United States Department of Labor
Employees' Compensation Appeals Board

JERRY L. THOMPSON, Appellant	)	
and	)	**Docket No. 05-1293**
	)	**Issued: December 2, 2005**
DEPARTMENT OF THE ARMY, ANNISTON ARMY DEPOT, Anniston, AL, Employer	)	

Appearances:
Jerry L. Thompson, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On May 9, 2005 appellant filed an appeal of nonmerit decisions of the Office of Workers' Compensation Programs dated December 27, 2004 and February 24, 2005 denying his requests for a review of his case on the merits. Pursuant to 20 C.F.R. §§ 501.2(c) and 501(d)(3), the Board has jurisdiction over these nonmerit decisions.

ISSUE

The issue is whether the Office properly refused to reopen appellant's case for further review of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On September 24, 2003 appellant, then a 51-year-old heavy equipment mechanic, filed an occupational disease claim (Form CA-2) asserting that he sustained a bilateral hearing loss on or before July 15, 2002 due to occupational exposure to hazardous noise beginning in September 1975. He did not stop work.

The employing establishment provided industrial noise survey data showing that, beginning in September 1975, appellant's job duties exposed him to engines and construction equipment generating hazardous noise from 71 to 105 decibels. In an October 31, 2002 letter, Dr. Charles L. Pederson, an employing establishment physician, noted that a recent audiogram on an unspecified date showed a significant threshold shift indicative of hearing loss.[1]

In December 10 and 23, 2003 letters, the Office referred appellant, the record and a statement of accepted facts to Dr. Robert Sciacca, an otolaryngologist, for a second opinion evaluation. Dr. Sciacca performed an otologic and audiometric evaluation on January 12, 2004. He obtained an audiogram showing the following thresholds at 500, 1,000, 2,000 and 3,000 cycles per second (cps): on the left, 10, 5, 15 and 65 decibels; on the right; 10, 5, 10 and 65 decibels. He noted that the characteristic high frequency notch pattern indicative of noise-induced hearing loss. Tympanometry was normal bilaterally. Dr. Sciacca diagnosed a bilateral sensorineural hearing loss causally related to hazardous noise exposure at work. He recommended bilateral hearing aids.

In a January 23, 2004 report, an Office medical adviser reviewed Dr. Sciacca's January 12, 2004 report to determine if appellant had a ratable hearing loss according to the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* hereinafter, (A.M.A., *Guides*). For the right ear, the Office medical adviser totaled the frequency losses of 10, 5, 10 and 65 decibels to total 90 decibels. He then divided the total of 90 by 4, resulting in 22.25 decibels. The adviser then subtracted the "fence" of 25 decibels, leaving a monaural loss of 0 percent. For the left ear, the Office medical adviser totaled the 10, 5, 15 and 65 decibel losses to equal 95 decibels. He then divided the total of 95 by 4, to equal 23.75 decibels. The adviser then subtracted the "fence" of 25 decibels, to equal 0. When multiplied by the 1.5 monaural loss factor, this equaled a zero percent monaural loss of hearing in the left ear. Entering zero percent monaural losses into the formula for calculating binaural hearing loss also resulted in a zero percent impairment. The Office medical adviser therefore determined that appellant did not have a ratable hearing loss in either ear and was thus not entitled to a schedule award. He noted that appellant did not require hearing aids or further examination by a medical specialist.

On February 10, 2004 the Office accepted that appellant sustained a bilateral hearing loss causally related to hazardous noise exposure at work.

On February 17, 2004 appellant claimed a schedule award for hearing loss.

By decision dated February 20, 2004, the Office found that the accepted bilateral hearing loss was not ratable under the A.M.A., *Guides*. The Office further found that hearing aids and further medical benefits were not authorized.

[1] Appellant submitted employing establishment audiograms and audiometric test results dated October 26, 1996, December 20, 2001 and October 2, 29 and 31 and November 18, 2002. Appellant also submitted a November 20, 2002 audiometry report. Neither the employing establishment reports nor the November 20, 2002 audiologist's report were signed or reviewed by a physician. Therefore, these documents do not constitute medical evidence for the purposes of this case. *Vickey C. Randall*, 51 ECAB 357 (2000); *Merton J. Sills*, 39 ECAB 572, 575 (1988).

In an October 30, 2004 form, appellant requested reconsideration of the February 20, 2004 decision. He submitted a copy of Dr. Pederson's October 31, 2002 report previously of record. Appellant also submitted an undated letter from his wife, Harriet Thompson, describing his hearing difficulties.

By decision dated December 7, 2004, the Office denied appellant's October 30, 2004 request for reconsideration on the grounds that the evidence submitted did not include new, relevant evidence or legal argument. The Office found that Dr. Pederson's October 31, 2002 report was repetitive as it was already of record and that the letter from appellant's wife was irrelevant to the medical issue of whether the accepted hearing loss was ratable.

