U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DAVID ELLIS and DEPARTMENT OF THE ARMY,
ROCK ISLAND ARSENAL, Rock Island, IL

Docket No. 01-1404; Submitted on the Record;
Issued February 25, 2002

DECISION and ORDER

Before MICHAEL J. WALSH, ALEC J. KOROMILAS,
WILLIE T.C. THOMAS

The issues are: (1) whether the Office of Workers' Compensation Programs properly found that appellant had no more than a two percent monaural hearing loss for which he received a schedule award; and (2) whether the Office properly denied appellant's request for a review of the written record.

On August 10, 1999 appellant, then a 49-year-old materials handler worker, filed a claim alleging that he sustained permanent hearing loss while in the performance of duty. He did not stop work.

Accompanying appellant's claim were employing establishment audiograms dated October 25, 1984 to August 8, 2000; and an August 8, 2000 report from an audiologist. The employing establishment audiograms revealed progressive hearing loss. The report from the audiologist dated August 8, 2000 indicated bilateral mild to moderate high frequency sensorineural impairment.

Appellant submitted a narrative statement indicating that he began working for the employing establishment in 1982 as a materials handler and was exposed to loud noise from a variety of machinery for eight to nine hours per day. He indicated that during this time the employing establishment provided earplugs for hearing protection.

The employing establishment submitted a letter dated September 7, 2000 which indicated that as a forklift operator appellant's noise exposure was minimal. The employing establishment noted that appellant was exposed to noise from 85.1 decibels to 93.5 decibels. It was further noted that the audiology report of October 19, 1995 suggested asymmetry between appellant's ear impairment may be associated with recreational shooting and hunting.

By letter dated November 6, 2000, the Office referred appellant to Dr. Guy McFarland, a Board-certified otolaryngologist, for otologic examination and audiological evaluation. The

Office provided Dr. McFarland with a statement of accepted facts, available exposure information and copies of all medical reports and audiograms.

Dr. McFarland performed an otologic evaluation of appellant on November 20, 2000 and audiometric testing was conducted on the doctors behalf on the same date. Testing at the frequency levels of 500, 1,000, 2,000 and 3,000 revealed the following: right ear 15, 25, 25 and 40 decibels; left ear 15, 25, 20 and 35 decibels. Dr. McFarland determined that appellant sustained bilateral sensorineural hearing loss with tinnitus, consistent with a history of chronic noise exposure in the work environment.

In a letter dated December 12, 2000, the Office accepted appellant's claim for bilateral sensorineural hearing loss and tinnitus.

On January 15, 2001 an Office medical adviser reviewed Dr. McFarland's report and the audiometric test of November 20, 2000. The medical adviser determined that the date of maximum medical improvement was November 20, 2000. The medical adviser evaluated the audiogram performed on behalf of Dr. McFarland and testing at the frequency levels of 500, 1,000, 2,000 and 3,000 revealed the following: right ear 15, 25, 25 and 40 decibels; left ear 15, 25, 20 and 35 decibels. The medical adviser determined that appellant sustained employment-related bilateral sensorineural hearing loss of .32 percent and monaural hearing loss of 2 percent and granted a schedule award of 2 percent monaural hearing loss.

In a decision dated March 13, 2001, the Office determined that appellant sustained a two percent monaural hearing loss of the right ear for the period of November 20 to 27, 2000.

In a letter dated April 17, 2001, appellant requested a review of the written record. He indicated that he was entitled to an additional schedule award for his tinnitus condition.

By decision dated May 31, 2001, the Office denied appellant's request for a review of the written record. The Office found that the request was not timely filed. Appellant was informed that his case had been considered in relation to the issues involved and that the request was further denied for the reason that the issues in this case could be addressed by requesting reconsideration from the district Office and submitting evidence not previously considered.

The Board finds that appellant has no more than a two percent work-related monaural hearing loss, for which he received a schedule award.

The schedule award provisions of the Federal Employees' Compensation Act[1] and its implementing regulation[2] set forth the number of weeks of compensation payable to employees sustaining permanent impairment from loss, or loss of use, of scheduled members or functions of the body. However, the Act does not specify the manner in which the percentage of loss shall be determined. 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

[1] 5 U.S.C. § 8107.

