed as a scheduled member, there is no evidence that appellant has any loss of use of the tongue, only a loss of sensation. As the Secretary has not determined, pursuant to the discretionary authority granted in section 8107(c)(22) of the Act, that the sense of smell or taste constitutes any other important external or internal organ of the body, there is no statutory basis for the payment of a schedule award for loss of sensation of the nose or tongue.[25] The Act does not provide for the Office to

[18] Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 4 (June 2003).

[19] 5 U.S.C. § 8107.

[20] 20 C.F.R. § 10.404; *Henry B. Ford, III*, 52 ECAB 220 (2001).

[21] *See Leroy M. Terska*, 53 ECAB 247 (2001).

[22] 5 U.S.C. § 8107(c).

[23] 5 U.S.C. § 8107(c)(22).

[24] *See supra* note 19.

[25] *See Leroy M. Terska, supra* note 21.

add organs or functions to the compensation scheduled on a case-by-case basis nor does the Board have the power to enlarge the provisions of either statute or regulation.[26] The Office properly denied appellant's claim for a schedule award for the loss of taste and smell.

LEGAL PRECEDENT -- ISSUE 3

To require the Office to reopen a case for merit review under section 8128(a) of Act,[27] 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.[28] 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.[29] 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.[30]

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.[31] The Board also has held that the submission of evidence which does not address the particular issue involved does not constitute a basis for reopening a case.[32] 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.[33]

ANALYSIS -- ISSUE 3

The Office granted appellant a schedule award for a four percent permanent hearing loss in the left ear and denied his schedule award claim for loss of smell and taste. On May 21, 2007 appellant requested reconsideration. He asserted that, as part of the tongue's function was taste and as it was listed as a scheduled member under the regulations, he was entitled to an award for his loss of taste. Appellant also contended that Dr. Brandow did not perform a sufficient examination, only partially reviewed the medical records and did not apply the A.M.A., *Guides*. However, he previously raised these arguments before the Office. Evidence or arguments which

[26] *See Janet C. Anderson*, 54 ECAB 394 (2003).

[27] 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."

[28] 20 C.F.R. § 10.606(b)(2).

[29] *Id*. at § 10.607(a).

[30] *Id*. at § 10.608(b).

[31] *Arlesa Gibbs*, 53 ECAB 204 (2001); *James E. Norris*, 52 ECAB 93 (2000).

[32] *Ronald A. Eldridge*, 53 ECAB 218 (2001); *Alan G. Williams*, 52 ECAB 180 (2000).

[33] *Vincent Holmes*, 53 ECAB 468 (2002); *Robert P. Mitchell*, 52 ECAB 116 (2000).

repeats or duplicates evidence already in the case record has no evidentiary value and does not constitute a basis for reopening a case.[34]

Appellant asserted that the Office ignored a 2006 hearing evaluation he submitted from Ms. Frantsovl. The record, however, does not contain a 2006 hearing evaluation from Ms. Frantsovl.

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 new and relevant evidence not previously considered. As he did not meet any of the necessary regulatory requirements, he is not entitled to further merit review.[35]

CONCLUSION

The Board finds that appellant has no more than a four percent permanent impairment of the left ear. The Board further finds that he is not entitled to a schedule award for loss of taste and smell and that the Office properly denied his request for reconsideration of the merits of his claim under 5 U.S.C. § 8128.

[34] *Richard Yadron*, 57 ECAB ___ (Docket No. 05-1738, issued November 8, 2005).

[35] On appeal, appellant requests information under the Freedom of Information Act. The Board, however, is not the proper forum to address the request as its jurisdiction is limited to review of final decisions of the Office. *See Karen L. Yaeger*, 54 ECAB 317 (2003).

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated August 20 and January 10, 2007 are affirmed.

Issued: April 15, 2008
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