

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

K.S., Appellant)
and) Docket No. 09-1531
DEPARTMENT OF THE AIR FORCE, TINKER) Issued: March 8, 2010
AIR FORCE BASE, OK, Employer)

)

Appearances: Case Submitted on the Record
Appellant, pro se
Office of Solicitor, for the Director

DECISION AND ORDER

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

JURISDICTION

On May 12, 2009 appellant filed a timely appeal of a September 10, 2008 schedule award decision of the Office of Workers' Compensation Programs. The record also contains Office decisions dated December 29, 2008 and May 4, 2009 denying appellant's requests for reconsideration. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the schedule award decision.

ISSUES

The issues are: (1) whether appellant has more than three percent binaural hearing loss for which he received a schedule award; and (2) whether the Office properly denied appellant's requests for reconsideration without further merit review.

FACTUAL HISTORY

On February 19, 2008 appellant, then a 54-year-old welder, filed an occupational disease claim for hearing loss in both ears caused by noise exposure in the course of his federal employment. He first became aware of his hearing loss on September 24, 1987 and first realized

it was caused by his employment on September 9, 1988. Appellant did not stop work. The employing establishment submitted evidence confirming his work history and annual audiograms results dated between May 17, 1978 and July 19, 2007.

On July 2, 2008 the Office referred appellant with a statement of accepted facts to Dr. Richard Dawson, a Board-certified otolaryngologist, for a second opinion evaluation to determine whether he sustained a noise-induced hearing loss condition due to noise exposure of his federal employment. In an August 12, 2008 report, Dr. Dawson compared a May 17, 1978 audiogram from the beginning of appellant's noise exposure to his present findings to determine sensorineural hearing loss in excess of what would normally be predicated on the basis of presbycusis. He opined that workplace noise exposure was sufficient in intensity and duration to cause appellant's hearing loss. Dr. Dawson diagnosed bilateral high tone sensorineural hearing loss due to noise exposure at work. He recommended binaural amplification. An audiogram performed on August 12, 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, 20, 20 and 50 for the right ear and 15, 20, 25 and 55 for the left ear respectively. Based on these results, Dr. Dawson determined that appellant had three percent binaural hearing impairment.

In an August 18, 2008 decision, the Office accepted appellant's claim for binaural hearing loss. It also authorized hearing aids.

In an August 27, 2008 report, an Office medical adviser reviewed Dr. Dawson's report and audiometric test results and argued that appellant had a three percent binaural hearing loss. The medical adviser also noted that the date of maximum medical improvement was August 12, 2008, the date of Dr. Dawson's examination.

Appellant filed a schedule award claim on August 26, 2008.

In a September 10, 2008 decision, the Office granted a schedule award for three percent binaural hearing loss. The period of the award ran for six weeks from August 12 to September 22, 2008.

On October 2, 2008 appellant requested reconsideration. In an attached statement, he indicated that he was submitting another audiogram performed at the employing establishment showing 75 percent loss of high frequency hearing entitling him to a schedule award greater than 3 percent. No medical or audiological evidence accompanied the request.

In a December 29, 2008 decision, the Office denied appellant's reconsideration request finding that he submitted insufficient evidence to warrant a merit review.

In an undated letter requesting reconsideration, received on March 3, 2009, appellant asserted that his previous reconsideration request included audiogram results performed by the employing establishment demonstrating greater hearing loss than that found by the Office. He further asserted that the audiologist to which the Office referred him did not "have or use all the hearing documentation," which resulted in an incorrect and unfair outcome of his schedule award claim.

In a May 4, 2009 decision, the Office denied appellant's reconsideration request finding that it did not raise substantive legal questions or include 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* (A.M.A., *Guides*) (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 cps, 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. Dawson. On August 12, 2008 Dr. Dawson examined appellant and an audiogram was performed on the physician's behalf. He opined that appellant's hearing loss was sufficient to cause bilateral high tone sensorineural hearing loss due to noise exposure encountered in his workplace. Dr. Dawson also recommended binaural amplification.

An Office medical adviser applied the Office's standard procedures to the August 12, 2008 audiogram. The Office tested decibel losses at 500, 1,000, 2,000 and 3,000 cps and recorded decibel losses of 15, 20, 20 and 50 respectively in the right ear. The total decibel loss in the right ear is 105. When divided by 4, the result is an average hearing loss of 26.25 decibels. The average hearing of 26.25 is reduced by the fence of 25 decibels to equal 1.25, which when

¹ A.A., 59 ECAB ____ (Docket No. 08-951, issued September 22, 2008); see *Harry Butler*, 43 ECAB 859 (1992).

