

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

ROBERT L. HENRY, Appellant

and

**DEPARTMENT OF THE AIR FORCE, EGLIN
AIR FORCE BASE, FL, Employer**

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**Docket No. 03-2228
Issued: January 6, 2004**

Appearances:
Robert L. Henry, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

DAVID S. GERSON, Alternate Member
WILLIE T.C. THOMAS, Alternate Member
MICHAEL E. GROOM, Alternate Member

JURISDICTION

On September 10, 2003 appellant filed a timely appeal from the Office of Workers' Compensation Programs merit decisions dated June 26 and January 9, 2003 adjudicating a schedule award. Pursuant to 20 C.F.R. §§ 10.501.2(c) and 501.3, the Board has jurisdiction of the merits of this case. The Office also issued an August 18, 2003 decision, denying appellant's requests for reconsideration. The Board has jurisdiction of the January 9, June 26 and August 18, 2003 decisions.

ISSUES

The issues are: (1) whether appellant sustained more than a six percent permanent hearing loss of the left ear for which he received a schedule award and whether he had any ratable loss of hearing of the right ear; and (2) whether the Office properly denied appellant's request for reconsideration.

FACTUAL HISTORY

On October 9, 2002 appellant, then a 50-year-old heavy mobile equipment mechanic leader, filed an occupational disease claim alleging that he sustained a hearing loss due to hazardous noise exposure at work.

In a report dated November 15, 2002, Captain Laura L. Butler, an audiologist at an employing establishment medical facility, stated that noise exposure most likely contributed to appellant's hearing changes. She noted that audiological records showed a fluctuation in his high frequency hearing loss since 1992. She provided the results of audiometric testing that she performed on November 14, 2002.

In a report dated November 21, 2002, Dr. James McQueen, a Board-certified otolaryngologist and an Office referral physician, diagnosed noise-induced sensorineural hearing loss and provided the results of audiometric testing performed on that date. Testing for the right ear at the frequency levels of 500, 1,000, 2,000 and 3,000 cycles per second revealed decibel losses of 20, 10, 5 and 20, respectively. Testing for the left ear at the frequency levels of 500, 1,000, 2,000 and 3,000 cycles per second revealed decibel losses of 15, 10, 20 and 70 respectively.

In a report dated December 11, 2002, the Office's district medical adviser applied the Office's standardized procedures to Dr. McQueen's evaluation. He totaled the decibel losses of 20, 10, 5 and 20 in the right ear at 55 decibels and divided by 4 to obtain the average hearing loss 13.75 decibels. This average was then reduced by 25 decibels to equal a figure less than 0 which was multiplied by the established factor of 1.5 to compute a 0 percent hearing loss in the right ear. The Office's district medical adviser totaled the decibel losses of 15, 10, 20 and 70 in the left ear at 115 decibels and divided by 4 to obtain the average hearing loss of 28.75 decibels. This average was then reduced by 25 decibels to equal 3.75 which was multiplied by the established factor of 1.5 to compute a 5.63 percent hearing loss, rounded to 6 percent, in the left ear.

By letter dated December 18, 2002, the Office accepted appellant's claim for a noise-induced hearing loss.

On December 24, 2002 appellant filed a claim for a schedule award.

By decision dated January 9, 2003, the Office granted appellant a schedule award for a 6 percent monaural hearing loss of the left ear for 3.12 weeks of compensation.¹

On January 16, 2003 appellant requested a review of the written record and submitted additional evidence. A September 20, 2002 report prepared by two audiologists provided the results of audiometric testing and a diagnosis of bilateral sensorineural hearing loss.

¹ Under the Federal Employees' Compensation Act, the maximum award for hearing loss of one ear is 52 weeks of compensation. 5 U.S.C. § 8107(c)(13)(A). Since the monaural loss in this case is six percent, appellant is entitled to six percent of 52 weeks or 3.12 weeks of compensation.

By decision dated and finalized June 26, 2003, an Office hearing representative affirmed the Office's January 9, 2003 decision.

By letter dated July 25, 2003, appellant's congressional representative requested reconsideration and submitted a statement from appellant, who argued that Dr. McQueen did not perform a proper medical evaluation. Appellant contended that he had submitted sufficient medical evidence to support a higher hearing loss award. Appellant also submitted numerous documents including a number of audiograms performed by audiologists.²

By decision dated August 18, 2003, the Office denied appellant's request for reconsideration on the grounds that the evidence submitted was irrelevant and insufficient to warrant further merit review.

LEGAL PRECEDENT- Issue 1

The schedule award provisions of the Federal Employees' Compensation Act³ and its implementing regulation⁴ 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, the Act 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 American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) has been adopted by the implementing regulation as the appropriate standard for evaluating schedule losses.⁵

The Office evaluates industrial hearing loss in accordance with the standards contained in the A.M.A., *Guides*.⁶ Using the frequencies of 500, 1,000, 2,000, and 3,000 cycles per second, the losses at each frequency are added and averaged.⁷ 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.⁸ The remaining amount is multiplied by a factor of 1.5 to arrive at the percentage of monaural hearing loss.⁹ 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

² Appellant had previously submitted a number of these documents to the Office.

³ 5 U.S.C. § 8107.

⁴ 20 C.F.R. § 10.404.

⁵ *Id.*

⁶ *Stuart M. Cole*, 46 ECAB 1011 (1995).

⁷ A.M.A., *Guides* at 250 (5th ed. 2001).

