

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of LON E. GRINAGE and DEPARTMENT OF THE AIR FORCE,
KELLY AIR FORCE BASE, San Antonio, TX

Docket No. 02-673; Submitted on the Record;
Issued October 7, 2002

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issues are: (1) whether the Office of Workers' Compensation Programs properly found that appellant had no more than an 11 percent monaural hearing loss of the left ear for which he received a schedule award; and (2) whether the Office properly denied appellant's request for a hearing before an Office hearing representative.

On September 22, 2000 appellant, then a 43-year-old warehouseman and equipment operator, filed a notice of occupational disease and claim for compensation (Form CA-2) alleging that he sustained permanent hearing loss while in the performance of duty.¹

Appellant's submitted an employing establishment audiogram dated August 10, 2000. The report indicated that he sustained routine noise exposure. Appellant also submitted a statement indicating that he was not given hearing protection until August 5, 2000.

The employing establishment furnished the Office with copies of appellant's job description, employment records and employee medical reports. Appellant also submitted information regarding his noise exposure history. The employing establishment also submitted audiograms dated December 14, 2000 to February 7, 2001. The employing establishment physician noted that appellant demonstrated a mild high frequency sensorineural hearing loss in the left ear for frequencies of 6000 hertz and 8000 hertz and in the right ear at 6000 hertz.

In a statement of accepted facts dated April 7, 2001, the Office noted that appellant worked as a warehouseman and equipment operator from 1985 to 1998 with the employing establishment. Appellant's duties included standing, stooping, bending and working seven to eight hours a day on cement in uncomfortable positions. He frequently lifted and carried supplies, materials and equipment that weighed up to 70 pounds. Appellant was exposed to

¹ The record reflects that appellant was terminated from federal employment effective January 20, 2000 for submitting false information on his application for federal employment and for altering government documents.

noise from machinery, aircraft's, air hammers, forklifts, chainsaws and air tools. He noted that hearing protection was not provided until August 10, 2000.

By letter dated April 16, 2001, the Office referred appellant to Dr. Alan Dinesman, a Board-certified otolaryngologist, for an otological examination and audiological evaluation.

Dr. Dinesman performed an otological evaluation of appellant on May 7, 2001 and audiometric testing was conducted on the doctor's behalf on the same date. Dr. Dinesman diagnosed a mild sensorineural hearing loss due to noise exposure at appellant's employing establishment. Dr. Dinesman did not believe appellant was a candidate for a hearing aid.

The medical adviser evaluated the audiogram performed for Dr. Dinesman on May 7, 2001 and testing at the frequency levels of 500, 1,000, 2,000 and 3,000 revealed the following: right ear 25, 15, 20 and 40 decibels; left ear 30, 30, 30 and 40 decibels. The medical adviser determined that appellant sustained employment-related sensorineural hearing loss of 11 percent to the left ear.

In a May 25, 2001 decision, the Office notified appellant that his occupational disease claim had been accepted for noise-induced hearing loss.

On June 6, 2001 appellant filed a claim for a schedule award.

In a decision dated July 9, 2001, the Office determined that appellant sustained 11 percent impairment of the left ear for the period of May 7 to June 16, 2001.

In an undated letter, appellant requested an additional schedule award for his right ear. He submitted duplicative medical records from October 20, 1980 to July 9, 2001.

In a letter dated September 12, 2001, appellant requested an oral hearing before an Office hearing representative.

In a decision dated October 19, 2001, the Office denied appellant's request for a hearing. 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.²

The Board finds that appellant has no more than an 11 percent work-related permanent impairment of the left ear, for which he received a schedule award.

² Appellant submitted additional evidence and a reconsideration request after issuance of the October 19, 2001 decision. On February 19, 2002 the Office issued a merit reconsideration decision. However, the Board acquired jurisdiction over the appeal on February 7, 2001, therefore, the February 19, 2002 Office decision is null and void. The Board and the Office may not have concurrent jurisdiction over the same issue in a case; *see Russell E. Lerman*, 43 ECAB 770 (1992) and *Douglas E. Billings*, 41 ECAB 880 (1990). Furthermore, the Board may not consider new evidence on appeal. 20 C.F.R. § 501.2(c).

Section 8107(c) of the Federal Employees Compensation Act³ 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.⁴ 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.⁵

The Office evaluates industrial hearing loss in accordance with the standards contained in the American Medical Association, *Guides to the Evaluation of Permanent Impairment*.⁶ 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.⁷ 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.⁸ The remaining amount is multiplied by a factor of 1.5 to arrive at the percentage of monaural hearing loss.⁹ 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.¹⁰ The Board has concurred in the Office’s adoption of this standard for evaluating hearing loss.¹¹

An Office medical adviser applied the Office’s standardized procedures to the May 7, 2001 audiogram performed for Dr. Dinesman. Testing for the right ear at the frequency levels of 500, 1,000 and 3,000 hertz revealed decibels losses of 25, 15, 20 and 40 respectively. These decibels were totaled at 100 and were divided by 4 to obtain an average hearing loss at those cycles of 25 decibels. The average of 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 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 30, 30, 30 and 40 respectively. These decibels were totaled at 130 and were divided by 4 to obtain the average hearing loss at those cycles of 32.5 decibels. The average of 32.5 decibels was then reduced by 25 decibels (the first 25 decibels were discounted as discussed above) to equal 7.5 which was

³ 5 U.S.C. §§ 8101-8193, § 8107(c).

⁴ *Daniel C. Goings*, 37 ECAB 781 (1986); *Richard Beggs*, 28 ECAB 387 (1977).

⁵ *Henry L. King*, 25 ECAB 39 (1973); *August M. Buffa*, 12 ECAB 324 (1961).

⁶ A.M.A., *Guides* at 250 (5th ed. 2001).

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Donald E. Stockstad*, 53 ECAB ____ (Docket No. 01-1570, issued January 23, 2002).

multiplied by the established factor of 1.5 to compute a 11.25 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. Dinesman's May 7, 2001 report and the accompanying audiogram performed on his behalf. The result is an 11 percent monaural loss as set forth above.

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

Section 8124(b) of the Act,¹² 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 under subsection (a) of this title is entitled, on request made within 30 days after the date of issuance of the decision, to a hearing on his claim before a representative of the Secretary."¹³

The Board has held that section 8124(b)(1) is "unequivocal" in setting forth the time limitation for requesting hearings. A claimant is entitled to a hearing as a matter of right only if the request is filed within the requisite 30 days.¹⁴ Even where the hearing request is not timely filed, the Office may within its discretion, grant a hearing and must exercise this discretion.¹⁵

In the instant case, the Office properly determined that appellant's request for a hearing postmarked September 12, 2001 was not timely filed as it was made more than 30 days after the issuance of the Office's July 9, 2001 decision. The Office therefore, properly denied appellant's hearing as a matter of right.

The Office then proceeded to exercise its discretion, in accordance with Board precedent, to determine whether to grant a hearing in this case. The Office determined that a hearing was not necessary as the issue in the case was medical and could be resolved through the submission of medical evidence in the reconsideration process. Therefore, the Office properly denied appellant's request for a hearing as untimely and properly exercised its discretion in determining to deny appellant's request for a hearing as he had other review options available.

¹² 5 U.S.C. §§ 8101-8193.

¹³ 5 U.S.C. § 8124(b)(1).

¹⁴ *Tammy J. Kenow*, 44 ECAB 619 (1993).

¹⁵ *Id.*

The October 19 and July 9, 2001 decisions of the Office of Workers' Compensation Programs are affirmed.

Dated, Washington, DC
October 7, 2002

Michael J. Walsh
Chairman

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member