

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JAMES W. SCHAFFNER and DEPARTMENT OF THE NAVY,
PHILADELPHIA NAVAL BUSINESS CENTER, Philadelphia, PA

*Docket No. 99-2537; Submitted on the Record;
Issued November 3, 2000*

DECISION and ORDER

Before WILLIE T.C. THOMAS, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issues are: (1) whether appellant has sustained a ratable left ear hearing loss; and (2) whether appellant has met his burden of proof in establishing that he sustained a loss of hearing in his right ear causally related to his federal employment

On April 15, 1998 appellant, then a 46-year-old pipefitter, filed an occupational disease claim (Form CA-2) alleging that he sustained hearing loss in both ears due to exposure to noise in the course of his federal employment. He also stated that he first became aware that he had a hearing loss problem and related it to his employment on September 1996. On the reverse side of the form, the employing establishment indicated that appellant had not stopped work.

Accompanying the claim, the employing establishment submitted various documents, including employing establishment medical records and reference audiograms covering the period 1975 to 1997.

The Office of Workers' Compensation Programs referred appellant to Dr. Herbert Kean, a Board-certified otolaryngologist, for an examination and evaluation of medical records. In a report dated July 16, 1998, Dr. Kean noted on examination of the ears showed normal canals and drums. He stated:

“[Appellant] had a report from Dr. Rose’s office showing 40 percent discrimination in his right ear. A hearing test was performed which showed a mild, high frequency hearing loss in the left ear of 40 decibels at 4,000 hertz. In the right ear he had a severe, high frequency hearing loss with marked asymmetry. Speech reception thresholds were 15 in the right and 5 in the left, with 80 percent discrimination scores in the right and 100 percent discrimination scores in the left ear.”

* * *

“The hearing test at work showed that his earliest audiograms in 1988 showed a mild, 4,000 cycle dip in the left ear with a more prominent loss in the right ear

with a descending curve. The hearing loss in the left ear remained fairly stable but the hearing loss in the right ear continued over the years. An audiogram performed in 1997 showed approximately the same results from his occupation as I was able to gather in the hearing test in my office. The hearing test in the right ear showed continuing deterioration, even from 1997 to 1998.”

* * *

“It is my opinion that this patient has an asymmetric hearing pattern, with the right ear being significantly worse than the left. The left ear has changed very little since the earliest employment audiograms and the right ear has changed significantly. This is inconsistent with occupational hearing loss and it is my opinion that any progression of his hearing loss in the left ear from 1975 to the present time is related to his occupation at the Philadelphia Naval Shipyard and the progression of his hearing loss in the right ear is unrelated to his occupation. Aggressive otologic evaluation is recommended in order to determine the etiology of the progressive hearing loss in the right ear.”

Dr. Kean found that testing at the frequency levels of 500, 1,000, 2,000 and 3,000 hertz revealed: in the right ear decibel levels of 15, 20, 45 and 60, respectively; and in the left ear, decibel levels of 0, 0, 5 and 35, respectively.

On August 12, 1998 a district medical adviser applied the standards of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* to the findings of Dr. Kean to determine that appellant had a nonratable hearing loss in the left ear and a 15 percent hearing loss in the right ear unrelated to occupational noise exposure. The district medical adviser indicated that the date of maximum medical improvement was July 13, 1998.

By decision dated October 19, 1998, the Office accepted appellant’s claim for a left ear hearing loss due to his employment-related noise exposure. The Office determined, however, that appellant’s hearing loss was nonratable under the standards of the A.M.A., *Guides* and that, therefore, he was not entitled to a schedule award under the Act. The Office also found that appellant was entitled to medical benefits. In addition, the Office found that appellant right ear hearing loss was not due to exposure to loud noise while federally employed; therefore, no benefits were payable for treatment of the right ear.

Appellant, through counsel, requested a hearing before an Office hearing representative on November 19, 1998. By decision dated December 17, 1998, the Office’s Branch of Hearings and Review denied appellant’s request for a hearing on the grounds that it was not filed within 30 days of the Office’s last merit decision on October 19, 1998. The Office stated that it has considered the matter in relation to the issue involved and further denied appellant’s hearing request on the basis that the case could be resolved by submitting additional evidence on reconsideration to establish that appellant had sustained a compensable impairment.

By letter dated June 10, 1999, appellant’s representative requested reconsideration of the October 19, 1998 decision. In support of the request for reconsideration, appellant submitted a copy of June 3, 1998 and January 29, 1999 reports by Dr. David N. Schwartz, a Board-certified otolaryngologist. In the June 3, 1998 report, Dr. Schwartz mostly discussed a condition other than hearing loss. He stated:

“[Appellant’s] secondary problem is hearing loss especially in the right ear. He has noticed that the right ear is much worse. He has had a significant history of hearing loss for several years. He has had marked noise exposure. He has had some intermittent tinnitus on the right side. He has had no head trauma or ear surgery.”

