

FACTUAL HISTORY

On September 26, 2002 appellant, then a 55-year-old senior production supervisor, filed an occupational disease claim alleging that he sustained a hearing loss as a result of his federal employment. In support of his claim, appellant submitted the results of audiograms conducted annually by the employing establishment.

On February 13, 2003 the Office referred appellant to Dr. Montra Kanok, a Board-certified otolaryngologist, for a second opinion. Dr. Kanok examined appellant on March 18, 2003 and determined that an audiogram taken that day indicated that appellant had a moderate to severe bilateral high frequency sensorineural hearing loss and mild tinnitus in both ears which was more than likely caused by his years of noise exposure with the employing establishment. He noted that at this point, a trial hearing aid might be beneficial to the claimant.

On April 17, 2003 the Office accepted appellant's claim for bilateral sensorineural hearing loss.

The Office referred Dr. Kanok's opinion to the Office medical adviser, who applied the American Medical Association, *Guides to the Evaluation of Permanent Impairment*, to determine that appellant had a four percent monaural hearing loss in his left ear and a zero percent monaural loss in his right ear. He further noted that hearing aids were indicated for the left ear.

By decision dated July 22, 2003, the Office issued a schedule award for a four percent hearing loss in the left ear to run for 2.08 weeks for the period March 18 to April 1, 2003. The Office noted that appellant was to be paid based on three-fourths of a weekly pay rate of \$1,375.06, or \$1,031.30, for a total payment of \$2,145.10. The Office noted that although appellant's claim was accepted for binaural hearing loss, it had been determined that the hearing loss in the right ear was not to the extent to be considered compensable.

On April 16, 2004 appellant requested reconsideration. In support thereof, appellant submitted, *inter alia*, a letter from the employing establishment dated April 13, 2004 wherein it was noted that they were unable to retrieve any further records from their files, a copy of the employing establishment's Form 50, notification of personnel action, for appellant dated January 3, 1967 noting appellant's career conditional appointment and a certificate of medical examination for April 16, 1981.

On June 23, 2004 the Office denied appellant's request for reconsideration without reviewing the merits of the case.

LEGAL PRECEDENT -- ISSUE 1

The schedule award provision of the Federal Employees' Compensation Act¹ and its implementing regulation² set forth the number of weeks of compensation to be paid for

¹ 5 U.S.C. §§ 8101-8193; *see* 5 U.S.C. § 8107(c).

² 20 C.F.R. § 10.404.

permanent loss or loss of use, of the members of the body listed in the schedule. Where the loss of use is less than 100 percent, the amount of compensation is paid in proportion to the percentage of loss of use.³ However the Act does not specify the manner in which the percentage of impairment shall be determined. For consistent results and to ensure equal justice for all claimants, the Office adopted the A.M.A., *Guides* as a standard for determining the percentage of impairment and the Board has concurred in such adoption.⁴

The Office evaluates industrial hearing loss in accordance with the standards contained in the A.M.A., *Guides*.⁵ Using the frequencies of 500, 1,000, 2,000 and 3,000 cycles per second (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, then added to the greater loss and the total is divided by six to arrive at the amount of the binaural hearing loss.⁹ The Board has concurred in the Office’s adoption of this standard for evaluating hearing loss.¹⁰

ANALYSIS

The Office medical adviser applied the Office’s standardized procedures to the March 18, 2003 audiogram performed for Dr. Kanok. Testing for the right ear at the frequency levels of 500, 1,000, 2,000 and 3,000 cps revealed decibel losses of 5, 5, 25 and 45. These decibel levels totaled 80 and when divided by 4, resulted in an average hearing loss at those cycles of 20 decibels. The average of 20 decibels was then reduced by 25 decibels (the first 25 decibels were discounted as discussed above) to equal 0, which was multiplied by the established factor of 1.5 to compute a 0 percent loss of hearing for the right ear. Testing for the left ear at the frequency levels of 500, 1,000, 2,000 and 3,000 cps revealed decibel losses of 5, 5, 45 and 55. These decibel levels totaled 110 and when divided by 4, resulted in an average hearing loss at those cycles of 27.5 decibels. The average of 27.5 decibels was then reduced by 25 decibels (the first 25 decibels were discounted as discussed above) to equal 2.5, which was multiplied by the established factor of 1.5 to compute a 3.8 percent hearing loss in the left ear, rounded up to 4

³ 5 U.S.C. § 8107(c)(19).

⁴ 20 C.F.R. § 10.404; *Donald E. Stockstad*, 53 ECAB ____ (Docket No. 01-1570, issued January 23, 2002); *petition for recon. granted (modifying prior decision)*, (Docket No. 01-1570, issued August 13, 2002).

