U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JOHN G. ZABAWSKI and DEPARTMENT OF THE NAVY, NAVSEA FECA FIELD OFFICE, Philadelphia, PA

Docket No. 98-2086; Submitted on the Record;
Issued April 20, 2000

DECISION and ORDER

Before MICHAEL J. WALSH, GEORGE E. RIVERS,
WILLIE T.C. THOMAS

The issues are: (1) whether appellant has met his burden of proof in establishing that he sustained an increase in hearing loss causally related to noise exposure in his federal employment; and (2) whether the Office of Workers' Compensation Programs, by its May 11, 1998 decision, abused its discretion by refusing to reopen appellant's case for further consideration of the merits of his claim under 5 U.S.C. § 8128(a).

The record forwarded on appeal indicated that by decision dated May 8, 1979, the Office granted appellant a schedule award for a 15 percent binaural hearing loss. The award covered the period May 24 to December 19, 1979.

On September 8, 1995 appellant, then a 67-year-old marine pipefitter, filed an occupational disease claim (Form CA-2) alleging that he sustained an additional hearing loss causally related to factors of his federal employment. On the reverse side of the form, the employing establishment indicated that appellant was still exposed to noise.[1]

Accompanying the claim, the employing establishment submitted appellant's job description as a pipefitter, appellant's history of his employment and an August 28, 1995 report by Beverlee Duffy, an audiologist, and her August 16, 1995 audiogram. He stated, "clinical impression is one of sloping moderate to severe sensorineural hearing loss at 200 Hz [hertz] and above bilaterally." Dr. Duffy recommended annual audiologic evaluations and binaural amplification upon medical clearance from and ear, noise and throat physician.

On April 16, 1996 the Office referred appellant to Dr. Herbert Kean, a Board-certified otolaryngologist, for an examination and evaluation of medical records. In a report dated May 23, 1996, Dr. Kean reported the findings of his May 2, 1996 examination of appellant and

[1] On July 15, 1997 appellant filed a claim for a schedule award (Form CA-7). The record supports that appellant retired effective September 15, 1995.

concluded that appellant suffered from a moderately severe, high-tone, sensorineural hearing loss with speech reception thresholds of 0 in the right and 15 in the left and discrimination scores of 84 percent in the right at a test level of 40 and 76 percent in the left at a test level of 55.

Dr. Kean also stated:

> "This hearing loss is correctable and binaural hearing aids are recommended. The only record I have for comparison is a hearing test done at Memorial Hospital of M[oun]t Holly on August 16, 1995, which showed the same findings as obtained in my office on May 2, 1996. This patient has a past history of noise exposure dating back to 1949. He was a plumber and steamfitter from 1949 to 1975 until he was employed by the Philadelphia Naval Shipyard. During his time at the [s]hipyard, he wore ear protection when working as a pipefitter. The hearing loss, which he has at the present time is consistent with occupational noise and it is my opinion that the substantial part of this noise is related to pre[n]avy [y]ard employment. With the use of ear protection at the Philadelphia Naval Shipyard, it is my opinion that the progression of his hearing has been minimal, if any."

In a July 10, 1996 report, an Office medical adviser opined after reviewing Dr. Kean's report, a statement of accepted facts and the medical record and applying the standard of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (fourth edition 1993), to the findings of Dr. Kean to determine that appellant had a 15 percent hearing loss of the left ear and a 13.125 percent hearing loss of the right ear for a 14 percent binaural hearing loss.[2] Appellant had previously been awarded a schedule award of 15 percent. Therefore, no additional hearing loss was found.

By decision dated July 30, 1997, the Office denied appellant's claim finding that the medical evidence of record failed to support an increase in appellant's hearing loss. Appellant remained entitled to medical benefits and hearing aids.

By letter dated February 6, 1998, appellant requested reconsideration of the July 30, 1997 decision and submitted a February 5, 1998 statement by appellant.

By decision dated May 11, 1998, the Office denied appellant's request for reconsideration, finding that the evidence submitted was insufficient to warrant review of the prior decision.

The Board finds that appellant has failed to establish that he sustained an increase in hearing loss causally related to noise exposure in his federal employment.

The schedule award provision of the Federal Employees' Compensation Act set forth the numbers of weeks of compensation to be paid for permanent loss of use of the members of the body that are listed in the schedule.[3] The Act, however, does not specify the manner in which

[2] The district medical adviser noted that "Since PNSY has supplied no audiograms it is impossible to definitely state that claimant's hearing loss does not have a PNSY induced component.

