United States Department of Labor
Employees' Compensation Appeals Board

G.D., Appellant	)	
and	)	**Docket No. 08-1517**
	)	**Issued: December 3, 2008**
ARIZONA AIR NATIONAL GUARD, Tucson, AZ, 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 May 1, 2008 appellant filed a timely appeal from the Office of Workers' Compensation Programs' July 25 and November 27, 2007 merit decisions, denying his claim for a schedule award for an employment-related loss of hearing, and an April 14, 2008 decision, denying his request for further merit review. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d), the Board has jurisdiction over the merits of the claim.

ISSUES

The issues are: (1) whether appellant established that he sustained a ratable hearing loss entitling him to a schedule award; and (2) whether the Office properly refused to reopen appellant's case for further review of the merits pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On August 9, 2006 appellant, then a 54-year-old fuels distribution system worker, filed an occupational disease claim (Form CA-2) alleging that he developed chronic tinnitus and hearing loss due to high frequency jet noise during his work on the jet line. He had been a full-

time employee since 1974 and, beginning in the early 1990s, experienced progressively worsening ringing in his ears. The employing establishment acknowledged that the work environment around the air force base was very hazardous for noise. Appellant submitted medical and testing records dating from January 23, 1971 to August 16, 2005 demonstrating a progressive hearing loss and confirming his tinnitus.

On April 11, 2007 the Office referred appellant for a second opinion. On April 25, 2007 Dr. Eugene P. Falk, Board-certified in otolaryngology, examined appellant noting, "[h]e does have bilateral tinnitus since 1983." He performed an audiological evaluation finding that appellant had normal hearing in the speech frequencies up to 2,000 cycles per second (cps) but at greater than 2,000 cps there was a sharp drop off which was symmetrical and bilateral to about 60 to 65 decibels with excellent discrimination and normal tympanometry. Dr. Falk observed, "[appellant] will need hearing aids for the rest of his life."

Dr. Brian E. Schindler, an Office medical consultant and Board-certified otolaryngologist, reviewed appellant's record on July 5, 2007. He stated that appellant sustained a bilateral high frequency sensorineural hearing loss causally related to his federal employment and listed April 25, 2007 as the date of appellant's maximum medical improvement. As to calculating a schedule award, Dr. Schindler found that, based on Dr. Falk's April 25, 2007 audiogram, appellant did not have a ratable hearing loss. He also indicated that he would not authorize a hearing aid.

In a decision dated July 25, 2007, the Office accepted that appellant sustained an employment-related hearing loss. However, because the hearing loss was not ratable, it denied a schedule award. Further, the Office denied appellant's request for a hearing aid.

On August 16, 2007 Dr. Ann S. Ash, Board-certified in family medicine, advised the Office arguing that appellant "needs hearing aids and would benefit substantially from them." Appellant subsequently filed a request for reconsideration on August 20, 2007.

On October 2, 2007 the Office requested that Dr. Schindler review the record to determine whether appellant would benefit from a hearing aid and to confirm whether he had a ratable hearing loss. Dr. Schindler responded on November 14, 2007, stating that according to the "A[merican] M[edical] A[ssociation,] [*Guides*] *to* [*the Evaluation of*] *Permanent Impairment* (5th edition) which is the formula used by the [Department of Labor]" appellant has a zero percent hearing loss. He stated that appellant "will not likely experience substantial benefit from hearing aids," however, "a trial of binaural amplification with digital aids could be tried to see if they are helpful."

On November 27, 2007 the Office issued a decision denying appellant a schedule award, finding that he did not have a ratable hearing loss. It authorized hearing aids on a trial basis, maintaining that they would be authorized for ongoing use if appellant and his doctor found them beneficial.

On February 1, 2008 appellant filed a request for reconsideration. He submitted a statement dated January 5, 2008 detailing the impact of his hearing loss and tinnitus on his daily

life and activities. Appellant also submitted several statements from friends and family describing their observations regarding his hearing loss.

