United States Department of Labor
Employees' Compensation Appeals Board

A.B., Appellant	)	
	)	
and	)	**Docket No. 09-1992**
	)	**Issued: May 5, 2010**
DEPARTMENT OF THE ARMY, CPAC, ATTN: ICPA, Fort Carson, CO, 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 July 28, 2009 appellant filed a timely appeal from a February 3, 2009 schedule award decision and a June 30, 2009 nonmerit decision of the Office of Workers' Compensation Programs. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.

ISSUES

The issues are: (1) whether appellant established that he has more than a nine percent binaural hearing loss for which he has received schedule awards; and (2) whether the Office refused to reopen appellant's case for further consideration of the merits pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On May 12, 2008 appellant, a 71-year-old retired[1] pipe fitter/plumber, filed a traumatic injury claim (Form CA-2) for hearing loss that he attributed to employment-related exposure to

[1] The record reflects appellant retired January 3, 1995.

loud noise produced by tools he used in the performance of his federal duties, such as high power air and steam tools as well as electric and air hammers.

Appellant submitted a June 30, 2007 report in which Dr. Max Stanley Chartrand, behavioral medicine specialist, reported that a video otoscopy and tympanometry revealed tympanosclerosis and considerable scarring on tympanic membrane. In his history, Dr. Chartrand noted that appellant complained of: "chronic tinnitus and considerable scar tissue on each tympanic membrane apparently due to childhood chronic [otitis media with effusion] and subject sensorineural damage from working in a Radar [*sic*] facility for many years."

Appellant submitted an undated note documenting his employment history and results from an audiogram conducted January 17, 2008.

The Office referred appellant, together with a statement of accepted facts, for a second opinion examination by Dr. Richard Lee Cundy, a Board-certified otarlaryngologist. In a December 1, 2008 report, Dr. Cundy diagnosed neurosensory hearing loss and tinnitus. He reported that appellant has significant hearing loss at all frequencies in excess of that expected for a person of his age caused by his employment as a pipe fitter and a security guard. Dr. Cundy recommended appellant be outfitted with hearing aids. An audiogram conducted December 1, 2008 which reflected testing at 500, 1,000, 2,000 and 3,000 cycles per second (cps) levels and showed the following decibel losses: 40, 30, 20 and 25 in the right ear and 35, 30, 50 and 50 in the left ear. Dr. Cundy recommended appellant be furnished hearing aids.

By report dated January 8, 2009, the district medical adviser reviewed the audiogram supplied by Dr. Cundy and determined that appellant sustained a 24.375 percent monaural hearing loss in his left ear and a 5.63 percent hearing loss in his right, producing an 8.8 percent binaural hearing loss. The district medical adviser authorized hearing aids.

On January 8, 2009 the Office accepted appellant's claim for binaural hearing loss.

By decision dated February 3, 2009, the Office granted appellant a schedule award for an 8.8 percent hearing loss impairment, rounded to 9 percent, which it reduced to 4 percent to reflect a prior schedule award appellant received for binaural hearing loss under another claim.[2]

Appellant submitted results from audiograms conducted between 1982 and 1987. He submitted a copy of the district medical adviser's January 8, 2009 report and an undated document concerning appellant's employment history. Appellant also submitted a January 12, 1987 note in which Dr. J. Valentine Cichon, a Board-certified otolaryngologist, reported that appellant's prior audiograms revealed "fluctuating low frequency hearing loss in the right ear."

On June 9, 2009 appellant requested reconsideration.

By decision dated June 30, 2009, the Office denied the request.

[2] The record reflects that appellant was granted a schedule award for a five percent hearing loss under File No. xxxxxx021. The February 3, 2009 nine percent hearing loss schedule ward was reduced by this five percent impairment award to four percent.

LEGAL PRECEDENT - - ISSUE 1

Section 8107 of the Federal Employees' Compensation Act sets forth the number of weeks of compensation to be paid for the permanent loss of use of specified members, functions and organs of the body.[3] The Act, however, does not specify the manner by which the percentage loss of a member, function or organ shall be determined. To ensure consistent results and equal justice under the law, good administrative practice requires the use of uniform standards applicable to all claimants. The implementing regulations have adopted the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) (5th ed. 2001) as the appropriate standard for evaluating schedule losses.[4] Effective February 1, 2001, schedule awards are determined in accordance with the A.M.A., *Guides* (5th ed. 2001).[5]

Using the frequencies of 500, 1,000, 2,000 and 3,000 cps, 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 and then added to the greater loss and the total is divided by six to arrive at the amount of the binaural hearing loss.[9]

ANALYSIS -- ISSUE 1

On appeal, appellant faults the Office's February 3, 2009 decision because it did not include an award for tinnitus, only provided eight weeks of compensation and did not award hearing aids.

