United States Department of Labor
Employees' Compensation Appeals Board

M.P., Appellant	)	
and	)	**Docket No. 08-1785**
	)	**Issued: January 9, 2009**
DEPARTMENT OF THE NAVY, PUGET SOUND NAVAL SHIPYARD, Bremerton, WA, 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
COLLEEN DUFFY KIKO, Judge

JURISDICTION

On June 10, 2008 appellant filed a timely appeal of the decision of the Office of Workers' Compensation Programs dated December 3, 2007, denying his claim for a schedule award as the Office found that he had no ratable hearing loss in the left ear and tinnitus. His appeal is also timely filed from the February 15, 2008 decision, denying appellant's request for an oral hearing. Finally, appellant's appeal was timely filed from the May 9, 2008 decision denying his claim for reconsideration. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review the merits and nonmerits of this case.

ISSUES

The issues are: (1) whether appellant established entitlement to a schedule award due to a monaural (left ear) hearing loss and tinnitus causally related to factors of his federal employment; (2) whether the Office properly denied appellant's request for an oral hearing; and (3) whether the Office properly refused to reopen appellant's case for further review of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On January 25, 2007 appellant, then a 53-year-old former crane operator, filed an occupational disease claim alleging that he suffered hearing loss as a result of working around loud noise during his federal employment. He noted that his right middle ear bone was damaged in childhood. The employing establishment noted on the claim form that appellant was removed from employment on February 19, 2003.

In support of his claim, appellant submitted a February 8, 2007 report wherein Dr. Gerald G. Randolph, a Board-certified otolaryngologist, diagnosed bilateral sensorineural hearing loss and tinnitus in the left ear. Dr. Randolph noted that appellant has indicated that for the past 20 years he had a progressive hearing loss in both ears and constant tinnitus in his left ear. He noted that appellant suffered a right ear injury as a young child resulting in persisting hearing loss in his right ear. Dr. Randolph also noted that appellant was on active duty with the Navy from 1973 to 1977 where he had noise exposure. He noted that from 1977 to May 2001 appellant was employed as a heavy equipment operator and then a crane operator at the employing establishment. Dr. Randolph noted that appellant's audiogram revealed a very significant sensorineural hearing loss in the right ear. He noted that this hearing loss was present on audiograms dating back to November 23, 1983 and may have progressed somewhat in severity for those higher tones since 1983. Dr. Randolph opined that appellant had a 37.5 percent hearing loss in the right ear, a 0 percent hearing loss in the left ear and a binaural hearing loss ratable at 6.25 percent. He also recommended a two percent rating for tinnitus noting that appellant's tinnitus tended to interfere with aspects of normal daily living. Dr. Randolph noted that review of claimant's industrial audiograms dating back to the time of his initial employment for the employing establishment in 1977 would be necessary to determine if the hearing loss has been aggravated by industrial noise exposure. The audiogram performed in connection with this examination, taken on February 6, 2007 was also submitted.[1]

Appellant also submitted results of prior audiograms conducted for the employing establishment.

By letter dated April 25, 2007, the Office asked Dr. Randolph to perform an "independent medical examination."[2] In an opinion dated May 22, 2007, Dr. Randolph diagnosed bilateral sensorineural hearing loss. He noted that the hearing loss was considerably in excess of what would normally be predicted on the basis of presbycusis. Dr. Randolph opined that the workplace exposure was of sufficient intensity and duration to have aggravated hearing

[1] This audiogram reflected testing at frequency levels of 500, 1,000, 2,000 and 3,000 cycles per second (cps) and revealed decibel loss on the left of 20, 20, 20 and 15 (air) and 15, 20, 15 and 15 (bone), respectively. For the right ear the losses were noted as 15, 20, 80 and 85 (air) and 10, 15, 80 and 85 (bone), respectively. The audiologist calculated this as showing a 0 percent impairment to the left ear and a 37.5 percent (air) and 35.625 percent impairment (bone) to the right ear, which she noted would be a 27 percent (air) and 25.125 percent impairment (bone) if adjusted for presbycusis. She calculated appellant's binaural hearing loss as 6.25 percent (air) and 5.94 percent (bone).

