United States Department of Labor
Employees' Compensation Appeals Board

M.P., Appellant	)	
and	)	**Docket No. 08-1742**
	)	**Issued: February 2, 2009**
U.S. ARMY CORPS OF ENGINEERS, J. STROM THURMOND POWER PLANT, Savannah, GA, 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
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On June 3, 2008 appellant filed a timely appeal from the April 28, 2008 merit decision of the Office of Workers' Compensation Programs granting him a schedule award for four percent permanent impairment of binaural hearing loss. The record also contains an Office decision dated May 14, 2008 denying appellant's request for review of the merits of his claim pursuant to 5 U.S.C. § 8128(a). Pursuant to 5 U.S.C. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merit schedule award decision and the nonmerit decision in this case.

ISSUES

The issues are: (1) whether appellant has more than four percent binaural hearing loss for which he received a schedule award; and (2) whether the Office properly denied appellant's request for reconsideration pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On October 29, 2007 appellant, then a 52-year-old power plant mechanic, filed an occupational disease claim for hearing loss in both ears caused by noise exposure in the course of his federal employment. He indicated that he first became aware of his hearing loss on January 19, 1995 and realized it was caused by his employment on October 24, 2007 after undergoing an audiological evaluation. Appellant did not stop work. He subsequently filed Form CA-7, claim for compensation, on October 29, 2007 requesting a schedule award for his hearing loss. The employing establishment submitted results from its March and October 2001 and August 2007 hazardous noise survey documenting the decibel levels at appellant's workplace.

On February 28, 2008 the Office referred appellant to Dr. Thomas Crews, a Board-certified otolaryngologist, for a second opinion evaluation to determine whether he sustained a noise-induced hearing loss condition caused by noise exposure during federal employment. Dr. Crews submitted a March 14, 2008 report detailing his examination with an accompanying audiogram made on the same day. He diagnosed noise induced bilateral high frequency sensorneural hearing loss and opined that appellant's hearing loss was due to noise exposure encountered in his workplace given the absence of any other precipitating factors. Dr. Crews also recommended a trial of amplification. An audiogram performed on behalf of his on March 14, 2008 reflected testing at the frequency levels of 500, 1,000, 2,000 and 3,000 cycles per second (cps) and revealed the following decibel losses: 15, 15, 20 and 65 for the right ear and 15, 15, 25 and 55 for the left ear respectively.

In an April 18, 2008 report, an Office medical adviser reviewed Dr. Crews' report and audiometric test results and concluded that appellant had a four percent bilateral sensorineural hearing loss. In addition to authorizing hearing aids, the Office medical adviser also noted that the date of appellant's maximum medical improvement was March 14, 2008, the date of Dr. Crews' examination.

On April 22, 2008 the Office accepted appellant's occupational disease claim for bilateral sensorineural hearing loss. In an April 28, 2008 decision, it granted a schedule award for a four percent bilateral hearing loss. The period of the award ran for eight weeks from March 14 to May 8, 2008.

In a May 6, 2008 letter, appellant requested reconsideration on the basis that the number of weeks of compensation awarded was too low. He also noted that wearing hearing aids was like a permanent disfigurement.

On May 14, 2008 the Office denied appellant's request for reconsideration without reviewing the merits on the grounds that appellant did not raise any substantive legal questions or submit new and relevant evidence.

LEGAL PRECEDENT -- ISSUE 1

The schedule award provision of the Federal Employees' Compensation Act and its implementing regulations 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. Where the loss of use is less than 100 percent, the amount of compensation is paid in proportion to the percentage loss of use. 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 sounds 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* (5th ed. 2001) has been adopted by the Office for evaluating schedule losses and the Board has concurred in such adoption.[1]

The Office evaluates industrial hearing loss in accordance with the standards contained in the A.M.A., *Guides*. 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. 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. The remaining amount is multiplied by a factor of 1.5 to arrive at the percentage of monaural hearing loss. 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. The Board has concurred in the Office's adoption of this standard for evaluating hearing loss.[2]

ANALYSIS -- ISSUE 1

Appellant submitted a claim for hearing loss and the Office developed the claim by referring him to Dr. Crews who opined that appellant's hearing loss was due to noise exposure encountered in his workplace given the absence of any other precipitating factors. Dr. Crews also had an audiogram performed on his behalf and he recommended a trial of amplification.

