U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of AUSBON N. JOHNSON and DEPARTMENT OF THE NAVY, MILITARY SEALIFT COMMAND -- PACIFIC, Oakland, Calif.

Docket No. 97-1567; Submitted on the Record;
Issued March 19, 1999

DECISION and ORDER

Before GEORGE E. RIVERS, DAVID S. GERSON, BRADLEY T. KNOTT:

The issues are: (1) whether the Office of Workers' Compensation Programs properly rescinded its acceptance of appellant's claim for bilateral hearing loss; and (2) whether appellant has more than a 28.1 percent monaural loss of hearing, for which he received a schedule award.

On July 31, 1994 appellant, then a 64-year-old boatswain, filed a notice of occupational disease and claim for compensation, Form CA-2, alleging that he sustained a hearing loss as a result of his federal employment. Appellant explained that he first became aware of his illness in November 1968, and that his hearing continued to deteriorate since that time. Appellant did not cease working at the time he filed his claim. Both appellant and the employing establishment submitted evidence documenting his exposure to hazardous work-related noise throughout his approximate 30-year tenure with the employing establishment. The parties also submitted various medical records and numerous employment screening audiograms. In a statement of accepted facts, dated September 28, 1994, the Office accepted that appellant was exposed to occupational noise levels above 85 decibels from November 1966 to the present.

On January 3, 1995, Wade R. Cartwright, M.D., a Board-certified otolaryngologist and an Office referral physician, examined appellant.[1] An audiogram was also administered that same day on Dr. Cartwright's behalf. Based on the physical examination and audiometric evaluation, Dr. Cartwright diagnosed a severe high frequency sensorineural hearing loss for the left ear and a severe low frequency as well as high frequency sensorineural hearing loss for the right ear. Regarding the cause of appellant's hearing loss, Dr. Cartwright opined that while the left ear sensorineural hearing loss resulted from occupational noise exposure, the right ear sensorineural hearing loss had a combination of medical as well as occupational noise exposure etiologies. The doctor further explained that the component of the right ear hearing loss attributable to occupational noise exposure would be approximately the same as the left ear.

[1] By letter dated October 5, 1994, the Office referred appellant to Dr. Cartwright for audiologic and otologic evaluation. The Office, however, did not provide Dr. Cartwright with a statement of accepted facts.

By letter dated January 26, 1995, the Office informed appellant that it accepted his claim for work-related "bilateral hearing loss."

After advising appellant of the acceptance of his claim, the Office forwarded the claim to its medical consultant, David N. Schindler, M.D., a Board-certified otolaryngologist. In a report dated February 26, 1995, Dr. Schindler indicated that he reviewed several of the screening audiograms, the earliest of which revealed that appellant had asymmetrical hearing loss with a severe flat left-sided hearing loss.[2] Dr. Schindler also reviewed Dr. Cartwright's January 3, 1995 report and accompanying audiogram. The doctor, however, mischaracterized Dr. Cartwright's results as revealing "a high frequency hearing loss in the *right* ear and a persistent flat hearing loss in the *left* ear." Dr. Schindler simply reversed Dr. Cartwright's findings with respect to appellant's right and left ears. In conclusion, Dr. Schindler stated that "the condition found in the examination of [January 3, 1995] may in part have been aggravated by the conditions of federal [e]mployment." While Dr. Schindler provided a final diagnosis of "bilateral high frequency neurosensory hearing loss, consistent in part with hearing loss of noise exposure," the doctor did not provide an assessment of the extent of appellant's permanent hearing loss.

On March 21, 1995, the Office referred the claim back to its medical consultant with specific instructions to assess the extent of appellant's permanent impairment due to bilateral hearing loss.[3] In a report dated May 11, 1995, Dr. Schindler incorporated much of his findings from his earlier report, including his mischaracterization of Dr. Cartwright's January 3, 1995 opinion, but expressed a somewhat different opinion regarding the etiology of appellant's hearing impairment. Whereas in his prior report Dr. Schindler found that appellant's "bilateral high frequency neurosensory hearing loss [was] consistent in part with hearing loss of noise exposure," he subsequently determined that only appellant's "right-sided high frequency neurosensory hearing loss" was consistent, in part, "with acoustic trauma of noise exposure." Based on appellant's January 3, 1995 audiogram, Dr. Schindler calculated a 28.1 percent monaural loss of hearing in the right ear.[4] The doctor noted that the left ear hearing loss was not calculated because this loss was "not consistent with noise exposure and [had] been consistently present since early screening audiograms."

