

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

T.H., Appellant)	
)	
and)	Docket No. 12-764
)	Issued: February 26, 2013
)	
DEPARTMENT OF THE ARMY, AIR)	
NATIONAL GUARD, Springfield, IL, Employer)	
)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Alternate Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On February 22, 2012 appellant filed a timely appeal from the Office of Workers' Compensation Programs' (OWCP) September 29, 2011 schedule award decision and February 2, 2012 nonmerit decision denying his request for reconsideration. Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 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 sustained more than 29 percent binaural (both ears) hearing loss for which he received schedule awards; and (2) whether OWCP properly denied his request for further merit review of his claim pursuant to 5 U.S.C. § 8128(a).

On appeal, appellant contends that OWCP's medical adviser did not rule on his accepted bilateral tinnitus condition in rating his permanent impairment.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On December 18, 2009 appellant, then a 58-year-old aircraft maintenance technician, filed an occupational disease claim alleging that he developed hearing loss due to noise exposure from running aircraft and jets throughout a typical workday. He was last exposed to noise at work on July 3, 2008, when he retired. On April 29, 2010 OWCP accepted appellant's claim for binaural hearing loss.

On January 12, 2010 appellant filed a claim for a schedule award (Form CA-7). An audiogram performed at Memorial Medical Center revealed the following decibel (dB) losses at 500, 1,000, 2,000 and 3,000 hertz (Hz): 25, 25, 35 and 45 dB for the right ear and 35, 30, 30 and 50 dB for the left ear. Appellant had mild-to-moderately severe sensorineural binaural hearing loss.

By letter dated March 24, 2010, OWCP referred appellant, together with the medical record and a statement of accepted facts, to Dr. Gerald W. Moritz, a Board-certified otolaryngologist, for a second opinion. In an April 23, 2010 medical report, Dr. Moritz noted that a prior audiogram showed bilateral sensorineural hearing loss involving both ears. Appellant had more loss in the left ear than in the right ear. His worse loss was at 4,000 Hz in the left ear, which showed a hearing level of 65 dB. An audiogram performed on Dr. Moritz's behalf on April 22, 2010 showed the dB losses at frequencies of 500, 1,000, 2,000 and 3,000 Hz: 25, 35, 40 and 45, respectively, for the right ear and 25, 40, 60 and 65, respectively, for the left ear. He diagnosed sensorineural binaural hearing loss secondary to appellant's employment-related noise exposure as an aircraft maintenance technician. There was no suggestion of presbycusis or other etiologies for the hearing loss. Dr. Moritz recommended that appellant undergo an annual audiogram to monitor his hearing. He concluded that appellant may be a candidate for amplification.

On September 27, 2010 Dr. David H. Garelick, OWCP's medical adviser, reviewed appellant's case file, including Dr. Moritz's April 22, 2010 audiometric data. He determined that appellant had 19.7 percent binaural sensorineural hearing loss based on Table 11-1 and Table 11-2 of the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*² (A.M.A., *Guides*). Dr. Garelick noted that there was no reference audiogram for review and agreed with Dr. Moritz that appellant's exposure to employment-related noise was of sufficient quantity and intensity to have contributed to his hearing loss. He concluded that appellant reached maximum medical improvement on April 22, 2010.

In a decision dated November 10, 2010, OWCP granted appellant a schedule award for 19.7 percent binaural sensorineural hearing loss. The award ran for 40 weeks during the period April 22, 2010 to January 26, 2011.

By letter dated February 15, 2011, appellant requested reconsideration. He contended that a recent audiogram showed further determination in his hearing and that he had employment-related tinnitus. A January 10, 2004 audiogram showed the dB losses at frequencies of 500, 1,000, 2,000 and 3,000 Hz: 10, 15, 20 and 35 dB for the right ear and 15, 15, 35, 55 dB for the left ear. An April 4, 2008 audiogram showed the dB losses at the same

² A.M.A., *Guides* (6th ed. 2009).

frequencies which were 10, 10, 25, and 45, respectively, for the right ear and 10, 10, 35 and 50, respectively, for the left ear. An audiogram performed on January 5, 2011 also showed the decibel losses at the same frequencies: 15, 25, 25 and 55 dB for the right ear and 20, 20, 40 and 60 dB for the left ear.

On April 11, 2011 Dr. Garelick reviewed appellant's case record to determine whether he had any additional impairment and whether he had tinnitus as a result of his accepted work-related noise exposure. He reiterated his prior opinion that appellant had 19.7 percent binaural sensorineural hearing loss and reached maximum medical improvement on April 22, 2010. Dr. Garelick stated that no additional audiometric data had been submitted since the April 22, 2010 audiometric results. He noted that tinnitus was often associated with noise hearing loss and, thus, recommended that any tinnitus manifested by appellant should be associated with his work-related hearing loss for which he should be compensated accordingly.

