U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of FLOYD R. HUNTER and DEPARTMENT OF THE NAVY,
NAVAL AIR STATION, San Diego, CA

Docket No. 98-494; Submitted on the Record;
Issued September 24, 1999

DECISION and ORDER

Before MICHAEL J. WALSH, GEORGE E. RIVERS,
DAVID S. GERSON

The issues are: (1) whether appellant has met his burden of proof in establishing a ratable hearing loss, for which he was entitled to a schedule award; (2) whether the Office of Workers' Compensation Programs' denial of appellant's request for a hearing pursuant to section 8124 of the Federal Employees' Compensation Act constituted an abuse of discretion; and (3) whether the Office's denial of appellant's request for reconsideration pursuant to section 8128 of the Act constituted an abuse of discretion.

On February 28, 1996 appellant, then a 54-year-old rigger, filed an occupational disease claim, alleging that he sustained a hearing loss that he first became aware of and realized was causally related to factors of his federal employment on February 21, 1996. On July 22, 1996 the Office accepted appellant's claim for a bilateral hearing loss. On July 29, 1996 appellant filed a claim for a schedule award in relation to his hearing loss. Appellant filed another schedule award claim on November 6, 1996.

The employing establishment submitted a copy of appellant's job description, which indicated that as part of his employment, he was exposed to noise on an airfield and quaywall and ships. Appellant also had a history of past exposure to ship noises when he was employed by the U.S. Navy as a boatswains mate from March 1959 to October 1978. In addition, the employing establishment submitted a copy of appellant's medical records, including audiograms taken during employment.

The Office referred appellant, together with the statement of accepted facts and the case record, to Dr. Edward W. Gallagher, a Board-certified otolaryngologist, for an examination. The Office indicated that appellant was exposed to occupational noise levels above 85 decibels for the periods when he was employed as a boatswains mate between March 1959 to October 1978, as a rigger from October 1978 to August 1981, as a boatswains mate from August 1981 to August 1985 and as a rigger from August 1985 to November 1993. In a report dated July 15, 1996, Dr. Gallagher indicated that appellant was exposed as a rigger to noises from air

compressors, jet engines, helicopters, grinders, forklift payloaders, cranes and other types of noisy equipment for up to eight hours a day, five days a week. He found a bilateral high frequency sensorineural hearing loss with resulting tinnitus. Dr. Gallagher reported that there was nothing in appellant's medical history to apportion any of his hearing loss to any preemployment or nonindustrial factors. He also reported that testing for appellant's left ear at 500, 1,000, 2,000 and 3,000 cycles per second (CPS) showed decibel losses of 20, 15, 20 and 45 by air conduction, respectively, while testing for the right ear revealed decibel losses of 20, 20, 25 and 55, by air conduction, respectively. Dr. Gallagher concluded that appellant's hearing had gradually deteriorated since it was first detected January 31, 1986 and recommended that hearing aids be issued to appellant.

The Office referred Dr. Gallagher's report and case record to Dr. Brian Schindler, an Office medical consultant and Board-certified otolaryngologist, for his review. In a report dated January 23, 1997, Dr. Schindler noted that he reviewed the file and that appellant's claim was accepted as having been exposed to hazardous noise all working for the employing establishment. He indicated that audiograms from 1986 revealed that appellant had bilateral high frequency hearing loss at that time. Dr. Schindler indicated that he reviewed Dr. Gallagher's report and that the audiogram from this report showed a bilateral high frequency hearing loss, which Dr. Gallagher believed was related to appellant's noise exposure. Dr. Schindler concurred with this assessment. Nonetheless, he further found that appellant's hearing loss worsened after his retirement in November 1993. Dr. Schindler, therefore, utilized the audiogram dated January 20, 1994, which was shortly after appellant's retirement. He reported that based on a review of the January 20, 1994 audiogram appellant had not sustained any ratable hearing loss and that his hearing loss after that date was caused by the aging process was not related to factors of noise exposure. Dr. Schindler concluded that appellant, therefore, had a 0 percent hearing loss in the right ear and a 0 percent hearing loss into left ear.