In a decision dated June 21, 1995, the Office granted appellant a schedule award for a 28.1 percent monaural hearing loss in his right ear.[5] In essence, the Office effectively rescinded

[2] Although the doctor noted that this audiogram was not dated, he surmised that it might have been a preemployment audiogram. It is not at all apparent from Dr. Schindler's report how he was able to surmise that this undated audiogram was both the earliest audiogram and a preemployment audiogram. At the conclusion of his report, Dr. Schindler suggested that the Office obtain the dates of the screening audiograms prior to adjudicating the case.

[3] The Office apparently did not obtain the dates of the screening audiograms as Dr. Schindler previously suggested.

[4] In calculating the percentage of appellant's permanent hearing loss in his right ear, Dr. Schindler mistakenly applied the frequencies reported for appellant's left ear.

[5] Although the Office's June 21, 1995 decision does not specifically indicate an award for a 28.1 percent monaural hearing loss in appellant's right ear, this information is reported in an Office Form CA-203, dated June 19, 1995.

its January 26, 1995 acceptance of appellant's claim for employment-related bilateral hearing loss.

Appellant subsequently requested an oral hearing before the Office which was conducted on March 19, 1996. In a June 13, 1996 decision, the hearing representative concluded that additional medical development was necessary and therefore, she set aside the Office's June 21, 1995 decision. Initially, the hearing representative noted that the Office had not provided Dr. Cartwright a statement of accepted facts. Additionally, the hearing representative noted that the Office had not attempted to verify the dates of the screening audiograms submitted by the employing establishment. The hearing representative also noted a number of deficiencies with regard to Dr. Schindler's May 11, 1995 opinion. Specifically, the hearing representative noted that Dr. Schindler did not provide an explanation for his change of opinion from his initial report of February 26, 1995. Also noted was the fact that Dr. Schindler's opinion concerning the extent of appellant's hearing loss in the right and left ear differed from Dr. Cartwright's January 3, 1995 opinion. Finally, the hearing representative noted that Dr. Schindler erroneously applied the frequencies reported for the left ear when calculating appellant's 28.1 percent monaural hearing loss in the right ear. In light of these deficiencies, the hearing representative set aside the Office's June 25, 1991 decision and instructed the Office to verify the dates of the screening audiograms and provide that information, along with a statement of accepted facts, to a Board-certified otolaryngologist for an examination and opinion on the causal relationship between appellant's hearing loss and the factors of his federal employment.

In July 1996, the Office contacted the employing establishment in an effort to verify the dates of appellant's screening audiograms; however, despite the effort, the dates of at least three of the screening audiograms could not be ascertained. On August 12, 1996, appellant submitted another screening audiogram dated April 25, 1996.

On September 4, 1996, the Office sought clarification from Dr. Schindler regarding his May 11, 1995 opinion. The Office also provided Dr. Schindler a statement of accepted facts. In a report dated October 2, 1996, Dr. Schindler explained that upon reviewing appellant's screening audiograms, he was unable to determine when the first audiogram occurred. Nonetheless, Dr. Schindler explained that the "earliest"[6] audiogram revealed a high frequency neurosensory hearing loss in the left ear and a flat profound high frequency hearing loss in the right ear. The doctor further explained that the earliest dated audiogram, January 24, 1972, revealed a severe hearing loss in the right ear. Additionally, Dr. Schindler reconciled his earlier misstatements regarding Dr. Cartwright's opinion. Based on the January 3, 1995 audiogram, Dr. Schindler calculated a 28.1 percent monaural loss of hearing in appellant's left ear. The doctor did not calculate appellant's right ear hearing loss.