By decision dated April 20, 2011, OWCP accepted appellant's claim for bilateral tinnitus based on Dr. Garelick's opinion. It found that he sustained tinnitus as a result of his employment-related noise exposure, but that the evidence did not support a schedule award for greater than 19.7 percent binaural sensorineural hearing loss.

On May 3, 2011 appellant filed a Form CA-7 for an additional schedule award.

By letter dated June 6, 2011, OWCP referred appellant, together with the case record and a statement of accepted facts, to Dr. John C. Dailey, a Board-certified otolaryngologist, for a second opinion. In a June 27, 2011 report, Dr. Dailey obtained a history of the accepted employment injuries and appellant's medical, family and social background. He listed findings on physical examination. Dr. Dailey obtained an audiogram dated June 27, 2011 which showed the dB losses at frequencies of 500, 1,000, 2,000 and 3,000 Hz: 35, 40, 45, and 55, respectively, for the right ear and 35, 35, 55 and 65, respectively, for the left ear. He diagnosed mild-to-moderate sensorineural hearing loss in both ears with good word recognition and subjective complaints of bilateral constant tinnitus. Dr. Dailey advised that these symptoms were compatible with appellant's previous exposure to loud noise in his long-time work as an airplane maintenance technician. He stated that appellant would benefit from hearing aids for both ears which would not only help his hearing, but would also help to mask out the ringing which seemed to be his most bothersome complaint.

On September 12, 2011 Dr. Garelick reviewed appellant's medical record, including Dr. Dailey's June 27, 2011 report. He stated that the dB sum of hearing loss was 175 dB in the right ear and 190 dB in the left ear. Dr. Garelick determined that appellant had 29.1 percent binaural sensorineural hearing loss. He cited Table 11-1 and Table 11-2 on pages 250 and 252, respectively, of the sixth edition of the A.M.A., *Guides* as a basis for the rating. Dr. Garelick advised that appellant reached maximum medical improvement on June 27, 2011, the date of Dr. Dailey's audiogram. He stated that, when compared to a reference audiogram dated July 8, 1970, there had been a significant loss in appellant's hearing commensurate with his employment. There had even been progression of the hearing loss when compared to an audiogram completed last year. Consequently, Dr. Garelick advised that this new award should represent the total hearing loss rather than an additional award. He agreed with Dr. Dailey that appellant's employment-related noise exposure was of sufficient quantity and intensity to have at least contributed to his current hearing loss.

In a September 29, 2011 decision, OWCP granted appellant a schedule award for 29.1 percent binaural sensorineural hearing loss. As appellant previously received an award of 19.7 percent impairment he was entitled to an additional 9.4 percent. The award covered 18 weeks of compensation for the period June 27 to October 30, 2011.

On January 6, 2012 appellant requested reconsideration. He resubmitted copies of Dr. Dailey's June 27, 2011 report and Dr. Garelick's April 11 and September 12, 2011 reports. In a December 28, 2011 prescription, Dr. Dailey advised that appellant had medical clearance for hearing aids.

In a January 19, 2012 report, Dr. Alfred Harney, a Board-certified internist, noted appellant's exposure to employment-related noise on a daily basis for over 30 years. He agreed with Dr. Dailey that appellant had employment-related bilateral tinnitus.

In a February 2, 2012 decision, OWCP denied appellant's request for reconsideration, finding that it neither raised substantive legal questions nor included new and relevant evidence and, thus, was insufficient to warrant a merit review of its prior decision.

LEGAL PRECEDENT -- ISSUE 1

The schedule award provision of FECA³ 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. FECA, however, does not specify the manner in which the percentage of loss of a member shall be determined. The method used in making such determination is a matter which rests in the sound discretion of OWCP. 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 sixth edition of the A.M.A., *Guides*, has been adopted by OWCP for evaluating schedule losses and the Board has concurred in such adoption.⁴

OWCP 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 Hz, 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 dB result in no impairment in the ability to hear everyday speech under everyday conditions.⁵ 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 OWCP's adoption of this standard for

³ 5 U.S.C. §§ 8101-8193.

⁴ *R.D.*, 59 ECAB 127 (2007); *Bernard Babcock, Jr.*, 52 ECAB 143 (2000); *see also* 20 C.F.R. § 10.404.

