

United States Department of Labor
Employees' Compensation Appeals Board

H.P., Appellant
and
DEPARTMENT OF LABOR, MINE SAFETY
& HEALTH ADMINISTRATION, Mesa, AZ,
Employer

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Docket No. 08-960
Issued: September 10, 2008

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On February 14, 2008 appellant filed a timely appeal from a January 30, 2008 nonmerit decision of the Office of Workers' Compensation Programs that denied his request for reconsideration and an October 17, 2007 decision granting him a schedule award for two percent monaural hearing loss in the right ear. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merit and nonmerit decisions.

ISSUES

The issues are: (1) whether appellant met his burden of proof in establishing that he had more than two percent monaural hearing loss in his right ear and no ratable hearing loss in his left ear; and (2) whether the Office properly denied appellant's request for reconsideration without conducting a merit review.

FACTUAL HISTORY

On November 28, 2006 appellant, then a 71-year-old mine safety and health specialist, filed an occupational disease claim stating that he developed binaural hearing loss in the performance of duty. He first realized the nature of his condition and related it to his employment on July 12, 1995. Appellant attributed his condition to high levels of noise exposure from machinery and equipment, to which he was exposed while performing inspections and compliance assistance at mines. He did not stop work.

The employing establishment confirmed that appellant had noise exposure from rock crushing machines, conveyor belts, milling equipment, blasting operations, mobile equipment, mine fans, slushers, trains, pneumatic operated equipment and construction activities. It indicated that appellant's noise exposure was ongoing. The employing establishment also provided audiometric testing data, personnel records and a noise exposure history for appellant, indicating that his exposure to high noise levels through his federal civilian employment began in January 1978 and continued. In an undated statement, appellant described the noise to which he was exposed during mine visits between March 17, 1978 and the present.

On May 3, 2007 the Office referred appellant to Dr. C. Phillip Daspit, a Board-certified otolaryngologist, for a second opinion to determine the extent of any work-related hearing loss. In a May 18, 2007 report, Dr. Daspit noted that appellant had a history of noise exposure over the course of his federal civilian employment. He explained that appellant was exposed to noise from drills, cone crushers, shaker screens, screw conveyors, fans, generators, motors and other machinery and equipment. Dr. Daspit found normal results in an otologic examination. He diagnosed "bilateral mild-to-moderate high frequency sensorineural hearing loss ... definitely related to many years of loud noise exposure while employed by the [F]ederal [G]overnment as a mine inspector." An audiogram conducted on Dr. Daspit's behalf on May 16, 2008 reflected testing at frequencies of 500, 1,000, 2,000 and 3,000 cycles per second (cps) and showed the following decibel losses: 15, 25, 20 and 45 for the right ear and 10, 20, 15 and 45 for the left ear. Dr. Daspit noted that, pursuant to the American Medical Association, *Guides to the Evaluation of Permanent Impairment*¹ (A.M.A., *Guides*), appellant had two percent monaural hearing loss in the right ear and no ratable monaural hearing loss in the left ear.

On June 11, 2007 the Office accepted appellant's claim for binaural sensorineural hearing loss.

In a June 8, 2007 worksheet, the Office medical adviser calculated appellant's hearing impairment for schedule award purposes. He added the audiometric testing values for the right ear, 15, 25, 20 and 45 to total 85, for an average decibel loss of 21.25 and no ratable monaural hearing loss for the right ear. The medical adviser added the audiometric testing values for the left ear, 10, 20, 15 and 45 to total 90, for an average decibel loss of 22.5 and no ratable monaural hearing loss for the left ear. He recommended that hearing aids be authorized.

¹ A.M.A., *Guides* (5th ed.).

By decision dated June 12, 2007, the Office determined that appellant had no ratable hearing loss and was not entitled to a schedule award. It advised that appellant was entitled to medical benefits for the effect of his injury.

On June 24, 2007 appellant requested an oral hearing, noting that Dr. Daspit informed him that his hearing loss was severe enough to require hearing aids. He also stated that a June 11, 2007 audiogram conducted upon the employing establishment's request had confirmed that he had a hearing loss.