Dr. Schwartz also stated that appellant’s right ear had mild otitis externa and the left ear was clear. He stated that an audiogram reveals an asymmetric hearing loss with 40 percent discrimination in the right ear with a marked sensorineural loss pattern. Tympanometry is normal. Dr. Schwartz’s diagnosed asymmetric sensorineural hearing loss with decreased discrimination.

In the January 29, 1999 report, Dr. Schwartz stated:

“[I] had the opportunity to review not only my records on [appellant], but also a packet of material sent to me including hearing conservation data from 1975 to the present. I also reviewed a report from Dr. Kean dated July 16, 1998.”

* * *

“It is my understanding that [appellant] had worked at the [employing establishment] from 1975 until the present time. He apparently used noised protection in the form of muffs and plugs occasionally. He was exposed to various noises in the process of shipbuilding. In 1995 he worked for the Navy Public Works after the shipbuilding cease. According to Dr. Kean he still is exposed to noise, but wears protection during noise exposure. Apparently, [appellant] has had no other significant source of noise exposure either from the military or from hobbie.”

* * *

“[Appellant] was first examined by me on June 3, 1998 for snoring as well as hearing loss. His ear examination was otherwise unremarkable at that time. He underwent an audiogram, in our office on June 3, 1998 which revealed an asymmetric hearing loss with noise-induced pattern in the left ear with discrimination score of 100 percent and a markedly sloping sensorineural loss also with a partial noise-induced pattern in the right ear. However, the right ear discrimination score was 40 percent which is a significant loss.”

* * *

“Because of the asymmetry in his hearing loss pattern he underwent a [magnetic resonance imaging] MRI scan of the brain and internal auditory canals which revealed no evidence of an acoustic neuroma which could cause a possible hearing loss pattern demonstrated on his audiogram.”

* * *

“In reviewing the audiometric history in 1975 it appears that there was a high frequency sloping hearing loss in the right ear consistent with a genetic pattern of progressive hearing loss. The left ear had a hearing loss at 4,000 cycles per second consistent with a noise-induced pattern. The greatest degree of hearing loss in both ears, at that time, was in the 40 decibels. Range. Over the subsequent 20+ years he had progression of hearing loss in both ears, but much more severely in the right ear.” “My Audiogram suggests a maximum hearing loss of 40 decibels. In the left ear which is not considerably different the preemployment audiometric findings in 1975. However, there has been a progressive hearing loss in the right ear down to a maximum loss of 80 [pounds.] From the preemployment level of 40.”

* * *

“It is my opinion that [appellant] has had minimal increase in hearing loss in the left ear due to noise exposure over the twenty years that he has been exposed to a noisy environment. The right ear hearing loss most likely is due to a genetic hearing loss with a small contribution of noise-induced loss. However, in my opinion with a reasonable degree of medical certainty, the hearing loss pattern is mostly genetic rather than due to noise. If he had a significant reaction over the many years to noise, then I would expect that his hearing in his left ear would have deteriorated significantly. The latest audiogram does not show significant deterioration. In summary, I do not believe that there had been a significant contribution of noise to this patients overall pattern of asymmetric hearing loss.”

By decision dated June 24, 1999, after a merit review, the Office denied modification of the prior decision.

The Board finds that appellant does not have a compensable left ear hearing loss.

The schedule award provisions of the Act set forth the number of weeks of compensation to be paid for permanent loss of use of the members of the body that are listed in the schedule.¹ The Act, however, does not specify the manner in which 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.² 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.”³

Under the A.M.A., *Guides*, hearing loss is evaluated by determining decibel loss at the frequency levels 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 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

¹ 5 U.S.C. § 8107.

² *Danniel C. Goings*, 37 ECAB 781 (1986); *Richard Beggs*, 28 ECAB 387 (1977).

³ *Henry L. King*, 25 ECAB 39, 44 (1973); *August M. Buffa*, 12 ECAB 324, 325 (1961).

everyday conditions.⁴ 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.⁵

The Office medical adviser applied the Office's standardized procedures to the July 13, 1998 audiogram performed for Dr. Kean. Testing for the left ear at the frequency levels of 500, 1,000, 2,000 and 3,000 Hz revealed decibel levels of 0, 0, 5 and 35 respectively. These decibel were totaled at 40 and were divided by 4 to obtain the average hearing loss at those cycles of 10 decibels. The average of 10 decibels was then reduced by 25 decibels (the first 25 decibels were discounted as discussed above) to equal 0 which was multiplied by the established factor of 1.5 to compute a 0 percent loss of hearing for the left ear. The district medical adviser agreed with Dr. Kean that the hearing loss in appellant's right ear was unrelated to factors of his employment. Accordingly, pursuant to the Office's standardized procedures, the Office medical adviser determined that appellant had a nonratable hearing loss in his left ear.

