U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JERRY D. WILBANKS and DEPARTMENT OF DEFENSE, DEFENSE MAPPING AGENCY, St. Louis, MO

Docket No. 01-197; Submitted on the Record;
Issued October 17, 2001

DECISION and ORDER

Before MICHAEL E. GROOM, BRADLEY T. KNOTT,
A. PETER KANJORSKI

The issues are: (1) whether the Office of Workers' Compensation Programs properly denied appellant's claim for a schedule award for hearing loss; and (2) whether the Office properly denied appellant's request for a review of the written record.

On October 14, 1999 appellant, then a 54-year-old utility systems operator filed a claim alleging that he sustained permanent hearing loss while in the performance of duty. He continued to work.[1]

Accompanying appellant's claim were employing establishment audiograms dated September 23, 1975 to May 18, 1999; two medical reports from Dr. P.J. Shanahan, an employing establishment dispensary physician, dated May 18 and July 19, 1999; a medical report and audiological evaluation from Dr. George P. Katsantonis, a Board-certified otolaryngolgist, dated July 13, 1999 and an audiogram of the same date. The employing establishment audiograms dated September 23, 1975 to May 18, 1999 noted progressive hearing loss. The August 21, 1984 audiogram revealed bilateral low and high frequency hearing loss. The medical report from Dr. Shanahan dated May 18, 1999 noted appellant's progression of hearing loss and chronic tinnitus in both ears. The July 19, 1999 medical report noted appellant was referred to an otolaryngologist, who indicated appellant's hearing loss was compatible with chronic noise exposure and early presbycusis and recommended appellant be removed from the noisy work environment. The audiological evaluation from Dr. Katsantonis dated July 13, 1999 revealed that the audiologic curve was compatible with chronic noise exposure as well as mild presbycusis. He noted that appellant's hearing loss was primarily related to chronic noise exposure at work.

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[1] Appellant filed two previous hearing loss claims, file numbers A11-47466 and A11-0138503. In both cases the Office determined appellant did not sustain a ratable hearing loss. Case number A11-0138503 was appealed to the Board where the Board determined appellant did not sustain a ratable hearing loss (Docket No. 95-2597, issued August 4, 1997).

Appellant submitted a narrative statement dated October 14, 1999 indicating that his initial position was that of a boiler operator mechanic where he worked in the vicinity of pumps, boilers and chillers which generated noise. He indicated that he was issued ear plugs as a precaution.

The employing establishment submitted a summary of appellant's noise exposure and indicated that appellant worked in the following positions: boiler operator from 1973 to 1996; systems operator at a computer terminal from 1996 to 1999; and a electronics maintenance control technician from 1999 to the present. The employing establishment noted appellant was exposed to noise from air handling units, air compressors, pipe threading machines, drill presses, grinders, sandblasters, pumps and generators. The period of exposure varied with each assignment and the employee was provided with disposable hearing protection.

In a statement of accepted facts dated January 19, 2000, the Office noted that appellant was employed as a utility systems operator from 1973 to the present time. Prior to 1996 appellant worked primarily in the boiler room operating chilled water and steam generating systems. The average noise exposure during the workday ranged from 50 to 97 decibels. Appellant was exposed to the above-described noise for an average of 40 hours per week until 1996 when the exposure was reduced.

By letter dated February 2, 2000, the Office referred appellant to Dr. Jeffrey Kirsch, a Board-certified otolaryngologist, for otologic examination and audiological evaluation. The Office provided Dr. Kirsch with a statement of accepted facts, available exposure information, and copies of all medical reports and audiograms.

Dr. Kirsch performed an otologic evaluation of appellant on February 24, 2000 and audiometric testing was conducted on the doctors behalf on the same date. Testing at the frequency levels of 500, 1,000, 2,000 and 3,000 revealed the following: right ear 15, 10, 15 and 50 decibels; left ear 15, 5, 15 and 45 decibels. Dr. Kirsch determined that appellant sustained high frequency sensorineural hearing loss above 2000 hertz in both ears, consistent with a history of chronic noise exposure in the work environment.

On April 14, 2000 an Office medical adviser reviewed Dr. Kirsch's report and the audiometric test of February 24, 2000. The medical adviser determined that appellant's hearing loss was not severe enough to be ratable for a schedule award after applying the Office's current standards for evaluating hearing loss to the results of the February 24, 2000 audiology test. He determined that appellant had a zero percent monaural hearing loss in the left ear and zero percent monaural hearing loss in the right ear and no binaural hearing loss. The medical adviser noted reviewing the medical record and concluded that the February 24, 2000 audiogram was used for adjudication as it met all Office standards and was part of Dr. Kirsch's evaluation.