By decision dated August 14, 2007, the hearing representative set aside the June 12, 2007 schedule award denial. She found that the Office medical adviser had incorrectly added the audiometric decibel levels for appellant's right ear to find a total of 85 decibels lost and no ratable hearing loss. However, the test established that appellant lost a total of 105 decibels in his right ear which, under the formula for rating hearing loss, resulted in a two percent monaural hearing loss. The hearing representative directed that the Office grant appellant a schedule award for two percent hearing loss in the right ear.

By decision dated October 17, 2007, the Office granted appellant a schedule award for two percent monaural hearing loss in the right ear.

In an undated appeal form, appellant requested reconsideration. He resubmitted the arguments advanced in support of his oral hearing request. Appellant also noted that the employing establishment had requested another hearing test and he was unaware if the results had been forwarded to the Office.

On December 27, 2007 the Office advised appellant that it had received his reconsideration request but that the form was incomplete. It also noted that appellant's June 24, 2007 statement had already been considered. Appellant sent a January 4, 2008 reconsideration request form and submitted another copy of his June 24, 2007 statement.

By decision dated January 30, 2008, the Office denied appellant's request for reconsideration without conducting a merit review on the grounds that he had neither advanced a new and relevant legal argument nor submitted new evidence.

LEGAL PRECEDENT -- ISSUE 1

The schedule award provision of the Federal Employees' Compensation Act² and its implementing regulation³ 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 to all claimants, good administrative practice necessitates the use of a single set of tables so that there may be

² 5 U.S.C. § 8107.

³ 20 C.F.R. § 10.404 (2002).

uniform standards applicable to all claimants. The A.M.A., *Guides* has been adopted by the implementing regulation as the appropriate standard for evaluating schedule losses.⁴

The Office evaluates industrial hearing loss in accordance with the standards contained in the A.M.A., *Guides*.⁵ Using the frequencies of 500, 1,000, 2,000 and 3,000 cps, the losses at each frequency are added up and averaged.⁶ 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.⁷ The remaining amount is multiplied by a factor of 1.5 to arrive at the percentage of monaural hearing loss.⁸ 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.⁹ The Board has concurred in the Office’s adoption of this standard for evaluating hearing loss.¹⁰

ANALYSIS -- ISSUE 1

The hearing representative applied the Office’s standard procedures, detailed above, to the May 16, 2007 audiogram conducted on Dr. Daspit’s behalf. Appellant’s May 16, 2007 audiogram tested decibel losses at the 500, 1,000, 2,000 and 3,000 cps levels and recorded decibel losses of 15, 25, 20 and 45 respectively for the right ear. The total decibel loss in the right ear is 105 decibels.¹¹ When divided by 4, the result is an average hearing loss of 26.25 decibels. The average loss of 26.25 decibels is reduced by the “fence” of 25 decibels to equal 1.25 decibels, which when multiplied by the established factor of 1.5, results in a 1.875 percent monaural hearing loss, rounded up to a two percent monaural hearing loss for the right ear.

Testing for the left ear at the frequencies of 500, 1,000, 2,000 and 3,000 cps revealed decibel losses of 10, 20, 15 and 45 decibels respectively, for a total decibel loss of 90 decibels. When divided by 4, the result is an average hearing loss of 22.5 decibels. The average loss of 22.5 decibels is reduced by the “fence” of 25 decibels, to equal -2.5 decibels, which when multiplied by the established factor of 1.5, results in no hearing loss.

⁴ *Id.*

⁵ A.M.A. *Guides* 250 (5th ed. 2001).

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Donald E. Stockstad*, 53 ECAB 301 (2002), *petition for recon. granted (modifying prior decision)*, Docket No. 01-1570 (issued August 13, 2002).

¹¹ As properly found in the hearing representative’s August 14, 2007 decision, the Office medical adviser’s June 8, 2007 calculations incorrectly added the decibel losses for the right ear. The hearing representative properly added the values in calculating the hearing loss.

