

**United States Department of Labor
Employees' Compensation Appeals Board**

R.B., Appellant

and

U.S. POSTAL SERVICE, POST OFFICE,
Phoenix, AZ, Employer

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**Docket No. 10-148
Issued: July 9, 2010**

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 October 20, 2009 appellant filed a timely appeal from the September 1, 2009 decision of the Office of Workers' Compensation Programs adjudicating his schedule award claim and the October 8, 2009 decision denying his reconsideration request. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether appellant has greater than four percent monaural hearing loss in his right ear and any ratable hearing loss in his left ear; and (2) whether the Office abused its discretion in denying appellant's request for reconsideration.

FACTUAL HISTORY

On March 5, 2008 appellant, then a 65-year-old retired custodian, filed an occupational disease claim alleging that he sustained bilateral high-frequency hearing loss due to noise

exposure at work.¹ Prior to his custodial position, he worked as an automation clerk for approximately 13 years in an area with loud noises from machines and other equipment and as a truck driver for 6 years with exposure to loud noise on the docks and on the highway. As a custodian, appellant was exposed to noise from machines and other equipment for three and one half years. On September 18, 2008 the Office accepted his claim for binaural sensorineural hearing loss. Appellant filed a claim for a schedule award on April 8, 2009.

In a December 12, 2006 report, received by the Office on March 24, 2008, Dr. Thad E. Bartell, an attending Board-certified otolaryngologist, stated that appellant had binaural hearing loss caused by industrial noise exposure and presbycusis. A December 7, 2006 audiogram received from Dr. Bartell's office was signed by a certified audiologist. However, the date the testing equipment was last calibrated was not provided. Also received by the Office on March 24, 2008 was an unsigned audiogram. The individual who administered the test is not indicated on the audiogram report nor the date the test was performed. There is no indication as to when the testing equipment was last calibrated.

In an August 28, 2008 report, Dr. C. Phillip Daspit, a Board-certified otolaryngologist and an Office referral physician, provided findings on physical examination and stated that hearing test results revealed binaural sensorineural high-frequency hearing loss. Audiometric testing performed on August 26, 2008 by a certified audiologist revealed, at the frequency levels of 500, 1,000, 2,000 and 3,000 cycles per second: left ear decibel losses of 15, 15, 20 and 50; right ear decibel losses of 15, 20, 20 and 55. The report shows that the audiometric testing equipment was last calibrated in November 2007.

On June 4, 2009 Dr. Brian E. Schindler, a Board-certified otolaryngologist and an Office medical adviser, totaled the decibel losses of 15, 15, 20 and 50 in the left ear for the frequency levels of 500, 1,000, 2,000 and 3,000 cycles per second at 100 decibels and divided by 4 to obtain the average hearing loss of 25 decibels. This average was then reduced by 25 decibels to equal 0 decibels and multiplied by the established factor of 1.5 to compute 0 percent impairment in the left ear. Dr. Schindler totaled the losses of 15, 20, 20 and 55 in the right ear at 110 decibels and divided by 4 to obtain the average hearing loss of 27.5 decibels. This average was then reduced by 25 decibels to equal 2.5 which was multiplied by the established factor of 1.5 to compute 3.8 percent monaural hearing loss in the right ear, rounded to 4 percent.²

By decision dated September 1, 2009, the Office granted a schedule award based on 3.8 percent right ear hearing loss, rounded to 4 percent, for 2.08 weeks from August 26 to September 9, 2008. It denied his claim for a schedule award for the left ear on the grounds that

¹ Appellant retired effective March 30, 2007.

² See Federal (FECA) Procedural Manual, Part 2 -- Claims, *Schedule Award and Permanent Disability Claims*, Chapter 2.808.6(d) (October 2005) (these procedures contemplate that, after obtaining all necessary medical evidence, the file should be routed to an Office medical adviser for an opinion concerning the nature and percentage of impairment in accordance with the A.M.A., *Guides*, with the medical adviser providing rationale for the percentage of impairment specified, especially when there is more than one evaluation of the impairment present).

the medical evidence established that his left ear hearing loss was not severe enough to be ratable. Appellant was paid at the 75 percent augmented rate for employees with dependents.³

Appellant requested reconsideration and submitted a September 17, 2009 report from Dr. Bartell who stated that he had difficulty understanding words, especially without his hearing aids, because consonant sounds occurred in the high frequencies. His speech discrimination scores ranged from 80 to 90 percent in the right ear and 82 to 96 percent in the left ear. A September 23, 2009 unsigned audiogram did not indicate who performed the testing and the date the equipment was last calibrated was not provided. Appellant contended that his schedule award should have been greater because he had a dependent, the award should be based on his loss of comprehension rather than his loss of hearing and Dr. Daspit told him that he had five percent hearing loss in his right ear and one percent in his left ear.

By decision dated October 8, 2009, the Office denied appellant's reconsideration request on the grounds that the evidence submitted was not sufficient to warrant further merit review. It also noted that appellant was paid at the augmented rate for dependents and his schedule award was based on correct application of the Office's standardized procedures to the report and audiometric test results provided by Dr. Daspit. The Office authorized an upgrade for his right ear hearing aid only.

