

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of CHARLES F.P. SULLIVAN and DEPARTMENT OF JUSTICE,
DRUG ENFORCEMENT ADMINISTRATION, Quantico, VA

*Docket No. 98-1221; Submitted on the Record;
Issued November 3, 1999*

DECISION and ORDER

Before GEORGE E. RIVERS, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issues are: (1) whether appellant has a ratable hearing loss causally related to his federal employment; and (2) whether the Office of Workers' Compensation Programs properly denied appellant's request for review of the written record.

In a decision dated October 9, 1997, the Office advised appellant that, while his claim had been accepted for a hearing loss due to employment-related noise exposure, the hearing loss was not severe enough to be considered ratable. The Office further explained that, although appellant was not entitled to a schedule award, he was entitled to medical benefits for the effects of his injury. This determination was based upon the September 23, 1997 calculation of the Office medical adviser, which in turn, was made on the basis of the August 27, 1997 audiological evaluation and reports submitted by Dr. Richard E. Linde, a Board-certified otolaryngologist and an impartial medical examiner.¹

Appellant subsequently filed a request for a review of the written record, which was postmarked November 15, 1997. Appellant also submitted additional medical evidence not previously considered by the Office. In a decision dated January 28, 1998, the Office found that appellant did not submit his request for review within 30 days of the Office's October 9, 1997 decision and, therefore, he was not entitled to a review of the written record as a matter of right. Additionally, the Office considered the matter in relation to the issue involved and denied appellant's request on the basis that the issue could equally well be addressed through the reconsideration process.

Appellant subsequently filed an appeal with the Board on February 25, 1998.

¹ The Office referred appellant to Dr. Linde on July 29, 1997 based on the recommendation of the Office medical adviser, who had noted an improvement in appellant's hearing since his July 16, 1996 audiogram, which revealed a nonratable hearing loss and his earlier November 22, 1994 audiogram, which had been interpreted as revealing a three percent binaural hearing loss.

The Board has duly reviewed the evidence contained in the case record presented on appeal and finds that appellant does not have a ratable hearing loss causally related to his federal employment.²

Section 8107 of the Federal Employees' Compensation Act³ 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. The Act, however, does not specify the manner by which the percentage loss of a member, function or organ shall be determined. The method of determining this percentage rests in the sound discretion of the Office.⁴ To ensure consistent results and equal justice under the law to all claimants, good administrative practice requires the use of uniform standards applicable to all claimants.⁵

The Office evaluates permanent hearing loss in accordance with the standards contained in the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed. 1993). Utilizing the hearing levels recorded at frequencies of 500, 1,000, 2,000 and 3,000 hertz, the losses at each frequency are added up and averaged, and a "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 sounds under 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 Board has concurred in the Office's adoption of this standard for evaluating hearing loss.⁸

In reviewing appellant's most recent August 27, 1997 audiogram, the frequency levels recorded at 500, 1,000, 2,000 and 3,000 hertz for the right ear reveal decibel losses of 15, 10, 15 and 40, respectively, for a total of 80 decibels. When this figure is divided by 4, the result is an average hearing loss of 20 decibels. The average loss of 20 is reduced by 25 decibels to equal 0, which when multiplied by the established factor of 1.5, results in a 0 percent monaural hearing

² As previously noted, appellant submitted additional medical evidence along with his November 15, 1997 request for a review of the written record. This evidence was not made available to the Office prior to the issuance of its October 9, 1997 decision. Inasmuch as the Board's review is limited to the evidence of record that was before the Office at the time of its final decision, the Board cannot consider appellant's newly submitted evidence. 20 C.F.R. § 501.2(c).

³ 5 U.S.C. § 8107.

⁴ *Daniel C. Goings*, 37 ECAB 781 (1986); *Richard Beggs*, 28 ECAB 387 (1977).

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

⁶ See A.M.A., *Guides* 224 (4th ed. 1993); see also *Kenneth T. Esther*, 25 ECAB 335; *Terry A. Wethington*, 25 ECAB 247.

⁷ FECA Program Memorandum No. 272 (issued February 24, 1986).

⁸ *Daniel C. Goings*, *supra* note 4.

loss for the right ear.⁹ Testing for the left ear at the frequency levels of 500, 1,000, 2,000 and 3,000 hertz revealed decibel losses of 15, 10, 15 and 55 decibels respectively, for a total of 95 decibels. Utilizing the same above-noted formula results in a 0 percent monaural hearing loss for the left ear.¹⁰ Accordingly, pursuant to the Office's standardized procedures, the Office medical adviser determined that appellant had a nonratable hearing loss in both ears.

The Board finds that the Office medical adviser applied the proper standards to the findings as stated in Dr. Linde's reports and the accompanying August 27, 1997 audiogram performed on his behalf. This resulted in a calculation of a nonratable hearing loss as set forth above. Consequently, the Office properly determined that appellant was not entitled to a schedule award.

The Board also finds that the Office properly denied appellant's request for review of the written record.

Any claimant dissatisfied with a decision of the Office shall be afforded an opportunity for an oral hearing or, in lieu thereof, a review of the written record. A request for review of the written record must be submitted, in writing, within 30 days of the date of issuance of the decision. A claimant is not entitled to a review 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.¹¹ The Office has discretion, however, to grant or deny a request that is made after this 30-day period.¹² In such a case, the Office will determine whether a discretionary hearing should be granted and, if not, will so advise the claimant with reasons.¹³

The Office denied appellant's request for a schedule award in a decision dated October 9, 1997. Because appellant made his request for review of the written record on November 15, 1997, more than 30 days after the Office's October 9, 1997 decision, he is not entitled to a review as a matter of right. Moreover, the Office considered whether to grant a discretionary review, and correctly advised appellant that the issue could equally well be addressed by requesting reconsideration. Accordingly, the Board finds that the Office properly exercised its discretion in denying appellant's untimely request for review of the written record.¹⁴

⁹ Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.4b(2)(b) (September 1994).

¹⁰ *Id.*

¹¹ 20 C.F.R. § 10.131(a) and (b).

¹² *Herbert C. Holley*, 33 ECAB 140 (1981).

¹³ *Rudolph Bermann*, 26 ECAB 354 (1975).

¹⁴ The Board has held that a denial of review on this basis is a proper exercise of the Office's discretion. *E.g.*, *Jeff Micono*, 39 ECAB 617 (1988).

Accordingly, the decisions of the Office of Workers' Compensation Programs dated January 28, 1998 and October 9, 1997 are hereby affirmed.

Dated, Washington, D.C.
November 3, 1999

George E. Rivers
Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member