⁵ *See* A.M.A., *Guides* 250.

evaluating hearing loss.⁶ The Board has also noted OWCP's policy to round the calculated percentage of impairment to the nearest whole number.⁷

OWCP's procedures provide that, after obtaining all necessary medical evidence, the file should be routed to OWCP's 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.⁸ It may follow the advice of its medical adviser or consultant where he or she has properly utilized the A.M.A., *Guides*.⁹

ANALYSIS -- ISSUE 1

OWCP accepted that appellant sustained a binaural sensorineural hearing loss and bilateral tinnitus due to work-related noise exposure. On November 10, 2010 appellant received a schedule award for 19.7 percent binaural sensorineural hearing loss. On May 3, 2011 he requested an additional schedule award. OWCP developed this claim by referring appellant to Dr. Dailey who examined appellant and obtained an audiogram on June 27, 2011. Dr. Dailey diagnosed binaural sensorineural hearing loss and bilateral tinnitus. He opined that these conditions were caused by appellant's employment-related noise exposure as an aircraft maintenance technician. On September 12, 2011 Dr. Garelick, OWCP's medical adviser, properly applied OWCP's standardized procedures to the June 27, 2011 audiogram performed for Dr. Dailey. He found that appellant had 175 dB loss in the right ear and 190 dB loss in the left ear, resulting in 29.1 percent binaural sensorineural hearing loss based on Table 11-1 and Table 11-2 on pages 250 and 252, respectively of the sixth edition of the A.M.A., *Guides*.

The June 27, 2011 audiogram recorded decibel losses at frequencies of 500, 1,000, 2,000 and 3,000 Hz for the right ear: 35, 40, 45 and 55, respectively or a total loss of 175 dB. The average of this figure is 43.75 dB. This average was then reduced by 25 dB to 18.75, which was multiplied by the established factor of 1.5 to result in a 28.125 or 28.1 percent monaural loss of hearing in the right ear.¹⁰ The application of the formula, as well as, the rating provided by, Table 11-1 results in 28.1 percent right ear hearing loss impairment. Testing for the left ear at the frequency levels of 500, 1,000, 2,000 and 3,000 Hz revealed decibel losses of 35, 35, 55 and 65, respectively or a total loss of 190 dB. The average of this figure is 47.5. This average is then reduced by 25 dB to 22.5, which is multiplied by the established factor of 1.5 to result in a 33.75

⁶ *E.S.*, 59 ECAB 249 (2007); *Reynaldo R. Lichtenberger*, 52 ECAB 462 (2001).

⁷ *J.H.*, Docket No. 08-2432 (issued June 15, 2009); *Robert E. Cullison*, 55 ECAB 570 (2004). See Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.4(b)(2)(b) (September 2010).

⁸ See *G.M.*, Docket No. 11-1295 (issued January 25, 2012).

⁹ *J.S.*, Docket No. 11-1634 (2012); see *Paul Fierstein*, 51 ECAB 381 (2000); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Payment of Schedule Awards*, Chapter 2.808.7(b)(2) (April 1995).

¹⁰ The Board notes that OWCP policy is to round the calculated percentage of impairment to the nearest whole number. Federal (FECA) Procedure Manual, *supra* note 7 at Chapter 3.700.3(b) (October 1990). See *J.H.*, *supra* note 7.

or 33.8 percent monaural hearing loss of the left ear.¹¹ The application of the formula, as well as, the rating provided by Table 11-1 results in 33.8 percent left ear hearing loss impairment.

Dr. Garelick concluded that appellant had 29.1 percent binaural hearing loss¹² and OWCP's September 29, 2011 schedule award decision found 29.1 percent binaural hearing impairment which it reduced by 19.7 percent, the amount of his previous schedule award for binaural hearing loss, to reflect 9.4 percent.

The Board notes that OWCP policy is to round the calculated percentage of impairment to the nearest whole number.¹³ Thus, appellant's binaural hearing loss should be rounded to nine percent impairment. This error is harmless as OWCP's September 29, 2011 decision reflects that the period of the award, June 27 to October 30, 2011, represents the number of weeks compensation was paid in proportion to the percentage loss of use for permanent loss of appellant's hearing. The amount of compensation is paid in proportion to the percentage loss of use when the loss of use is less than 100 percent.¹⁴ The compensation schedule in FECA provides that the maximum number of weeks of compensation for hearing loss in both ears is 200 weeks.¹⁵ Nine percent of 200 weeks is 18 weeks of compensation, which is the period that OWCP paid appellant. Thus, the 18 weeks of compensation added to the 40 weeks of compensation appellant previously received for the 19.7 percent binaural hearing loss, which represents 20 percent binaural hearing loss, totals 58 weeks of compensation, which appellant received 29 percent of 200 weeks yields 58 weeks of compensation.