The Office medical adviser applied the Office's standard procedures, as noted by the March 14, 2008 audiogram. The Office tested decibel losses at 500, 1,000, 2,000 and 3,000 cycles per second and recorded decibel losses of 15, 15, 20 and 65 respectively in the right ear. The total decibel loss in the right ear is 115 decibels. When divided by 4, the result is an average hearing loss of 28.75 decibels. The average loss of 28.75 decibels is reduced by the fence of 25 decibels to equal 0, which when multiplied by the established factor of 1.5, resulted in 5.63 percent impairment of the right ear. The audiogram tested decibel losses for the left ear at 500, 1,000, 2,000 and 3,000 cycles per second and recorded decibel losses of 15, 15, 25 and 55 respectively for a total decibel loss of 110 decibels. When divided by 4, the result is an average hearing loss of 27.5 decibels. The average loss of 27.55 decibels is reduced by the fence of 25

[1] *Harry Butler*, 43 ECAB 859 (1992).

[2] *E.S.*, 59 ECAB ___ (Docket No. 07-1587, issued December 10, 2007); *Donald E. Stockstad*, 53 ECAB 301 (2002), *petition for recon. granted (modifying prior decision)*, Docket No. 01-1570 (issued August 13, 2002).

decibels to equal 0, which when multiplied by the established factor of 1.5, resulted in 3.75 percent impairment of the left ear. The Office medical adviser then proceeded to calculate appellant's binaural hearing loss. The 3.75 percent hearing loss for the left ear, when multiplied by 5, yielded a product of 18.75. The 18.75 was then added to the 5.63 percent hearing loss for the right ear to obtain a total of 24.38. The 24.38 was then divided by 6, in order to calculate a binaural hearing loss of 4.06 percent, rounded to 4 percent. Therefore, the evidence of record does not establish that appellant has greater than a four percent binaural hearing loss.

As noted, when the loss of use is less than 100 percent, the amount of compensation is paid in proportion to the percentage loss of use. The compensation schedule in the Act provides 200 weeks of compensation for complete loss of hearing in both ears.[3] The 200 weeks of compensation was multiplied by four percent in order to calculate 8 weeks as the appropriate duration of compensation. Under the Office's standardized procedures for determining hearing loss impairment, appellant has no greater impairment. Consequently, the Office properly awarded appellant eight weeks of compensation for a four percent binaural hearing loss.

LEGAL PRECEDENT -- ISSUE 2

To require the Office to reopen a case for merit review under section 8128(a), 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.[4] 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.[5]

ANALYSIS -- ISSUE 2

Appellant's request for reconsideration consists of a letter asserting that the number of weeks of compensation awarded was too low for a permanent disability and those hearing aids were a permanent disfigurement. However, he does not satisfy any of the three criteria required to reopen a case for merit review. Appellant's letter does not attempt to show that the Office erroneously applied the law because he did not identify a point of law that was erroneously applied or interpreted. He also did not advance any new relevant legal arguments in his letter requesting reconsideration. In addition, appellant did not submit any new medical evidence, which is necessary to determine the medical issue of hearing loss impairment. As a result, no relevant and pertinent new evidence supports his request for reconsideration.

Furthermore, appellant's assertion that hearing aids are a permanent disfigurement is not compensable according to the terms of the Act. His hearing aids do not constitute a serious disfigurement of the face, head or neck of a character likely to handicap him in securing or

[3] 5 U.S.C. § 8107(c)(13)(b).

[4] 20 C.F.R. § 10.606(b)(2).

[5] *Id.* at § 10.608(b).

maintaining employment.[6] Therefore, appellant is not entitled to additional compensation due to his use of hearing aids.

Consequently, the Office properly denied appellant's request for reconsideration without a merit review.

CONCLUSION

The Board finds that the Office properly awarded eight weeks of compensation for a four percent binaural hearing loss. The Board also finds that the Office properly denied appellant's request for reconsideration without a review of the merits.

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs decisions dated May 14 and April 28, 2008 are affirmed.

Issued: February 2, 2009
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

[6] *See* 5 U.S.C. § 8107(c)(21); *see also William Tipler*, 45 ECAB 185 (1993) (the Office nor the Board has the authority to enlarge the terms of the Act or to make an award of benefits under any terms other than those specified in the statute).