U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of FRANCIS X. LOWRY and DEPARTMENT OF THE NAVY, PHILADELPHIA NAVAL SHIPYARD, Philadelphia, Pa.

Docket No. 96-2558; Submitted on the Record;
Issued January 5, 1999

DECISION and ORDER

Before WILLIE T.C. THOMAS, MICHAEL E. GROOM, BRADLEY T. KNOTT

The issue is whether appellant has a ratable hearing loss causally related to factors of his federal employment.

On January 26, 1994 appellant, then a 46-year-old shipfitter, filed a notice of occupational disease and claim for compensation (Form CA-2) alleging a hearing loss due to exposure to loud noises in the performance of his federal employment. Appellant submitted various documents including audiological tests results dating from 1966 to 1994 and shows that appellant was exposed to noise levels above 85 decibels for periods up to 8 hours for 5 days a week.

In a letter dated May 3, 1994, the Office of Workers' Compensation Programs referred appellant, together with a statement of accepted facts and the case record, for audiologic and otologic evaluation by Dr. Herbert Kean, a Board-certified otolaryngologist. In the June 13, 1994 report, he indicated that on June 2, 1994 a hearing test was performed which showed good hearing in the speech frequencies, poor hearing in the high frequencies, but noted that the reliability of this hearing examination was felt to be only fairly good. Dr. Kean indicated that a comparison of the audiograms dating from 1985 to 1993, was performed and showed that appellant's hearing was normal, with no evidence of change of any sort. He also indicated that significant changes occurred between 1985 and 1993 in appellant's left ear, with small changes occurring in appellant's right ear. Dr. Kean went on to compare the audiograms prepared in 1993, with his current audiogram of 1994, noted changes of 10 to 15 decibels in all frequencies and indicated that these changes could not be attributed to the noise exposure of appellant's employment.[1] He then opined that the differences was either due to poor reliability or aging of the ear, but suspected aging; that "the changes between 1992 and the present time are uniform throughout all frequencies and do not represent a hearing problem as a result of his [appellant's] occupation."

[1] Dr. Kean's June 13, 1994, audiometric test results showed a seven percent binaural hearing loss in both of appellant's ears.

Upon review of Dr. Kean's June 2, 1994 audiogram and June 13, 1994 medical report, the District medical adviser found this claim insufficient for adjudication purposes because of the lack of reliability noted by him in his June 13, 1994 medical report. Therefore, the Office, in a letter dated July 26, 1994, again referred appellant, together with the statement of accepted facts and case record, along with Dr. Kean's audiogram and medical report, for a new audiologic and otologic evaluation by Dr. Arnold K. Brenman, a Board-certified otologist.

In a medical report dated September 12, 1994, Dr. Brenman noted that he had reviewed the audiogram which was performed immediately following his examination and considered it to be both, reliable and valid. He also noted that all of the responses were repeatable. Dr. Brenman went on to compare his audiometric test results with those obtained by Dr. Kean on June 2, 1994 and indicated that the audiometric patterns were similar, but thresholds were somewhat higher than those of today. Dr. Brenman stated appellant's right ear thresholds were lower than those noted on the earlier tests, and that the left ear thresholds were lower than they were at the office of Dr. Kean. He also indicated that speech reception thresholds of June 2, 1994 were also within normal range of speech discrimination testing demonstrated good scores in the right ear (88 percent) and excellent scores in the left ear (92 percent). Dr. Brenman also stated that appellant "demonstrates bilateral higher tone sensorineural hearing loss which has been stable since 1992 except for somewhat higher thresholds reported by Dr. Kean on June [13,] 1994, apparently reflecting some lack of reliability. The hearing loss appears to be permanent and has not been recently progressive." Dr. Brenman explained that "the presence of patterns on March 4, 1994 that were identical with those obtained today [September 12, 1994, in Dr. Brenman's office] supports the conclusion by Dr. Kean that the audiogram performed at [Dr. Kean's] office on June 3, 1994 was indeed of limited reliability. Indeed, the audiogram of Dr. [David] Bromberg (March 4, 1993) [a Board-certified otolaryngologist] agrees closely with the work audiogram of September 15, 1992, further supporting the impression of hearing levels that have been stable since September 15, 1992" were identical with those obtained today and also supports the conclusion by Dr. Kean.

