

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

L.B., Appellant)	
)	
and)	Docket No. 10-507
)	Issued: October 4, 2010
DEPARTMENT OF THE AIR FORCE,)	
ROBINS AIR FORCE BASE, GA, Employer)	
)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On December 14, 2009 appellant filed a timely appeal of an August 11, 2009 schedule award decision of the Office of Workers' Compensation Programs and an August 31, 2009 decision denying his request for reconsideration without a merit review. 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 has more than 10 percent binaural hearing loss for which he received a schedule award; and (2) whether the Office properly denied appellant's request for reconsideration without a merit review.

FACTUAL HISTORY

On January 26, 2009 appellant, then a 57-year-old sheet metal mechanic and welder, filed an occupational disease claim for hearing loss caused by noise exposure in the course of his federal employment. He first realized that his hearing loss was caused or aggravated by his employment activities on January 1, 1998. Appellant did not stop work.

On February 2, 2009 the Office advised appellant of the factual and medical evidence necessary to establish his claim and allowed him 30 days to submit such evidence. Appellant did not submit any evidence to the record.

In a March 6, 2009 decision, the Office denied appellant's claim finding that he did not establish that he sustained an injury in the performance of duty.

Appellant requested reconsideration on April 22, 2009. In a statement dated March 17, 2009, he described workplace noise exposure from jet engines, rivet guns, impact guns, auxiliary air conditioners, auxiliary heaters, auxiliary air compressors and hammers. Appellant was exposed to this noise 8 to 10 hours per day for six days per week. He also listed his employment history and the types of noise exposure at each. Appellant also submitted audiogram results dated between September 7, 1993 and January 23, 2009.

On June 16, 2009 the Office referred appellant with a statement of accepted facts to Dr. Sean Peppard, a Board-certified otolaryngologist, for a second opinion. In a June 30, 2009 report, Dr. Peppard noted that at the beginning of appellant's noise exposure in 1989 he had normal hearing with normal pure-tone levels. He found that appellant showed sensorineural loss in excess of what would be normally predicated on the basis of presbycusis, with hearing loss worse in the left ear. Dr. Peppard advised that appellant's workplace exposure was sufficient as to intensity and duration to have caused the loss in question. His examination revealed clear external canals, intact tympanic membranes bilaterally and normal drum motility. Dr. Peppard diagnosed noise-induced sensorineural hearing loss and opined that this condition was due to noise exposure at appellant's federal employment as he had normal audiometries at the initiation of his federal employment in 1989 and had noise exposure throughout his career. He recommended noise protection and hearing aid fitting. An audiogram performed on Dr. Peppard's behalf on June 30, 2009 reflected testing at the frequency levels of 500, 1,000, 2,000 and 3,000 cycles per second and revealed the following decibel losses: 15, 20, 35 and 55 for the right ear and 20, 15, 40 and 65 for the left ear respectively. Based on these results and in accordance with American Medical Association, *Guides to the Evaluation of Permanent Impairment* (6th ed. 2009) (A.M.A., *Guides*), Dr. Peppard determined that appellant had 13.1 percent monaural hearing loss of the right ear, 18.8 percent monaural hearing loss of the left ear, 14.1 percent binaural hearing loss and 5 percent whole person impairment.

In a July 15, 2009 report, an Office medical adviser reviewed Dr. Peppard's report and audiometric test results. He concluded that appellant had 10 percent bilateral sensorineural hearing loss and that the date of maximum medical improvement was June 30, 2009, the date of Dr. Peppard's examination.

In a July 15, 2009 decision, the Office accepted appellant's claim for binaural noise-induced sensorineural hearing loss.

Appellant filed a schedule award claim on July 21, 2009.

In an August 11, 2009 decision, the Office granted a schedule award for 10 percent binaural hearing loss. The period of the award ran for 20 weeks and ran from June 30 to November 16, 2009.

Appellant submitted a request for reconsideration on August 21, 2009.

In an August 31, 2009 decision, the Office denied appellant's reconsideration request without a merit review finding that he did not raise any substantive legal questions or submit any 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 sound 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 A.M.A., *Guides* 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 cycles per second, 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 hearing loss claim and the Office developed the claim by referring him to Dr. Peppard. On June 30, 2009 Dr. Peppard examined appellant and an audiogram was obtained on the physician's behalf. He found that appellant's noise exposure in his federal employment was sufficient to cause binaural hearing loss.

