United States Department of Labor
Employees' Compensation Appeals Board

T.T., Appellant	)	
and	)	**Docket No. 09-1223**
	)	**Issued: January 20, 2010**
TENNESSEE VALLEY AUTHORITY, ALLEN FOSSIL PLANT, Memphis, TN, Employer	)	

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
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On April 7, 2009 appellant filed a timely appeal from the Office of Workers' Compensation Programs' merit decision dated October 22, 2008, which denied his claim for a schedule award. He also appealed a decision which denied merit review. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the schedule award in this case.

ISSUES

The issues are: (1) whether the Office properly denied appellant's claim for a schedule award for hearing loss; and (2) whether the Office properly denied appellant's request for reconsideration.

FACTUAL HISTORY

On April 8, 2008 appellant, then a 57-year-old laborer, filed a claim alleging that he sustained permanent hearing loss while in the performance of duty. He became aware of his hearing loss on April 3, 2008 and continues to be exposed to noise at his job.

On May 12, 2008 the Office requested additional medical evidence from appellant stating that the initial information submitted was insufficient to establish an injury. It also requested information from the employing establishment addressing appellant's claim.

The employing establishment submitted audiograms taken on its behalf from March 10, 1983 to August 17, 2007 which revealed mildly progressive hearing loss. Also submitted were employer medical records from May 4, 1977 to April 20, 1987 which noted appellant participated in an occupational health and hearing conservation program beginning in 1983 and was tested annually and required to wear earplugs. Also submitted was a job history summary from 1977 to 1987.

Appellant submitted an employment history with a job description for a laborer. In an accompanying statement, he noted working from May 1977 to the present as a laborer and molder where he spent 8 to 16 hours a day up to 7 days a week working on boilers. Appellant was exposed to noise from large fans and condensation pumps. He reported no exposure to hazardous noise outside of his employment.

On July 14, 2008 an Office claims examiner held a conference call with appellant to verify his childhood illnesses, current medications and to confirm his work status. Appellant reported having no childhood illnesses and noted that he was taking hypertension medication and was still working for the employer. A July 15, 2008 statement of accepted facts set forth appellant's noise exposure history prior to and during his employment with the employing establishment.

By letter dated July 15, 2008, the Office referred appellant and the statement of accepted facts to Dr. Mark P. Clemons, a Board-certified otolaryngologist, for an otologic examination and an audiological evaluation. Dr. Clemons performed an otologic evaluation of appellant on September 10, 2008 and audiometric testing was conducted on his behalf on the same date. Testing at the frequency levels of 500, 1,000, 2,000 and 3,000 cycles per second revealed the following: right ear 10, 20, 25 and 40 decibels; left ear 10, 20, 25 and 35 decibels. Dr. Clemons determined that appellant sustained sensorineural hearing loss which was at least in part due to the noise exposure encountered in appellant's employment. He recommended a trial of hearing aids but noted that they might not benefit appellant.

On October 20, 2008 an Office medical adviser reviewed Dr. Clemons' report and the audiometric test of September 10, 2008. He concluded that, in accordance with the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*,[1] (A.M.A., *Guides*), appellant had zero percent monaural hearing loss in each ear. The medical adviser determined that appellant's hearing loss was not severe enough to be ratable for a schedule award after applying the Office's current standards for evaluating hearing loss to the results of the September 10, 2008 audiogram. He did not recommend hearing aids be authorized.

On October 22, 2008 the Office accepted appellant's claim for hearing loss. It noted that although appellant's hearing loss was employment related it was not severe enough to be

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

considered ratable for purposes of a schedule award. The Office noted that the medical evidence revealed that appellant would not benefit from hearing aids.

On November 17, 2008 appellant requested reconsideration. He submitted a November 7, 2008 statement and disagreed with the Office's decision and advised that he would be submitting additional evidence from his physician which establishes his claim. Appellant submitted a duplicate copy of the medical adviser's report of October 20, 2008 and the October 22, 2008 Office decision.

In a December 16, 2008 decision, the Office denied appellant's reconsideration request finding that the request was insufficient to warrant review of the prior decision.

LEGAL PRECEDENT -- ISSUE 1

The schedule award provision of the Federal Employees' Compensation Act[2] and its implementing regulations[3] 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 A.M.A., *Guides* has been adopted by the implementing regulations 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 cycles per second, 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

[2] 5 U.S.C. § 8107.

[3] 20 C.F.R. § 10.404 (1999).

[4] *Id. See also Jacqueline S. Harris,* 54 ECAB 139 (2002).

