U. S. DEPARTMENT OF LABOR

# Employees' Compensation Appeals Board

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In the Matter of MATTHEW M. LONG and DEPARTMENT OF THE NAVY, PHILADELPHIA NAVAL SHIPYARD, Philadelphia, Pa.

*Docket No. 96-1922; Submitted on the Record;*
*Issued July 16, 1998*

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DECISION and ORDER

Before GEORGE E. RIVERS, DAVID S. GERSON,
A. PETER KANJORSKI

The issues are: (1) whether appellant has a ratable hearing loss causally related to factors of his federal employment; and (2) whether the Office of Workers' Compensation Programs properly denied appellant's request for a hearing pursuant to section 8124(b) of the Federal Employees' Compensation Act.

On April 26, 1995 appellant, then a 62-year-old rigger, filed a notice of occupational disease claim alleging that he sustained a hearing loss due to exposure to loud noises from various machines at work for 15 years and while employed as a steel mill worker for 27 years. The record shows that appellant has submitted various documents including audiological test results dating as far back as 1980 to 1995 and shows that appellant was exposed to various noise levels ranging from 64 to 98 decibels.

In a letter dated June 13, 1995, the Office referred appellant, together with a statement of accepted facts, for audiologic and otologic evaluation by Dr. Arnold K. Brenman, a Board-certified otolaryngologist. In a June 28, 1995 report, Dr. Brenman stated that appellant had a history of exposure to loud noise in his employment and indicated that he had reviewed the audiograms of record and the tests results of two separate audiograms, which immediately followed appellant's evaluation. Upon review, Dr. Brenman noted that the first audiogram #1, taken by the audiologist had proven to be unreliable so a second audiogram #2 was taken. He also noted, however, that the second audiogram #2 was proven to be valid and reliable since all responses were repeatable. Dr. Brenman went on to state: "[appellant's] true hearing ability appears to be represented by audiogram #2 today. It demonstrates normal range thresholds in both ears between 20 dB [decibels] and 25 dB at frequencies 250 Hz [hertz] through 3000 Hz. Mild threshold elevation is identified in ear at the remaining frequencies. While not diagnostic, this patter is consistent with the occurrence of a mild degree of occupational hearing loss. On the other hand, the presence of a positive family history (his [appellant's] sister ears a hearing

aid) suggests a familial-type of hearing loss can be also manifesting itself." Therefore, special weight was placed on audiogram #2 by Dr. Brenman.[1]

The district medical adviser, after reviewing Dr. Brenman's report, together with a statement of accepted facts and the medical record, utilized Dr. Brenman's report and attached audiogram evaluation #2 for the purpose of applying the standards of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed. 1993) to determine the extent of hearing loss, which have been approved by the Board. This resulted in a calculation of a nonratable hearing loss in both ears.

In a decision dated August 23, 1995, the Office rejected appellant's claim finding that he does not have a ratable hearing loss according to the standards of the A.M.A., *Guides* (4th Ed. 1993) and would not benefit from a hearing aid.

In a letter dated August 31, 1995, appellant requested reconsideration and submitted an additional audiogram dated March 24, 1995 from Joann L. Bevan, a licensed audiologist. The Office referred this audiogram to the district medical adviser who found the audiogram prepared by a licensed audiologist, neither contained a right ear reading at 3000 hertz, nor a rationalized opinion on the causal relationship of the test results provided, to appellant's work history, family history or hobbies.[2]

In a merit decision dated December 4, 1995, the Office denied appellant's request for reconsideration on the grounds that the audiogram/evidence provided by appellant to support his request for reconsideration of the denial of a schedule award for permanent impairment and hearing aids was insufficient to warrant modification of the prior decision. The Office also found that the June 28, 1995 report prepared by Dr. Brenman continued to represent the weight of the medical evidence because he is a Board-certified otolaryngologist, who had access of the medical records, together with a statement of accepted facts and performed a thorough examination. In addition, the Office noted that the March 24, 1995 audiogram provided by appellant on reconsideration was missing a required reading for the right ear at 3000 hertz.[3]

In a letter dated April 17, 1996, appellant requested a hearing in this matter. Appellant stated that although the Office issued its decision denying appellant's request for reconsideration on December 4, 1995, he did not receive a copy of this decision until April 3, 1996, after he had contacted Congressman Fattah's Office on April 1, 1996. Appellant requested that the Office accept his explanation for the untimely filing of his hearing request.

In a letter decision dated May 22, 1996, the Office denied appellant's request for a hearing since appellant had previously requested reconsideration under 5 U.S.C. § 8128 of the

[1] Dr. Brenman subsequently noted that "[appellant] has a very slight bilateral sensorineural hearing loss in the upper frequency range."

[2] An audiogram prepared by an audiologist must be certified by a physician as being accurate before it can be used to determine the percentage of hearing loss; *see Joshua A. Holmes*, 42 ECAB 231, 236 (1990).

[3] *Id.*

Act and was not entitled to a hearing on the same issue. The Office noted that it had considered the matter in relation to the issue involved and indicated that appellant's request was denied on the basis that the issue in this case can equally be addressed through a reconsideration application.