With respect to the cause of appellant's hearing loss, Dr. Schindler stated that the left ear high frequency neurosensory hearing loss was aggravated by appellant's federal employment. The doctor explained that this condition was present since 1972 and gradually deteriorated; a

[6] The doctor surmised that this audiogram was performed in the mid or early 1960s because the date "1951" was clearly written on the audiogram, thereby, suggesting that an old "American standard audiogram" was being utilized.

pattern consistent with noise-induced hearing loss. Regarding appellant's loss of hearing in the right ear, Dr. Schindler described the condition as a flat severe or profound neurosensory hearing loss, which had been documented since 1972 and had remained flat. The doctor explained that this condition was not the result of federal employment and was more consistent with "inner ear membrane rupture, head trauma, vascular disturbance, congenital, or viral illness." Dr. Schindler concluded that appellant's right ear hearing loss "would be exactly the same today" regardless of his federal employment.

In a letter dated October 4, 1996, the Office advised appellant that it had made a mistake in initially accepting a 28 percent loss of hearing in the right ear. The Office explained that the 28 percent loss that had previously been accepted should have been for the left ear and not the right ear. The Office further explained that the loss of hearing in appellant's right ear was unrelated to occupational noise exposure because the earliest audiograms on record showed a rather profound loss of hearing in that ear from the very earliest days of appellant's federal employment. The Office further advised appellant that he would be referred for another examination in accordance with the hearing representative's recommendation.

On January 24, 1997, Stewart G. Gherini, M.D., a Board-certified otolaryngologist and an Office referral physician, examined appellant and arranged for an audiogram to be administered that same day. Dr. Gherini diagnosed a flat severe low to high frequency sensorineural hearing loss in the right ear, a moderately severe mid to high sensorineural hearing loss in the left ear, and binaural tinnitus. Based on the audiogram administered on January 24, 1997, Dr. Gherini calculated a 46.9 percent monaural hearing impairment for the right ear, a 26.2 percent monaural hearing impairment for the left ear, and a binaural hearing impairment of 29.7 percent. With respect to the etiology of appellant's hearing loss, Dr. Gherini explained that while the loss of hearing in appellant's left ear was consistent with repetitive exposure to hazardous levels of noise, the right ear hearing loss was not consistent with such exposure. The doctor opined that appellant's right ear hearing loss "represents the affects of an inner ear membrane rupture, a vascular occlusion, endolymphatic hydrops, or a preexisting congenital/hereditary hearing loss."

In a decision dated February 18, 1997, the Office denied appellant's claim for compensation on the basis that the evidence of record did not establish that the hearing loss in the left ear was greater than the 28 percent impairment previously awarded. With respect to appellant's right ear hearing loss, the Office found that the evidence of record failed to establish that the claimed condition was causally related to the accepted activities or employment factors. In an accompanying memorandum, the Office explained that the weight of the medical evidence negated any causal relationship between appellant's right ear hearing loss and his exposure to hazardous noise levels. The Office further noted that while appellant's January 24, 1997 audiogram demonstrated only a 26 percent permanent loss of hearing in the left ear as compared to the 28 percent seen on the January 3, 1995 audiogram, the 2 percent variation from the prior audiogram was not significant and within the limits of audiometric error. Consequently, the Office denied appellant's claim. Appellant filed a notice of appeal with the Board on April 2, 1997.[7]

[7] Appellant submitted additional evidence along with his notice of appeal. As the Board's review is limited to the

The Board finds that the Office has presented sufficient medical evidence in support of its decision to rescind acceptance of appellant's claim for employment-related hearing loss in his right ear.

