

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DONALD R. LIGGITT and DEPARTMENT OF THE NAVY,
HUMAN RESOURCES OFFICE, Parris Island, S.C.

*Docket No. 96-2524; Submitted on the Record;
Issued September 8, 1998*

DECISION and ORDER

Before GEORGE E. RIVERS, WILLIE T.C. THOMAS,
BRADLEY T. KNOTT

The issues are: (1) whether the Office of Workers' Compensation Programs properly denied appellant's request for a hearing; (2) whether appellant has more than a 28 percent binaural hearing loss for which he was granted a schedule award.

On September 26, 1988 appellant, then a 48-year-old heavy mobile equipment mechanic, filed an occupational disease claim, Form CA-2, alleging that he sustained a hearing loss in the course of his federal employment. On February 11, 1994 appellant filed another CA-2 for the same hearing loss. Appellant did not miss any work due to his hearing loss and eventually retired.

In an undated report, Form CA-1332, received by the Office on August 1, 1995, Dr. Christina S. Gwozdz, an otolaryngologist and second opinion physician, based on an audiogram performed on June 29, 1995, opined that appellant had down sloping sensorineural hearing loss, mild to severe, in both ears which had worsened in the last 14 years due to prolonged noise exposure in his federal employment.

The Office referred the case to the District medical adviser who, on September 20, 1995, based on the June 29, 1995 audiogram, determined that appellant had a 28 percent binaural loss using the Office's current standards for evaluating hearing loss.

On November 3, 1995 the Office granted appellant a schedule award for a 28 percent binaural loss. The period of the award ran from June 29, 1995 to July 24, 1996.

By letter dated January 9, 1996, which was also postmarked January 9, 1996, appellant requested an oral hearing before an Office hearing representative.

By decision dated February 15, 1996, the Office's Branch of Hearings and Review denied appellant's request for a hearing, stating that appellant's letter requesting a hearing was postmarked January 9, 1996, more than 30 days after the Office issued the November 3, 1995

decision and that, therefore, appellant's request was untimely. The Branch informed appellant that he could request reconsideration by the Office and submit additional evidence.

By letter dated April 2, 1996, appellant requested reconsideration of the Office's November 3, 1995 decision and submitted additional evidence. Appellant contended that he had a 75 percent loss of hearing in the right ear and a 78 percent loss of hearing in his left ear and that he was unable to wear hearing aids. Appellant submitted an audiogram dated August 25, 1993 which at frequencies of 500, 1,000, 2,000 and 3,000 showed 30, 25, 40 and 60 decibels for the right ear, respectively, and 30, 20, 40 and 65 decibels for the left ear, respectively. He also submitted an audiogram dated November 28, 1995 which showed at those same above-mentioned frequencies 30, 20, 40 and 60 decibels in the right ear and 20, 20, 35 and 45 decibels in the left ear. In a report received by the Office on April 4, 1996, James E. Wasson interpreted the November 28, 1995 audiogram as showing a hearing loss. In a report dated March 19, 1996, Dr. Ann L. Widener, an audiologist, stated that since she first saw appellant in August 1993 she had been trying to give him hearing aids to use but he found them too much trouble because he suffered from a terrible occlusion effect like that of being in a barrel. Appellant resubmitted the June 29, 1995 audiogram. Based on the June 29, 1995 audiogram, Susan W. Flory, an audiologist, opined that appellant had an articulation index of 75 percent hearing loss in the right ear and a 78 percent hearing loss in the left ear.

In a report dated March 25, 1996, Dr. Kenneth A. Brown, a Board-certified otolaryngologist, stated that a March 22, 1996 audiogram showed an articulation index of 75 percent hearing loss in the right ear and a 78 percent hearing loss in the left ear, and that an audiogram from Dr. Widener in 1993 showed a similar configuration. He stated that appellant had demonstrated an intolerance to any hearing aid presented to him.

In a memorandum dated June 4, 1996, the Office asked the District medical adviser to consider that appellant stated that he could not wear hearing aids and that his physician stated that appellant had a 75 percent hearing loss in the right ear and a 78 percent hearing loss in the left ear, and to reconsider the percentage of appellant's hearing loss. The District medical adviser responded, stating that appellant did not have an increased hearing loss due to his inability to wear hearing aids and if he truly needed a hearing aid, he would be able to tolerate wearing one. He also stated that using the formula for calculating a schedule award, the June 29, 1995 audiogram would result in a binaural loss of 28 percent.

By decision dated June 20, 1996, the Office denied appellant's reconsideration request.

The Board finds that the Office properly denied appellant's request for a hearing.

Section 8124(b)(1) of the Federal Employees' Compensation Act provides that "a claimant... is entitled, on request made within 30 days after the date of the issuance of the decision, to a hearing on his claim before a representative of the Secretary."¹ Section 10.131 of the Office's federal regulations implementing this section of the Act, provides that a claimant shall be afforded the choice of an oral hearing or a review of the written record by a

¹ 5 U.S.C. § 8124(b)(1).

representative of the Secretary.² Thus, a claimant has a choice of requesting an oral hearing or a review of the written record pursuant to section 8124(b)(1) of the Act and its implementing regulation.

Section 10.131(a) of the Office's regulations³ provides in pertinent part that "a claimant is not entitled to an oral hearing if the request is not made within 30 days of the date of issuance of the decision as determined by the postmark of the request..."

