

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DAVID O. PEREZ and DEPARTMENT OF THE AIR FORCE,
KELLY AIR FORCE BASE, San Antonio, TX

*Docket No. 01-1332; Oral Argument Held September 5, 2002;
Issued October 24, 2002*

Appearances: *David O. Perez, pro se; Thomas G. Giblin, Esq.,
for the Director, Office of Workers' Compensation Programs.*

DECISION and ORDER

Before ALEC J. KOROMILAS, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issues are: (1) whether appellant has established that he has a ratable hearing loss causally related to factors of his federal employment; and (2) whether the Office of Workers' Compensation Programs properly denied appellant's request for an oral hearing as untimely.

On March 14, 2000 appellant, then a 60-year-old equipment mechanic, filed an occupational disease claim alleging that his high frequency hearing loss was due to factors of his federal employment. He indicated that he was exposed to hazardous noise for over 20 years working with rivet guns, grinders, support machinery and other equipment. Appellant further indicated that he first became aware of his hearing loss on April 1, 1998 and that his hearing loss was work related on October 20, 1999. He submitted employment records, evidence documenting his exposure to hazardous work-related noise throughout his employment in the United States Army and the employing establishment, and various medical records including, employment screening audiograms.

By letter dated March 23, 2000, the Office advised appellant that the evidence submitted was insufficient to establish his claim. The Office requested that appellant submit additional factual and medical evidence supportive of his claim. By letter of the same date, the Office advised the employing establishment to submit factual evidence regarding appellant's claim.

Appellant submitted an April 20, 2000 letter indicating that he did not currently work in a hazardous noise work area. He stated that his date of last exposure to hazardous noise was February 28, 1998 at the employing establishment.¹ Appellant also stated that he had been aware of his hearing loss since May 1974 and that he was made aware of his gradual hearing loss at

¹ The record reveals that appellant retired from the employing establishment on February 28, 1998.

high frequencies by the employing establishment's employee health clinic every time he took a hearing test. Further, he stated that he had never filed a hearing loss claim prior to the instant claim and that he had provided the Office with the results of his hearing loss examinations conducted by his private physician.

After reviewing the medical evidence of record, the Office advised appellant, by letter dated August 16, 2000, that a second opinion medical examination was necessary. The Office referred appellant along with medical records, a statement of accepted facts and a list of specific questions to Dr. Alan Dinesman, a Board-certified otolaryngologist, for a second opinion examination.

Dr. Dinesman submitted a September 5, 2000 report indicating that appellant had sensorineural hearing loss due to noise exposure at the employing establishment based on audiometric testing on the same date. Utilizing the American Medical Association, *Guides to the Evaluation of Permanent Impairment*, he opined that appellant had a zero percent monaural hearing loss and a zero percent binaural hearing loss. Dr. Dinesman stated that hearing aids were not recommended at that time.

On October 4, 2000 appellant filed a claim for a schedule award.

On October 7, 2000 an Office medical adviser reviewed appellant's medical records and a statement of accepted facts. The Office medical adviser determined that appellant had a zero percent hearing loss in the right and left ears based on the fourth edition of the A.M.A., *Guides*. The Office medical adviser also determined that the September 5, 2000 audiogram met the Office's standards and noted Dr. Dinesman's recommendation that hearing aids were not recommended at that time.

In an October 25, 2000 decision, the Office accepted appellant's claim for hearing loss. However, the Office found the evidence of record insufficient to establish that appellant had a ratable hearing loss due to factors of his employment. Accordingly, the Office denied appellant's claim for a schedule award.

By letter dated January 22, 2001, appellant requested an oral hearing before an Office representative.

In a February 28, 2001 decision, the Office denied appellant's request for an oral hearing as untimely filed.

The Board finds that appellant has not established that he sustained a ratable hearing loss causally related to factors of his federal employment.

The schedule award provision of the Federal Employees' Compensation Act² and its implementing regulation³ 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

² 5 U.S.C. § 8107.

³ 20 C.F.R. § 10.404 (1999).

