

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DONALD McNEIL and DEPARTMENT OF THE NAVY,
PHILADELPHIA NAVAL SHIPYARD, Philadelphia, Pa.

*Docket No. 96-1254; Submitted on the Record;
Issued May 15, 1998*

DECISION and ORDER

Before DAVID S. GERSON, BRADLEY T. KNOTT,
A. PETER KANJORSKI

The issue is whether appellant has met his burden of proof to establish that he sustained an increase in hearing loss causally related to noise exposure in his federal employment.

On October 28, 1994 appellant filed a claim (Form CA-7) for an additional hearing loss.

The record forwarded on appeal, indicated that by decision dated December 30, 1991, the Office of Workers' Compensation Programs granted appellant a schedule award for a 28 percent binaural hearing loss. The award covered the period November 1, 1991 to October 27, 1992. On March 23, 1993 appellant filed a claim (Form CA-7) for additional hearing loss, which was denied by decision dated April 28, 1993. The record also indicated that appellant's employment-related noise exposure ceased as of September 2, 1994.

In support of the claim, appellant submitted a September 26, 1994 attending physician's report (Form CA-20) by Dr. Eric J. Carlton, a Board-certified otolaryngologist; a September 26, 1994 audiogram, performed for Dr. Carlton; and an employing establishment hearing conservation data sheet.

In the September 26, 1994 attending physician's report (Form CA-20), Dr. Carlton indicated that appellant suffered moderate to severe noise-induced sensorineural hearing loss. Dr. Carlton checked "yes" to the question whether appellant's condition was caused or aggravated by an employment activity. The September 26, 1994 audiogram submitted with Dr. Carlton's report indicated that appellant had a 42 percent binaural loss of hearing. The employing establishment's hearing conservation data sheet, reviewed by a physician whose signature is illegible, reported the results of a September 2, 1994 audiometric test performed at time of termination of employment, also indicated a substantial increase in hearing loss from the year before.

On November 7, 1994 the Office referred Dr. Carlton's September 26, 1994 report and audiogram of the same date, to a District medical adviser for review. After review, the District medical adviser stated that "[appellant] has severe deterioration in past year (27 [percent] [to] 42 [percent]) without explanation." The District medical adviser recommended that appellant undergo a complete evaluation.

Appellant was referred to Dr. Arnold K. Brenman, a Board-certified otolaryngologist for an examination and evaluation of the medical records. In a five-page report dated December 1, 1994, Dr. Brenman stated that he reviewed the record. He also stated that appellant related that he was voluntarily laid off work on September 2, 1994. Dr. Brenman reported his findings on examination of appellant on that day and concluded that appellant suffered bilateral, fairly symmetrical sensorineural hearing loss and lacking significant history of recreational noise exposure, causally related appellant's hearing loss to conditions of his employment. Dr. Brenman stated that he reviewed the September 26, 1994 audiogram, which showed substantially higher air and bone conduction thresholds than those obtained in the audiogram performed for him that day. Dr. Brenman also reviewed the test results from the employing establishment dated September 2, 1994, which also were higher than those obtained that day. Dr. Brenman noted that the audiogram performed for him agreed more closely to test results obtained on March 23, 1993. He also noted a significant degree of variability of hearing test results. Dr. Brenman stated that the audiogram performed for him revealed results in close agreement with results in 1991, which is an indication that appellant's hearing loss has not been progressive during the past several years. He also stated that "There is no identified organic basis for the thresholds that tended to be somewhat higher at some of the frequencies for the tests of March 23, 1993, September 2 and September 26, 1994. Presence of fluctuating hearing loss is surmised. Fluctuating hearing loss cannot be a manifestation of occupational hearing loss, in my considered opinion." Dr. Brenman concluded that bilateral, fairly symmetrical sensorineural hearing loss is present. He stated that the audiometric configuration is a reflection of the occurrence of damage to the inner ear. Such damage can be due to noise-induced hearing loss (occupational and/or acoustic). Dr. Brenman also stated that in the absence of significant history of recreational noise exposure during the period of employment of appellant, the hearing loss appears to be ascribable to conditions of his employment at the Philadelphia Naval Shipyard.

In a January 6, 1995 report, a District medical adviser, after applying the Office's standard procedures to the December 1, 1994 audiogram performed for Dr. Brenman, determined that appellant had a 26.25 percent binaural hearing loss and as appellant had previously been awarded a schedule award of 28 percent, no additional hearing loss was found.