In a decision dated February 4, 1997, the Office denied appellant's claim for a schedule award on the grounds that he had no ratable permanent impairment. By decision dated September 10, 1997, the Office denied appellant's request for an oral argument on the grounds that it was untimely. In a decision dated December 16, 1997, the Office denied appellant's request for reconsideration on the grounds it was *prima facie* insufficient to warrant review pursuant to section 8128 of the Act.

The Board finds that this case is not in posture for decision.

Section 8107(c) of the Act[1] specifies 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 of loss of a member, function or organ shall be determined. The method used in making such a determination is a matter which rests in the sound discretion of the Office.[2] For consistent results and to ensure equal justice

[1] 5 U.S.C. §§ 8101-8193, § 8107(c).

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

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.[3]

The Office evaluates permanent hearing loss in accordance with the standards contained in the American Medical Association, *Guides to the Evaluation of Permanent Impairment*, 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 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. Each amount is then multiplied by 1.5. The amount of the better ear is multiplied by 5 and added to the amount from the worse ear. The entire amount is then divided by 6 to arrive at a percentage of binaural hearing loss.[4] The Board has concurred in the Office's adoption of this standard for evaluation hearing loss for schedule award purposes.[5] In addition, the Federal Procedure Manual requires that all claims for hearing loss due to its acoustic trauma, require an opinion from a Board-certified specialist in otolaryngology.[6] The procedure manual further indicates that audiological testing is to be performed by persons possessing certification and ideology from the American Speech Language Hearing Association (ASHA), or state licensure as an audiologist.[7] The audiological testing should precede to visit to the otolaryngologist since the latter should have the audiological findings at the time of the examination.

In the present case, the Office medical consultant deviated from requirements of the Federal Procedural Manual by not reviewing the appropriate audiogram dated July 15, 1996, which was performed in contemplation of review by Dr. Gallagher. Although he provided a report and testing that was consistent with the procedure manual, this report and Dr. Gallagher's audiogram were not reviewed by Dr. Schindler as the claims examiner requested. Rather, the Office medical consultant reviewed an earlier audiogram dated January 20, 1994. A review of that audiogram reveals that it is not in compliance with Federal Procedure Manual requirements as it does not indicate that the person performing the audiogram had the proper ASHA qualification because the audiogram only provides a training certification number as opposed to a state licensure number or ASHA qualification. In addition, Dr. Schindler's review of the earlier audiogram is beyond the scope of the Office medical adviser's duties in reviewing a report for a schedule award as the Office medical adviser is to provide information on the nature and percentage of impairment based on a review of the report by the treating physician or Office referral physician.[8] In addition, Dr. Schindler's report is internally inconsistent as he initially indicates that he concurs with Dr. Gallagher's assessment that appellant's hearing loss was

---

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

[4] A.M.A., *Guides* p. 166 (3d ed., 1987).

[5] *See Goings, supra* note 2.

[6] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Causal Relationship*, Chapter 2.805.3(d)(6) (June 1995).

[7] Federal (FECA) Procedure Manual, Part 3 -- Medical, *Requirement for Medical Reports*, Chapter 3.600.8(a)(2) (September 1994).

[8] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Claims Management*, Chapter 2.808.6(d) (March 1995).

caused by noise exposure which was based on the July 1996 audiogram and later indicates that any hearing loss after January 1994 was not due to noise exposure. Consequently, this case must be remanded for a proper review of the medical report and testing provided by Dr. Gallagher as required by the Federal Procedure Manual. After such further development as the Office deems necessary, a *de novo* decision shall be issued on the merits of appellant's claim for a schedule award.

In view of the disposition of this case with respect to the merits of appellant's schedule award for hearing loss, the issue regarding appellant's request for reconsideration is moot. In addition, the issue concerning appellant's untimely request for a hearing is now premature as this case must be remanded for a *de novo* decision.

The decisions of the Office of Workers' Compensation Programs dated December 16, September 10 and February 4, 1997 are hereby set aside and this case is remanded for further proceedings consistent with this decision.

Dated, Washington, D.C.
September 24, 1999

Michael J. Walsh
Chairman

George E. Rivers
Member

David S. Gerson
Member