An Office medical adviser applied the Office's standard procedures to the June 30, 2009 audiogram. It tested decibel losses at 500, 1,000, 2,000 and 3,000 cycles per second and recorded decibel losses of 15, 20, 35 and 55 respectively in the right ear. The total decibel loss in the right ear is 125. When divided by 4, the result is an average hearing loss of 31.25 decibels. The average hearing of 31.25 is reduced by the fence of 25 decibels to equal 6.25, which when multiplied by the established factor 1.5, resulted in 9.38 percent impairment of the right ear. The audiogram tested decibel losses for the left ear at 500, 1,000, 2,000 and 3,000 cycles per second

¹ *Harry Butler*, 43 ECAB 859 (1992); see Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010) (applying the sixth edition of the A.M.A., *Guides* effective May 1, 2009).

² *E.S.*, 59 ECAB ____ (Docket No. 07-1587, issued December 10, 2007); see also A.M.A., *Guides* 250-53 (6th ed. 2009).

and recorded decibel losses of 20, 15, 40 and 65 respectively. The total decibel loss in the left ear is 140. When divided by four, the result is an average hearing loss of 35 decibels. The average hearing loss of 35 is reduced by the fence of 25 decibels to equal 10, which when multiplied by the established factor of 1.5, resulted in 15 percent impairment of the left ear. The Office medical adviser then proceeded to calculate appellant's binaural hearing loss. The 9.38 percent hearing loss of the right ear, when multiplied by 5, yielded a product of 46.9. The 46.9 was then added to 15 percent hearing loss for the left ear to obtain a total of 61.9. The 61.9 was then divided by 6, in order to calculate a binaural hearing loss of 10.31, rounded to 10 percent.³

The evidence of record establishes that appellant has a 10 percent binaural hearing loss. Although Dr. Peppard stated that appellant had 13.1 percent right ear hearing loss, 18.8 percent left ear hearing loss and 14.1 percent binaural hearing loss, he did not explain this calculation in conformance with the A.M.A., *Guides*. The Office medical adviser set forth his calculations based on audiometric results obtained by Dr. Peppard. He applied the Office's standard for evaluating hearing losses and to find a 10 percent binaural hearing loss. There is no other medical evidence showing a greater loss pursuant to this standard.

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.⁴ 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.⁵

ANALYSIS -- ISSUE 2

Appellant's request for reconsideration consists of an appeal request form with a checkmark next to "reconsideration." He did not explain any reasons why he disagreed with the Office's decision. Appellant does not satisfy any of the three criteria required to reopen a case for merit review. His request does not attempt to show that the Office erroneously applied the law as he did not identify a point of law that was erroneously applied or interpreted. Appellant's request form also did not advance any new relevant legal arguments not previously considered by the Office. In addition, he did not submit any new medical evidence addressing the issue of hearing loss impairment due to noise exposure at his workplace. This is particularly important as the underlying issue is medical in nature, regarding whether appellant has more than 10 percent binaural hearing loss due to his federal employment. As a result, no relevant and pertinent new evidence supports appellant's request for reconsideration.

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 20 C.F.R. § 10.606(b)(2).

⁵ *Id.* at § 10.608(b).

On appeal, appellant asserts that he should be properly compensated for sustaining severe hearing loss as indicated by two outside medical opinions. Although appellant submitted new medical evidence with his appeal, the Board may only review evidence that was in the record at the time the Office issued its final decision.⁶ Under the Office's standardized procedures for determining hearing loss impairment, the Office found that appellant had 10 percent binaural hearing impairment and issued him a schedule award for this amount. Appellant also asserts that he has difficulty hearing conversations and must increase the sound level while watching television. The Board has also held that factors such as limitations on daily activities do not go into the calculation of a schedule award.⁷

CONCLUSION

The Board finds that appellant has more than 10 percent binaural hearing loss for which he received a schedule award. The Board also finds that the Office properly denied appellant's request for reconsideration without a merit review.

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' decisions dated August 31 and 11, 2009 are affirmed.

Issued: October 4, 2010
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

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

⁶ *Id.* at § 501.2(c).

⁷ *E.L.*, 59 ECAB ____ (Docket No. 07-2421, issued March 10, 2008).