U.S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of CLAYTON G. VERDEAUX and DEPARTMENT OF THE TREASURY, FEDERAL BUREAU OF INVESTIGATION, Oklahoma City, Okla.

Docket No. 97-348; Submitted on the Record;
Issued October 16, 1998

DECISION and ORDER

Before WILLIE T.C. THOMAS, BRADLEY T. KNOTT,
A. PETER KANJORSKI

The issues are: (1) whether appellant sustained a ratable hearing loss in the performance of duty; (2) whether appellant is entitled to additional medical benefits in the form of hearing aids; and (3) whether the Office of Workers' Compensation Programs abused its discretion in denying appellant's request for a review of the written record.

On December 19, 1995 the Office accepted appellant's claim for a work-related hearing loss but determined that, based on the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed. 1993), the hearing loss was not severe enough to be considered ratable, and denied his request for hearing aids and additional medical benefits.

On appeal, appellant alleges that his loss of hearing was only one part of his claim and that expenses pertaining to his injury have been continuous, over the years, with repair surgery again being necessary to the eardrums.

A review of the pertinent evidence of record discloses that appellant was evaluated by Dr. Bloyce Hill Britton, an associate professor in the Department of Otorhinolaryngology at Oklahoma Memorial Hospital. In his report dated September 29, 1994, Dr. Britton, reported, as follows:

> "Microscopic examination of the ears revealed the following: the left ear canal and tympanic membrane were normal with no evidence of fluid, infection of perforation. Examination of the right ear revealed a small posterior superior perforation of the tympanic membrane with no evidence of active infection. Tuning fork testing revealed the Weber test to lateralize to the right ear using the 512 tuning fork. Air conduction is greater than bone conduction bilaterally.
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> "Review of the audiogram (copies enclosed for your records) reveals a difference in the hearing level between the two ears, however, both ears are still within

ranges considered to be normal by the American Medical Association rating system. Speech discrimination scores are normal. It is apparent that his hearing in the right ear is not as good as in the left ear, however, again accepted measurements show zero percent of hearing loss.

"Impression: It is my impression this patient has a perforation of the right tympanic membrane with a very mild hearing loss. Without repair of this perforation, he probably will have recurrent intermittent infections. Further surgery could improve his hearing, however, I would doubt it would ever equal his left ear postoperatively."

An Office medical adviser reviewed Dr. Britton's September 29, 1994 report on October 31, 1994 and concluded that appellant had zero percent hearing loss under the fourth edition of the A.M.A., *Guides* and that appellant would not benefit from a hearing aid.

The record does not contain a claim for reimbursement of past medical expenses and the Office did not make a finding regarding reimbursement of past medical expenses in its decision dated December 19, 1995. Therefore, the Board may not consider this issue raised for the first time on appeal. See 20 C.F.R. § 501.2(c).[1] Appellant has not submitted any current medical evidence of a need for medical care and supplies under section 8103 of the Act. Should the need for such medical care arise in the future, he may file an appropriate claim at that time.

The Board finds that appellant's employment-related hearing loss is not ratable and that he is not entitled to a schedule award or medical benefits.

The compensation schedule of the Federal Employees' Compensation Act[2] specifies the number of weeks of compensation to be paid for permanent loss of use of various members or functions of the body. But the Act does not specify the manner by which a percentage loss shall be determined. The method used in making such a determination is a matter that rests in the sound discretion of the Office.[3] 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]

The Office evaluates hearing loss in accordance with the standards contained in the A.M.A., *Guides*, using 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

[1] The Board has jurisdiction to consider and decide appeals from the final decision of the Office in any case arising under the Act. The Board may review all relevant questions of law, fact, and discretion in such cases. There shall be no appeal with respect to any interlocutory matter disposed of by the Office during the pendency of a case. The review of a case shall be limited to the evidence in the case record which was before the Office at the time of its final decision.

[2] 5 U.S.C. § 8107.

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

[4] *Kenneth E. Leone*, 46 ECAB 133 (1994).

deducted because, according to the A.M.A., *Guides*, if the average hearing level loss is less than 25 decibels, no impairment is presumed to exist in the ability to hear everyday sounds under everyday listening conditions.[5] The remaining amount is multiplied by 1.5 to arrive at the percentage of monaural hearing loss.[6] Binaural hearing 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 binaural hearing loss. The Board has concurred in the Office's adoption of this standard for evaluating hearing loss for schedule award purposes.[7]

The Office medical adviser applied the Office's standardized procedures to the September 29, 1994 audiogram obtained by Dr. Britton, a Board-certified otolaryngologist and Office referral physician. As the average hearing loss for each ear was less than 25 decibels, the Office medical adviser correctly calculated no ratable impairment.

Although the record establishes that appellant's federal employment exposed him to hazardous levels of noise, and although the medical evidence supports that this exposure caused a high frequency sensorineural hearing loss, the extent of this loss was not great enough to entitle appellant to schedule compensation.

The Board further finds that the Office's refusal to grant appellant written review of the record by an Office hearing representative did not constitute an abuse of discretion.

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 final decision.[8] 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." 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.[9]

In the present case, the Office denied appellant's request on the grounds that it was untimely. In its July 17, 1996 decision, the Office stated that appellant was not, as a matter of right, entitled to a review of the written record since his request had not been made within 30 days of its December 19, 1995 decision. 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 of further employment-related disability could be addressed through a reconsideration application.

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

[6] *Id.*

[7] *John Hilton Davis*, 46 ECAB 893 (1995).

[8] *See supra* note 1.

[9] 20 C.F.R. § 10.131(b); *Michael J. Welsh*, 40 ECAB 994 (1989).

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.[10] 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 such a request is untimely or made after reconsideration or an oral hearing, are a proper interpretation of the Act and Board precedent.[11]

In the present case, appellant's request for a review of the written record was made more than 30 days after the date of issuance of the Office's decision dated December 19, 1995 and, thus, appellant was not entitled to a review of the written record as a matter of right. Appellant's request for a review of the written record was postmarked January 31, 1996. Hence, the Office was correct in stating in its December 19, 1995 decision that appellant was not entitled to a review of the written record as a matter of right because his request for a review of the written record was not made within 30 days of the Office's December 19, 1995 decision.

While the Office also has the discretionary power to grant a review of the written record when a claimant is not entitled to a review of the written record as a matter of right, the Office, in its July 17, 1996 decision, properly exercised its discretion by stating that it had considered the matter in relation to the issue involved and had denied appellant's request for a review of the written record on the basis that the issue of further employment-related disability could be addressed through a reconsideration application. The Board has held that, as the only limitation on the Office's authority is reasonableness, abuse of discretion is generally shown through proof of manifest error, clearly unreasonable exercise of judgment, or actions taken which are contrary to both logic and probable deduction from established facts.[12] In the present case, the evidence of record does not indicate that the Office committed any act in connection with its denial of appellant's request for a review of the written record which could be found to be an abuse of discretion.

[10] *Daniel J. Perea*, 42 ECAB 214, 221 (1990).

[11] *Michael J. Welsh*, 40 ECAB 994 (1989).

[12] *Joseph F. Mchale*, 45 ECAB 669 (1994).

The decision of the Office of Workers' Compensation Programs dated July 17, 1996 and December 19, 1995 are hereby affirmed.

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

Willie T.C. Thomas
Alternate Member

Bradley T. Knott
Alternate Member

A. Peter Kanjorski
Alternate Member