U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of GLEN D. WILLIS and TENNESSEE VALLEY AUTHORITY, PARADISE FOSSIL PLANT, Drakesville, KY

Docket No. 02-1839; Submitted on the Record;
Issued December 26, 2002

DECISION and ORDER

Before ALEC J. KOROMILAS, COLLEEN DUFFY KIKO, DAVID S. GERSON

The issues are: (1) whether appellant sustained more than a 10 percent bilateral hearing loss for which he received a schedule award and; (2) whether the Office of Workers' Compensation Programs properly denied his request for reconsideration.

On July 19, 2000 appellant, then a 59-year-old maintenance mechanic, filed a notice of occupational disease, claiming that his hearing loss was caused by noise exposure in the course of his federal employment. He first became aware of his hearing loss and realized that it was caused or aggravated by his employment on January 9, 1990.

The employing establishment furnished the Office with copies of appellant's job description.

By letter dated May 25, 2001, the Office referred appellant and a statement of accepted facts to Dr. Phillip B. Klapper, a Board-certified otolaryngologist, for an audiologic and otologic evaluation. The audiologist performing the June 12, 2001 audiogram for Dr. Klapper noted findings on audiological evaluation. Testing at the frequency levels of 500, 1,000, 2,000 and 3,000 hertz (Hz) revealed the following: right ear 15, 25, 55 and 65 decibels; left ear 10, 5, 50 and 55 decibels. Dr. Klapper noted that appellant had no noise exposure outside the Federal Government and that he had sustained work-related bilateral noise-induced high frequency hearing loss. He recommended hearing aids.

By decision dated June 19, 2001, the Office accepted appellant's claim for bilateral noise-induced hearing loss.

On July 18, 2001 appellant filed a claim for a schedule award.

In a report dated September 7, 2001, an Office medical adviser reviewed the findings of Dr. Klapper and determined that appellant had a 10 percent bilateral hearing loss. He noted that hearing aids were indicated.

In a decision dated November 19, 2001, the Office awarded appellant 10 percent impairment for bilateral noise-induced hearing loss.

By undated letter received by the Office on December 10, 2001, appellant requested reconsideration. In support of his request, he submitted a November 30, 2001 audiogram from David A. Mann, an audiologist, who found a 22 percent bilateral hearing loss.

In a report dated February 20, 2002, the Office medical adviser reviewed appellant's November 30, 2001 audiogram and noted that it was not conducted according to the Office's audiogram protocols. He also commented that a hearing loss increase from 10 percent to 22 percent in six months "seems very unlikely."

In a decision dated March 12, 2002, the Office denied modification of its November 19, 2001 decision.

By letter received by the Office on March 25, 2002, appellant again requested reconsideration.

The record fails to disclose that appellant submitted any evidence pursuant to his March 25, 2002 request for reconsideration.

On June 19, 2002 the Office denied reconsideration.

The Board finds that the record does not establish more than a 10 percent permanent impairment for bilateral hearing loss.

The schedule award provision of the Federal Employees' Compensation Act[1] and its implementing regulation[2] set forth the number of weeks of compensation payable to employees sustaining permanent impairment from loss or loss of use, of scheduled members or functions of the body. However, the Act does not specify the manner in which the percentage of loss shall be determined. 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. The American Medical Association, *Guides to the Evaluation of Permanent Impairment* has been adopted by the implementing regulation as the appropriate standard for evaluating schedule losses.[3]

The Office evaluates industrial hearing loss in accordance with the standards contained in the A.M.A., *Guides*.[4] Using the frequencies of 500, 1,000, 2,000 and 3,000 cycles per second, the losses at each frequency are added up and averaged.[5] Then, the "fence" of 25 decibels is

[1] 5 U.S.C. § 8107.

[2] 20 C.F.R. § 10.404 (1999).

[3] *Id*.

[4] A.M.A., *Guides* at 250 (5th ed. 2001).

[5] *Id.*

deducted because, as the A.M.A., *Guides* points out, losses below 25 decibels result in no impairment in the ability to hear everyday speech under everyday conditions.[6] The remaining amount is multiplied by a factor of 1.5 to arrive at the percentage of monaural hearing loss.[7] 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.[8] The Board has concurred in the Office's adoption of this standard for evaluating hearing loss.[9]

In order to establish a work-related loss of hearing, the Board requires: (1) that the employee undergo both audiometric and otologic examination; (2) that the audiometric testing precede the otologic examination; (3) that the audiometric testing be performed by an appropriately certified audiologist; (4) that the otologic examination be performed by an otolaryngologist certified or eligible for certification by the American Academy of Otolaryngology; (5) that the audiometric and otologic examination be performed by different individuals as a method of evaluating the reliability of the findings; (6) that all audiological equipment authorized for testing meet the calibration protocol contained in the accreditation manual of the American Speech and Hearing Association; (7) that the audiometric test results included both bone conduction and pure tone air conduction thresholds, speech reception thresholds and monaural discrimination scores; and (8) that the otolaryngologist's report must include: date and hour of examination, date and hour of employee's last exposure to loud noise, a rationalized medical opinion regarding the relation of the hearing loss to the employment-related noise exposure and a statement of the reliability of the tests.[10]

Although appellant submitted a November 30, 2001 audiogram which revealed a 22 percent bilateral hearing loss, that audiogram did not contain a statement as to when the audiometer was last calibrated, nor was it signed by a physician and thus there was no rationalized medical opinion establishing a causal relationship. Further, the audiogram was not performed by two individuals, it failed to disclose the calibration protocol date for the audiological equipment, it failed to note appellant's last time and date of noise exposure and it failed to include a statement regarding the reliability of the tests.[11]

On the other hand, the Office medical adviser applied the Office's standard procedures to the January 16, 2001 audiogram performed for Dr. Klapper, the second opinion physician who is a Board-certified otolaryngologist. Testing for the right ear at frequency levels of 500, 1,000, 2,000 and 3,000 Hz revealed decibel losses of right ear 15, 25, 55 and 65 decibels respectively.