⁵ A.M.A., *Guides* 250.

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *See supra* note 4.

percent. Pursuant to the Office's standardized procedures, the medical adviser properly determined that appellant had a 4 percent monaural hearing loss in his left ear.¹¹

With respect to schedule awards for hearing impairments, the pertinent provision of the Act provides that, for a total, or 100 percent loss of hearing in one ear, an employee shall receive 52 weeks of compensation.¹² In the instant case, appellant does not have a total, or 100 percent monaural hearing loss, but rather a 4 percent monaural hearing loss. As appellant has a 4 percent loss of use of his right ear, he is entitled to 4 percent of 52 weeks of compensation, which is 2.08 weeks. The Office, therefore, properly determined the number of weeks of compensation for which appellant is entitled.¹³

LEGAL PRECEDENT -- ISSUE 2

To require the Office to reopen a case for merit review under section 8128(a) of the Act,¹⁴ the Office's regulation provides that 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.¹⁵ 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.¹⁶ When a claimant fails to meet one of the above standards, it is a matter of discretion on the part of the Office whether to reopen a case for further consideration under section 8128(a) of the Act.¹⁷

¹¹ On appeal, appellant contends that the Board should take into consideration the fact that his preemployment audiogram was never located and contends that he should not be penalized for the failure to find this document. Appellant has not been so penalized. The employing establishment advised the Office that all of appellant's records retrievable from the National Archives and Records Administration Center in St. Louis, Missouri, had been provided to the Office. The Office properly applied the A.M.A., *Guides* in determining appellant's hearing impairment as evidenced in his recent audiogram.

¹² 5 U.S.C. § 8107(c)(13)(A).

¹³ On appeal, appellant alleged that the Office erred in determining the period of the award for hearing loss, which ran from March 18 to April 1, 2003. The Office properly began the award on the date of maximum medical improvement as determined by the Office medical adviser, who relied on the date of the March 18, 2003 audiogram. The period covered by schedule awards commences on the date that the employee reaches maximum medical improvement from the residuals of the employment injury. *James E. Earle*, 51 ECAB 567 (2000). *Yolandra Librera*, 37 ECAB 388 (1986). Appellant further contends on appeal that he is entitled to a hearing aid for his right ear. The Office medical adviser only stated that a hearing aid was indicated for the left ear. Furthermore, Dr. Kanok's report does not indicate that appellant is required to wear a hearing aid for his right ear. Thus, there is no evidence of entitlement to a hearing aid for the right ear.

¹⁴ 5 U.S.C. § 8101 *et. seq.* 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 application." 5 U.S.C. § 8128(a).

¹⁵ 20 C.F.R. § 10.606(b)(2).

¹⁶ 20 C.F.R. § 10.607(a).

¹⁷ *Joseph W. Baxter*, 36 ECAB 228, 231 (1984).

The Board has held that the submission of evidence which repeats or duplicates evidence already in the case record does not constitute a basis for reopening a case.¹⁸ The Board has held that the submission of evidence which does not address the particular issue involved does not constitute a basis for reopening a case.¹⁹ While the 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.²⁰

ANALYSIS -- ISSUE 2

In the present case, appellant has not established that the Office abused its discretion in the June 23, 2004 decision by denying his request for reconsideration of its July 22, 2003 decision. The Board notes that appellant submitted no new evidence relating to his degree of hearing impairment. As he submitted no new evidence related to the subject of the July 22, 2003 denial, has not shown that the Office erroneously applied or interpreted a specific point of law, advanced a relevant legal argument not previously considered by the Office, or submitted relevant and pertinent new evidence not previously considered by the Office, appellant has not established that he was entitled to a merit review of his petition for reconsideration.

CONCLUSION

The Board finds that appellant has not established that he is entitled to more than a four percent impairment of the left ear for which he received a schedule award. Furthermore, the Board finds that the refusal of the Office to reopen appellant's case for further consideration of the merits of his claim, pursuant to 5 U.S.C. § 8128(a), did not constitute an abuse of discretion.

¹⁸ *Eugene F. Butler*, 36 ECAB 393, 398 (1984); *Jerome Ginsberg*, 32 ECAB 31, 33 (1980).

¹⁹ *Edward Matthew Diekemper*, 31 ECAB 224, 225 (1979).

²⁰ *John F. Critz*, 44 ECAB 788, 794 (1993).

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated June 23, 2004 and July 22, 2003 are hereby affirmed.

Issued: December 8, 2004
Washington, DC

Colleen Duffy Kiko
Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member