U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of BILLY W. JOHNSON and TENNESSEE VALLEY AUTHORITY, Chattanooga, TN

Docket No. 01-1160; Submitted on the Record;
Issued February 14, 2002

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
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 refused to reopen appellant's case for a merit review under 5 U.S.C. § 8128(a).

On December 7, 1998 appellant, then a 55-year-old heavy equipment 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 February 15, 1974 to October 24, 1996. The employing establishment audiograms revealed slight worsening of hearing loss.

Appellant submitted a narrative statement indicating that he began working for the employing establishment in 1974 and was exposed to loud noise from air compressors. He indicated that in 1977 he was provided with hearing protection in the form of rubber earplugs, however, his hearing loss became progressively worse.

The employing establishment submitted a summary of appellant's noise exposure and indicated that appellant worked at the John Sevier Fossil Plant and was exposed to loud noise four to six hours per day. The employing establishment further noted that a mandatory hearing loss conservation program was initiated in 1973 and at this time ear defenders were issued. In 1988 disposable earplugs were issued.

In a statement of accepted facts, the Office noted that in 1974 appellant was employed as an air compressor operator and a scraper operator with mild to loud noise exposure; from 1975 to 1977 he was employed as a core drill operator and scraper operator with mild noise exposure;

[1] The record indicates that appellant retired in February 26, 1999.

and from 1977 to 1998 appellant was employed as a heavy equipment operator with loud noise exposure. Appellant was exposed to noise from heavy equipment and during this time earplugs were issued for hearing protection.

By letter dated June 28, 1999, the Office referred appellant to Dr. Jeffrey Robbins, a Board-certified otolaryngologist, for otologic examination and audiological evaluation. The Office provided Dr. Robbins with a statement of accepted facts, available exposure information and copies of all medical reports and audiograms.

Dr. Robbins performed an otologic evaluation of appellant on July 16, 1999 and audiometric testing was conducted on the doctor's behalf on the same date. Testing at the frequency levels of 500, 1,000, 2,000 and 3,000 revealed the following: right ear 10, 20, 20 and 35 decibels; left ear 10, 15, 20 and 30 decibels. Dr. Robbins determined that appellant sustained bilateral mild high frequency sensorineural hearing loss, consistent with a history of chronic noise exposure in the work environment.

On July 22, 1999 an Office medical adviser reviewed Dr. Robbins' report and the audiometric test of July 16, 1999. 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 July 16, 1999. The medical adviser 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.

By decision dated August 4, 1999, the Office accepted appellant's claim for a hearing loss due to employment-related noise exposure however, determined that the hearing loss was not severe enough to be considered ratable for purposes of a schedule award.

In a letter dated August 10, 1999, appellant requested a hearing before an Office hearing representative.

By decision dated July 5, 2000, the Office hearing representative affirmed the August 4, 1999 decision of the Office on the grounds that the evidence was not sufficient to establish that appellant sustained a ratable hearing loss as a result of his employment noise exposure.

In a letter dated July 26, 2000, appellant requested review of the decision dated July 5, 2000.

By decision dated August 3, 2000, the Office denied appellant's claim as the evidence submitted was insufficient to warrant modification of its prior decision.

Appellant requested review of the decision dated August 3, 2000 and submitted additional medical evidence. He submitted an audiogram dated July 13, 2000 which revealed mild to severe sensorineural hearing loss.

On September 27, 2000 an Office medical adviser reviewed the audiometric test of July 13, 2000. The medical adviser determined that the audiogram was not performed and submitted under the strict conditions and protocol followed by the Office and was not signed by a physician. The medical adviser further noted that appellant was removed from the hazardous

noise source in 1998, yet the July 13, 2000 audiogram implies severe worsening of hearing loss for all tones since this time. The medical adviser noted that it was unlikely that such a high level of presumed worsening of appellant hearing loss would occur in a year and therefore believed these results to be suspect.

By decision dated October 26, 2000, the Office denied appellant's claim as the evidence submitted was insufficient to warrant modification of its prior decision.

In a letter dated November 13, 2000, appellant requested review of the decision dated October 26, 2000 and submitted additional medical evidence. He submitted a duplicate copy of the audiogram dated July 13, 2000 countersigned by a physician and two documents accompanying the audiogram.

