United States Department of Labor
Employees' Compensation Appeals Board

R.H., Appellant	)	
and	)	**Docket No. 08-586**
	)	**Issued: June 18, 2008**
DEPARTMENT OF THE AIR FORCE, MICHIGAN AIR NATIONAL GUARD, Selfridge Air National Guard Base, MI, 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
DAVID S. GERSON, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On December 18, 2007 appellant timely appealed the August 30, 2007 nonmerit decision of the Office of Workers' Compensation Programs, which denied his July 16, 2007 request for reconsideration. He also timely appealed the May 18, 2007 merit decision denying a schedule award for employment-related hearing loss. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d), the Board has jurisdiction over the merits of appellant's claim.

ISSUES

The issues are: (1) whether appellant has a ratable hearing loss; and (2) whether the Office properly denied appellant's July 16, 2007 request for reconsideration under 5 U.S.C. § 8128(a).

FACTUAL HISTORY

Appellant, a 57-year-old retired supervisory firefighter, has an accepted occupational disease claim for bilateral noise-induced hearing loss and sensorineural hearing loss. His

employment-related hearing loss arose on or about May 15, 1985. Appellant retired January 2, 2005.

Dr. Warren L. Brandes, a Board-certified otorhinolaryngologist and Office referral physician, examined appellant on January 13, 2005. An audiogram was administered that same day. Dr. Brandes diagnosed bilateral high frequency sensorineural hearing loss, which he attributed to appellant's occupational noise exposure.

Based on a May 12, 2006 telephone conversation with appellant, the Office began developing appellant's claim for a schedule award. The case file was later referred to the Office medical adviser to determine if appellant had ratable hearing loss due to his accepted condition. In a report dated June 15, 2006, the Office medical adviser found that appellant's January 13, 2005 audiogram did not demonstrate a ratable hearing loss.

By decision dated May 18, 2007, the Office denied appellant's claim for a schedule award. The Office explained that appellant's accepted hearing loss was not severe enough to be considered ratable.

On July 16, 2007 appellant requested reconsideration. The Office subsequently received additional copies of appellant's employee medical records. In a decision dated August 30, 2007, the Office denied appellant's request for reconsideration.

LEGAL PRECEDENT -- ISSUE 1

Section 8107 of the Federal Employees' Compensation Act sets forth the number of weeks of compensation to be paid for the permanent loss of use of specified members, functions and organs of the body.[1] The Act, however, does not specify the manner by which the percentage loss of a member, function or organ shall be determined. To ensure consistent results and equal justice under the law, good administrative practice requires the use of uniform standards applicable to all claimants. The implementing regulations have adopted the American Medical Association, *Guides to the Evaluation of Permanent Impairment* as the appropriate standard for evaluating schedule losses.[2] Effective February 1, 2001, schedule awards are determined in accordance with the A.M.A., *Guides* (5th ed. 2001).[3]

Using the frequencies of 500, 1,000, 2,000 and 3,000 hertz, the losses at each frequency are added up and averaged.[4] The next step is to deduct the "fence" of 25 decibels because losses below this 25-decibel threshold result in no impairment in the ability to hear everyday speech under everyday conditions.[5] The remaining amount is multiplied by 1.5 to arrive at the

[1] For a complete, or 100 percent loss of hearing in one ear, an employee shall receive 52 weeks' compensation. For complete loss of hearing in both ears, an employee shall receive 200 weeks' compensation. 5 U.S.C. § 8107(c)(13) (2000).

[2] 20 C.F.R. § 10.404 (2007).

[3] Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 (June 2003).

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

[5] *Id.*

percentage of monaural hearing loss.[6] The binaural loss is determined by calculating the loss in each ear using the above-noted formula for monaural loss. The side with the lesser hearing loss is multiplied by five, and then added to the opposite-side greater loss, and the sum is divided by six to arrive at the binaural hearing loss.[7]

ANALYSIS -- ISSUE 1

In reviewing appellant's January 13, 2005 audiogram, the frequency levels recorded at 500, 1,000, 2,000 and 3,000 hertz for the right ear reveal decibel losses of 10, 15, 20 and 10, respectively, for a total of 55 decibels. This figure when divided by 4 results in an average hearing loss of 13.75 decibels. The average loss of 13.75 is reduced by 25 decibels to 0, which represents no ratable monaural hearing loss for the right ear. Testing for the left ear at the frequency levels of 500, 1,000, 2,000 and 3,000 hertz revealed decibel losses of 10, 10, 10 and 45 decibels respectively, for a total of 75 decibels, which represented an average loss of 18.75 decibels. When the average loss of 18.75 decibels is reduced by 25 decibels, the result is a 0 percent monaural hearing loss for the left ear. Accordingly, appellant's most recent audiogram does not establish a ratable hearing loss for either ear.

LEGAL PRECEDENT -- ISSUE 2

The Office has the discretion to reopen a case for review on the merits.[8] Section 10.606(b)(2) of Title 20 of the Code of Federal Regulations provides that the application for reconsideration, including all supporting documents, must set forth arguments and contain evidence that either: (i) shows that the Office erroneously applied or interpreted a specific point of law; (ii) advances a relevant legal argument not previously considered by the Office; or (iii) constitutes relevant and pertinent new evidence not previously considered by the Office.[9] Section 10.608(b) provides that, when an application for reconsideration 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.[10]

ANALYSIS - ISSUE 2

Appellant's July 16, 2007 request for reconsideration neither alleged nor demonstrated that the Office erroneously applied or interpreted a specific point of law. Additionally, he did not advance a relevant legal argument not previously considered by the Office. Therefore, appellant is not entitled to a review of the merits of his claim based on the first and second above-noted requirements under section 10.606(b)(2).[11] He also failed to satisfy the third

[6] *Id.*

[7] *Id.*

[8] 5 U.S.C. § 8128(a).

[9] 20 C.F.R. § 10.606(b)(2).

[10] 20 C.F.R. § 10.608(b).

[11] 20 C.F.R. § 10.606(b)(2)(i) and (ii).

requirement under section 10.606(b)(2). On August 23, 2007 the Office received 38 pages of appellant's employee medical records. These documents were already part of the record and thus, do not constitute relevant and pertinent new evidence not previously considered by the Office.[12] Consequently, appellant is not entitled to a review of the merits of his claim based on the third requirement under section 10. 606(b)(2).[13] As he was not entitled to a review of the merits of his claim pursuant to any of the three requirements under section 10.606(b)(2), the Office properly denied the July 16, 2007 request for reconsideration.

CONCLUSION

Appellant does not have a ratable hearing loss; therefore, he is not entitled to a schedule award. The Board further finds that the Office properly denied appellant's July 16, 2007 request for reconsideration.

ORDER

IT IS HEREBY ORDERED THAT the August 30 and May 18, 2007 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: June 18, 2008
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

[12] Submitting additional evidence that repeats or duplicates information already in the record does not constitute a basis for reopening a claim. *James W. Scott*, 55 ECAB 606, 608 n.4 (2004).

[13] 20 C.F.R. § 10.606(b)(2)(iii).