

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

B.F., Appellant

and

**DEPARTMENT OF THE AIR FORCE,
BEALE AIR FORCE BASE, CA, Employer**

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**Docket No. 10-1721
Issued: March 22, 2011**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

RICHARD J. DASCHBACH, Chief Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On June 15, 2010 appellant filed a timely appeal from the Office of Workers' Compensation Programs' December 16, 2009 decision denying his request for reconsideration of the merits of a schedule award. Pursuant to the Federal Employees' Compensation Act¹ and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the nonmerit decision.

ISSUE

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

On appeal, appellant contends that no decision was made as to compensation for his accepted condition of tinnitus.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On March 6, 2008 appellant, then a 51-year-old lead firefighter, filed an occupational disease claim (Form CA-2) alleging that noise exposure at work caused hearing loss. On March 24, 2008 she filed a claim for a schedule award (Form CA-7) and submitted a series of audiograms and medical reports.

On May 8, 2008 the Office accepted that appellant was exposed to occupational noise levels above 85 decibels from 1974 to 1980 during the course of his federal employment and referred him to Dr. Nancy H. Appelblatt, a Board-certified otolaryngologist, to determine the nature and extent of his hearing loss.

A June 3, 2008 audiogram performed by Dr. Appelblatt revealed the following decibel losses at frequencies of 500, 1,000, 2,000 and 3,000 hertz (Hz): 5, 10, 15 and 60 for the right ear and 10, 10, 30 and 55 for the left ear. In her July 9, 2008 report, Dr. Appelblatt diagnosed sensorineural hearing loss and tinnitus “due to acoustic trauma from occupational exposure.” She concluded that it was “medically probable” that appellant’s hearing loss was due to his exposure to noise in federal employment as the findings are consistent with noise-induced sensorineural hearing loss. Dr. Appelblatt opined that his complaints of tinnitus were “very significant” and that he would benefit from bilateral digital hearing aids, which “would also act as tinnitus maskers.”

On August 15, 2008 the Office accepted appellant’s claim for bilateral hearing loss and tinnitus.

On September 6, 2008 an Office medical consultant, Dr. David N. Schindler, a Board-certified otolaryngologist, reviewed Dr. Appelblatt’s June 3, 2008 audiogram and July 9, 2008 otologic examination report. After applying the Office’s protocols for determining hearing loss, he found that appellant had a 0 percent monaural hearing loss in his right ear and a 1.9 percent monaural hearing loss in his left ear. Dr. Schindler concurred with Dr. Appelblatt that hearing aids were indicated.

On November 4, 2008 the Office granted appellant a schedule award for two percent hearing loss in his left ear, totaling 1.04 weeks of compensation for the period July 9 to 16, 2008. It approved a hearing aid for his left ear. The Office noted that, although it had accepted appellant’s claim for an employment-related binaural hearing loss, the loss in the right ear was not ratable.

On November 28, 2008 appellant requested a review of the written record by an Office hearing representative. He submitted a narrative statement dated November 17, 2008 and resubmitted a number of audiograms.

By decision dated March 19, 2009, an Office hearing representative affirmed the November 4, 2008 decision. He noted that the June 3, 2008 audiogram was conducted in accordance with established Office standardized procedures and properly used to determine the extent of impairment to appellant’s hearing.

On October 23, 2009 appellant requested reconsideration and submitted an October 16, 2009 narrative statement discussing his noise exposure and a printout of the U.S. Department of Labor's website regarding Evaluation of Impairment. He also resubmitted copies of pages from audiogram reports dated June 3 and September 6, 2008 by Dr. Appelblatt and Dr. Schindler. Appellant stated that his tinnitus was longstanding and distressing and that he suffered from a constant high-pitched ringing in his ears, which affected his perception, hearing acuity, concentration and sleep.

By decision dated December 16, 2009, the Office denied appellant's request for reconsideration on the basis that the evidence submitted was insufficient to warrant further merit review. Appellant failed to show that the Office erroneously applied or interpreted a specific point of law, did not advance a relevant legal argument not previously considered, nor constituted relevant and pertinent new evidence not previously considered by the Office.

