U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JAMES A. CROWDER, SR. and DEPARTMENT OF THE NAVY, PHILADELPHIA NAVAL SHIPYARD, Philadelphia, PA

Docket No. 98-2103; Submitted on the Record;
Issued March 3, 2000

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issues are: (1) whether appellant has met his burden of proof in establishing that he sustained greater than a 10 percent binaural hearing loss for which he received a schedule award; and (2) whether the Office of Workers' Compensation Programs properly denied appellant's request for a hearing pursuant to section 8124 of the Federal Employees' Compensation Act.

On May 6, 1996 appellant, then a 50-year-old reduction shop planner, filed an occupational disease claim for hearing loss due to factors of his federal employment of which he first became aware in August 1995. In a decision dated December 20, 1996, the Office granted appellant a schedule award for a 10 percent binaural hearing loss for 20 weeks of compensation for the period of October 14, 1996 to March 2, 1997. By letter dated July 5, 1997, appellant requested a hearing. In a letter decision dated February 12, 1998, the Office denied appellant's request as untimely filed. By letter dated February 24, 1998, appellant requested reconsideration. In a merit decision dated May 27, 1998, the Office denied appellant's request for reconsideration on the grounds that the evidence submitted was not sufficient to warrant modification of the prior merit decision.

The Board has duly reviewed the entire case record on appeal and finds that appellant has not established greater than a 10 percent hearing loss.

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 five and added to the amount from the worse ear. The entire amount is then divided by six to arrive at a percentage of binaural hearing loss.[4] The Board has concurred in the Office's adoption of this standard for evaluation of hearing loss for schedule award purposes.[5]

In the present case, the Office referred appellant to Dr. Arnold Brenman, a Board-certified otolaryngologist, for an examination, including audiometric testing. In a report dated October 14, 1996, Dr. Brenman discussed appellant's work history. The report indicated that an audiometric evaluation was performed on equipment last calibrated to standards on April 12, 1996. He reported that the audiogram revealed bilateral sensorineural hearing loss. Dr. Brenman indicated that the testing for the right ear at 500, 1,000, 2,000 and 3,000 cycles per second showed decibel losses of 20, 20, 30 and 55, respectively, while testing for the left ear revealed decibel losses of 20, 20, 30 and 60, respectively.

The Office medical adviser properly applied the Office's standard procedures to the audiogram obtained by Dr. Brenman. After adding the 4 measured frequencies for the right and left ears, he found hearing losses of 125 and 130 decibels, respectively. Dr. Brenman then properly divided the hearing losses by 4 to find a total hearing loss of 31.25 and 32.5 respectively. The Office medical adviser properly subtracted the 25 decibel fence to find a loss of 6.25 in the right ear and 7.5 in the left ear. These figures were then multiplied by 1.5 providing a hearing loss of 9.375 in the right ear and 11.25 in the left ear. In accordance with the A.M.A, *Guides*, the Office medical adviser multiplied the sum of the better ear, *i.e.*, 9.75 by 5 for a total of 46.875, which was then added to the left ear figure of 11.25 for a total of 58.125. After the Office medical adviser divided this number by 6, he indicated that appellant had a total hearing loss of 10 percent.

Thus, the results of the October 14, 1996 audiogram, as evaluated by the Office medical adviser under the applicable standards, establish that appellant has no more than a 10 percent hearing loss, for which he received a schedule award. Appellant has not established greater than a 10 percent bilateral sensorineural hearing loss.

The Board also finds that the Office properly denied appellant's request for a hearing.

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

[4] p. 166 (3d ed., 1987).

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

Section 8124(b)(1) of the Act provides that a "claimant for compensation not satisfied with the decision of the Secretary ... is entitled, on request made within 30 days after the date of the issuance of the decision, to a hearing on his claim before a representative of the Secretary."[6] As section 8124(b)(1) is unequivocal in setting forth the time limitations for requesting a hearing, a claimant is not entitled to a hearing as a matter of right unless the request is made within the requisite 30 days.[7]

The Office issued the last merit decision, *i.e.*, decision granting or denying benefits, in this case, on December 20, 1996. In a letter dated July 5, 1997, appellant requested an oral hearing. While appellant urges on appeal that he filed timely requests for a hearing, the record is devoid of any letter to the Branch of Hearings and Review requesting a hearing prior to the letter dated July 5, 1997. Thus, as appellant requested a hearing beyond the 30-day time limitation, he is not entitled to a hearing as a matter of right.

Even when the hearing request is not timely, the Office has discretion to grant the hearing request and must exercise that discretion. In this case, the Office advised appellant that it considered his request in relation to the issue involved and the hearing was denied on the basis that he could address this issue by submitting evidence, which showed that he had sustained greater than a 10 percent hearing loss. Appellant was advised that he may request reconsideration with additional evidence. The Board has held that an abuse of discretion is generally shown through proof of manifest error, a clearly unreasonable exercise of judgment, or actions taken which are contrary to both logic and probable deductions from established facts.[8] There is no evidence of an abuse of discretion in the denial of a hearing in this case.

[6] 5 U.S.C. § 8124(b)(1).

[7] *Charles J. Prudencio*, 41 ECAB 499 (1990); *Ella M. Garner*, 36 ECAB 238 (1984).

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

The decisions of the Office of Workers' Compensation Programs dated May 27 and February 12, 1998 are hereby affirmed.

Dated, Washington, D.C.
March 3, 2000

Michael J. Walsh
Chairman

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member