By decision dated December 7, 2000, the Office denied appellant's application for review without conducting a merit review on the grounds that the evidence submitted was cumulative in nature and insufficient to warrant review of its prior decision.

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

[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] P. 166 (4th ed. 1994).

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

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]

An Office medical adviser applied the Office's standardized procedures to the July 16, 1999 audiogram performed for Dr. Robbins. Testing for the right ear at the frequency levels of 500, 1,000, 2,000 and 3,000 hertz revealed decibels losses of 10, 20, 20 and 35 respectively. These decibels were totaled at 85 and were divided by four to obtain an average hearing loss at those cycles of 21.25 decibels. The average of 21.25 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 10, 15, 20 and 30 respectively. These decibels were totaled at 75 and were divided by four to obtain the average hearing loss at those cycles of 18.75 decibels. The average of 18.75 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.

Appellant submitted a July 13, 2000 audiogram which revealed mild to severe sensiorneural hearing loss. However the medical adviser determined that the audiogram was not performed and submitted under the strict conditions and established protocol followed by the Office and was not signed by a physician. The medical adviser further noted that it was unlikely that such a high level of presumed worsening of appellant's hearing loss would occur in a year and therefore believed these results to be suspect.

The Board finds that the Office medical adviser applied the proper standards to the findings stated in Dr. Robbin's report and the July 16, 1999 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 in its December 7, 2000 decision properly denied appellant's request for reconsideration on the merits under 5 U.S.C. § 8128(a) on the basis that her request for reconsideration did not meet the requirements set forth under section 8128.[10]

Under section 8128(a) of the Act,[11] the Office has the discretion to reopen a case for review on the merits. The Office must exercise this discretion in accordance with the guidelines set forth in section 10.606(b)(2) of the implementing federal regulations,[12] which provides that a

[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).

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

[10] *See* 20 C.F.R. § 10.606(b)(2)(i-iii)

[11] 5 U.S.C. § 8128(a).

[12] 20 C.F.R. § 10.606(b) (1999).

claimant may obtain review of the merits if her written application for reconsideration, including all supporting documents, sets forth arguments and contain evidence that:

> "(i) Shows that [the Office] erroneously applied or interpreted a specific point of law; or
>
> (ii) Advances a relevant legal argument not previously considered by [the Office]; or
>
> (iii) Constitutes relevant and pertinent new evidence not previously considered by the [Office]."

Section 10.608(b) provides that any application for review of the merits of the claim which does not meet at least one of the requirements listed in section 10.606(b) will be denied by the Office without review of the merits of the claim.[13]

In the present case, the Office denied appellant's claim without conducting a merit review on the grounds that the evidence submitted was cumulative and insufficient. In support of his request for reconsideration, appellant submitted a copy of the July 13, 2000 audiogram and accompanying documents. Although the audiogram was countersigned by a physician, the physician did not address whether any increase in ratable hearing loss was due to the accepted employment exposure. Additionally, this evidence was duplicative of evidence already contained in the record[14] and was previously considered by the Office in its October 26, 2000 decision and found deficient. Therefore, the Office properly determined that this evidence did not constitute a basis for reopening the case for a merit review. Appellant neither showed that the Office erroneously applied or interpreted a point of law; advanced a point of law or fact not previously considered by the Office; nor did he submit relevant and pertinent evidence not previously considered by the Office."[15] Therefore, appellant did not submit relevant evidence not previously considered by the Office.

[13] 20 C.F.R. § 10.608(b).

[14] Evidence that repeats or duplicates evidence already in the case record has no evidentiary value and does not constitute a basis for reopening a case; *see Daniel Deparini*, 44 ECAB 657 (1993); *Eugene F. Butler*, 36 ECAB 393, 398 (1984); *Bruce E. Martin*, 35 ECAB 1090, 1093-94 (1984).

[15] 20 C.F.R. § 10.606(b).

The decisions of the Office of Workers' Compensation Programs dated December 7 and October 26, 2000 are hereby affirmed.

Dated, Washington, DC
February 14, 2002

Michael J. Walsh
Chairman

David S. Gerson
Alternate Member

A. Peter Kanjorski
Alternate Member