U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of WILLIAM A. WRIGHT and TENNESSEE VALLEY AUTHORITY, WHEELER HYDRO PLANT, Town Creek, AL

Docket No. 00-2692; Submitted on the Record;
Issued October 25, 2001

DECISION and ORDER

Before DAVID S. GERSON, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly denied appellant's request for a review of the written record.

On February 11, 1997 appellant, then a 64-year-old former laborer, filed a notice of occupational disease and claim for compensation, alleging that he sustained a loss of hearing as a result of his federal employment.[1]

By letter dated March 19, 1997, the Office referred appellant to Dr. Edward E. Walker, a Board-certified otolaryngologist. An audiogram conducted under Dr. Walker's supervision on December 19, 1997 revealed decibel losses for the right ear at 500, 1,000, 2,000 and 3,000 cycles per second of 10, 15, 10 and 60, respectively. On February 17, 1998 the Office medical adviser reviewed Dr. Walker's results, totaled the decibel losses at 95 and divided it by 4 to obtain the average hearing loss at those cycles of 23.75. Then the "fence" of 25 decibels was deducted because, as the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed. 1993), points out, losses below 25 decibels result in no impairment in the ability to hear everyday speech under everyday conditions. When one deducts the fence of 25 decibels from a hearing loss of 23.75 decibels, it shows no measurable hearing loss in appellant's right ear.

With regard to his left ear, Dr. Walker's test of December 19, 1997 showed decibel loss at the 500, 1,000, 2,000 and 3,000 cycles per second at 10, 0, 30 and 65 decibels, respectively. The Office medical adviser added these figures to total 105 and divided this by 4 to find an average hearing loss of 26.25. When he deducted the "fence" of 25 decibels, he arrived at 1.25, which he multiplied by the established factor of 1.5 to compute a 1.88- percent loss of hearing in the left ear. Accordingly, pursuant to the Office's standardized procedures, the Office medical

[1] Appellant was terminated on December 31, 1992 due to a voluntary reduction-in-force.

adviser determined that appellant had a nonratable loss of hearing in his right ear, and a two percent loss of hearing in his left ear.

On February 17, 1998 appellant's claim was accepted for bilateral sensorineural hearing loss.

On April 15, 1998 appellant filed a claim for a schedule award.

On May 7, 1998 the Office issued a schedule award for a two percent permanent impairment of the left ear.

By letter dated July 13, 1998, appellant requested reconsideration. Appellant filed another request for reconsideration by letter dated August 26, 1998.

In support of his requests for reconsideration, appellant submitted a copy of a June 11, 1998 audiogram from Belltone. This was interpreted by the audiologist as showing an 11 percent hearing disability in the right ear and a 13 percent hearing disability in the left ear.

By letter dated September 29, 1998, the Office referred appellant to Dr. Walker for a second examination. Dr. Walker conducted a second audiogram on October 23, 1998. This report showed greater hearing loss; the Office medical adviser interpreted this audiogram as showing a five percent bilateral sensorineural hearing loss.

By decision dated November 19, 1998, the Office denied modification of the May 7, 1998 schedule award. The Office found that the Belltone audiogram did not comply with the Office's protocols and was inappropriate for calculation of a schedule award. The Office noted that Dr. Walker's October 23, 1998 audiogram revealed that appellant did have an increase in permanent impairment for hearing loss; however, the Office concluded that this progression did not result from the hearing loss sustained in the course of appellant's employment, as appellant had not been exposed to hazardous noise in his employment since he left on December 31, 1992.

On February 23, 2000 the Office received a letter from appellant, dated February 11, 2000, wherein he stated that he had no response to his request for a review of the written record. Attached to the February 23, 2000 letter was a letter of December 15, 1998, wherein appellant requested review of the record.[2] In an April 25, 2000 response to appellant, the Office noted:

> "In reviewing your file, I find that it has not been requested by the Branch of Hearings and Review, and that your case file has never left the Jacksonville Office. This leads me to believe that they did not receive your December 1998 letter requesting a hearing; therefore, I am forwarding your case file to the Branch of Hearings and Review for their review."

By decision dated May 26, 2000, the Office denied appellant's request for review of the written record. The Office found that, as appellant had previously requested reconsideration, he

[2] There is no evidence in this letter was received prior to February 23, 2000. *See Santiago Gonzalez,* 43 ECAB 189 (1991); *Irene T. Krajewski,* 43 ECAB 1137 (1992).

was not, as a matter of right, entitled to a review of the written record. However, the Office reviewed appellant's request in it discretion, and denied the hearing request for the reason that the issue in this case could equally well be addressed by requesting reconsideration from the district Office.

The Board's jurisdiction is limited to final decisions of the Office issued within one year of the filing of the appeal.[3] Since appellant filed his appeal on August 15, 2000, the only decision over which the Board has jurisdiction on this appeal is the May 26, 2000 decision denying his request for review on the written record.

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

Section 8124(b) of the Federal Employees' Compensation Act, concerning a claimant's entitlement to a hearing before an Office representative, states:

> "Before review under section 8128(a) of this title, 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."[4]

The Office, in its broad discretionary authority in the administration of the Act, has the power to hold hearings in certain circumstances where no legal provision was made for such hearings and the Office must exercise this discretionary authority in deciding whether to grant or deny a review of the written record by an Office hearing representative. The Office's procedures, which require the Office to exercise its discretion to grant or deny a hearing when a hearing request is untimely or made after reconsideration under section 8128(a), are a proper interpretation of the Act and Board precedent.[5] The statutory right to a hearing pursuant to section 8124(b)(1) follows an initial decision of the Office.[6]

In the instant case, appellant requested reconsideration of the May 7, 1998 decision awarding a two percent permanent impairment to the left ear on July 13 and August 26, 1998. Because appellant requested a written review of the record on December 15, 1998, after he had requested and received reconsideration under section 8128(a), he is not entitled to a review of the written record under section 8124(a) as a matter of right. The Office properly exercised its discretion when it decided not to grant a discretionary hearing on the grounds that the issue in the case could equally well be addressed by requesting reconsideration from the district Office and submitting evidence not previously considered. Consequently, the Office properly denied appellant's December 15, 1998 request for a review of the written record.

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[3] 20 C.F.R. § 501.3(d).

[4] 5 U.S.C. § 8124(b)(1).

[5] *Henry Moreno*, 39 ECAB 475 (1988).

[6] *Eileen A. Nelson*, 46 ECAB 377, 380 (1994); *see* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Disallowances*, Chapter 2.1400.10(b) (March 1997).

The decision of the Office of Workers' Compensation Programs dated May 26, 2000 is hereby affirmed.

Dated, Washington, DC
October 25, 2001

David S. Gerson
Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member