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

[6] *Id.*

[7] *Id.*

[8] *Id.*

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 Office properly referred appellant to Dr. Clemons regarding his hearing loss. An Office medical adviser reviewed Dr. Clemons findings and concluded that appellant's hearing loss was aggravated by his employment. The medical adviser applied the Office's standardized procedures to the September 10, 2008 audiogram performed for Dr. Clemons. Testing for the right ear at the frequency levels of 500, 1,000, 2,000 and 3,000 cycles per second revealed decibels losses of 10, 20, 25, and 40, respectively. These decibels were totaled at 95 and were divided by 4 to obtain an average hearing loss at those cycles of 23.75 decibels. The average of 23.75 decibels was then reduced by 25 decibels (the first 25 decibels were discounted as discussed above) to equal zero percent hearing loss for the right ear. Testing for the left ear at the frequency levels of 500, 1,000, 2,000 and 3,000 cycles per second revealed decibels losses of 10, 20, 25 and 35 respectively. These decibels were totaled at 90 and were divided by 4 to obtain the average hearing loss at those cycles of 23.75 decibels. The average of 23.75 decibels was then reduced by 25 decibels (the first 25 decibels were discounted as discussed above) to zero which was multiplied by the established factor of 1.5 to compute a zero percent hearing loss for the left ear.

The Board finds that the Office medical adviser applied the proper standards to Dr. Clemons' September 10, 2008 report and the September 10, 2008 audiogram. The result is a zero percent monaural hearing loss and a zero percent binaural hearing loss as set forth above. The Board also notes that, while Dr. Clemons recommended a trial of hearing aids, his opinion is equivocal on this aspect of the claim as he also questioned whether they would be of any benefit to appellant.[11] The Office medical adviser determined that hearing aids should not be authorized. Consequently, the Board finds that the Office also properly denied authorization for hearing aids.

LEGAL PRECEDENT -- ISSUE 2

Under section 8128(a) of the Act,[12] the Office has the discretion to reopen a case for review on the merits. The Office must exercise this discretion in accordance with the guidelines set forth in section 10.606(b)(2) of the implementing federal regulations,[13] which provide that a

[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] *See T.M.*, 60 ECAB ___ (Docket No. 08-975, issued February 6, 2009) (the Board has held that medical opinions which are speculative or equivocal in character have little probative value).

[12] 5 U.S.C. § 8128(a).

[13] 20 C.F.R. § 10.606(b).

claimant may obtain review of the merits of his or her written application for reconsideration, including all supporting documents, sets forth arguments and contain evidence that:

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

Section 10.608(b) provides that any application for review of the merits of the claim which does not meet at least one of the requirements listed in section 10.606(b) will be denied by the Office without review of the merits of the claim.[14]

ANALYSIS -- ISSUE 2

Appellant's November 17, 2008 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.

Appellant submitted a narrative statement dated November 7, 2008 and asserted that he disagreed with the Office's decision denying his claim for a schedule award for hearing loss and advised that he would be submitting additional evidence from his physician which established his claim. These assertions do not demonstrate that the Office erroneously applied or interpreted a specific point of law nor do they advance a relevant legal argument not previously considered by the Office. Appellant did not set forth a particular point of law or fact that the Office had not considered or establish that the Office had erroneously interpreted a point of law. Although he indicated additional medical evidence would be forthcoming no additional evidence was received. Consequently, 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).

With respect to the third requirement, appellant did not submit any relevant new evidence with his reconsideration request. He submitted a copy of the medical adviser's report of October 20, 2008 and the October 22, 2008 Office decision. This evidence is duplicative of evidence contained in the record and was previously considered by the Office.[15] Although appellant indicated that new evidence was forthcoming, no additional evidence was received prior to the December 16, 2008 decision. The Office's October 22, 2008 decision denied a schedule award because there was no medical evidence supporting a ratable impairment. Thus, the underlying issue is medical in nature. As such it is appellant's obligation to submit new

[14] *Id.* at § 10.608(b).

[15] Evidence that repeats or duplicates evidence already in the case record has no evidentiary value and does not constitute a basis for reopening a case; *see Daniel Deparini,* 44 ECAB 657 (1993); *Eugene F. Butler,* 36 ECAB 393, 398 (1984); *Bruce E. Martin,* 35 ECAB 1090, 1093-94 (1984).

medical evidence to support that an employment-related condition caused permanent impairment of a scheduled member of the body. But, as noted above, appellant did not submit any new and relevant medical evidence with his reconsideration request. Therefore, the Office properly denied this reconsideration request.

The Board finds that the Office properly determined that appellant 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), and properly denied his request for reconsideration.

CONCLUSION

The Board finds the Office properly denied appellant's claim for a schedule award for hearing loss and properly denied appellant's request for reconsideration.

ORDER

IT IS HEREBY ORDERED THAT the December 16 and October 22, 2008 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: January 20, 2010
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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