The Board has held that the Office, in its broad discretionary authority in the administration of the Act, has the power to hold hearings in certain circumstances where no legal provision was made for such hearings, and that the Office must exercise this discretionary authority in deciding whether to grant a hearing.⁴ Specifically, the Board has held that the Office has the discretion to grant or deny a hearing request on a claim involving an injury sustained prior to the enactment of the 1966 amendments to the Act, which provided the right to a hearing,⁵ when the request is made after the 30-day period for requesting a hearing,⁶ and when the request is for a second hearing on the same issue.⁷

In the present case, appellant's January 9, 1996 hearing request, which was postmarked January 9, 1996, was made more than 30 days after the date of issuance of the Office's November 3, 1995 decision, and therefore the Office was correct in stating in that decision that appellant was not entitled to a hearing. The Office exercised its discretionary powers in denying appellant's request for a hearing, and in so doing, did not act improperly.

The Board also finds that appellant has no more than a 28 percent binaural loss for which he received a schedule award.

The schedule award provision of the Act⁸ provides for compensation to employees sustaining permanent impairment from loss or loss of use of specified members of the body. The Act's compensation schedule specifies the number of weeks of compensation to be paid for the permanent loss of use of specified members, functions, and organs of the body. The Act does not, however, specify the manner by which the percentage loss of a member, function, or organ shall be determined. The method used in making such a determination is a matter that rests in the sound discretion of the Office.⁹ For consistent results and to ensure equal justice under the

² 20 C.F.R. § 10.131.

³ 20 C.F.R. § 10.131(a).

⁴ *Henry Moreno*, 39 ECAB 475, 482 (1988).

⁵ *Rudolph Bermann*, 26 ECAB 354, 360 (1975).

⁶ *Herbert C. Holley*, 33 ECAB 140, 142 (1981).

⁷ *Frederick Richardson*, 45 ECAB 454, 466 (1994); *Johnny S. Henderson*, 34 ECAB 216, 219 (1982).

⁸ 5 U.S.C. § 8107 *et seq.*

⁹ *Arthur E. Anderson*, 43 ECAB 691, 697 (1992); *Danniel C. Goings*, 37 ECAB 781, 783 (1986).

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.¹⁰

The Office evaluates industrial hearing loss in accordance with the standards contained in the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed. 1993) using the frequencies of 500, 1,000, 2,000 and 3,000 cycles per second. The losses at each frequency are added up and averaged and the “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 under everyday conditions. The remaining amount is multiplied by 1.5 to arrive at the percentage of monaural 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 5, then added to the greater loss and the total is divided by 6, to arrive at the amount of the binaural loss.¹¹ The Board has concurred in the Office’s use of this standard for evaluating hearing losses for schedule award purposes.¹²

In his report dated September 20, 1995, the District medical adviser determined that based on the June 29, 1995 audiogram, the frequency levels recorded at 500, 1,000, 2,000 and 3,000 cycles per second for the right ear, 30, 30, 50 and 65 decibels respectively, totaled 175 decibels which divided by 4 yielded the average hearing loss at those frequencies at 43.75. He reduced the average 43.75 by 25 decibels to equal 18.75 which he multiplied by the established factor of 1.5 to compute a 28.13 percent monaural loss for the right ear. The District medical adviser totaled the decibel losses at the above-mentioned frequencies for the left ear, 35, 30, 50 and 65 respectively, at 180 which he divided by 4 to obtain the average hearing loss at those frequencies of 45. He reduced the average 45 by the 25 decibel “fence” to equal 20 which he multiplied by the established factor of 1.5 to compute a 30 percent monaural loss for the left ear. The District medical adviser then multiplied the 28.13 percent loss in the right ear by 5, added it to the 30 percent loss in the left ear and divided the sum by 6 to calculate appellant’s binaural loss at 28.44 percent, which he rounded out to a 28 percent binaural loss. The Board finds that the District medical adviser applied the proper standards to the June 25, 1995 audiogram results and properly determined that appellant had a 28 percent binaural loss. Further, in his response to the Office’s June 4, 1996 memorandum, the District medical adviser opined that appellant’s hearing loss would not be increased by his inability to use a hearing aid and reiterated that, despite appellant’s physician’s opinion that appellant had a hearing loss of 75 percent in his right ear and 78 percent in his left ear, using the formula for a schedule award, the results of the June 29, 1995 audiogram yielded a 28 percent binaural loss. The additional evidence appellant submitted consisting of the reports from Dr. Brown dated March 25, 1996, from the audiologists Ann L. Widener and Susan W. Flory dated March 19, 1996 and June 29, 1995, respectively, and from James E. Wasson, received by the Office on April 4, 1996, do not demonstrate that appellant is entitled to a schedule award of more than 28 percent.

¹⁰ *Arthur E. Anderson, supra* note 9 at 697; *Henry L. King*, 25 ECAB 39, 44 (1973).

¹¹ *See also* A.M.A., *Guides* 224 (4th ed. 1993).

¹² *Daniel C. Goings, supra* note 9.

The decisions of the Office of Workers' Compensation Programs dated June 20 and February 15, 1996 and November 3, 1995 are hereby affirmed.

Dated, Washington, D.C.
September 8, 1998

George E. Rivers
Member

Willie T.C. Thomas
Alternate Member

Bradley T. Knott
Alternate Member