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[6] *Id.*

[7] *Id.*

[8] *Id.*

[9] *Donald E. Stockstad*, 53 ECAB __ (Docket No. 01-1570, issued January 23, 2002); *petition for recon. granted* (issued August 13, 2002).

[10] Federal (FECA) Procedure Manual, Part 3 -- Medical, *Requirements for Medical Reports*, Chapter 3.600.8(a) (September 1994) and Exhibit 4 (September 1996); *Raymond H. Van Nett*, 44 ECAB 480, 482-83 (1993).

[11] *James A. England*, 47 ECAB 115, 18 (1995).

These decibel losses were totaled at 160 and divided by 4 to obtain the average hearing loss at those cycles of 40 decibels. The average of 40 decibels was then reduced by 25 decibels (the first 25 decibels were discounted as discussed above) to equal 22.5 decibels which was multiplied by the established factor 1.5 to compute a 7.5 percent loss of hearing for the right ear. Testing for the left ear at frequency levels of 500, 1,000, 2,000 and 3,000 Hz revealed decibel losses of 10, 5, 50 and 55 decibels respectively. These decibel losses were totaled at 120 and divided by 4 to obtain the average hearing loss at those cycles of 30 decibels. The average of 30 decibels was then reduced by 25 decibels to equal 5 decibels for the left ear which was multiplied by the established factor 1.5 to compute a 7.5 percent loss of hearing for the left ear. The Office medical adviser next multiplied 7.5 percent, the monaural loss for the left ear, by 5 and added that figure with 22 percent, the monaural loss for the right ear. The sum was then correctly divided by 6 to arrive at 9.91 percent binaural loss and rounded off to 10 percent binaural hearing loss.

While the Office must provide rationale for selecting one audiogram over another as the basis for rating a claimant's hearing loss, the Office is justified in selecting an audiogram that complies with the Office's requirements as set forth in its procedure manual over one that does not.[12] As Dr. Klapper's audiogram was the only one that complied with the Office's requirements, the Office properly used it to rate appellant's hearing loss.

The Board finds that the Office medical adviser applied the proper standards to the findings stated in Dr. Klapper's report. This resulted in a calculation of 10 percent bilateral hearing loss for which a schedule award had been awarded. Consequently, the evidence does not establish that appellant has a greater hearing loss than that for which he has previously received a schedule award.

The Board further finds that the Office properly denied appellant's request for reconsideration.

Section 8128(a) of the Act vests the Office with discretionary authority to determine whether it will review an award for or against compensation:

> "The Secretary of Labor may review an award for or against payment of compensation at any time on his or her own motion or on application. The Secretary in accordance with the facts found on review may --
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> (1) end, decrease, or increase the compensation awarded; or
>
> (2) award compensation previously refused or discontinued."[13]

Under 20 C.F.R. § 10.606(b)(2), a claimant may obtain review of the merits of the claim by submitting evidence and argument: (1) showing that the Office erroneously applied or interpreted a specific point of law; or (2) advancing a relevant legal argument not previously

[12] *Halley Albertson*, 31 ECAB 901 (1980).

[13] 5 U.S.C. § 8128(a).

considered by the Office; or (3) constituting relevant and pertinent new evidence not previously considered by the Office.[14] Section 10.608(b) provides that where the request is timely but fails to meet at least one of the standards described in section 10.606(b)(2), or where the request is untimely and fails to present any clear evidence of error, the Office will deny the application for reconsideration without reopening the case for a review on the merits.[15]

In its June 19, 2002 decision, the Office correctly noted that appellant did not provide any new and relevant evidence or raise any substantive legal arguments not previously considered sufficient to warrant a merit review. Appellant also did not argue that the Office erroneously applied or interpreted a point of law. Consequently, appellant is not entitled to a merit review of his claim based upon the requirements under 20 C.F.R. § 10.606(b)(2). Accordingly, the Board finds that the Office acted within its discretion in denying appellant's request for reconsideration.[16]

The June 19 and March 12, 2002 decisions of the Office of Workers' Compensation Programs are hereby affirmed.

Dated, Washington, DC
December 26, 2002

Alec J. Koromilas
Member

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

[14] 20 C.F.R. § 10.606(b)(2) (1999).

[15] 20 C.F.R. § 10.608(b) (1999).

[16] The record contains a July 15, 2002 decision of the Office, issued after appellant filed his appeal with the Board on July 2, 2002, which addresses a denial of a reconsideration request. It is well established that the Board and the Office may not have concurrent jurisdiction over the same case and those Office decisions, which change the status of the decision on appeal are null and void. *Douglas E. Billings*, 41 ECAB 880, 895 (1990).