U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of LUIS LUNA and DEPARTMENT OF THE AIR FORCE, McCLELLAN AIR FORCE BASE, North Highlands, CA

Docket No. 00-1831; Submitted on the Record;
Issued April 25, 2001

DECISION and ORDER

Before MICHAEL J. WALSH, BRADLEY T. KNOTT, PRISCILLA ANNE SCHWAB

The issues are: (1) whether appellant is entitled to a schedule award for his employment-related hearing loss; and (2) whether the Office of Workers' Compensation Programs properly denied appellant's request for a review of the written record pursuant to section 8124(b) of the Federal Employees' Compensation Act.[1]

On September 16, 1999 appellant, then a 54-year-old production shop supervisor, filed a notice of occupational disease alleging that he developed hearing loss due to factors of his employment. By decision dated December 17, 1999, the Office accepted that appellant's bilateral hearing loss was caused by 33 years of occupational noise exposure in his employment, but did not grant a schedule award because appellant's hearing loss was not ratable.

Appellant requested review of the written record by certified letter postmarked January 19, 2000. The Office's Branch of Hearings and Review denied appellant's request in a decision dated March 13, 2000, stating that since his request was not made within 30 days, he was not entitled to an oral hearing or review of the written record as a matter of right. The Branch informed appellant that he could request reconsideration by the Office and submit additional evidence.

Medical evidence submitted in support of appellant's claim substantiated that his federal employment exposed him to noise from various sources that included power tools and heavy machinery in the performance of duties that pertained mainly to the manufacture of sheet metal. The Office referred appellant on October 25, 1999 to Dr. Stuart Gherini, a Board-certified otolaryngologist, for otologic evaluation and examination. The Office provided Dr. Gherini with a statement of accepted facts, available exposure information and copies of relevant medical reports and audiograms. Upon receipt of Dr. Gherini's October 25, 1999 report and an audiogram performed at his request on October 25, 1999, the Office medical adviser applied the

[1] 5 U.S.C. § 8101 *et seq.*

American Medical Association, *Guides to the Evaluation of Permanent Impairment*[2] to the October 25, 1999 audiogram.

By decision dated December 17, 1999, the Office denied appellant's claim for a schedule award on the grounds that, while appellant had a work-related binaural loss of hearing, the hearing loss was not sufficient to warrant a schedule award. The Office determined, however, that appellant was entitled to medical benefits for the effects of his hearing loss.

The Board finds that appellant is not entitled to a schedule award for his employment-related hearing loss.

The schedule award provisions of the Act[3] set forth the number of weeks of compensation to be paid for permanent loss of use of the members listed in the schedule. 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 determinations is a matter, which rests in the sound discretion of the Office. However, as a matter of administrative practice and to ensure consistent results to all claimants, the Office has adopted and the Board has approved the use of the A.M.A., *Guides* as the uniform standard applicable to all claimants.[4]

Under the A.M.A., *Guides*, hearing loss is evaluated by determining decibel loss at the following frequency levels: 500, 1,000, 2,000 and 3,000 hertz (Hz). The losses at each frequency are added up and averaged and a fence of 25 decibels (dB) is deducted since, as the A.M.A., *Guides* points out, losses below 25 dB result in no impairment in the ability to hear everyday speech in everyday conditions.[5] The remaining amount is multiplied by 1.5 to arrive at the percentage of monaural hearing 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 the binaural hearing loss.[6]

The Office medical adviser properly applied the standard procedures to the October 25, 1999 audiogram. Testing of appellant's left ear at the frequency levels of 500, 1,000, 2,000 and 3,000 Hz revealed decibel losses of 15, 10, 25 and 20 totaling 70 dBs. The total of 70 dBs was then divided by 4 to obtain the average hearing loss at those cycles of 17.5 dBs. The average of 17.5 dBs was then reduced by 25 decibels to equal 0, which was multiplied by the established factor of 1.5, which computed a 0 percent hearing loss for the left ear.

Testing for the right ear at the frequency levels of 500, 1,000, 2,000 and 3,000 Hz revealed decibel losses of 10, 20, 20 and 25 totaling 75 dBs. The total of 75 dBs was then

[2] A.M.A., *Guides* (4th ed. rev., 1993)

[3] 5 U.S.C. § 8107.

[4] A.M.A., *Guides* (4th ed. 1993); *see Danniel C. Goings*, 37 ECAB 781 (1986).

[5] *See* A.M.A., *Guides* at 224 (4th ed. 1993); *see also Danniel C. Goings, id*.

[6] A.M.A., *Guides* at 224.

divided by 4 to obtain the average hearing loss at those cycles of 18.75 dBs. The average of 18.75 dBs was then reduced by 25 decibels to equal 0, which was multiplied by the established factor of 1.5, which computed a 0 percent hearing loss for the right ear.

Accordingly, the Office medical adviser properly found that appellant had nonratable hearing loss in both ears.

The Board further finds that the Office properly denied appellant's request for a review of the written record as untimely.

Section 8124(b)(1) of the Act provides that "a claimant for compensation not satisfied with a 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."[7] Section 10.615 of the federal regulations implementing this section of the Act provides that a claimant shall be afforded a choice between two formats: An oral hearing or a review of the written record.[8] The regulations provide that the hearing request must be sent within 30 days (as determined by postmark or other carrier's date marking) of the date of decision for which a hearing is sought.[9]

In this case, appellant's request for a review of the written record was postmarked January 19, 2000. Since this is more than 30 days after the December 17, 1999 Office decision, appellant is not entitled to a review of the written record as a matter of right.

Although appellant's request for a review of the written record was untimely, the Office has discretionary authority to grant the request and the Office must exercise such discretion.[10]

In this case, the Office advised appellant that the issue could be addressed through the reconsideration process and the submission of new evidence. This is considered a proper exercise of the Office's discretionary authority.[11]

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.[12] There is no indication that the Office abused its discretion in this case.

The March 13, 2000 and December 17, 1999 decisions of the Office of Workers' Compensation Programs are affirmed.

---

[7] 5 U.S.C. § 8124(b)(1).

[8] 20 C.F.R. § 10.615.

[9] 20 C.F.R. §10.616(a).

[10] *See Cora L. Falcon*, 43 ECAB 915 (1992).

[11] *Id.*

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

Dated, Washington, DC
April 25, 2001

Michael J. Walsh
Chairman

Bradley T. Knott
Alternate Member

Priscilla Anne Schwab
Alternate Member