The Board finds that the Office applied the proper standards to the findings stated in Dr. Daspit's May 16, 2007 report and audiogram. The result is two percent monaural hearing loss in the right ear and zero percent monaural hearing loss in the left ear. Therefore, the medical evidence does not establish more than two percent monaural hearing loss in the right ear and a nonratable hearing loss in the left ear.¹²

LEGAL PRECEDENT -- ISSUE 2

Under section 8128 of the Act, the Office has discretion to grant a claimant's request for reconsideration and reopen a case for merit review. Section 10.606(b)(2) of the implementing federal regulation provides guidance for the Office in using this discretion.¹³ The regulation provides that the Office should grant a claimant merit review when the claimant's request for reconsideration and all documents in support thereof:

“(i) Shows that [the Office] erroneously applied or interpreted a specific point of law; or

“(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].”¹⁴

Section 10.608(b) provides that when an application for review of the merits of a claim 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.¹⁵ When reviewing an Office decision denying a merit review, the function of the Board is to determine whether the Office properly applied the standards set forth at section 10.606(b)(2) to the claimant's application for reconsideration and any evidence submitted in support thereof.¹⁶

¹² The Board notes that Dr. Daspit's May 18, 2007 report indicated that appellant complained of tinnitus. Pursuant to the A.M.A., *Guides*, a claimant may be entitled to an additional five percent impairment for tinnitus if there is a measurable hearing loss and it interferes with the activities of daily living. *Robert E. Cullison*, 55 ECAB 570, 573 (2004), *citing* A.M.A., *Guides* 246. However, Dr. Daspit only noted appellant's complaint of tinnitus and did not provide his own diagnosis and findings supporting such a diagnosis. He also did not provide a reasoned opinion addressing how any tinnitus interfered with activities of daily living. Therefore, the Board finds that the Office properly did not address tinnitus when calculating appellant's schedule award.

¹³ 20 C.F.R. § 10.606(b)(2).

¹⁴ *Id.*

¹⁵ 20 C.F.R. § 10.608(b) (1999).

¹⁶ *Annette Louise*, 54 ECAB 783 (2003).

ANALYSIS -- ISSUE 2

Appellant requested reconsideration of the Office's October 17, 2007 decision granting him a schedule award for two percent monaural hearing loss in the right ear. He resubmitted a statement dated June 24, 2007, previously of record, noting that the employing establishment had requested another hearing test and that he was unaware whether the Office had received the results. On December 27, 2007 the Office advised appellant that the request form was incomplete and that the argument provided had been previously submitted. In response, appellant submitted a second reconsideration request form and another copy of his June 24, 2007 statement.

The Board finds that the Office properly denied appellant's request for reconsideration without reviewing the merits because appellant failed to meet the above-listed three regulatory criteria warranting a merit review. Appellant's request for reconsideration neither asserted that the Office misapplied or misinterpreted a point of fact or law nor advanced a new and relevant legal argument. His argument consisted of submitting a copy of the argument he had previously advanced in support of his hearing request, with the addition of a paragraph advising that the employing establishment had referred him for further testing. The Board has held that evidence or argument that repeats or duplicates evidence previously of record has no evidentiary value and does not constitute a basis for reopening a case.¹⁷ Furthermore, the additional statement regarding a hearing test requested by the employing establishment does not show that the Office erroneously applied or interpreted a specific point of law nor does it advance a relevant legal argument not previously considered by the Office as appellant offered no explanation as to how any such request showed an error by the Office or how it advanced new and relevant legal argument. Appellant did not submit the results of the alleged new testing, nor did he provide any additional new and relevant medical evidence in support of his schedule award claim.

Accordingly, the Board finds that appellant has not met the three regulatory criteria for obtaining a merit review. Consequently, the Board finds that the Office properly denied appellant's request for reconsideration without conducting a merit review.

CONCLUSION

The Board finds that appellant has not established that he has more than two percent right ear hearing loss, for which he received a schedule award, or that he has a ratable left ear hearing loss. The Board also finds that the Office properly denied appellant's request for reconsideration without reviewing the merits of the claim.

¹⁷ *J.P.*, 58 ECAB ___ (Docket No. 06-1274, issued January 29, 2007).

ORDER

IT IS HEREBY ORDERED THAT the January 30, 2008 and October 17, 2007 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: September 10, 2008
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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