The Board has upheld the Office's authority under 5 U.S.C. § 8128(a) to reopen a claim at any time on its own motion and, where supported by the evidence, set aside or modify a prior decision and issue a new decision.[8] The Board has noted, however, that the power to annul an award is not an arbitrary one and that an award for compensation can only be set aside in the manner provided by the compensation statute.[9] It is well established that once the Office accepts a claim, it has the burden of justifying termination or modification of compensation.[10] This holds true where, as here, the Office later decides that it has erroneously accepted a claim for compensation. To justify rescission of acceptance, the Office must establish that its prior acceptance was erroneous based on new or different evidence or through new legal argument and/or rationale.[11]

In the instant case, the Office originally accepted appellant's claim for bilateral hearing loss based primarily on the opinion of one of its referral physicians, Dr. Cartwright. However, after accepting the claim on January 25, 1996, the Office subsequently forwarded the record to its medical consultant, Dr. Schindler. Although Dr. Schindler initially concurred with Dr. Cartwright's diagnosis of work-related bilateral hearing loss, he subsequently changed his opinion by finding that appellant's occupational noise exposure contributed to his loss of hearing in only one ear, not both ears. Based upon the May 11, 1995 opinion of its medical consultant, the Office subsequently issued a schedule award for a 28.1 percent monaural loss of hearing and effectively rescinded its earlier acceptance of employment-related hearing loss in appellant's right ear. Thus, by relying on new, contrary evidence, the Office ostensibly had justification for rescinding its January 25, 1996 acceptance of appellant's claim for bilateral hearing loss. However, as previously noted, the Office's June 21, 1995 decision was set aside by the hearing representative in view of certain deficiencies in the Office medical consultant's May 11, 1995 opinion. At the Office's request, Dr. Schindler attempted to cure the noted deficiencies in his May 11, 1995 opinion. While the physician's subsequent report of October 2, 1996 addressed

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evidence of record which was before the Office at the time of its final decision, the Board cannot consider appellant's newly submitted evidence. 20 C.F.R. § 501.2(c).

[8] *Eli Jacobs*, 32 ECAB 1147, 1151 (1981).

[9] *Shelby J. Rycroft*, 44 ECAB 795 (1993). *Compare Lorna R. Strong*, 45 ECAB 470 (1994).

[10] *See Frank J. Meta, Jr.*, 41 ECAB 115, 124 (1989); *Harold S. McGough*, 36 ECAB 332, 336 (1984).

[11] *Laura H. Hoexter (Nicholas P. Hoexter)*, 44 ECAB 987 (1993); *Alphonso Walker*, 42 ECAB 129, 132-33 (1990); *petition for recon. denied*, 42 ECAB 659 (1991); *Beth A. Quimby*, 41 ECAB 683, 688 (1990); *Roseanna Brennan*, 41 ECAB 92, 95 (1989); *Daniel E. Phillips*, 40 ECAB 1111, 1118 (1989), *petition for recon. denied*, 41 ECAB 201 (1990).

some of the concerns raised by the hearing representative, it is nonetheless insufficiently rationalized to justify a recession.[12]

The Office medical consultant's opinion was not the only new medical evidence obtained by the Office. In accordance with the June 13, 1996 decision of the hearing representative, the Office referred appellant for examination by Dr. Gherini. The Office provided Dr. Gherini with a statement of accepted facts and, in a letter dated December 23, 1996, specifically posed the following question: "Is the hearing loss in the right ear proximately caused by the accepted exposure to hazardous noise levels that [appellant] had during his civilian Naval career?" As previously noted, Dr. Gherini diagnosed a flat severe low to high frequency sensorineural hearing loss in the right ear, a moderately severe mid to high sensorineural hearing loss in the left ear, and binaural tinnitus. As to the etiology of appellant's hearing loss, Dr. Gherini opined that while the loss of hearing in appellant's left ear was consistent with repetitive exposure to hazardous levels of noise, the right ear hearing loss was not consistent with such exposure. After noting that appellant did not have a history of a blast injury or acoustic trauma to the right ear, Dr. Gherini explained:

> "If the hearing loss in the right ear were due to occupational noise exposure, one would expect the audiometric pattern to match that in the left ear and this is not the case. Typically, repetitive noise exposure spares the lower frequencies and the maximal loss is seen between 3,000 and 8,000 Hertz. This is not the case with [appellant's] hearing in his right ear."