On April 14, 2008 the Office denied appellant's request for reconsideration finding that the evidence submitted was not relevant to the issue of whether he sustained a ratable hearing loss.

LEGAL PRECEDENT -- ISSUE 1

The schedule award provision of the Federal Employees' Compensation Act[1] 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 rests 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* (5th ed. 2001) has been adopted by the Office for evaluating schedule losses and the Board has concurred in such adoption.[2]

The Office evaluates industrial hearing loss in accordance with the standards contained in the A.M.A., *Guides*.[3] Using the frequencies of 500, 1,000, 2,000 and 3,000 cps the losses at each frequency are added up and averaged.[4] The average is then reduced by the 25 decibel fence. The remaining amount is multiplied by a factor of 1.5 to arrive at the percentage of monaural hearing loss.[5] 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.[6] The Board has concurred in the Office's adoption of this standard for evaluating hearing loss.[7]

Regarding tinnitus, the A.M.A., *Guides* states:

> "Tinnitus in the presence of unilateral or bilateral hearing impairment may impair speech discrimination. Therefore, add up to five percent for tinnitus in the presence of measurable hearing loss if the tinnitus impacts the ability to perform activities of daily living."[8]

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[1] 5 U.S.C. §§ 8101-8193.

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

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

[4] *Id.*

[5] *Id.*

[6] *Id.*

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

[8] *Supra* note 3.

ANALYSIS -- ISSUE 1

The Board finds that the Office properly determined that appellant had no ratable hearing loss and thus it is not compensable. Dr. Falk, a Board-certified otolaryngologist, reported that appellant sustained bilateral tinnitus since 1983; that although appellant's speech was normal in frequencies up to 2,000 cps, there was a sharp drop off in frequencies greater than 2,000 cps, which was symmetrical and bilateral, but speech discrimination was excellent.

Dr. Schindler, the Office medical consultant, properly applied the fifth edition of the A.M.A., *Guides* and the Office's standardized procedures to the April 25, 2007 audiogram performed by Dr. Falk. Testing for the right ear at frequency levels of 500, 1,000, 2,000 and 3,000 cps revealed decibel losses of 10, 10, 10 and 60 respectively. These decibel losses were totaled at 90 and divided by 4 to obtain the average hearing loss per cycle of 22.5. The average of 22.5 was then reduced by the 25 decibel fence to equal 0 decibels for the right ear. The 0 was multiplied by 1.5 resulting in a 0 percent loss for the right ear. Testing for the left ear revealed decibel losses of 15, 10, 10 and 55, respectively. These decibel losses were totaled at 90 and divided by 4 to obtain the average hearing loss per cycle of 22.5. The average of 22.5 was then reduced by the 25 decibel fence to equal 0 decibels for the left ear. The 0 was multiplied by 1.5 resulting in a 0 percent loss for the left ear. Accordingly, the Office medical adviser correctly calculated appellant's hearing loss under the Office's standardized procedures to be nonratable for both the right and left ear.

The Board finds that Dr. Schindler applied the proper standards to the audiometric findings, resulting in a calculation of zero percent binaural hearing loss. In order to be eligible for a schedule award, appellant must have a loss above 25 decibels when averaging his hearing loss at the 500, 1,000, 2,000 and 3,000 cps levels. This 25 decibel fence exists because, according to the A.M.A., *Guides*, the ability to hear everyday sounds under everyday listening conditions is not impaired when the average hearing loss levels are 25 decibels or less.[9] While the Board finds that appellant sustained an employment-related hearing loss, it is not ratable for purposes of a schedule award.

Further, appellant claimed that he suffered from chronic tinnitus. According to the A.M.A., *Guides*, tinnitus in the presence of monaural hearing impairment may impair speech discrimination and therefore up to five percent may be added to the measurable hearing loss if tinnitus impacts the ability to perform daily activities.[10] However, subjective information regarding the impact of tinnitus on daily life should not be the sole criteria for determining impairment. Objective data must be integrated with the subjective data to estimate the degree of impairment.[11]

In his medical notes, Dr. Falk noted that appellant had bilateral tinnitus since 1983 and his prior medical records established the existence of this condition. However, according to

[9] *See id.*

[10] *Id.*

[11] *Id*.