[2] The Board notes that although the Office referred appellant to Dr. Randolph for an "independent" examination thereby implying a conflict in medical opinion pursuant to 5 U.S.C. § 8123(a), there was no conflict in medical opinion as appellant had initially selected Dr. Randolph and there was no opposing medical evidence.

loss if inadequate ear protection were utilized. He opined that, on a more probable than not basis, the hearing loss in appellant's left ear has not been aggravated by industrial noise exposure. With regard to the right ear, Dr. Randolph indicated that, on a more probable than not basis, the increased hearing loss in the right ear was not related to noise and suggested a private otolaryngologic evaluation to rule out acoustic neuroma. He then recommended a two percent rating for tinnitus as it did interfere with sleep and activities. Dr. Randolph noted that, in the absence of evidence of increasing hearing loss due to noise exposure, he could not specifically state that the tinnitis was related to industrial noise, but he did note that appellant had noise exposure during his federal employment and that the tinnitus in his left ear began while he was working for the employing establishment. The results of an audiogram conducted for Dr. Randolph were also submitted.[3]

By letter dated July 10, 2007, the Office asked the Office medical adviser to review appellant's hearing loss claim. In a report dated July 13, 2007, the Office medical adviser noted that he needed the audiogram performed on February 26, 2007. He noted that this was the closest valid audiogram to appellant's last workplace noise exposure so this test would be more significant than the one performed on May 22, 2007. The Office medical adviser then noted that appellant had hearing loss in his right ear secondary to nonwork-related accident and indicated that both Dr. Randolph and he did not feel that workplace noise exposures aggravated the loss in this ear.

The Office medical adviser disagreed with Dr. Randolph in that he believed that appellant's left ear hearing loss was related to his federal employment workplace noise exposure. He noted that, since he did not have the February 26, 2007 audiogram, he could not confirm that this audiogram showed zero percent loss but that if the audiogram did show a zero percent hearing loss impairment than no tinnitus rating may be given.

By letter dated July 23 2007, the Office accepted appellant's claim for noise-induced monaural tinnitus in his left ear. In a decision dated July 24, 2007, it denied appellant's claim for a schedule award for tinnitus.

On July 26, 2007 appellant filed a claim for a schedule award.

On August 9, 2007 appellant requested review of the written record by an Office hearing representative. By letter dated October 2, 2007, he requested an oral hearing. Appellant contended that he was ill-advised by a representative of Conner Hearing Clinic who he did not believe completely informed him of the various appeals available.

By decision dated October 19, 2007, the hearing representative set aside the Office's decision and remanded the case for further development of the evidence. He noted that the Office medical adviser indicated that he needed the audiogram performed by Dr. Randolph's office on February 25, 2007, but it was never given to him.

[3] This audiogram, conducted on May 22, 2007 reflected testing at frequency levels of 500, 1,000, 2,000 and 3,000 cps and revealed decibel losses on the right ear (air) of 25, 25, 85 and 105, respectively and 25, 20, 20 and 20, respectively for the left ear.

By letter dated November 5, 2007, the Office forwarded the February 6, 2007 audiogram to the Office medical adviser and asked him to determine if the tinnitus was ratable due to appellant's federal employment and if so, to provide the percentage of impairment. In a medical report dated November 6, 2007, the Office medical adviser concluded that appellant's hearing loss in his left ear was related to his workplace noise exposure and that the right ear hearing loss was due to a prior accident and was not work related. He did note that the right monaural hearing impairment was 37.5 percent and that the binaural hearing impairment would be 6.3 percent. The Office medical adviser noted that he did not believe the right ear impairment was work related, but that if the Office disagreed, then appellant would be entitled to a right ear impairment of 37.5 percent plus 2 percent for tinnitus for a total of 39.5 percent. He did note that appellant's tinnitus was at least aggravated by his workplace exposure and recommended hearing aids to help with tinnitus symptoms.