By decision dated April 17, 2000, the Office accepted appellant's claim for a hearing loss due to employment-related noise exposure. However, the hearing loss was not severe enough to be considered ratable for purposes of a schedule award.

In a letter dated May 19, 2000, appellant requested a review of the written record.

By decision dated August 4, 2000, the Office denied the appellant's request for a review of the written record. The Office found that the request was not timely filed. Appellant was informed that his case had been considered in relation to the issues involved, and that the request was further denied for the reason that the issues in this case could be addressed by requesting reconsideration from the district Office and submitting evidence not previously considered.

The Board finds the Office properly denied appellant's claim for a schedule award for hearing loss.

Section 8107(c) of the Federal Employees' Compensation Act[2] 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.[3] For consistent results and to ensure equal justice 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.[4]

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.[5] The Board has concurred in the Office's adoption of this standard for evaluation hearing loss for schedule award purposes.[6] In addition, the Federal Procedure Manual requires that all claims for hearing loss due to its acoustic trauma, requires an opinion from a Board-certified specialist in otolaryngology.[7] The procedure manual further indicates that audiological testing is to be performed by persons possessing certification and ideology from the American Speed Language Hearing Association (ASHA) or state licensure as an audiologist.[8]

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[2] 5 U.S.C. §§ 8101-8193, § 8107(c).

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

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

[5] Page 166 (4th ed. 1994).

[6] *See Danniel C. Goings, supra* note 3.

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

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

An Office medical adviser applied the Office's standardized procedures to the February 24, 2000 audiogram performed for Dr. Kirsch. Testing for the right ear at the frequency levels of 500, 1,000, 2,000 and 3,000 hertz revealed decibels losses of 15, 10, 15 and 50 respectively. These decibels were totaled at 90 and were divided by 4 to obtain an average hearing loss at those cycles of 22.5 decibels. The average of 22.5 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 of hearing for the right ear. Testing for the left ear at the frequency levels of 500, 1,000, 2,000 and 3,000 hertz revealed decibels losses of 15, 5, 15 and 45 respectively. These decibels were totaled at 80 and were divided by four to obtain the average hearing loss at those cycles of 20 decibels. The average of 20 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 loss for the left ear.

The Board finds that the Office medical adviser applied the proper standards to the findings stated in Dr. Kirsch's report and the February 24, 2000 audiogram. The result is a zero percent monaural hearing loss and a zero percent binaural hearing loss as set forth above.[9]

The Board further finds that the Office did not abuse its discretion in denying appellant's untimely request for a review of the written record.

Section 8124 of the Act provides that a claimant is entitled to a hearing before an Office representative when a request is made within 30 days after issuance of an Office's final decision.[10] The Office's regulations expanded section 8124 to provide the opportunity for a "review of the written record" before an Office hearing representative in lieu of an "oral hearing."[11] The Office provided that such review of the written record is also subject to the same requirement that the request must be made within 30 days of the Office's final decision.[12]

The Office properly found that appellant's request for a review of the written record was untimely. His request for review of the written record postmarked May 20, 2000 was made more than 30 days after the Office's April 17, 2000 decision.

The Board has held that 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 that the Office must exercise this discretionary authority in deciding whether to grant a hearing.[13] The principles underlying the Office's authority to grant or deny a written review of the record are analogous to the principles underlying its authority to grant or deny a hearing. The Office's procedures, which require the Office to exercise its discretion to grant or deny a request for a review of the written record when

[9] This decision does not affect appellant's entitlement to medical benefits for the accepted employment injury.

[10] 5 U.S.C. § 8124(b).

[11] *See* 20 C.F.R. §§ 10.615-10.616 (1999).

[12] *See id.*

[13] *Herbert Holley*, 33 ECAB 140 (1981).

such a request is untimely or made after reconsideration or an oral hearing, are a proper interpretation of the Act and Board precedent.[14]

The Board finds that the Office properly exercised its discretion by further denying appellant's request upon finding that he could have the matter further addressed by the Office through a reconsideration request along with the submission of new medical evidence.[15]

The August 4 and April 17, 2000 decisions of the Office of Workers' Compensation Programs are affirmed.

Dated, Washington, DC
October 17, 2001

Michael E. Groom
Alternate Member

Bradley T. Knott
Alternate Member

A. Peter Kanjorski
Alternate Member

[14] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Hearings and Reviews of the Written Record*, Chapter 2.1601 (October 1992).

[15] With his appeal appellant submitted additional evidence. However, the Board may not consider new evidence on appeal; *see* 20 C.F.R. § 501.2(c).