Dr. Falk, appellant had excellent speech discrimination. Dr. Schindler did not discuss the tinnitus in his report or mention that it impacted appellant's hearing as appellant's hearing loss was not ratable.

Although appellant contends that his tinnitus adversely affects his home and work life, it is for the evaluating physician to integrate any subjective complaints with objective data to estimate the degree of impaired speech discrimination due to tinnitus. The Board finds that appellant is not entitled to an additional award for tinnitus because the medical evidence does not establish a ratable hearing impairment or that tinnitus was impacting his speech discrimination.[12]

LEGAL PRECEDENT -- ISSUE 2

Section 8128(a) of the Act[13] does not entitle a claimant to a review of an Office decision as a matter of right. This section vests the Office with discretionary authority to determine whether it will review an award for or against compensation.[14] The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a).[15]

To require the Office to reopen a case for merit review under section 8128(a) of the Act,[16] the Office's regulations provide 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.[17] 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.[18] 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.[19]

[12] The Board notes that appellant also stated in his appeal that he was authorized for hearing aids on a trial basis and they have improved his quality of life. In its letter authorizing the trial period for the hearing aids, the Office stated that if appellant and his doctor determined the hearing aids to be beneficial they may be authorized on an ongoing basis. If appellant has found the hearing aids useful he should request such ongoing authorization from the Office, as the permanent authorization of hearing aids is not an issue properly before the Board. *See* 20 C.F.R. § 501.2(c).

[13] 5 U.S.C. §§ 8101-8193.

[14] *Id.* at § 8128(a).

[15] *Annette Louise*, 54 ECAB 783, 789-90 (2003).

[16] 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).

[17] 20 C.F.R. § 10.606(b)(2).

[18] *Id*. at § 10.607(a).

[19] *Id.* at § 10.608(b).

The Board has held that the submission of evidence or argument which repeats or duplicates evidence or argument already in the case record[20] and the submission of evidence or argument which does not address the particular issue involved does not constitute a basis for reopening a case.[21]

ANALYSIS -- ISSUE 2

Appellant has not shown that the Office erroneously applied or interpreted a specific point of law; he has not advanced a relevant legal argument not previously considered by the Office, and he has not submitted relevant and pertinent new evidence not previously considered by the Office.

Appellant submitted several statements from himself and his family and friends addressing the impact of his hearing loss on his daily activities. This evidence is not relevant to the issue on reconsideration. The Office's November 27, 2008 decision denied appellant's claim finding that his hearing loss was not ratable and therefore ineligible for a schedule award. The statements addressing his hearing loss are not relevant to the medical question of whether the extent of his hearing loss is ratable. The Board held that the submission of evidence which does not address the particular issue involved in the case does not constitute a basis for reopening the claim.[22]

Further, appellant did not show that the Office erroneously applied or interpreted a point of law, nor did he advance a point of law not previously considered by the Office. Therefore, the Office properly refused to reopen his claim for a review on the merits.

CONCLUSION

The Board finds that appellant did not sustain a ratable hearing loss entitling him to a schedule award. Further, the Office properly denied his request for further merit review.

[20] *D.I.*, 59 ECAB___(Docket No. 07-1534, issued November 6, 2007); *Eugene F. Butler*, 36 ECAB 393, 398 (1984).

[21] *D.K.*, 59 ECAB___(Docket No. 07-1441, issued October 22, 2007); *Edward Matthew Diekemper*, 31 ECAB 224, 225 (1979).

[22] *See David J. McDonald*, 50 ECAB 185 (1998).

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated April 14, 2008 and November 27, 2007 are affirmed.

Issued: December 3, 2008
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