Appellant argued on appeal that the schedule award should have accounted for his tinnitus. The A.M.A., *Guides* provides that if tinnitus interferes with activities of daily living such as sleeping, reading and other tasks requiring concentration, up to five percent may be added to a measurable binaural hearing impairment.¹⁶ The Board has held, however, that a claimant is not entitled to an additional schedule award where the record contains no medical evidence directly addressing the impact of tinnitus on appellant's activities of daily living.¹⁷ In this case, OWCP accepted that appellant had tinnitus, but there is not medical evidence addressing whether the tinnitus interfered with his activities of daily living. Appellant, therefore, has not established entitlement to compensation due to tinnitus.

¹¹ *Id.*

¹² When calculating binaural hearing loss, the lesser hearing loss percentage, 28.1 percent for the right ear, is multiplied by 5, then added to the greater loss percentage of 33.8 percent and divided by 6, which results in a binaural hearing loss of 29.05 or 29.1 percent.

¹³ *See supra* note 10.

¹⁴ *See J.H., supra* note 10.

¹⁵ 5 U.S.C. § 8107(c)(13)(B).

¹⁶ *See A.M.A., Guides* 249. *See also R.D.*, 59 ECAB 127, 131 (2007).

¹⁷ *R.D., id.*

Appellant may request a schedule award or increased schedule award based on evidence of a new exposure or medical evidence showing progression of an employment-related condition resulting in permanent impairment or increased impairment.

LEGAL PRECEDENT -- ISSUE 2

To require OWCP to reopen a case for merit review under section 8128 of FECA,¹⁸ OWCP's regulation provide that a claimant must: (1) show that OWCP erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by OWCP; or (3) constitute relevant and pertinent new evidence not previously considered by OWCP.¹⁹ To be entitled to a merit review of an OWCP 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.²⁰ When a claimant fails to meet one of the above standards, OWCP will deny the application for reconsideration without reopening the case for review of the merits.

ANALYSIS -- ISSUE 2

On January 6, 2012 appellant disagreed with OWCP's September 29, 2011 decision granting him a schedule award for a total 29.1 percent binaural sensorineural hearing loss. The relevant issue on reconsideration is whether he submitted sufficient medical evidence to establish additional bilateral hearing impairment due to his employment-related noise exposure.

Dr. Dailey's December 28, 2011 prescription found that appellant had medical clearance for hearing aids. He did not address the relevant issue of whether appellant had any additional bilateral hearing loss causally related to his employment-related noise exposure. As this evidence does not address the relevant issue of causal relationship, the Board finds that it is insufficient to reopen appellant's claim for further merit review.²¹ Likewise, Dr. Harney's January 19, 2012 report is insufficient to warrant merit review of appellant's claim. He found that appellant had employment-related bilateral tinnitus, but failed to provide a medical opinion addressing whether the diagnosed condition caused any additional impairment.²²

Appellant resubmitted copies of Dr. Dailey's June 27, 2011 report and Dr. Garelick's April 11 and September 12, 2011 reports. This evidence is duplicative of evidence contained in

¹⁸ *Supra* note 3. Under section 8128 of FECA, the 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).

¹⁹ 20 C.F.R. § 10.606(b)(1)-(2).

²⁰ *Id.* at § 10.607(a).

²¹ *S.J.*, Docket No. 08-2048 (issued July 9, 2009); *R.M.*, 59 ECAB 690 (2008); *D. Wayne Avila*, 57 ECAB 642 (2006); *Betty A. Butler*, 56 ECAB 545 (2005) (evidence that does not address the particular issue involved does not constitute a basis for reopening a claim).

²² *Id.*

the record and was previously considered by OWCP. The Board finds, therefore, that appellant has not established a basis for reopening his case for further merit review.²³

The Board finds that OWCP properly determined that appellant was not entitled to further review of the merits of his claim pursuant to any of the three requirements under section 10.606(b)(2) and properly denied his January 6, 2012 request for reconsideration.²⁴

CONCLUSION

The Board finds that appellant did not establish that he sustained greater than 29 percent binaural hearing loss for which he received schedule awards. The Board further finds that OWCP properly denied appellant's request for further merit review of his claim pursuant to 5 U.S.C. § 8128(a).

ORDER

IT IS HEREBY ORDERED THAT the February 2, 2012 decision of the Office of Workers' Compensation Programs is affirmed and the September 29, 2011 decision of OWCP is affirmed, as modified.

Issued: February 26, 2013
Washington, DC

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board

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

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

²³ 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. *F.R.*, 58 ECAB 607 (2007); *Arlesa Gibbs*, 53 ECAB 204 (2001).

²⁴ *M.E.*, 58 ECAB 694 (2007) (when an application for reconsideration does not meet at least one of the three requirements enumerated under section 10.606(b)(2), OWCP will deny the application for reconsideration without reopening the case for a review on the merits).