⁸ *Id.*

⁹ *Id.*

arrive at the amount of the binaural hearing loss.¹⁰ The Board has concurred in the Office's adoption of this standard for evaluating hearing loss.¹¹

ANALYSIS - Issue 1

The Office medical adviser reviewed the results of the audiometric testing performed on November 21, 2002 for Dr. McQueen, a Board-certified otolaryngologist and an Office referral physician, and correctly applied the Office's standardized procedures. Testing for the right ear at the frequency levels of 500, 1,000, 2,000, and 3,000 cycles per second revealed decibel losses of 20, 10, 5 and 20, respectively. These decibel losses were totaled at 55 decibels and were divided by 4 to obtain the average hearing loss 13.75 decibels. This average was then reduced by 25 decibels (25 decibels being discounted as discussed above) to equal a figure less than 0 which was multiplied by the established factor of 1.5 to compute a 0 percent hearing loss in the right ear. Testing for the left ear at the frequency levels of 500, 1,000, 2,000, and 3,000 cycles per second revealed decibel losses of 15, 10, 20 and 70 respectively. These decibel losses were totaled at 115 decibels and were divided by 4 to obtain the average hearing loss of 28.75 decibels. This average was then reduced by 25 decibels to equal 3.75 which was multiplied by the established factor of 1.5 to compute a 5.63 percent hearing loss in the left ear, rounded to 6 percent.

The Board finds that the Office's district medical adviser correctly applied the procedures in the A.M.A., *Guides* and the Office's procedure manual to the audiometric testing results obtained for Dr. McQueen and determined that appellant had a six percent hearing loss of the left ear and no ratable hearing loss of the right ear.

The September 20 and November 15, 2002 hearing loss evaluations submitted by appellant were not performed in accordance with the requirements of the A.M.A., *Guides* and the Office's Procedure Manual. The September 20, 2002 hearing evaluation was not performed by a Board-certified (or certification eligible) otolaryngologist,¹² does not contain a rationalized medical opinion as to causal relationship,¹³ does not document the calibration protocol for the

¹⁰ *Id.*

¹¹ *Donald E. Stockstad*, 53 ECAB ____ (Docket No. 01-15700, issued January 23, 2002); *petition for recon. granted* (modifying prior decision), Docket No. 01-1570 (issued August 13, 2002).

¹² Federal (FECA) Procedure Manual, Part 3 -- Medical, *Requirements for Medical Reports*, Chapter 3.600.8.a (September 1994); Exhibit 4 (December 1994, September 1996)

¹³ *Id.*

audiological equipment,¹⁴ does not include both bone conduction and pure-tone air conduction,¹⁵ does not show the date and hour of last exposure to noise,¹⁶ and does not contain a statement commenting on the reliability of the testing.¹⁷ The November 14, 2002 hearing evaluation contains these same deficiencies with the exception that the calibration of the equipment is documented. As these audiometric evaluations were not prepared according to the A.M.A., *Guides* and the Office's procedure manual, they are not probative to the issue of whether appellant has a greater hearing loss.¹⁸

LEGAL PRECEDENT - Issue 2

The Code of Federal Regulations provides that a claimant may obtain review of the merits of the claim by: (1) showing that the Office erroneously applied or interpreted a specific point of law; or (2) advancing a relevant legal argument not previously considered by the Office; or (3) submitting relevant and pertinent evidence not previously considered by the Office.¹⁹ When an application for review of the merits of a claim does not meet at least one of these requirements, the Office will deny the application for review without reviewing the merits of the claim.²⁰

ANALYSIS - Issue 3

Upon reconsideration of his claim, appellant stated his disagreement with the hearing loss impairment rating of Dr. McQueen and argued that other medical evidence of record supported his contention that he had a higher hearing loss impairment. However, lay persons are not competent to render a medical opinion.²¹ Therefore, appellant's opinion of Dr. McQueen's report does not constitute relevant and pertinent evidence not previously considered by the Office. Appellant also submitted numerous documents, including a number of audiograms performed by audiologists, but many of these documents had previously submitted been and appellant's submission did not contain any hearing evaluation conducted by a physician in accordance with the relevant standards of the A.M.A., *Guides*. Therefore, this evidence was not new and relevant to appellant's claim. As appellant did not show that the Office erroneously applied or interpreted a specific point of law, advance a relevant legal argument not previously

¹⁴ *Id.*

¹⁵ Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.4.b (June 2003); *Requirements for Medical Reports*, Chapter 3.600, Exhibit 4 (December 1994, September 1996).

¹⁶ Federal (FECA) Procedure Manual, Part 3 -- Medical, *Requirements for Medical Reports*, Chapter 3.600, Exhibit 4 (December 1994, September 1996).

¹⁷ *Id.*

¹⁸ The record also contains several audiograms obtained by audiologists at earlier dates, but these are of no probative value for similar reasons.

¹⁹ 20 C.F.R. § 10.606(b)(2).

²⁰ 20 C.F.R. § 10.608(b).

²¹ See *Sheila Arbour (Victor E. Arbour)*, 43 ECAB 779 (1992); *James A. Long*, 40 ECAB 538 (1989).

considered by the Office, or submit relevant and pertinent evidence not previously considered by the Office, the Office properly denied his request for reconsideration.

CONCLUSION

Appellant has failed to establish that he sustained more than a six percent permanent hearing loss in the left ear for which he received a schedule award or that he had a ratable hearing loss of the right ear and he also failed to meet the requirements for reopening the case for further merit review.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated August 18, June 26 and January 9, 2003 are affirmed.

Issued: January 6, 2004
Washington, DC

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member