By decision dated January 31, 1995, the Office denied appellant's claim finding that the medical evidence of record failed to support an increase in appellant's hearing loss. Appellant remained entitled to medical benefits and a hearing aid.¹

¹ The Office, in its January 31, 1995 decision, stated that the District medical adviser reviewed tests results and advised that the test performed was of a routine nature and not in accordance with the American Medical Association, *Guide to the Evaluation of Permanent Impairment*.

By letter dated September 19, 1995, through his representative, appellant requested reconsideration of the January 31, 1995 decision and submitted an April 7, 1995 audiogram performed for Dr. Carlton, which indicated “unchanged still 42 [percent] loss.”

By decision dated December 6, 1995, after a merit review, the Office denied appellant’s request for reconsideration, finding that the evidence submitted was insufficient to warrant modification of the prior decision.

The Board finds that appellant has failed to establish that he sustained an increase in hearing loss causally related to noise exposure in his federal employment.

The schedule award provision of the Federal Employees’ Compensation 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.² 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.³ 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.”⁴

Under the A.M.A., *Guides*, hearing loss is evaluated by determining decibel (dBs) loss at the frequency levels of 500, 1,000, 2,000, and 3,000 hertz (Hz). The losses at each frequency are added up and averaged and a “fence” of 25 dBs is deducted since, as the A.M.A., *Guides* points out, losses below 25 dBs result in no impairment in the ability to hear everyday speech in everyday conditions.⁵ 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.⁶ The Board has concurred in the Office’s adoption of this standard for evaluating hearing loss.⁷

The Office medical adviser applied the Office’s standardized procedures to the December 1, 1994 audiogram performed for Dr. Brenman. Testing for the right ear at the frequency levels of 500, 1,000, 2,000 and 3,000 Hz revealed dBs losses of 25, 40, 50, and 55, respectively. These dBs were totaled at 170 and were divided by 4 to obtain the average hearing loss at those cycles of 42.5 dBs. The average of 42.5 dBs was then reduced by 25 dBs (the first 25 dBs were discounted as discussed above) to equal 17.5 which was multiplied by the

² 5 U.S.C. § 8107.

³ *Danniel C. Goings*, 37 ECAB 781 (1986); *Richard Beggs*, 28 ECAB 387 (1977).

⁴ *Henry L. King*, 25 ECAB 39, 44 (1973); *August M. Buffa*, 12 ECAB 324, 325 (1961).

⁵ A.M.A., *Guides*, 224.

⁶ *Id*; see also *Danniel C. Goings*, *supra* note 3 at 784.

⁷ *Danniel C. Goings*, *supra* note 3.

established factor of 1.5 to compute a 26.25 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 Hz revealed dBs losses of 25, 45, 40, 60, respectively. These dBs were totaled at 170 and were divided by 4 to obtain the average hearing loss at those cycles of 42.5 dBs. The average of 42.5 dBs was then reduced by 25 dBs (as explained) to equal 17.5, which was multiplied by the established factor of 1.5 to compute a 26.25 percent loss of hearing for the left ear. The amount of the left ear (the better ear - in this case both ears were equal), 26.25 was multiplied by 5 and added to the amount for the right ear, 26.25 which totaled 157.5. The 157.5 was then divided by 6 to arrive at the percentage of binaural hearing loss. Accordingly, pursuant to the Office's standardized procedures, the Office medical adviser properly determined that appellant sustained a 26.25 percent binaural hearing loss.

The Board finds that the Office medical adviser properly applied the appropriate standards to the findings provided by Dr. Brenman's report dated December 1, 1994 and the accompanying audiogram. This resulted in a calculation of a 26.25 percent binaural hearing loss as set forth above. Therefore, the Office properly concluded that the evidence established that appellant has no more than a 28 percent binaural hearing loss for which he received a schedule award.

The April 7, 1995 audiogram submitted with appellant's request for reconsideration merely stated "unchanged still 42 [percent] loss." Dr. Carlton's 1995 audiogram was unchanged from his 1994 study, which was of a routine nature and not in accordance with A.M.A., *Guides* and as with the 1994 audiogram the substantial increase in hearing loss remained unexplained. Therefore, the Board finds that Dr. Carlton's 1995 audiogram is insufficient to overcome Dr. Brenman's well-rationalized report and audiogram which was performed in accordance with A.M.A., *Guides* and showed no more than a 28 percent binaural loss of hearing.

The December 6, 1995 decision of the Office of Workers' Compensation Programs is affirmed.

Dated, Washington, D.C.
May 15, 1998

David S. Gerson
Member

Bradley T. Knott
Alternate Member

A. Peter Kanjorski

Alternate Member