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.⁴

The Office evaluates industrial hearing loss in accordance with the standards contained in the A.M.A., *Guides* (4th ed. 1993).⁵ 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.⁶ Then, the “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 speech under everyday conditions.⁷ The remaining amount is multiplied by a factor of 1.5 to arrive at the percentage of monaural hearing loss.⁸ 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.⁹ The Board has concurred in the Office’s adoption of this standard for evaluating hearing loss.¹⁰

On October 7, 2000 the Office medical adviser reviewed the otologic and audiologic testing performed on appellant by Dr. Dinesman and applied the Office’s standardized procedures to this evaluation. Testing for the left ear at the frequency levels of 500, 1,000, 2,000 and 3,000 cycles per second revealed decibel losses of 25, 25, 20 and 15 respectively. These decibel losses were totaled at 90 decibels and were divided by 4 to obtain the average hearing loss of 22.5 decibels.¹¹ This average loss was then reduced by 25 decibels (25 decibels being discounted as discussed above) to equal 0, which was multiplied by the established factor of 1.5 to compute a 0 percent hearing loss in the left ear. Testing for the right ear at the frequency levels of 500, 1,000, 2,000 and 3,000 cycles per second revealed decibel losses of 20, 15, 10 and 20 respectively. These decibel losses were totaled at 65 decibels and were divided by 4 to obtain the average hearing loss of 16.25 decibels. This average was then reduced by 25 decibels (25 decibels being discounted as discussed above) to equal 0, which was multiplied by the established factor of 1.5 to compute a 0 percent hearing loss in the right ear. To compute the binaural hearing loss, the lesser loss in the left ear, zero percent, was multiplied by the established factor of five, added to the zero percent loss in the right ear and this sum was divided by the established factor of six to calculate a zero percent binaural hearing loss.

⁴ *Henry L. King*, 25 ECAB 39, 44 (1973); *August M. Buffa*, 12 ECAB 324, 325 (1961).

⁵ *George L. Cooper*, 40 ECAB 296, 302 (1988).

⁶ A.M.A., *Guides*, 224-25 (4th ed. 1993).

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Donald A. Larson*, 41 ECAB 947, 951 (1990).

¹¹ The Board notes that the total for decibel losses of the left ear is actually 85 decibels rather than 90 decibels as found by the Office medical adviser. The Board notes, however, that this miscalculation equates to a harmless error as it does not effect the ultimate result in this case.

Based on these calculations, the Office found that a hearing aid was not warranted.

The Board finds that the Office followed standardized procedures in evaluating appellant's loss of hearing and properly denied compensation for permanent impairment on the grounds that appellant's loss of hearing was not ratable. The Board has reviewed the other audiograms appearing in the case record and notes that they do not give rise enough to demonstrate a ratable hearing loss.

The Board further finds that the Office properly denied appellant's request for an oral hearing as untimely.

Section 8124(b)(1) of the Act¹² provides:

“Before review under section 8128(a) of this title, a claimant for compensation not satisfied with a decision of the Secretary under subsection (a) of this section 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.”¹³

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.¹⁴ The Office's procedures, which require the Office to exercise its discretion to grant or deny a hearing request when such a request is untimely or made after reconsideration or an oral hearing, are a proper interpretation of the Act and Board precedent.¹⁵

In this case, the Office issued its decision denying appellant's claim for a schedule award on October 25, 2000. Appellant's letter requesting reconsideration was dated January 22, 2001. As appellant's request for an oral hearing was dated more than 30 days after issuance of the October 25, 2000 decision, he was not entitled to a hearing as a matter of right.

The Office then exercised its discretion and determined that the issue in this case could be resolved with a request for reconsideration and the submission of evidence establishing that appellant had a ratable hearing loss based on the fourth edition of the A.M.A., *Guides*. The Board finds that the Office's exercise of discretion was proper under the law and facts of this case. Consequently, the Office's February 28, 2001 decision denying appellant's January 22, 2001 request for an oral hearing was proper.

¹² 5 U.S.C. §§ 8101-8193.

¹³ 5 U.S.C. § 8124(b)(1).

¹⁴ *Bonnie Goodman*, 50 ECAB 139, 145 (1998).

¹⁵ *Martha A. McConnell*, 50 ECAB 129, 130 (1998); *Michael J. Welsh*, 40 ECAB 994, 997 (1989).

The February 28, 2001 and October 25, 2000 decisions of the Office of Workers' Compensation Programs are hereby affirmed.

Dated, Washington, DC
October 24, 2002

Alec J. Koromilas
Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member