The Office medical adviser applied the Office's standardized procedures to the December 1, 2008 audiogram obtained by Dr. Cundy. Testing at frequency levels of 500, 1,000, 2,000 and 3,000 cps revealed hearing losses in the right ear of 40, 30, 20 and 25 respectively. These totaled 115 decibels which, when divided by 4, yields an average hearing loss of 28.75 decibels. The average of 28.75 decibels, is reduced by 25 decibels (the first 25 decibels are

[3] The Act provides that, for complete or 100 percent loss of hearing in one ear, an employee shall receive 52 weeks' compensation. For complete loss of hearing of both ears, an employee shall receive 200 weeks' compensation. 5 U.S.C. § 8107(c)(13) (2000).

[4] 20 C.F.R. § 10.404 (2006).

[5] Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 (June 2003).

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

[7] *Id.*

[8] *Id.*

[9] *Id.*

discounted as discussed above) and is then multiplied by the established factor of 1.5 to produce a 5.63 percent hearing loss in the right ear.

Testing for the left ear at frequency levels of 500, 1,000, 2,000 and 3,000 cps revealed hearing losses in the left ear of 35, 30, 50 and 50 respectively. These totaled 165 decibels, which, when divided by 4, yields an average hearing loss of 41.25 decibels. The average of 41.25 decibels, reduced by 25 decibels (the first 25 decibels were discounted as discussed above) and multiplied by the established factor of 1.5 produces a 24.38 percent hearing loss in the left ear.

Using these calculations, the district medical adviser calculated appellant's binaural hearing loss. The 5.63 percent hearing loss for the left ear was multiplied by 5 and yielded a product of 28.13. The 28.13 was then added to the 24.83 percent hearing loss for the right ear to obtain a total of 52.50. The 52.50 was then divided by 6, in order to calculate a binaural hearing loss of 8.75 percent which the Office rounded up to 9. Therefore, the evidence of record establishes that appellant has a nine percent binaural hearing loss.

Appellant argues that this figure should have been adjusted to reflect the impact of tinnitus (ringing in the ears) on his hearing loss. Dr. Cundy diagnosed tinnitus but provided no opinion, rationalized or otherwise, specifically addressing the impact of tinnitus on appellant's activities of daily living[10] and therefore neither the district medical adviser nor the Office were required to factor in the impact of tinnitus on appellant's hearing loss.[11]

Appellant disputes the Office's award of only eight weeks of compensation for his hearing loss. The eight-week period commences on December 1, 2008, the date of Dr. Cundy's report, because his report is the only probative medical evidence of record establishing appellant's hearing loss. Although appellant submitted results from several prior audiograms reflecting bilateral hearing loss, none of these audiograms have any probative value because they were not certified by a physician as accurate and thus cannot be used to establish the compensation period for a schedule award.[12] Therefore, as the only probative medical evidence of record on this issue, Dr. Cundy's December 1, 2008 report establishes the starting point of the compensation period for appellant's hearing loss schedule award.[13]

[10] *Randolph Taylor*, 6 ECAB 986, 988 (1954) (holding that a medical opinion not fortified by medical rational is of little probative value).

[11] *See Juan A. Trevino*, 54 ECAB 356, 358 (2003).

[12] *See Joshua A. Holmes*, 42 ECAB 231, 236 (1990). *See also James A. England*, 47 ECAB 115 (1995) (finding that an audiogram not certified by a physician as being accurate has no probative value; the Office need not review uncertified audiograms).

[13] *See* 5 U.S.C. § 8101(2). This subsection defines the term physician. *See also Charley V.B. Harley*, 2 ECAB 208, 211 (1949) (where the Board held that medical opinion, in general, can only be given by a qualified physician); *Herman L. Henson*, 40 ECAB 341 (1988) (an audiologist is not considered a physician under the Act). *See also Robert E. Cullison*, 55 ECAB 570 (2004) (the Office does not have to review every uncertified audiogram, which has not been prepared in connection with an examination by a medical specialist).

The applicable compensation schedule is set by statute.[14] The Act provides for 200 weeks of compensation for 100 percent binaural hearing loss. Here, the Office determined that appellant sustained an 8.8 percent impairment, which it rounded to 9 percent. It reduced this impairment rating to four percent to reflect the schedule award appellant received for a five percent hearing loss impairment under a prior claim. Applying appellant's established four percent hearing loss impairment to the statutory schedule then, appellant is entitled to 8 weeks of compensation (four percent impairment x 200 weeks = 8 weeks of compensation). The Board notes that if appellant's award was calculated for monaural loss of hearing he would be entitled to 16 weeks of compensation, less 10 weeks for the award he has previously received. The computation of eight weeks of compensation for a binaural hearing loss is therefore the most beneficial method of calculation of this hearing loss.