LEGAL PRECEDENT

To require the Office to reopen a case for merit review under section 8128(a) of the Act² the Office's regulations provide that a timely request for reconsideration in writing may be reviewed on its merits if the employee has submitted evidence or an argument that either: (1) shows that the Office erroneously applied or interpreted a specific point of law; or (2) advances a relevant legal argument not previously considered by the Office; or (3) or constitutes relevant and pertinent new evidence not previously considered by the Office.³ Section 10.608(b) of the Office regulations provide 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.⁴

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.⁵

ANALYSIS

In support of his request for reconsideration, appellant submitted a narrative statement dated October 16, 2009 and a printout of the U.S. Department of Labor's website regarding Evaluation of Impairment. He also resubmitted copies of pages from a June 3, 2008 audiogram report by Dr. Appelblatt and a September 6, 2008 audiogram report by Dr. Schindler. The Board finds that the printout regarding Evaluation of Impairment, is insufficient to reopen the case for further merit review. It does not constitute relevant or pertinent new evidence concerning the medical issue of whether appellant has more than two percent monaural (left ear) employment-

² *Id.* Under section 8128 of the Act, the Secretary of Labor may review an award for or against payment of compensation at any time on her own motion or on application. *Id.* at § 8128(a).

³ 20 C.F.R. § 10.606(b)(2). *D.K.*, 59 ECAB 141 (2007). See *E.K.*, Docket No. 09-1827 (issued April 21, 2010).

⁴; *K.H.*, 59 ECAB 495 (2008); *E.K.*, *supra* note 3

⁵ *Eugene F. Butler*, 36 ECAB 393 (1984).

related hearing loss. The Board finds that the resubmission of the audiometric reports and appellant's narrative statement of exposure did not require reopening his case for merit review because these submissions were previously reviewed and considered by the Office. This evidence is duplicative of that already of record and reviewed by the Office. The Board finds that it does not constitute relevant and pertinent new evidence. Therefore, appellant has not established a basis for reopening his case.⁶

On appeal, appellant contends that the Office did not address compensation for his accepted condition of tinnitus. He contended that he suffers from a constant high-pitched ringing in his ears. Appellant noted that the Office's website states that if the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (6th ed., 2009) do not evaluate an occupational disease, other professionally-recognized standards may be used. He cited the Oregon and Veterans Affairs' guides as examples. The Board notes that the A.M.A., *Guides* provide that "tinnitus is not a disease but rather a symptom that may be the result of disease of injury."⁷ The A.M.A., *Guides* state that "if tinnitus interferes with activities of daily living [ADL's], including sleep, reading (and other tasks requiring concentration), enjoyment of quiet recreation and emotional well being, up to five percent may be added to a measurable binaural hearing impairment."⁸ As the A.M.A., *Guides* provide a method of evaluation for the condition of tinnitus, appellant's argument has no basis in fact. The Office accepted appellant's tinnitus condition and approved a hearing aid for his left ear. Moreover, the nature of the loss in this case was of only the left ear as the weight was not ratable. The Board finds that the Office did address the issue of compensation for appellant's tinnitus. Appellant has not advanced a relevant legal argument not previously considered by the Office.

Appellant did not submit any evidence to show that the Office erroneously applied or interpreted a specific point of law, failed to advance a relevant legal argument not previously considered by the Office and did not submit relevant and pertinent new evidence not previously considered by the Office. As he did not meet any of the necessary requirements, the Board finds that he is not entitled to further merit review.⁹

CONCLUSION

Because appellant's request for reconsideration did not meet at least one of the criteria required to reopen a case, the Board finds that the Office properly denied his request for reconsideration without a merit review.

⁶ *D.K.*, *supra* note 3.

⁷ A.M.A., *Guides* 249 (6th ed. 2009).

⁸ *Id.* See also *R.D.*, 59 ECAB 127 (2007); *S.G.*, 58 ECAB 383 (2007); *Robert E. Cullison*, 55 ECAB 570 (2004).

⁹ *L.H.*, 59 ECAB 253 (2007).

ORDER

IT IS HEREBY ORDERED THAT the December 16, 2009 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 22, 2011
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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