United States Department of Labor
Employees' Compensation Appeals Board

J.L., Appellant	)	
and	)	**Docket No. 08-1152**
	)	**Issued: October 3, 2008**
DEPARTMENT OF THE TREASURY, UNITED STATES MINT, Denver, CO, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On February 29, 2008 appellant timely appealed the December 20, 2007 nonmerit decision of the Office of Workers' Compensation Programs denying his request for reconsideration and a March 7, 2007 merit decision denying a schedule award for employment-related hearing loss. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d), the Board has jurisdiction over the merits of the schedule award.

ISSUES

The issues are: (1) whether appellant has a ratable hearing loss entitling him to a schedule award; and (2) whether the Office properly refused to reopen appellant's case for reconsideration under 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On January 10, 2005 appellant, then a 56-year-old Chief, Quality and Technical Support, filed an occupational disease claim alleging that he sustained hearing loss due to factors of his federal employment. He submitted information pertaining to his employment and history of exposure to loud noise. Appellant noted that the employing establishment informed him that he

had a high frequency hearing loss. He submitted documentation from the employing establishment corroborating this information, including a chronology of audiogram results from June 20, 1983 to January 10, 2005 as well as copies of audiograms from 2003. Appellant retired from the employing establishment in January 2007.

A statement of accepted facts dated March 8, 2005 indicated that appellant had been exposed to various sources of high level noise while working for the employing establishment in various positions since April 1972.

On March 8, 2005 the Office referred appellant for an audiological and otologic evaluation with Dr. Richard Cundy, Board-certified in otolaryngology. An audiogram was completed on March 29, 2005, which reflected testing at frequency levels including those of 500, 1,000, 2,000 and 3,000 cycles per second (cps) and revealed decibel losses on the left of 20, 15, 15 and 45, respectively, and on the right of 10, 5, 10 and 20, respectively. Dr. Cundy diagnosed bilateral neurosensory hearing loss. He opined that the hearing loss was due to appellant's 30-year exposure to high noise levels encountered in his federal employment. Dr. Cundy advised that appellant may need hearing aids in the future.

On May 10, 2005 an Office medical adviser reviewed the March 29, 2005 audiogram results and found that appellant had a zero percent impairment and therefore did not have a ratable hearing loss. The Office medical adviser did not authorize hearing aids as Dr. Cundy did not feel appellant required them presently.

On May 13, 2005 the Office accepted appellant's claim for binaural noise-induced hearing loss.

On December 26, 2006 appellant requested a schedule award. In an April 10, 2006 letter, he indicated that his hearing loss was worsening. Appellant submitted a March 27, 2006 letter and audiogram from Troy Dyer, an audiologist, an April 7, 2006 letter from Jeanne Barr, a registered nurse and occupational health nurse at the employing establishment's health office; and a chronology of audiogram results from June 20, 1983 through December 18, 2006, with copies of audiograms dated November 30 and December 18, 2006.

By decision dated March 7, 2007, the Office denied appellant's request for a schedule award. It found that the March 29, 2005 audiogram provided by Dr. Cundy and verified by the Office medical adviser did not result in a ratable hearing loss.

On December 1, 2007 appellant requested reconsideration and reiterated that his hearing had worsened. He indicated that he retired from the employing establishment on January 2, 2007 and was currently working in the private sector at Safeway and frequently asked people to repeat themselves. Appellant submitted a copy of a June 12, 2007 audiogram prepared by an audiologist along with verification of his employment with Safeway.

By decision dated December 20, 2007, the Office denied appellant's request for reconsideration without a merit review.

LEGAL PRECEDENT -- ISSUE 1

Section 8107 of the Federal Employees' Compensation Act sets forth the number of weeks of compensation to be paid for the permanent loss of use of specified members, functions and organs of the body.[1] The Act, however, does not specify the manner by which the percentage loss of a member, function or organ shall be determined. To ensure consistent results and equal justice under the law, good administrative practice requires the use of uniform standards applicable to all claimants. The implementing regulations have adopted the American Medical Association, *Guides to the Evaluation of Permanent Impairment* as the appropriate standard for evaluating schedule losses.[2] Effective February 1, 2001, schedule awards are determined in accordance with the A.M.A., *Guides* (5th ed. 2001).[3]

Using the frequencies of 500, 1,000, 2,000 and 3,000 cps, the losses at each frequency are added up and averaged.[4] 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.[5] The remaining amount is multiplied by a factor of 1.5 to arrive at the percentage of monaural hearing loss.[6] 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, and then added to the greater loss and the total is divided by six to arrive at the amount of the binaural hearing loss.[7]

Office procedures provide that, after obtaining all necessary medical evidence, the file should be routed to the Office medical adviser for an opinion concerning the nature and percentage of impairment in accordance with the A.M.A., *Guides*, with the Office medical adviser providing rationale for the percentage of impairment specified.[8]

ANALYSIS -- ISSUE 1

In support of his claim for an employment-related hearing loss, appellant submitted a chronology of audiogram results from June 20, 1983 to January 10, 2005 as well as copies of audiograms from 2003. This evidence, however, does not meet the Office's criteria to establish

[1] The Act provides that for complete, or 100 percent loss of hearing in one ear, an employee shall receive 52 weeks' compensation. For complete loss of hearing of both ears, an employee shall receive 200 weeks' compensation. 5 U.S.C. § 8107(c)(13) (2000).