The Board finds that the Office medical adviser properly applied the appropriate standards to the findings provided in Dr. Kean's report dated July 16, 1998 and the accompanying July 13, 1998 audiogram. This resulted in a nonratable hearing loss in the left ear as set forth above.

The Board further finds that this case is not in posture for decision on the issue of whether appellant's hearing loss in the right ear is causally related to noise exposure in his federal employment.

An employee seeking benefits under the Act⁶ has the burden of establishing the essential elements of his or her claim, including the fact that the individual is an "employee of the United States" within the meaning of the Act, that the claim was filed within the applicable time limitations of the Act, that an injury was sustained in the performance of duty as alleged and that any disability and/or specific condition for which compensation is claimed are causally related to the employment injury.⁷ These are the essential elements of each and every compensation claim regardless of whether the claim is predicated upon a traumatic injury or occupational disease.⁸

To establish that an injury was sustained in the performance of duty in an occupational disease claim, a claimant must submit the following: (1) medical evidence establishing the presence or existence of the disease or condition for which compensation is claimed; (2) a factual statement identifying employment factors alleged to have caused or contributed to the presence or occurrence of the disease or condition; and (3) medical evidence establishing that the employment factors identified by the claimant were the proximate cause of the condition for

⁴ A.M.A., *Guides* at 224.

⁵ *Id*; see also *Danniel C. Goings*, *supra* note 2 at 784.

⁶ 5 U.S.C. § 8101.

⁷ *Joe D. Cameron*, 41 ECAB 153 (1989); *Elaine Pendleton*, 40 ECAB 1143, 1154 (1989).

⁸ *Victor J. Woodhams*, 41 ECAB 345 (1989).

which compensation is claimed or, stated differently, medical evidence establishing that the diagnosed condition is causally related to the employment factors identified by claimant.

It is not disputed that appellant has a loss of hearing in his right ear; however, the Office determined that the medical evidence of record failed to demonstrate that appellant's loss of hearing in his right ear was causally related to factors of his federal employment.

In this case, Dr. Kean, an Office referral specialist, after reviewing a statement of accepted facts, medical records, an audiogram performed for him and conducting a physical examination, attributed appellant's hearing loss to an unknown etiology. He stated that the hearing loss in appellant's right ear "is unrelated to his occupation." Dr. Kean recommended an aggressive otologic evaluation to determine the etiology of the progressive hearing loss in appellant's right ear. Dr. David N. Schwartz, a Board-certified otolaryngologist, who appellant saw on his own, reviewed an audiogram performed for him,⁹ reviewed appellant's medical records, including Dr. Kean's July 16, 1998 report and conducted an examination of appellant. Dr. Schwartz stated that "the right ear hearing loss most likely is due to a genetic hearing loss with a small contribution of noise-induced loss." Dr. Schwartz also stated "I do not believe there has been a significant contribution of noise to this patient's overall pattern of asymmetric hearing loss." The Board has held that it is not necessary to prove a significant contribution of factors of employment to a condition for the purpose of establishing causal relationship and if the medical evidence revealed that a work factor contributed in any way to appellant's condition such condition would be considered employment related for the purpose of compensation benefits under the Act.¹⁰

The Board finds that the medical evidence of record is in conflict¹¹ with regard to the causal relationship of appellant's right ear loss of hearing and the contribution to this loss by his exposure to noise in his federal employment. Section 8123(a) of the Act provides that, when there is a disagreement between the physician making the examination for the United States and the physicians of the employee, a third physician shall be appointed to make an examination to resolve the conflict.¹² Accordingly, the case will be remanded to the Office for resolution of the conflict.

On remand, the Office should refer appellant, along with a statement of accepted facts and the medical record, to an appropriate specialist for an impartial evaluation and report including a rationalized opinion as to whether appellant's right ear hearing loss is in any way causally related to factors of his federal employment. After such further development of the evidence as may be necessary, the Office shall issue an appropriate final decision on appellant's entitlement.

The Office of Workers' Compensation Programs' decision dated October 19, 1998 is hereby affirmed regarding appellant's left ear hearing loss, and set aside regarding appellant's

⁹ Dr. Schwartz's audiogram is not part of the record.

¹⁰ *Arnold Gustafson*, 41 ECAB 131 (1989); *Beth P. Chaput*, 37 ECAB 158 (1985); *Henry Klaus*, 9 ECAB 333.

¹¹ In order to properly find a conflict in medical evidence the opposing medical reports must be of virtually equal weight and rationale. *James P. Roberts*, 31 ECAB 1010 (1980).0

¹² 5 U.S.C. § 8123(a).

right ear hearing loss. The Office's decisions dated June 24, 1999 is set aside and the case remanded for further action consistent with this decision.¹³

Dated, Washington, DC
November 3, 2000

Willie T.C. Thomas
Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member

¹³ In view of the action taken in this case, the Board finds it unnecessary to address whether the Office properly denied appellant's request for a hearing under section 8124 of the Act.