By decision dated December 3, 2007, the Office found that appellant had not established a ratable impairment due to hearing loss or tinnitus.

By letter dated February 3, 2008, appellant requested an oral hearing. He noted that, although he had not filed this request within 30 days, he asked that the request be allowed because at the time of the decision he was not aware of the various avenues of appeal available. Appellant further noted that he was unable to find an attorney to represent him at a reasonable fee.

By decision dated February 15, 2008, the Office denied appellant's request for an oral hearing as untimely filed. It further found that appellant's request could be equally well addressed by requesting reconsideration from the Office and submitting new evidence or appealing to this Board.

By letter dated March 19, 2008, appellant requested reconsideration. He contended that his tinnitus was in both ears and not just his left ear and that he was entitled to a schedule award.

By decision dated May 9, 2008, the Office denied appellant's claim for reconsideration without reviewing the merits of the case.

LEGAL PRECEDENT -- ISSUE 1

The schedule award provision of the Federal Employees' Compensation Act[4] and its implementing regulation[5] 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 uniform standards applicable to all claimants. The American Medical Association, *Guides to the*

[4] 5 U.S.C. § 8107.

[5] 20 C.F.R. § 10.404.

Evaluation of Permanent Impairment (A.M.A., *Guides*) has been adopted by the implementing regulations as the appropriate standard for evaluating schedule losses.[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] 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.[9] The remaining amount is multiplied by a factor of 1.5 to arrive at the percentage of monaural hearing loss.[10] 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.[11] The Board has concurred in the Office's adoption of this standard for evaluating hearing loss.[12]

Regarding tinnitus, the A.M.A., *Guides* states that tinnitus in the presence of unilateral or bilateral hearing impairment may impair speech discrimination. Therefore, up to five percent may be added for tinnitus in the presence of measurable hearing loss, if the tinnitus impacts the ability to perform the activities of daily living.[13]

ANALYSIS -- ISSUE 1

The Board finds that the evidence of record is insufficient to establish that appellant is entitled to a schedule award as his hearing loss in the left ear in accordance with the fifth edition of the A.M.A., *Guides* is not ratable.[14]

Dr. Randolph concluded on May 22, 2007 that appellant's right ear hearing loss was not aggravated by his employment factors as it was due to a childhood middle ear injury. However, he further concluded that the left ear loss and tinnitus were due to noise exposure causally related to factors of appellant's federal employment.

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[6] *Id.*

[7] A.M.A., *Guides* 246-51 (5th ed. 2001).

[8] *Id.*

[9] *Id.*

[10] *Id.*

[11] *Id*.

[12] *See B.A.*, 58 ECAB ___ (Docket No. 06-2048, issued January 10, 2007; *see also Donald Stockstad*, 53 ECAB 301 (2002), *petition for recon. granted (modifying prior decision)*, Docket No. 01-1570 (issued August 13, 2002).

[13] A.M.A., *Guides* 246.

[14] The Board notes that the Office never issued a decision with regard to any impairment to appellant's right ear. Accordingly, whether appellant was entitled to a schedule award for any impairment to his right ear is not currently before the Board. *See* 20 C.F.R. § 501.2(c).

The Office medical adviser and Dr. Randolph both properly concluded that appellant had no ratable hearing impairment to his left ear. Using the results for the February 6, 2007 audiogram, the Office medical adviser reviewed the otologic and audiologic testing of Dr. Randolph and properly applied the Office's standardized procedures to this evaluation. Testing for the left ear at the frequency levels of 500, 1,000, 2,000 and 3,000 cps revealed decibel losses of 20, 20, 20 and 15, respectively. These decibel losses were totaled at 75.0 decibels and were divided by 4 to obtain the average hearing loss of 18.75 decibels. The average loss was then reduced by 25 decibels (25 decibels being discounted as discussed above) to equal a negative figure.