[2] 20 C.F.R. § 10.404 (1999).

uniform standards applicable to all claimants. The American Medical Association, *Guides to the Evaluation of Permanent Impairment* has been adopted by the implementing regulation as the appropriate standard for evaluating schedule losses.[3]

Using the A.M.A., *Guides* and the hearing levels recorded at frequencies of 500, 1,000, 2,000 and 3,000 cycles per second. 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. Each amount is then multiplied by 1.5. The amount of the better ear is multiplied by five and added to the amount from the worse ear. The entire amount is then divided by six to arrive at a percentage of binaural hearing loss.[4] The federal procedure manual requires that all claims for hearing loss due to its acoustic trauma, requires an opinion from a Board-certified specialist in otolaryngology.[5] The procedure manual further indicates that audiological testing is to be performed by persons possessing certification and audiology from the American Speech-Language-Hearing Association (ASHA) or state licensure as an audiologist.[6]

An Office medical adviser applied the Office's standardized procedures to the November 20, 2000 otologic evaluation performed by Dr. McFarland. Testing for the right ear at the frequency levels of 500, 1,000, 2,000 and 3,000 hertz revealed decibels losses of 15, 25, 25 and 40 respectively. These decibels were totaled at 105 and were divided by 4 to obtain an average hearing loss at those cycles of 26.25 decibels. The average of 26.25 decibels was then reduced by 25 decibels (the first 25 decibels were discounted as discussed above) to equal 1.25 which was multiplied by the established factor of 1.5 to compute a 1.9 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 hertz revealed decibels losses of left ear 15, 25, 20 and 35 decibels respectively. These decibels were totaled at 95 and were divided by four to obtain the average hearing loss at those cycles of 23.75 decibels. The average of 23.75 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 hearing loss for the left ear. The amount of the better ear, 0 is multiplied by 5 and added to the amount from the worse ear, 1.9. The entire amount is divided by six. Therefore, appellant sustained a .32 percent binaural hearing loss and a 2 percent monaural hearing loss.

Appellant further contends that he is entitled to compensation for his tinnitus condition. However, while the A.M.A., *Guides* allow for an award for tinnitus under disturbances of vestibular function, no additional ratable permanent hearing loss above the two percent monaural loss has been identified or documented in the medical evidence. There is no medical evidence that appellant's tinnitus was caused or contributed to by his federal employment noise exposure or that it has caused or contributed to his ratable hearing loss. Dr. McFarland's November 20,

[3] *Id.*

[4] Page 166 (4th ed. 1994).

[5] Federal (FECA) Procedural Manual, Part 2 -- Claims, *Causal Relationship,* Chapter 2.805.3(d)(6) (June 1995).

[6] Federal (FECA) Procedural Manual, Part 3 -- Medical, *Requirement for Medical Reports,* Chapter 3.600.8(a)(2) (September 1994).

2000 report indicated a diagnosis of tinnitus; however, no evidence was presented of dysequilibrium or that appellant could not perform his usual activities of daily living.[7] Appellant would be entitled to compensation if it were established that his tinnitus resulted in a loss of wage-earning capacity; however, there is no evidence of record that appellant sustained a loss of wage-earning capacity as a result of his tinnitus.[8]

The Board finds that the Office medical adviser applied the proper standards to the findings stated in Dr. McFarland's report and the November 20, 2000 audiogram. The result is a two percent monaural hearing loss as set forth above.[9]

The Board further finds that the Office did not abuse its discretion in denying appellant's untimely request for a review of the written record.

Section 8124 of the Act provides that a claimant is entitled to a hearing before an Office representative when a request is made within 30 days after issuance of an Office's final decision.[10] The Office's regulations expanded section 8124 to provide the opportunity for a "review of the written record" before an Office hearing representative in lieu of an "oral hearing."[11] The Office provided that such review of the written record is also subject to the same requirement that the request must be made within 30 days of the Office's final decision.[12]

The Office properly found that appellant's request for a review of the written record was untimely. His request for review of the written record postmarked April 17, 2001 was made more than 30 days after the Office's March 13, 2001 decision.

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.[13] The principles underlying the Office's authority to grant or deny a written review of the record are analogous to the principles underlying its authority to grant or deny a hearing. The Office's procedures, which require the Office to exercise its discretion to grant or deny a request for a review of the written record when

[7] *See Charles H. Potter*, 39 ECAB 645 (1988).

[8] *See Leonard J. Dragon, Sr.*, 48 ECAB 481 (1997); *Richard Larry Enders*, 48 ECAB 184 (1996).

[9] This decision does not affect appellant's entitlement to medical benefits for the accepted employment injury.

[10] 5 U.S.C. § 8124(b).

[11] *See* 20 C.F.R. § 10.615-10.616 (1999).

[12] *See id.*

[13] *Herbert Holley*, 33 ECAB 140 (1981).

such a request is untimely or made after reconsideration or an oral hearing, are a proper interpretation of the Act and Board precedent.[14]

The Board finds that the Office properly exercised its discretion by further denying appellant's request upon finding that he could have the matter further addressed by the Office through a reconsideration request along with the submission of new medical evidence.

The May 31 and March 13, 2001 decisions of the Office of Workers' Compensation Programs are affirmed.

Dated, Washington, DC
February 25, 2002

Michael J. Walsh
Chairman

Alec J. Koromilas
Member

Willie T.C. Thomas
Alternate Member

[14] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Hearings and Reviews of the Written Record*, Chapter 2.1601 (October 1992).