

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

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**A.B., Appellant**

**and**

**DEPARTMENT OF THE ARMY, ARMY  
DEPOT, Anniston, AL, Employer**

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**Docket No. 13-316  
Issued: June 20, 2013**

*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 November 26, 2012 appellant filed a timely appeal from Office of Workers' Compensation Programs' (OWCP) decisions dated September 6 and November 1, 2012. Pursuant to the Federal Employees' Compensation Act<sup>1</sup> (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 has a ratable hearing loss warranting a schedule award; (2) whether OWCP properly exercised its discretion in denying hearing aids; and (3) whether its refusal to reopen appellant's case for further consideration of the merits pursuant to 5 U.S.C. § 8128(a) constituted an abuse of discretion.

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<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

## **FACTUAL HISTORY**

This is the second appeal before the Board. Appellant, a 61-year-old machinist supervisor, filed an occupational disease claim on September 10, 2008, alleging that he sustained a bilateral hearing loss caused by factors of his federal employment. He was exposed to noise generated by punch and hydraulic presses, stud lathes, impact wrenches, air chisels and grinders, chipping hammers, crane horns and ventilation fans. Appellant submitted several audiograms which showed varying degrees of hearing loss.

OWCP referred appellant for a second opinion examination to Dr. Robert Hurlbutt, a Board-certified otolaryngologist. In a January 9, 2009 report, Dr. Hurlbutt found that appellant did not have a ratable hearing loss. He reviewed the statement of accepted facts and administered audiometric testing. Dr. Hurlbutt opined that, although appellant was intermittently exposed to hazardous noise in the course of his federal employment, the exposure was insufficient to cause hearing loss.

By decision dated January 26, 2009, OWCP denied appellant's claim, finding the medical evidence insufficient to establish that he sustained a work-related hearing loss. By decision dated November 18, 2009, it modified the January 26, 2009 decision to find the medical evidence sufficient to establish that appellant sustained work-related bilateral sensorineural hearing loss. OWCP denied a schedule award on the grounds that he did not sustain a ratable impairment. In a nonmerit decision dated January 27, 2010, it denied appellant's request for reconsideration. By decision dated September 23, 2010, OWCP denied modification of the November 18, 2009 decision. In a decision dated September 23, 2010, it denied modification of the November 18, 2009 decision. By decision dated September 23, 2011,<sup>2</sup> the Board affirmed the September 23, 2010 OWCP decision. The facts of this case as set forth in the Board's September 23, 2011 decision are incorporated by reference.

On December 15, 2011 appellant submitted several audiograms, which showed varying degrees of hearing loss. In a September 28, 2011 report, Dr. J. Scott Robertson, a Board-certified otolaryngologist, provided a September 28, 2011 audiogram and opined that appellant had a bilateral sensorineural hearing loss. He recommended hearing aids. Appellant submitted additional audiograms which were previously submitted to OWCP.

In order to determine whether appellant had any ratable impairment OWCP referred him for a second opinion examination with Dr. Dennis G. Pappas, a Board-certified otolaryngologist. In a January 23, 2012 report, Dr. Pappas found that appellant had no ratable hearing loss. An audiogram dated January 23, 2012, with an attached calibration certificate, showed hearing levels of 10, 10, 20 and 60 decibels (dB) on the right at 500, 1,000, 2,000 and 3,000 hertz (Hz), respectively and 15, 15, 20 and 50 dB on the left. Based on the audiogram results, appellant had a nonratable hearing loss pursuant to the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) (sixth edition). He diagnosed bilateral, progressive sensorineural hearing loss compatible with noise exposure. Dr. Pappas stated that appellant's workplace exposure was of sufficient intensity and duration to have caused and/or

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<sup>2</sup> Docket No. 11-290 (issued September 23, 2010).

aggravated noise-induced hearing loss. He stated that appellant had a moderate to moderately severe high frequency loss in either ear and recommended hearing protection and hearing aids.

In a February 2, 2012 report, an OWCP medical adviser reviewed the results of the January 23, 2012 audiogram. He determined that appellant had a nonratable work-related bilateral hearing loss. The medical adviser checked a box indicating that appellant would not benefit from hearing amplification.