In a February 3, 2005 letter, appellant requested reconsideration. He asserted that audiometric testing performed on January 21, 2005 by "Dr. A.F. Pattillo III" demonstrated a ratable hearing loss. He enclosed a January 27, 2005 letter from A. Fraser Pattillo, III, an individual "board certified in hearing instrument services," stating that audiometric testing performed on January 21, 2005 showed a severe bilateral high frequency hearing loss. Mr. Pattillo explained that this hearing loss was most evident by averaging the frequencies of 2,000, 3,000 and 4,000 cps.[2] Appellant also submitted a February 3, 2005 letter from his wife describing his difficulties in hearing conversations, sirens and the television.

By decision dated February 24, 2005, the Office denied appellant's February 3, 2005 request for reconsideration on the grounds that the evidence submitted did not raise substantive legal questions or include relevant evidence. The Office found that the letters from appellant's wife were irrelevant to the issue of whether the accepted hearing loss was ratable. The Office further found that Mr. Pattillo's letter was also irrelevant as he was not a physician as defined under the Federal Employees' Compensation Act.

LEGAL PRECEDENT

Section 10.606(b)(2) of Title 20 of the Code of Federal Regulations provides that a claimant may obtain review of the merits of the claim by either: (1) showing that the Office erroneously applied or interpreted a specific point of law; (2) advancing a relevant legal argument not previously considered by the Office; or (3) submitting relevant and pertinent new evidence not previously considered by the Office.[3] Section 10.608(b) provides that when an application for review of the merits of a claim does not meet at least one of the three requirements enumerated under section 10.606(b)(2), the Office will deny the application for reconsideration without reopening the case for a review on the merits.[4]

In support of his request for reconsideration, appellant is not required to submit all evidence which may be necessary to discharge his burden of proof.[5] Appellant need only submit

[2] Mr. Pattillo did not provide specific audiometric findings or submit copies of audiometric test results.

[3] 20 C.F.R. § 10.606(b)(2).

[4] 20 C.F.R. § 10.608(b).

[5] *Helen E. Tschantz*, 39 ECAB 1382 (1988).

relevant, pertinent evidence not previously considered by the Office.[6] When reviewing an Office decision denying a merit review, the function of the Board is to determine whether the Office properly applied the standards set forth at section 10.606(b)(2) to the claimant's application for reconsideration and any evidence submitted in support thereof.[7]

ANALYSIS

The Office accepted that appellant sustained a bilateral hearing loss in the performance of duty on or before July 15, 2002, caused by exposure to hazardous noise at work beginning in September 1975. By merit decision dated February 20, 2004, the Office found that the accepted hearing loss was not ratable.

Appellant requested reconsideration in an October 30, 2004 letter. He submitted a copy of Dr. Pederson's October 31, 2002 report previously of record and an undated letter from his wife describing his hearing difficulties. The Office denied reconsideration by decision dated December 7, 2004. Appellant again requested reconsideration on February 3, 2005 asserting that an enclosed January 27, 2005 letter from Mr. Pattillo, contending that it was sufficient to establish that the accepted hearing loss was ratable. Appellant also submitted a February 3, 2005 letter from his wife regarding his hearing difficulties.

Regarding Dr. Pederson's October 2002 report, 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 the case.[8] Mrs. Thompson's letters are irrelevant as she is not a medical professional competent to provide an opinion regarding the ratability of appellant's accepted hearing loss.[9] Regarding Mr. Pattillo's letter, the Board has held that where causal relationship of a hearing loss has been accepted and the remaining issue is the extent of hearing loss, as in this case, the audiometric findings of a competent audiologist may be accepted by the Office.[10] Mr. Pattillo is an audiologist as he notes a certification in hearing instrument services. Thus, his January 27, 2005 letter addressing the severity of appellant's hearing loss constitutes, new, relevant evidence requiring a merit review by the Office.

The case will be remanded to the Office for a merit review of Mr. Pattillo's January 27, 2005 letter. Following this and any other such development deemed necessary, the Office shall issue an appropriate decision in the case.

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[6] *See* 20 C.F.R. § 10.606(b)(3). *See also Mark H. Dever*, 53 ECAB 710 (2002).

[7] *Annette Louise*, 54 ECAB ___ (Docket No. 03-335, issued August 26, 2003).

[8] *Denis M. Dupor*, 51 ECAB 482 (2000); *Howard A. Williams*, 45 ECAB 853 (1994); *Eugene F. Butler*, 36 ECAB 393, 398 (1984).

[9] *Jaja K. Asaramo*, 55 ECAB ___ (Docket No. 03-1327, issued January 5, 2004) (where the Board held that laypersons are not competent to render a medical opinion).

[10] *See Rubel R. Garcia*, 33 EAB 1171, 1175 (1982) (distinguishing *Martin B. Carter*, 28 ECAB 281 and *Russell Williams*, 28 ECAB 444). *See also Herman L. Henson*, 40 ECAB 341 (1988) (while the Office medical adviser is not required to review uncertified audiograms submitted by a claimant; an audiogram prepared by an audiologist that conforms to OWCP standards may be accepted to determine the percentage of hearing loss).

CONCLUSION

The Board finds that the case is not in posture for a decision as the Office improperly denied a merit review of appellant's claim.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated February 24, 2005 is set aside and the case remanded for further development consistent with this decision and order.

Issued: December 2, 2005
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

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