Dr. Gherini adequately set forth the basis for his conclusion that appellant's exposure to hazardous levels of noise did not have "anything to do with the right-sided hearing loss." Accordingly, this evidence rises to the level of rationalized medical opinion evidence. Although Dr. Gherini's opinion regarding the etiology of appellant's right-sided hearing loss is partially contradicted by Dr. Cartwright's January 3, 1995 opinion, the Board notes that Dr. Cartwright did not provide an explanation for his conclusion that appellant's "right ear sensorineural hearing loss has a combination of medical etiology as well as occupational noise exposure etiology." In view of the foregoing analysis, the Board finds that the weight of the medical evidence negates any causal relationship between appellant's right-sided hearing loss and his exposure to hazardous noise levels. Thus, the Office properly rescinded acceptance of appellant's claim for employment-related hearing loss in his right ear.

With respect to the Office's award of compensation for appellant's employment-related loss of hearing in his left ear, the Board has duly reviewed the evidence contained in the case record presented on appeal and finds that appellant has no more than a 28.1 percent monaural hearing loss, for which he received a schedule award.

[12] Although Dr. Schindler stated that the hearing loss in appellant's right ear was "more consistent with inner ear membrane rupture, head trauma, vascular disturbance, congenital, or viral illness," he did not clearly explain the basis for his opinion. Moreover, the physician's opinion appears to be based in part upon speculation concerning the dates of the "earliest" screening audiograms of record.

Section 8107 of the Federal Employees' Compensation Act[13] 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.[14] 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.[15]

The Office evaluates permanent hearing loss in accordance with the standards contained in the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (fourth edition 1993). Utilizing the 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 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.[16] The remaining amount is multiplied by 1.5 to arrive at the percentage of monaural hearing loss.[17] The Board has concurred in the Office's adoption of this standard for evaluating hearing loss.[18]

Based upon appellant's January 3, 1995 audiogram, the frequency levels recorded at 500, 1,000, 2,000 and 3,000 hertz for the left ear reveal decibel losses of 0, 45, 75 and 55, respectively, for a total of 175 decibels. When this figure is divided by 4, the result is an average hearing loss of 43.75 decibels. The average loss of 43.75 is reduced by 25 decibels to equal 18.75, which when multiplied by the established factor of 1.5, results in a 28.1 percent monaural hearing loss for the left ear.[19] Appellant's most recent audiogram, dated January 24, 1997, revealed a 26.2 percent monaural hearing loss for the left ear.[20]

A schedule award under the Act is paid for permanent impairment involving the loss or loss of use of certain members of the body. The schedule award provides for the payment of compensation for a specific number of weeks as prescribed in the statute.[21] With respect to the schedule awards for hearing impairments, the pertinent provision of the Act provides that for a

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[13] 5 U.S.C. § 8107.

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

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

[16] *See* A.M.A., *Guides* 224 (4th ed. 1993); *see also Kenneth T. Esther*, 25 ECAB 335; *Terry A. Wethington*, 25 ECAB 247.

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

[18] *Danniel C. Goings*, *supra* note 14.

[19] Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.4b(2)(b) (October 1990).

[20] The frequency levels recorded at 500, 1,000, 2,000 and 3,000 hertz for the left ear reveal decibel losses of 10, 40, 60 and 65, respectively.

[21] 5 U.S.C. § 8107.

total, or 100 percent loss of hearing in one ear, an employee shall receive 52 weeks of compensation.[22] In the instant case, appellant does not have a total, or 100 percent monaural hearing loss, but rather at most a 28.1 percent monaural hearing loss, which the Office has determined was employment related. As appellant has no more than a 28.1 percent loss of use of his left ear, he is entitled to 28.1 percent of the 52 weeks of compensation, which is 14.6 weeks. The Office, therefore, properly determined the number of weeks of compensation for which appellant is entitled under the schedule award.

Accordingly, the decision of the Office of Workers' Compensation Programs dated February 18, 1997 is affirmed.

Dated, Washington, D.C.
March 19, 1999

George E. Rivers
Member

David S. Gerson
Member

Bradley T. Knott
Alternate Member

[22] 5 U.S.C. § 8107(c)(13)(A).