

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ANTHONY W. BARNES and DEPARTMENT OF THE NAVY,
NORFOLK NAVAL SHIPYARD, Portsmouth, VA

*Docket No. 99-769; Submitted on the Record;
Issued July 10, 2000*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issues are: (1) whether appellant has established that he sustained a ratable hearing loss as a result of his accepted employment injury; and (2) whether the refusal of the Office of Workers' Compensation Programs to reopen appellant's case for further consideration of the merits of his claim, pursuant to 5 U.S.C. § 8128(a), constituted an abuse of discretion.

On June 10, 1997 appellant, then a 61-year-old rigger,¹ filed a claim alleging that he had sustained a loss of hearing while in the performance of duty.

On January 8, 1998 the Office referred appellant, together with a statement of accepted facts, to Dr. Andrey I. Blumberg, Board-certified in otolaryngology, for an audiologic and otologic evaluation. In a report dated February 13, 1998, Dr. Blumberg concluded that the audiogram performed on that date by audiologist Pamela B. Swartz showed a hearing loss, which the doctor opined was caused by exposure to loud noises during appellant's military and civilian career. The audiogram performed on February 13, 1998 indicated that testing for the right ear at frequency levels of 500, 1,000, 2,000 and 3,000 cycles per second revealed decibel losses of 10, 15, 20 and 40 decibels and testing for the left ear revealed decibel losses of 10, 15, 20 and 50 decibels.

In a March 2, 1998 report, an Office medical adviser reviewed Dr. Blumberg's report and the audiogram taken for him and found that appellant's hearing loss was nonratable for schedule award purposes under the Office standards for evaluating hearing loss.

In a decision dated April 1, 1998, the Office accepted that appellant had an employment-related hearing loss but determined that appellant's hearing loss was not sufficient to warrant a

¹ Appellant retired in August 1997.

schedule award. The Office further indicated that hearing aids were authorized and authorized hearing loss evaluations every six months.²

Appellant subsequently requested reconsideration on June 18, 1998, which the Office, on September 15, 1998, denied in a nonmerit decision.

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

The schedule award provisions of the Federal Employees' Compensation Act provide for compensation to employees sustaining impairment from loss, or loss of use of specified members of the body.³ 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. For consistent results and to ensure equal justice, the Board has authorized the use of a single set of tables so that there may be uniform standards applicable to all claimants. The American Medical Association (A.M.A.), *Guides to the Evaluation of Permanent Impairment* (fourth edition 1993) has been adopted by the Office as a standard for evaluation of scheduled losses and the Board has concurred in such adoption.⁴

Under the A.M.A., *Guides*, hearing loss is evaluated by determining decibel losses at the frequency levels 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 since, as the A.M.A., *Guides* points out, losses below 25 decibels result in no impairment in the ability to hear everyday speech in everyday conditions.⁵ Then the remaining amount is multiplied by 1.5 to arrive at the percentage loss of monaural 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 binaural hearing loss.⁶

The Office medical adviser applied the Office's standardized procedures to the February 13, 1998 audiogram, performed for Dr. Blumberg. Testing for the right ear at frequency levels of 500, 1,000, 2,000 and 3,000 cycles per second revealed hearing losses of 10, 15, 20 and 40 decibels respectively. These decibels were totaled to 85 and were divided by 4 to obtain the average hearing loss at those cycles of 21.25 decibels. The average of 21.25 decibels was then reduced by 25 decibels (the first 25 decibels were discounted as discussed above) to equal 0, which was multiplied by the established factor of 1.5 to compute a 0 percent hearing

² The April 1, 1998 decision of the Office modified its March 5, 1998 decision, which denied appellant's claim for a schedule award as well as hearing aids and medical coverage. In his March 13, 1998 request for reconsideration, appellant noted that he had worn hearing aids since May 1997. He also noted that he had a ringing in his ears at all times.

³ 5 U.S.C. § 8107.

⁴ *Danniel C. Goings*, 37 ECAB 781, 783 (1986); *Richard Beggs*, 28 ECAB 387, 390-91 (1977).

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

⁶ *Id.*; see also *Danniel C. Goings*, *supra* note 4.

loss in the right ear. Testing for the left ear at the frequency levels of 500, 1,000, 2,000 and 3,000 cycles per second revealed decibel losses of 10, 15, 20 and 50 respectively. These decibels were totaled at 95 and were divided by 4 to obtain the average hearing loss at those cycles of 23.75 decibels. The average of 23.75 decibels was then reduced by 25 decibels (the first 25 decibels were discounted as discussed above) to equal 0, which was multiplied by the established factor of 1.5 to compute a 0 percent loss in the left ear.

Accordingly, pursuant to the Office's standardized procedures, the Office's medical adviser determined that appellant had a nonratable hearing loss in both ears.

The Board finds that the Office medical adviser applied the proper standards to the findings as stated in Dr. Blumberg's February 13, 1998 report and the accompanying February 13, 1998 audiogram performed on his behalf. This resulted in a calculation of a nonratable hearing loss as set forth above.

The Board further finds that the Office did not abuse its discretion pursuant to 5 U.S.C. § 8128(a) by refusing to reopen appellant's case for further consideration of the merits of his claim.

Appellant failed to support his June 18, 1998 request for reconsideration with new, relevant medical evidence supporting his contention that his hearing loss was ratable under the Act. Furthermore, appellant's June 18, 1998 letter does not contain relevant, pertinent information not previously considered by the Office, new or relevant points of fact or law and does not allege that the Office erred in applying or interpreting a point of law. Instead, the letter notes appellant's subjective complaints of ringing in his ears and the beneficial use of hearing aids, which the Office had previously authorized.

Thus, the evidence submitted in support of appellant's June 18, 1998 request for reconsideration did not constitute a basis for reopening appellant's case for merit review under 20 C.F.R. § 10.138.⁷ Therefore, appellant has not established that the Office abused its discretion under section 8128(a) of the Act, because he has failed to show that the Office erroneously applied or interpreted a point of law, that he advanced a point of law or a fact not previously considered by the Office, or that he submitted relevant and pertinent evidence not previously considered by the Office.

⁷ *Gaetan F. Valenza*, 35 ECAB 763 (1984).

The decisions of the Office of Workers' Compensation Programs dated September 15 and April 1, 1998 are hereby affirmed.

Dated, Washington, D.C.
July 10, 2000

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member