With regard to the tinnitus, the Board notes that the A.M.A., *Guides* provides that up to five percent may be added for tinnitus in the presence of measurable hearing loss if the tinnitus impacts the ability to perform the activities of daily living.[15] There is no provision for an award in the absence of a measurable hearing loss. As "measurable" is synonymous with "ratable," the Board finds, accordingly, that appellant's left ear loss is not ratable and thus he is not entitled to a schedule award for tinnitus.

LEGAL PRECEDENT -- ISSUE 2

Section 8124(b)(1) of the Act provides that, before review under section 8128(a) of this title, a claimant not satisfied with a decision of the Secretary is entitled, on request made within 30 days after the date of the issuance of the decision, to a hearing on his claim before a representative of the Secretary.[16] Section 10.614 of the federal regulations implementing this section of the Act provides that a claimant shall be afforded a choice of an oral hearing or a review of the written record.[17] The Office's regulations provide that the request must be sent within 30 days of the date of the decision, for which a hearing is sought and also that the claimant must not have previously submitted a reconsideration request (whether or not it was granted) on the same decision.[18]

The Board has held that the Office, in its broad discretionary authority in the administration of the Act, has the power to hold hearings in certain circumstances where no legal provision was made for such hearings and that the Office must exercise this discretionary authority in deciding whether to grant a hearing.[19] The Office's procedures, which require the Office to exercise its discretion to deny a hearing when the request is untimely or made after reconsideration, are a proper interpretation of Board precedent.[20]

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[15] *See supra* note 13.

[16] 5 U.S.C. § 8124(b)(1).

[17] 20 C.F.R. § 10.615.

[18] *Id*. at § 10.616(a).

[19] *Marilyn F. Wilson*, 52 ECAB 347 (2001).

[20] *Teresa M. Valle*, 57 ECAB 542 (2006). *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Hearings and Review of the Written Record*, Chapter 2.1601.4(b)(3) (October 1992).

ANALYSIS -- ISSUE 2

The Board finds that the Office properly denied appellant's request for an oral hearing as untimely filed. Appellant requested an oral hearing following the Office's December 3, 2007 decision. His request was dated February 3, 2008, more than 30 days after the December 3, 2007 decision was issued. Therefore, appellant was not entitled to a hearing as a matter of right.

The Office nevertheless exercised its discretionary authority by further considering appellant's request for a hearing in relation to the issue involved. It determined that the issue in the case could be equally well addressed by requesting reconsideration by the district Office and submitting new evidence in support of his claim. The Board finds that the Office appropriately exercised its discretion in denying appellant's hearing request. Accordingly, the Board finds that the Office's denial of appellant's untimely hearing request was proper.

LEGAL PRECEDENT -- ISSUE 3

To require the Office to reopen a case for merit review under section 8128(a) of the Act, the Office's regulations provide that the application for reconsideration, including all supporting documents, must set forth arguments and contain evidence that either: (1) shows that the Office erroneously applied or interpreted a specific point of law; (2) advances a relevant legal argument not previously considered by the Office; or (3) constitutes relevant and pertinent new evidence not previously considered by the Office.[21]

ANALYSIS -- ISSUE 3

The Board finds that appellant's request for reconsideration neither alleged nor demonstrated that the Office erroneously applied or interpreted a specific point of law. Furthermore, appellant did not submit any pertinent new and relevant evidence in support of his request for reconsideration. Thus, the Office properly declines to reopen the case on the merits as appellant did not meet the criteria for a merit review.[22]

CONCLUSION

The Board finds that the Office properly denied appellant's claim for a schedule award for a left ear hearing loss and tinnitus. The Board further finds that the Office properly denied appellant's request for an oral hearing and properly refused to reopen his case for further review of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

[21] 20 C.F.R. § 10.606(b)(2)(i-iii).

[22] *Id.*

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated May 9 and February 15, 2008 and December 3, 2007 are affirmed.

Issued: January 9, 2009
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board