LEGAL PRECEDENT -- ISSUE 1

The schedule award provision of the Federal Employees' Compensation Act⁴ provides for compensation to employees sustaining permanent impairment loss of use of scheduled members. 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 within the sound discretion of the Office. For consistent results and to ensure equal justice under the law to all claimants, 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* (A.M.A., *Guides*) has been adopted by the Office for evaluating schedule losses and the Board has concurred in the adoption of this standard.⁵

The Office evaluates industrial hearing loss in accordance with the standards contained in the A.M.A., *Guides*.⁶ Using the frequencies of 500, 1,000, 2,000 and 3,000 cycles per second, the losses at each frequency are added and averaged.⁷ 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

³ The Federal Employees' Compensation Act provides for 52 weeks of compensation for complete loss of hearing in one ear. 5 U.S.C. § 8107(c)(13)(A). Multiplying 52 weeks by four percent equals 2.08 weeks of compensation.

⁴ 5 U.S.C. § 8107.

⁵ See 20 C.F.R. § 10.404; *Thomas O. Bouis*, 57 ECAB 602 (2006).

⁶ A.M.A., *Guides* 250 (5th ed. 2001).

⁷ *Id.*

the ability to hear everyday speech under everyday conditions.⁸ The remaining amount is multiplied by a factor of 1.5 to arrive at the percentage of monaural hearing loss.⁹ 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.¹⁰

ANALYSIS -- ISSUE 1

On December 12, 2006 Dr. Bartell stated that appellant had binaural hearing loss caused by industrial noise exposure and presbycusis. A December 7, 2006 audiogram received from Dr. Bartell's office was signed by a certified audiologist. However, the date the testing equipment was last calibrated was not provided. Also received by the Office on March 24, 2008 was an unsigned audiogram. The individual who administered the test is not indicated on the audiogram report nor the date the test was performed. There is no indication as to when the testing equipment was last calibrated. The two audiograms are not sufficient to establish appellant's entitlement to a schedule award as the date of last calibration of the testing equipment was not provided and, in the 2008 audiogram, there is no indication that the testing was performed by a certified audiologist or an otolaryngologist.

Audiometric testing performed on August 26, 2008 for Dr. Daspit by a certified audiologist revealed, at the frequency levels of 500, 1,000, 2,000 and 3,000 cycles per second: left ear decibel losses of 15, 15, 20 and 50; right ear decibel losses of 15, 20, 20 and 55. The report shows that the audiometric testing equipment was last calibrated in November 2007.

Dr. Schindler applied the audiometric test results from Dr. Daspit to the Office's standardized procedures. He totaled the decibel losses of 15, 15, 20 and 50 in the left ear for the frequency levels of 500, 1,000, 2,000 and 3,000 cycles per second at 100 decibels and divided by 4 to obtain the average hearing loss of 25 decibels. This average was then reduced by 25 decibels to equal 0 decibels and multiplied by the established factor of 1.5 to compute 0 percent impairment in the left ear. Dr. Schindler totaled the losses of 15, 20, 20 and 55 in the right ear at 110 decibels and divided by 4 to obtain the average hearing loss of 27.5 decibels. This average was then reduced by 25 decibels to equal 2.5 which was multiplied by the established factor of 1.5 to compute 3.8 percent monaural hearing loss in the right ear, rounded to 4 percent.

The Board finds that the probative medical evidence from Dr. Daspit and Dr. Schindler establishes that appellant has no greater than four percent right ear hearing loss and no ratable left ear hearing loss.

On appeal, appellant contends that his schedule award should be based on the evidence from Dr. Bartell. As noted, however, the audiometric test results did not meet the Office's standardized procedures for determining hearing loss.

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

The Board finds that the Office properly calculated appellant's impairment due to hearing loss and determined that he had no greater than four percent impairment to his right ear and no ratable hearing loss to his left ear.

LEGAL PRECEDENT -- ISSUE 2

Section 8128(a) of the Federal Employees' Compensation Act¹¹ does not entitle a claimant to a review of an Office decision as a matter of right. This section vests the Office with discretionary authority to determine whether it will review an award for or against compensation. The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a).¹²

To require the Office to reopen a case for merit review under section 8128(a) of the Act,¹³ 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.¹⁴ To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant also must file his or her application for review within one year of the date of that decision.¹⁵ 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.¹⁶

ANALYSIS -- ISSUE 2

Appellant requested reconsideration and submitted a September 17, 2009 report in which Dr. Bartell stated that he had difficulty understanding words, especially without his hearing aids, because consonant sounds occurred in the high frequencies. His speech discrimination scores ranged from 80 to 90 percent in the right ear and 82 to 96 percent in the left ear. A September 23, 2009 unsigned audiogram did not indicate who performed the testing and the date the equipment was last calibrated. Dr. Bartell's report and the audiometric test results do not meet the requirements of the Office's standardized procedures for determining hearing loss. Therefore, this evidence does not constitute relevant and pertinent new evidence not previously considered by the Office. Because appellant did not show that the Office erroneously applied or interpreted a specific point of law, advance a relevant legal argument not previously considered or submit relevant and pertinent new evidence not previously considered by the Office, the Office properly denied his request for reconsideration.

¹¹ 5 U.S.C. § 8128(a).

¹² *Annette Louise*, 54 ECAB 783, 789-90 (2003).

¹³ Under section 8128(a) of the Act, "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on [his or her] own motion or on application." 5 U.S.C. § 8128(a).

¹⁴ 20 C.F.R. § 10.606(b)(2).

¹⁵ *Id.* at § 10.607(a).

¹⁶ *Id.* at § 10.608(b).

CONCLUSION

The Board finds that the evidence establishes that appellant has no greater than four percent right ear impairment and no ratable left ear hearing loss. The Board further finds that the Office did not abuse its discretion in denying his request for reconsideration.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated October 8 and September 1, 2009 are affirmed.

Issued: July 9, 2010
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