[2] 20 C.F.R. § 10.404 (2006).

[3] Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 (June 2003).

[4] A.M.A., *Guides* 250 (5th ed. 2001).

[5] *Id.*

[6] *Id.*

[7] *Id.*

[8] *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6(d) (August 2002).

an employment-related loss of hearing. The audiograms were not certified by a physician as being accurate. The Office does not have to review every uncertified audiogram, which has not been prepared in connection with an examination by a medical specialist.[9]

The Office referred appellant for a second opinion examination by Dr. Cundy, a Board-certified otolaryngologist. An Office medical adviser reviewed the audiogram and Dr. Cundy's report and correctly applied the Office's standardized procedures to the March 29, 2005 audiogram. Testing for the left ear at frequency levels of 500, 1,000, 2,000 and 3,000 cps revealed decibel losses of 20, 15, 15 and 45, respectively. These decibel losses were totaled at 95 and divided by 4 to obtain the average hearing loss per cycle of 23.75. The average of 23.75 was then reduced by the 25 decibel fence (the first 25 decibels are discounted as discussed above) to equal 0 decibels for the left ear. The 0 was multiplied by the 1.5 resulting in a 0 percent loss for the left ear. Testing for the right ear at frequency levels of 500, 1,000, 2,000 and 3,000 cps revealed decibel losses of 10, 5, 10 and 20, respectively. These decibel losses were totaled at 45 and divided by 4 to obtain the average hearing loss per cycle of 11.25. The average of 11.25 was then reduced by the 25 decibel fence to equal 0 decibels for the right ear. The 0 was multiplied by 1.5 resulting in a 0 percent loss for the right ear. The Office medical adviser properly found that appellant did not have a ratable hearing loss in either ear under the A.M.A., *Guides*. The Board finds that the Office medical adviser applied the proper standards to the March 29, 2005 audiogram. The result is a nonratable bilaterally hearing loss.[10]

LEGAL PRECEDENT -- ISSUE 2

The Office has the discretion to reopen a case for review on the merits.[11] Section 10.606(b)(2) of Title 20 of the Code of Federal Regulations provides that the application for reconsideration, including all supporting documents, must set forth arguments and contain evidence that either: (i) shows that the Office erroneously applied or interpreted a specific point of law; (ii) advances a relevant legal argument not previously considered by the Office; or (iii) constitutes relevant and pertinent new evidence not previously considered by the Office.[12] Section 10.608(b) provides that, when an application for reconsideration 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.[13]

ANALYSIS -- ISSUE 2

Appellant's December 1, 2007 request for reconsideration did not allege or demonstrate that the Office erroneously applied or interpreted a specific point of law. Additionally, he did

[9] *Robert E. Cullison*, 55 ECAB 570 (2004).

[10] To determine the binaural hearing loss, the lesser loss is multiplied by five and added to the greater loss and divided by six. Appellant has a zero percent binaural hearing loss.

[11] 5 U.S.C. § 8128(a).

[12] 20 C.F.R. § 10.606(b)(2).

[13] 20 C.F.R. § 10.608(b).

not advance a relevant legal argument not previously considered by the Office. Therefore, appellant is not entitled to a review of the merits of his claim based on the first and second above-noted requirements under section 10.606(b)(2).[14]

Appellant also failed to satisfy the third requirement under section 10.606(b)(2). He submitted evidence verifying his employment in the private sector; however, this evidence is not relevant to the issue of the extent of his hearing impairment. Appellant also submitted a June 12, 2007 audiogram prepared by an audiologist. As noted, if an audiogram is prepared by an audiologist it must be certified by a physician as being accurate before it can be used to determine the percentage of hearing loss.[15] Although this evidence is new, it does not constitute relevant and pertinent new evidence not previously considered by the Office.[16] Consequently, appellant is not entitled to a review of the merits of his claim based on the third requirement under section 10.606(b)(2).[17] As he was not entitled to a review of the merits of his claim pursuant to any of the three requirements under section 10.606(b)(2), the Office did not abuse its discretion in refusing to reopen appellant's claim for a review on the merits.

CONCLUSION

The Board finds that appellant has not established a ratable loss of hearing such that he is entitled to a schedule award. The Board further finds that the Office properly refused to reopen appellant's case for reconsideration on the merits under 5 U.S.C. § 8128(a).

[14] 20 C.F.R. § 10.606(b)(2)(i) and (ii).

[15] *Joshua A. Holmes*, 42 ECAB 231, 236 (1990).

[16] Submitting additional evidence that repeats or duplicates information already in the record does not constitute a basis for reopening a claim. *James W. Scott*, 55 ECAB 606, 608 n.4 (2004).

[17] 20 C.F.R. § 10.606(b)(2)(iii).

ORDER

IT IS HEREBY ORDERED THAT the December 20 and March 7, 2007 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: October 3, 2008
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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