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

multiplied by the established factor of 1.5, resulted in 1.9 percent impairment of the right ear. The audiogram tested decibel losses for the left ear at 500, 1,000, 2,000 and 3,000 cps and recorded decibel losses of 15, 20, 25 and 55 respectively. The total decibel loss in the left ear is 115. When divided by 4, the result is an average hearing loss of 28.75 decibels. The average hearing loss of 28.75 is reduced by the fence of 25 decibels to equal 3.75, which when multiplied by the established factor of 1.5, resulted in 5.7 percent impairment of the left ear. The Office medical adviser then proceeded to calculate appellant's binaural hearing loss. The 1.9 percent hearing loss of the right ear, when multiplied by 5, yielded a product of 9.5. The 9.5 was then added to the 5.7 percent hearing loss for the left ear to obtain a total of 15.2. The 15.2 was then divided by 6, in order to calculate a binaural hearing loss of 2.53, rounded to 3 percent.³ Therefore, the evidence of record does not establish that appellant has greater than three 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 of loss of use. The compensation schedule in the Act provides 200 weeks of compensation for complete hearing loss in both ears.⁴ The 200 weeks of compensation was multiplied by three percent in order to calculate six weeks as the appropriate duration of compensation. Under the Office's standardized procedures for determining hearing loss impairment, appellant has no greater impairment. The Office properly awarded him six weeks of compensation for three 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.⁵ 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.⁶

ANALYSIS -- ISSUE 2

Appellant's October 2, 2008 reconsideration request consisted of an appeal request form with a checkmark next to "reconsideration" as well as an attached statement from appellant indicating that he was including audiogram results showing 75 percent high frequency hearing loss entitling him to a schedule award greater than 3 percent. However, the reconsideration request did not identify a specific point of law that was erroneously applied or interpreted and it did not advance a relevant legal argument not previously considered. Instead, appellant's

³ See J.P., 60 ECAB ____ (Docket No. 08-832, issued November 13, 2008) (the policy of the Office is to round the calculated percentage of impairment to the nearest whole number).

⁴ 5 U.S.C. § 8107(c)(13)(B).

⁵ 10 C.F.R. § 10.606(b)(2).

⁶ *Id.* at § 10.608(b).

statement generally stated that an audiogram showing 75 percent loss of high frequency hearing entitled him to a greater schedule award, but he did not identify to which audiogram he referred or include the referenced audiogram with his reconsideration request.

The Board notes that appellant did not submit any new and relevant evidence with his reconsideration request. As the issue of appellant's permanent impairment is medical in nature, it should be addressed by the submission of pertinent new medical evidence. However, no new medical evidence was submitted with this reconsideration request.

In support of his March 3, 2009 reconsideration request, appellant submitted a statement asserting that the previously submitted audiogram performed by the employing establishment confirmed that his hearing loss was greater than that calculated by the August 12, 2008 audiogram. He also asserted that August 12, 2008 audiogram derived an incorrect and unfair outcome. However, appellant's statement merely reiterated his belief that the audiogram performed by the employing establishment supported a schedule award greater than three percent. As noted, the underlying issue in this case is medical in nature. Appellant did not submit any medical evidence with his reconsideration request. Moreover, his statement does not establish that the Office erroneously applied or interpreted a specific point of law or advance a relevant legal argument not previously considered by the Office. The Office properly denied this request for reconsideration.

On appeal, appellant reiterated his assertion that an audiogram he underwent at the employing establishment showed a greater hearing loss than the audiogram performed on Dr. Dawson's behalf. He further asserts that he submitted these audiogram results but they were never reviewed or regarded as new and relevant evidence. However, the record does not establish that audiograms were submitted with either reconsideration request. As noted, the medical nature of the present issue requires the submission of new and relevant medical evidence. Appellant's failure to submit the necessary evidence makes the Office's denial of his reconsideration requests proper.

CONCLUSION

The Board finds that appellant does not have more than three percent binaural hearing loss for which he received a schedule award. The Board also finds that the Office properly denied appellant's requests for reconsideration without a merit review.

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs decisions dated May 4, 2009, December 29 and September 10, 2008 are affirmed.

Issued: March 8, 2010
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