By decision dated February 7, 2012, OWCP found that appellant was not entitled to a schedule award because the medical evidence established that his bilateral hearing loss was nonratable. It also found that he did not require the use of hearing aids.

By letter dated March 12, 2012, appellant requested an oral hearing, which was held on June 11, 2012. At the hearing, he contended that he was entitled to be reimbursed for purchasing hearing aids, given that Dr. Pappas and other physicians had recommended that he needed them to enhance his hearing. Appellant testified regarding the difficulties he had in hearing conversations.

By decision dated September 6, 2012, an OWCP hearing representative affirmed the February 7, 2012 decision. She found that Dr. Robertson's September 28, 2011 report was of reduced probative value because he did not address whether appellant had been exposed to noise within the previous 16 hours, as required by the Federal (FECA) Procedure Manual, Part 3 -- Medical, *Hearing Loss*, Exhibit 4 (August 2011).<sup>3</sup>

By letter received by OWCP on October 9, 2012, appellant requested reconsideration. He resubmitted Dr. Robertson's September 28, 2011 report. Appellant also submitted a letter from Jennifer Smith, the audiologist, who performed the September 28, 2011 audiogram for Dr. Robertson. Ms. Smith stated:

“[Appellant] has requested that his audiological work up from September 28, 2011 be resubmitted to your office with the required information listed in your report. It was stated that the time and previous exposure to noise was not indicated on his last report. Our EHR system maintains this information and on September 28, 2011 audiological testing was completed on [appellant] at 11:00 a.m. and at the time of testing [appellant] reported no significant history of noise exposure for at least several months. It has been noted in several reports that [appellant] did suffer from noise[-]induced hearing loss as mentioned in the current report being used from Dr. Pappas' office; however[,] the degree of loss did not meet the standards for compensation. The visit on September 28, 2011 indicates a mild[-]to[-]severe sensorineural hearing loss for both the left and right ears. According to the A.M.A., *Guides* this loss yields a hearing impairment of 9.38 percent in the right ear and 1.88 percent in the left ear resulting in a binaural loss of 18.78 percent. Please take this audiometric data into consideration when reviewing [appellant's] case.”

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<sup>3</sup> Federal (FECA) Procedure Manual, Part 3 -- Medical, *Hearing Loss*, Chapter 3.600.8 Exhibit 4 (August 2011); *Janice M. Hatcher*, 55 ECAB 155 (2003).

Appellant also submitted a September 10, 2012 letter from Colonel Cedric McCord, the employing establishment's medical director; a September 10, 2012 audiogram report; a September 17, 2012 audiogram report and a September 18, 2012 report from Dr. Paul V. Stephens, Board-certified in otolaryngology, who stated that appellant had a mild-to-moderately severe bilateral sensorineural hearing loss and attached a September 18, 2012 which documented the hearing loss. Dr. Mitchell advised that the pattern of hearing loss appeared to be consistent with exposure to noise.

By decision dated November 1, 2012, OWCP denied appellant's application for review on the grounds that it did not raise any substantive legal questions or include new and relevant evidence sufficient to require it to review its prior decision. It advised him that, as he had presented new evidence of continued noise exposure, he should file a new occupational disease claim.

### **LEGAL PRECEDENT -- ISSUE 1**

The schedule award provision of FECA<sup>4</sup> and its implementing regulations<sup>5</sup> 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. However, FECA does not specify the manner in which the percentage of loss shall be determined. For consistent results and to ensure equal justice under the law to all claimants, good administrative practice necessitates 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 implementing regulations as the appropriate standard for evaluating schedule losses.<sup>6</sup>

OWCP evaluates industrial hearing loss in accordance with the standards contained in the A.M.A., *Guides*.<sup>7</sup> Using the frequencies of 500, 1,000, 2,000 and 3,000 Hz, the losses at each frequency are added up and averaged.<sup>8</sup> Then, the fence of 25 dB is deducted. The remaining amount is multiplied by a factor of 1.5 to arrive at the percentage of monaural hearing loss.<sup>9</sup> 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

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<sup>4</sup> 5 U.S.C. § 8107.

<sup>5</sup> 20 C.F.R. § 10.404. Effective May 1, 2009, OWCP began using the A.M.A., *Guides* (6<sup>th</sup> ed. 2009).