[3] 5 U.S.C. § 8107.

the percentage loss of a member shall be determined. The method used in making such a determination is a matter, which rests in the sound discretion of the Office.[4] However, as a matter of administrative practice the Board has stated "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."[5]

Under the A.M.A., *Guides*, hearing loss is evaluated by determining decibels loss at the frequency levels of 500, 1,000, 2,000 and 3,000 (Hz). The losses at each frequency are added up and averaged and a "fence" of 25 decibels is deducted, since, as the A.M.A., *Guides* points out, losses below 25 decibels result in no impairment in the ability to hear everyday speech in everyday conditions.[6] The remaining amount is multiplied by 1.5 to arrive at the percentage of monaural hearing loss. 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.[7]

The Office medical adviser applied the Office's standardized procedures to the May 2, 1996 audiogram performed for Dr. Kean. Testing for the right ear at the frequency levels of 500, 1,000, 2,000 and 3,000 Hz revealed decibels losses of 5, 10, 55 and 65, respectively. These decibels were totaled at 135 and were divided by 4 to obtain the average hearing loss at those cycles of 33.75 decibels. The average of 33.75 decibels was then reduced by 25 decibels (the first 25 decibels were discounted as discussed above) to equal 8.75 decibels, which was multiplied by the established factor of 1.5 to compute a 13.125 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 Hz revealed decibels levels of 5, 15, 55 and 65, respectively. These decibels were totaled at 140 and were divided by 4 to obtain the average hearing loss at those cycles of 35 decibels. The average of 35 decibels was then reduced by 25 decibels (the first 25 decibels were discounted as discussed above) to equal 10, which was multiplied by the established factor of 1.5 to compute a 15 percent loss of hearing for the left ear. The amount of the right ear (the better ear), 13.125 was multiplied by 5 and added to the amount for the left ear, 15, which totaled 80.625. The 80.625 was then divided by 6 to arrive at the percentage of binaural hearing loss. Accordingly, pursuant to the Office's standardized procedures, the Office medical adviser properly determined that appellant sustained a 14 percent binaural hearing loss.[8]

The Board finds that the Office medical adviser properly applied the appropriate standards to the findings provided by Dr. Kean's report dated May 2, l996 and the accompanying audiogram. This resulted in a calculation of a 14 percent binaural hearing loss as set forth above.

---

[4] *Danniel C. Goings*, 37 ECAB 781 (l986); *Richard Beggs*, 28 ECAB 387 (1977).

[5] *Henry L. King*, 25 ECAB 39, 44 (1973); *August M. Buffa*, 12 ECAB 324, 325 (1961).

[6] A.M.A., *Guides* at 224.

[7] *Id; see also Danniel C. Goings*, *supra* note 4 at 784.

[8] The Board notes that appellant's bilateral hearing loss totaled to 13.44 percent, which was rounded to 14 percent.

Therefore, the Office properly concluded that the evidence established that appellant has no more than a 15 percent binaural hearing loss for which he received a schedule award.

The Board also finds that in its decision dated May 2, 1997, the Office did not abuse its discretion in refusing to reopen appellant's case for further consideration of his claim on the merits under 5 U.S.C. § 8128(a).

Under 20 C.F.R. § 10.138(b)(1), a claimant may obtain review of the merits of his claim by showing that the Office erroneously applied or interpreted a point of law; by advancing a point of law or a fact not previously considered by the Office; or by submitting relevant and pertinent evidence not previously considered by the Office.[9] Section 10.138(b)(2) provides that when an application for review of the merits of a claim does not meet at least one of these three requirements, the Office will deny the application for review without reviewing the merits of the claim.[10]

In his February 6, 1998 request for reconsideration, appellant did not show that the Office erroneously applied or interpreted a point of law, nor did he advance a point of law or a fact not previously considered by the Office. In support of his reconsideration request, appellant submitted his February 5, 1998 statement. Appellant discussed his need for hearing aids and asked some questions concerning them. The relevant issue, which is medical in nature, is whether appellant has sustained additional hearing loss. Appellant's February 5, 1998 statement is immaterial to this issue and insufficient to warrant review of the prior decision.

As appellant's February 6, 1998 request for reconsideration does not meet at least one of the three requirements for obtaining a merit review, the Board finds that the Office did not abuse its discretion in denying that request.

[9] 20 C.F.R. § 10.138(b)(1); *see generally* 5 U.S.C. § 8128.

[10] 20 C.F.R. § 10.138(b)(2).

The May 11, 1998 and July 30, 1997 decisions of the Office of Workers' Compensation Programs are affirmed.

Dated, Washington, D.C.
April 20, 2000

Michael J. Walsh
Chairman

George E. Rivers
Member

Willie T.C. Thomas
Alternate Member