The District medical adviser, after reviewing both, Dr. Brenman's and Dr. Kean's medical reports, and audiograms, together with the statement of accepted facts and the medical record, utilized Dr. Brenman's report and attached audiogram 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.[2] This resulted in a calculation of a nonratable hearing loss in both ears. The District medical adviser noted that Dr. Brenman's audiogram was utilized instead of Dr. Kean's audiogram, because Dr. Kean felt the June 13, 1993 audiogram was not reliable.

In a decision dated December 17, 1994, the Office denied appellant's claim for a schedule award for the reason that the medical evidence of record failed to demonstrate that appellant had a ratable hearing loss as a result of noise exposure in his federal employment. The Office based its decision on the District medical adviser's review of the medical record and Dr. Brenman's September 12, 1994 report and audiogram.

[2] Dr. Brenman noted that appellant had an employment-related bilateral high tone sensorineural hearing loss which has been stable since 1992.

By letter dated December 21, 1994, appellant, through his attorney, requested a hearing before an Office hearing representative. By decision dated July 14, 1995, the Office hearing representative affirmed the Office's December 17, 1994 decision and denied appellant's claim for a schedule award because he had no ratable hearing loss.

On December 4, 1995 appellant requested reconsideration of the July 14, 1995 Office hearing representative's decision, and submitted a November 6, 1995 medical report and November 3, 1995 audiogram from Michael Grim, an audiologist. Appellant argues that Mr. Grim's hearing evaluation, which resulted in a 5.125 percent binaural hearing loss in both of appellant's ears, along with Dr. Brenman's and Dr. Kean's audiogram results would at least create a conflict in the three medical opinions requiring an impartial examination pursuant to 5 U.S.C. § 8123(a).

In a decision dated May 20, 1996, the Office denied modification of the Office hearing representative's July 14, 1995 decision. In an accompanying memorandum, the Office found that Mr. Grim, being an audiologist, was not a "physician" under the Federal Employees' Compensation Act, and there was no conflict in the medical opinion.[3] The Office also noted that Mr. Grim's report did not create a conflict in medical opinion requiring an impartial examination pursuant to 5 U.S.C. § 8123(a), as his report cannot be afforded equal weight to that of Dr. Brenman, a Board-certified otologist.[4]

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

Section 8107 of the Act[5] 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.[6] 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.[7]

[3] 5 U.S.C. § 8101(2) states: "physician" include surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors and osteopathic practitioners within the scope of their practices as defined by State law; *see also Barbara J. Williams*, 40 ECAB 649 (1988)

[4] Section 8123 (a) of the Act provides that, if there is a disagreement between the physician making the examination for the United States and the physician of an employee, a third physician will be appointed to make an examination. 5 U.S.C. § 8123(a). Where there exists a conflict of medical opinion and the case is referred to an impartial medical specialist for the purposes of resolving the conflict, the opinion of such specialist is entitled to special weight if sufficiently well rationalized and based upon a proper factual review of the case; *see Glen C. Chasteen*, 42 ECAB 493 (1991).

[5] 5 U.S.C. § 8107.