Appellant also disputes the Office's February 3, 2009 decision for not awarding hearing aids. The Office's procedure manual provides that hearing aids will be authorized when hearing loss has resulted from an accepted injury or disease if the attending physician so recommends.[15] The Board notes that both Dr. Cundy and the district medical adviser recommended appellant receive hearing aids. The Board notes that proceedings under the Act are not adversarial in nature. The Office shares in the responsibility to develop the evidence and has an obligation to see that justice is done.[16] Accordingly, the Board finds that the case must be remanded to the Office for further medical development on the question of whether appellant is entitled to hearing aids. Following this and such other development as is deemed necessary, the Office shall issue an appropriate merit decision regarding hearing aids should be authorized.

LEGAL PRECEDENT -- ISSUE 2

To require the Office to reopen a case for merit review under section 8128(a) of the Act,[17] 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.[18] 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.[19] When a claimant

[14] 5 U.S.C. § 8107(13)(B). *See* Federal (FECA) Procedural Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability*, Chapter 2.808.5(5)(a)(1) (October 2002).

[15] Federal (FECA) Procedure Manual, Part 3 -- Medical, *Medical Services and Supplies*, Chapter 3.400.3(d)(2) (October 1995).

[16] *Lyle Dayberry*, 49 ECAB 369, 372 (1998).

[17] 5 U.S.C. §§ 8101-8193. Under section 8128 of the Act, "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on her own motion or on application." 5 U.S.C. § 8128(a).

[18] 20 C.F.R. § 10.606(b)(2).

[19] *Id*. at § 10.607(a).

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.[20]

The Board has held that the submission of evidence or argument which repeats or duplicates evidence or argument already in the case record[21] and the submission of evidence or argument which does not address the particular issue involved does not constitute a basis for reopening a case.[22] While a reopening of a case may be predicated solely on a legal premise not previously considered, such reopening is not required where the legal contention does not have a reasonable color of validity.[23]

ANALYSIS -- ISSUE 2

Appellant did not argue that the Office erroneously applied a point of law, nor did she advance a new legal argument not previously considered by the Office. Therefore, he was not eligible or entitled to a merit review based upon the first two enumerated grounds noted above.

Concerning the third requirement, submission of relevant and pertinent new evidence not previously considered by the Office, appellant submitted a copy of the district medical adviser's January 8, 2009 report, results from audiograms conducted between 1982 and 1987, as well as Dr. Cichon's note. The district medical adviser's January 8, 2009 report was considered by the Office in rendering its February 3, 2009 decision and therefore furnishes no grounds for the Office to reopen appellant's claim for merit review.[24] The prior audiograms provide no grounds for the Office to reopen appellant's claim for merit review because there is insufficient information accompanying these audiograms to demonstrate that they met the Office's standards for audiograms used in the evaluation of permanent hearing impairments.[25] Finally, Dr. Cichon's note provides no grounds for reopening appellant's claim for review of the merits as it predates the date of injury alleged by appellant on his CA-2 and therefore is not relevant or pertinent to the issue underlying appellant's claim.

Therefore, the Board finds that the Office properly refused to reopen appellant's claim for further review on its merits under 5 U.S.C. § 8128.

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[20] *Id*. at § 10.608(b).

[21] *D.I.*, 59 ECAB ___ (Docket No. 07-1534, issued November 6, 2007); *Eugene F. Butler*, 36 ECAB 393, 398 (1984).

[22] *D.K.*, 59 ECAB ___ (Docket No. 07-1441, issued October 22, 2007); *Edward Matthew Diekemper*, 31 ECAB 224, 225 (1979).

[23] *M.E.*, 58 ECAB 694 (2007); *John F. Critz*, 44 ECAB 788, 794 (1993).

[24] *James W. Scott*, 55 ECAB 606 (2004).

[25] *M.E.*, *supra* note 23; Federal (FECA) Procedure Manual, Part 3 -- Medical, *Requirement for Medical Reports*, Chapter 3.600.8(a) (September 1994).

CONCLUSION

The Board finds appellant established that he sustained a ratable hearing loss entitling him to a schedule award. The Board further finds that the case must be remanded to the Office for further development on the question of whether hearing aids should be authorized. The Board also finds that the Office properly refused to reopen appellant's claim for further review on its merits under 5 U.S.C. § 8128.

ORDER

IT IS HEREBY ORDERED THAT the June 30 and February 3, 2009 decisions of the Office of Workers' Compensation Programs are affirmed in part and set aside in part and the case remanded for further development consistent with this decision of the Board.

Issued: May 5, 2010
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