The Board finds that appellant does not have a ratable hearing loss causally related to his federal employment.

The schedule award provisions of the Act[4] 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.[5] 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.[6]

The Office evaluates permanent hearing loss in accordance with the standards contained in the A.M.A., *Guides* (4th ed. 1993), using 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. Then 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.[7] 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 formular 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.[8] The Board has concurred in the Office's adoption of this standard for evaluating hearing loss.[9]

In the instant case, the District medical adviser correctly applied the Office's standard procedures to the June 28, 1995, #2 audiogram evaluation obtained by Dr. Arnold King Brenman, a Board-certified otoloaryngologist to whom the office referred appellant. The district medical adviser also agreed with Dr. Brenman's medical diagnosis, which revealed that appellant had a very slight bilateral sensorineural high frequency level hearing loss, consistent with loud noise exposure to various machinery on the job.[10]

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[4] 5 U.S.C. § 8107.

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

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

[7] The A.M.A., *Guides* points out that the losses below an average of 25 decibels is deducted as it does not result in impairment in the ability to hear everyday sounds under everyday listening conditions; *see* A.M.A., *Guides* 224 (4th ed. 1993); *see also Terry A. Wethington*, 25 ECAB 247; *Kenneth T. Esther*, 25 ECAB 335.

[8] FECA Program Memorandum No. 272 (issued February 24, 1986).

[9] *Danniel C. Goings*, *supra* note 5.

[10] The Office had accepted that appellant sustained an employment-related hearing loss in both ears due to loud

Testing for the right ear at the relevant frequencies revealed decibel losses of 15, 25, 25 and 30 for a total of 95, which was divided by 4 for an average hearing loss of 23.75 decibels; the average was reduced by the fence of 25 (the first 25 decibels were discounted as discussed above) to arrive at 0 or no ratable loss of hearing in the right ear.[11] The hearing loss in the right ear was not ratable under these standards and, therefore, not compensable.

Testing for the left ear at the same frequencies revealed decibel losses of 15, 25, 25 and 30 decibels respectively for a total of 90. This figure was divided by 4, for an average hearing loss of 23.75 decibels; the average was reduced by the fence of 25 (the first 25 decibels were discounted) to arrive at 0 or no ratable loss of hearing in the left ear.[12] The hearing loss in the left ear was not ratable under these standards and, therefore, not compensable.

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

Section 8124(b)(1) of the Act, concerning a claimant's entitlement to a hearing before an Office representative, provides in pertinent part: "Before review under 8128(a) of this title, a claimant for compensation not satisfied with a decision of the Secretary ... 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.[13] As section 8124(b)(1) is unequivocal in setting forth the time limitations for requesting a hearing, a claimant is not entitled to a hearing as a matter of right unless the request is made within the requisite 30 days.[14]

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. 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, when the request is made after the 30-day period for requesting a hearing, or when the request is for a second hearing on the same issue. The Office's procedures, which require the Office to exercise its discretion to grant or deny a hearing when the request is untimely or made after reconsideration, are a proper interpretation of the Act and Board precedent.[15]

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noise exposure from various machinery.

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

[12] *Id.*

[13] 5 U.S.C. § 8128(b)(1)

[14] *Charles J. Prudencio*, 41 ECAB 499 (1990); *Ella M. Garner*, 36 ECAB 238 (1984).

[15] *Henry Moreno*, 39 ECAB 475 (1988).

In the present case, appellant's hearing request was made after he had requested reconsideration in connection with his claim and, thus, appellant was not entitled to a hearing as a matter of right. On August 31, 1995 appellant had requested reconsideration of the Office's August 23, 1995 denial of his claim. Hence, the Office was correct in stating in its May 22, 1996 decision that appellant was not entitled to a hearing as a matter of right because he made his hearing request after he had requested reconsideration. Moreover, although appellant alleged that he did not receive a copy of the December 4, 1995 decision until April 3, 1996, the record does not contain any type of evidence that establishes that appellant did not receive the December 4, 1996 decision in a timely manner.

While the Office also has the discretionary power to grant a hearing when a claimant is not entitled to a hearing as a matter of right, the Office, in its May 22, 1996 decision, properly exercised its discretion by stating that it had further considered the matter but found that the issues in this case can equally be addressed by requesting reconsideration from the district office and submitting evidence not previously considered which establishes that the evidence provided in support of appellant's request for reconsideration of the denial of the schedule award for permanent impairment and hearing aids warranted modification of the prior decisions. Consequently, appellant was not entitled to a hearing as a matter of right under section 8124(b)(1) as appellant had previously exercised his right to reconsideration under 5 U.S.C. § 8128 and the Office properly exercised its discretion in deciding not to otherwise grant appellant's hearing request.

The decisions of the Office of Workers' Compensation Programs dated May 22, 1996, December 4 and August 23, 1995 are affirmed.

Dated, Washington, D.C.
July 16, 1998

George E. Rivers
Member

David S. Gerson
Member

A. Peter Kanjorski
Alternate Member