<sup>6</sup> *Id.*

<sup>7</sup> Federal (FECA) Procedure Manual, Part 3 -- Medical, *Special Determinations*, Chapter 3.700(4)(b) (January 2010).

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

six to arrive at the amount of the binaural hearing loss.<sup>10</sup> The Board has concurred in OWCP's adoption of this standard for evaluating hearing loss.<sup>11</sup>

The requirements of the evidence to be used in evaluating occupational hearing loss claims require that the employee should undergo audiological evaluation and otological examination; that the audiological testing precede the otologic examination; that the audiological evaluation and otologic examination be performed by different individuals as a method of evaluating the reliability of the findings; that the clinical audiologist and otolaryngologist be certified; that all audiological equipment authorized for testing meet the calibration protocol contained in the accreditation manual of the American Speech and Hearing Association that the audiometric test results include both bone conduction and pure-tone air conduction thresholds; speech reception thresholds and monaural discrimination scores; and that the otolaryngologist's report include the date and hour of examination; date and hour of the employee's last exposure to loud noise; a rationalized medical opinion regarding the relationship.<sup>12</sup>

### ANALYSIS -- ISSUE 1

OWCP accepted that appellant sustained a bilateral hearing loss due to noise exposure from his federal employment.<sup>13</sup> The issue is whether he sustained a ratable impairment in accordance with the A.M.A., *Guides*.

Dr. Pappas, a second opinion physician, provided a February 2, 2012 audiogram, with the requisite certification information and a calibration certificate, showing hearing levels of 5, 5, 10 and 25 dB on the right at 500, 1,000, 2,000 and 3,000 Hz, respectively, to find an average of 11.25. The average of 11.25 dB, reduced by 25 dB (the first 25 dB are discounted as discussed above) to total 0 dB. With regard to the left ear, the audiogram showed hearing levels of 5, 5, 5 and 25 dB on the left at 500, 1,000, 2,000 and 3,000 Hz, respectively, averaged 10 dB. The average of 10 dB, reduced by 25 dB (the first 25 dB are discounted), equals 0 dB. Based on this test, Dr. Pappas determined that appellant did not sustain a ratable hearing loss.<sup>14</sup> The Board finds that he properly applied the A.M.A., *Guides* to the February 2, 2012 audiogram to determine that appellant did not sustain a ratable hearing loss for schedule award purposes.<sup>15</sup>

Dr. Pappas provided a thorough examination and a reasoned opinion explaining how the findings on examination and testing did not result in a ratable hearing loss. The Board finds that

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<sup>10</sup> *Id.*

<sup>11</sup> See *Donald Stockstad*, 53 ECAB 301 (2002), *petition for recon. granted (modifying prior decision)* Docket No. 01-1570 (issued August 13, 2002).

<sup>12</sup> See *Joshua Holmes*, 42 ECAB 231 (1990).

<sup>13</sup> *Frantz Ghassan*, 57 ECAB 349 (2006); see Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Award and Permanent Disability Claims*, Chapter 2.808.6(d) (August 2002).

<sup>14</sup> A.M.A., *Guides* 249-51.

<sup>15</sup> See *S.G.*, 58 ECAB 383 (2007).

Dr. Pappas' report represents the weight of medical evidence at the time of OWCP's February 7, 2012 decision.

OWCP's medical adviser properly applied the applicable standards of the A.M.A., *Guides*, to determine that appellant did not have a ratable hearing loss. The Board will affirm the September 6, 2012 decision of OWCP's hearing representative.

### **LEGAL PRECEDENT -- ISSUE 2**

Section 8103(a) of FECA provides that the United States shall furnish to an employee who is injured while in the performance of duty, the services, appliances and supplies prescribed or recommended by a qualified physician, which the Secretary of Labor considers likely to cure, give relief, reduces the degree or the period of any disability or aid in lessening the amount of any monthly compensation.<sup>16</sup> Following medical evaluation of a claim, if the hearing loss is determined to be nonratable for schedule award purposes, other benefits such as hearing aids may still be payable if any employment-related hearing loss exists.<sup>17</sup>