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

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

The Office evaluates hearing losses in accordance with the standard set forth in the A.M.A., *Guides* (4th ed. 1993) and the Board has concurred in the use of this standard.[8] In addition to this standard, by which it computes the percentage of hearing loss, the Office has delineated requirements for the type of medical evidence used in evaluating hearing loss. The requirements, as set forth in the Office's Procedure Manual, are, *inter alia*, that the employee undergo both audiometric and otologic examination; that the audiometric testing precede the otologic examination; that the audiometric testing be performed by an appropriately certifi1ed audiologist; that the otologic examination be performed by an otolaryngologist certified or eligible for certification by the American Academy of Otolaryngology; that the audiometric and otologic examination be performed by different individuals as a method of evaluating the reliability of the findings; that all audiological equipment authorized for testing meet the calibration protocol contained in the accreditation manual of the American Speech and Hearing Association; that the audiometric test results include both bone conduction and pure tone air conduction thresholds, speech reception thresholds and monaural discrimination scores; and that the otolaryngologist's report must include: date and hour of examination, date and hour of employee's last exposure to loud noise, a rationalized medical opinion regarding the relation of the hearing loss to the employment-related noise exposure and a statement of the reliability of the tests.[9] The Office further advises that a certification must accompany each audiological battery indicating that the instrument calibration and the environment in which the test were conducted met the accreditation standards of the Professional Services Board of the ASHA (ANSI S3.6 (1969) and S.1 (1977), respectively. The calibration standards require daily, monthly, quarterly and annual testing.[10]

In the present case, the Board finds that while a ratable hearing loss was calculated previously with respect to the results from the audiogram performed on behalf of Dr. Kean, a Board-certified otolaryngologist on June 2, 1994, the Office properly disregarded this audiogram because the reliability of the hearing examination was considered to be only fairly good and not reliable by Dr. Kean. Additionally, with respect to the ratable hearing loss calculated on November 3, 1995 by Mr. Grim, an audiologist, the Board notes that Mr. Grim is not a "physician" under the Act[11] and that his audiogram results do not create a conflict requiring an impartial examination pursuant to 5 U.S.C. § 8123(a).[12] For the foregoing reasons, the Board

[8] *Leisa D. Vassar*, 40 ECAB 1287 (1989). Under the standard, the decibel losses at the frequencies of 500, 1,000, 2,000 and 3,000 hertz (Hz) are added, then divided by four to arrive at the average. From this average, the "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 under everyday conditions. The remaining amount is multiplied by 1.5 to arrive at the percentage of monaural hearing loss. To determine the loss for both ears, the loss in each ear is calculated using the formula for monaural loss. The lesser loss is multiplied by five, then added to the greater loss. The total is divided by six to arrive at the binaural loss.

[9] *See* Federal (FECA) Procedure Manual, Part 4 -- Medical Management, *Hearing Loss*, Chapter 4.300 (May 1991).

[10] For the complete list of requirements and the specifics of such requirements, *see* Federal (FECA) Procedure Manual, Chapter 2.0806, Part 2 -- Claims, Paragraph 16c and FECA Tr. No. 81-15 (Exhibit 5 in Part 2 of Chapter 2.806 of the Procedure Manual).

[11] *See supra* note 6.

[12] *See supra* note 4.

finds that the audiograms performed on behalf of Dr. Kean and Mr. Grim are not of equal weight to the audiogram prepared on behalf of Dr. Brenman, a Board-certified otologist on September 12, 1994.[13]

The Board further finds that the Office and the District medical adviser properly applied the Office's standardized procedure to the results of the audiogram dated September 12, 1994, and found that the result did not show a ratable hearing loss. The results were calculated as follows: Testing for the left ear at frequency levels of 500, 1,000, 2,000 and 3,000 Hz revealed hearing losses of 15, 15, 5 and 40 for a total of 75, which was divided by 4 for an average hearing loss of 18.75 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.[14] The hearing in the left ear was not ratable under these standards and, is therefore, not compensable. Testing for the right ear at frequency levels of 500, 1,000, 2,000 and 3,000 Hz revealed hearing losses of 10, 15, 10 and 30 for a total of 65, which was divided by 4 for an average hearing loss of 16.25 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 right ear.[15] The hearing in the right ear was not ratable under these standards and is, therefore, not compensable. Accordingly, the Board finds that appellant has not established his claim for a ratable hearing loss due to his federal employment.

The decision of the Office of Workers' Compensation Programs dated May 20, 1996 is affirmed.

Dated, Washington, D.C.
January 5, 1999

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

Bradley T. Knott
Alternate Member

[13] *See supra* note 11.

[14] *See Leisa D. Vassar, supra* note 8.

[15] *Id.*