### **ANALYSIS -- ISSUE 2**

The Board finds that the case is not in posture for decision as to whether appellant requires hearing aids. OWCP accepted that appellant sustained a work-related hearing loss, albeit nonratable. Dr. Robertson, an attending physician, and Dr. Pappas recommended hearing aids for appellant. At the hearing held on June 11, 2012, appellant testified regarding the difficulties he encountered in hearing normal conversations. The medical adviser checked a box indicating that appellant did not require the use of hearing aids. OWCP relied on this recommendation to deny hearing aids in its February 7 and September 6, 2012 decisions. As noted above, the only restriction on OWCP's authority to authorize medical treatment is one of reasonableness. OWCP should have requested that the medical adviser further address why hearing aids should not be authorized, since they were recommended by both Dr. Robertson and Dr. Pappas. On remand, it shall clarify this issue.

### **LEGAL PRECEDENT -- ISSUE 3**

Under 20 C.F.R. § 10.606(b), a claimant may obtain review of the merits of his or her claim by showing that OWCP erroneously applied or interpreted a specific point of law; by advancing a relevant legal argument not previously considered by OWCP; or by submitting relevant and pertinent evidence not previously considered by OWCP.<sup>18</sup> 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.<sup>19</sup> When a claimant fails to meet one of the above standards, it is a

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<sup>16</sup> 5 U.S.C. § 8103.

<sup>17</sup> *R.R.*, Docket No. 12-1840 (issued February 14, 2013); *see F.D.*, Docket No. 10-1175 (issued January 4, 2011).

<sup>18</sup> 20 C.F.R. § 10.606(b)(1); *see generally* 5 U.S.C. § 8128(a).

<sup>19</sup> *Howard A. Williams*, 45 ECAB 853 (1994).

matter of discretion on the part of OWCP whether to reopen a case for further consideration under section 8128(a) of FECA.<sup>20</sup>

### **ANALYSIS -- ISSUE 3**

The Board has reviewed the case record and finds that OWCP's refusal to reopen appellant's case for further consideration of the merits pursuant to 5 U.S.C. § 8128(a), constituted an abuse of discretion.

The Board notes that if a claim for hearing loss is accepted as causally related and the issue is one of ratability for a schedule award, an audiogram prepared by an audiologist may determine the percentage of hearing loss if the audiogram is accompanied by a physician's opinion certifying that the audiogram is accurate and that the audiologist properly determined the percentage of appellant's hearing loss by utilizing the approved standardized procedures.<sup>21</sup>

In support of his reconsideration request, appellant submitted the October 9, 2012 letter from Ms. Smith, the audiologist, who performed the September 28, 2011 audiogram for Dr. Robertson. Ms. Smith noted that OWCP had found Dr. Robertson's report deficient because the time and previous exposure to noise was not indicated on his report. She stated that her office records reflected that the September 28, 2011 testing was completed at 11:00 a.m. and, at the time of testing, appellant reported no significant history of noise exposure for at least several months. The Board finds that this letter constitutes relevant and pertinent evidence not previously considered by OWCP in regard to the issue of whether the September 28, 2011 audiogram was valid and shows a ratable hearing loss. Therefore, its refusal to reopen appellant's case for further consideration of the merits of his claim constituted an abuse of discretion.<sup>22</sup> The Board will set aside the November 1, 2012 decision and remand the case for a review of the merits of appellant's claim.

### **CONCLUSION**

The Board affirms the September 6, 2012 OWCP decision finding that appellant did not establish a ratable hearing loss warranting a schedule award. The Board finds that the issue of whether hearing aids should be authorized requires further development. The Board finds that OWCP abused its discretion by refusing to reopen appellant's case for further consideration of the merits.

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<sup>20</sup> *Joseph W. Baxter*, 36 ECAB 228, 231 (1994).

<sup>21</sup> *Joshua A. Holmes*, 42 ECAB 231, 236 (1990); *Rubel Garcia*, 33 ECAB 1171 (1982).

<sup>22</sup> *Carol Cherry (Donald Cherry)*, 47 ECAB 658 (1996).

**ORDER**

**IT IS HEREBY ORDERED THAT** the September 6, 2012 decision of the Office of Workers' Compensation Programs is affirmed. The November 1, 2012 nonmerit decision is set aside and remanded for further consideration of the merits of the claim, to be followed by an appropriate decision.

Issued: June 20, 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