U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of FRANK E. LEWIS and TENNESSEE VALLEY AUTHORITY, WORKERS' COMPENSATION DEPARTMENT, Chattanooga, TN

Docket No. 03-1336; Submitted on the Record;
Issued August 26, 2003

DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON, WILLIE T.C. THOMAS

The issues are: (1) whether appellant established that his hearing loss was caused by his federal employment; and (2) whether the refusal of the Office of Workers' Compensation Programs to reopen appellant's case for further consideration of the merits of his claim, pursuant to 5 U.S.C. § 8128(a), constituted an abuse of discretion.

On January 18, 2002 appellant, then a 54-year-old laborer, filed an occupational disease claim alleging that in 1992 he became aware that he sustained a hearing loss at work.[1] He worked until he retired on November 1, 1991.

Appellant submitted audiograms dated March 7, 1984, March 12 and June 14, 1990, one undated but received by the Office on February 28 and April 18, 2002.

The Office referred appellant to Dr. Sage K. Copeland, a Board-certified otolaryngologist, to assess the nature of appellant's hearing loss. In an undated report, received by the Office on April 24, 2002, Dr. Copeland reviewed the April 18, 2002 audiogram and diagnosed bilateral moderate, neurosensory high frequency hearing loss. He noted that the frequencies in appellant's right ear at 500, 1,000, 2,000 and 3,000 cycles per second were 40, 35, 35 and 55 and the frequencies in appellant's left ear at those same frequencies were 30, 25, 45 and 50. He responded "no" to the question whether appellant's workplace exposure was sufficient as to intensity and duration to have caused the loss in question. Dr. Copeland stated that there was no other contributing factor. He explained that his reasons for finding that appellant's hearing loss was not due to work exposure were the degree of loss, the degree of exposure and that the standard threshold shift was not present.

[1] The Office noted that the timeliness of appellant's claim was not at issue.

By decision dated August 21, 2002, the Office found that the medical evidence established that appellant's hearing loss was not caused by his federal employment.

In an undated letter, received by the Office on September 24, 2002, appellant requested reconsideration of the Office's decision. He did not submit additional evidence but stated that he had requested his employment records.

In a nonmerit decision dated October 2, 2002, the Office denied appellant's request for reconsideration.

By letter dated November 19, 2002, appellant requested reconsideration of the Office's decision. He did not submit additional evidence but stated his employment records indicated that he was in "a lot of his work areas" that were "above noise levels" and he would send the Office a few of his records.

In a nonmerit decision dated January 14, 2003, the Office denied appellant's request for reconsideration.

By letter dated March 12, 2003, appellant requested reconsideration of the Office's decision. He did not submit additional evidence and stated that the Office overlooked some vital work history that caused his hearing impairment.

In a nonmerit decision dated April 2, 2003, the Office denied appellant's request for reconsideration.

The Board finds that the case is not in posture for decision.

The schedule award provision of the Federal Employees' Compensation Act[2] provides for compensation to employees sustaining permanent impairment from loss or loss of use of specified members of the body. The Act's compensation schedule 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 does not, however, specify the manner by which the percentage loss of a member, function or organ shall be determined. The method used in making such a determination is a matter that 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 industrial hearing loss in accordance with the standards contained in the American Medical Association, *Guides to the Evaluation of Permanent Impairment*.[5] Using

[2] 5 U.S.C. § 8107 *et seq.*

[3] *Arthur E. Anderson*, 43 ECAB 691, 697 (1992); *Danniel C. Goings*, 37 ECAB 781, 783 (1986).

[4] *Arthur E. Anderson*, *supra* note 3 at 697; *Henry L. King*, 25 ECAB 39, 44 (1973).

[5] A.M.A., *Guides* at 224 (4th ed. 1993).

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 1.5 to arrive at the percentage of monaural 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 loss.[9] The Board has concurred in the Office's adoption of this standard for evaluating hearing loss.[10]

Dr. Copeland opined that appellant's hearing loss was not work related based on the degree of loss, the degree of exposure and the standard threshold shift. However, he did not compute the degree of loss in accordance with the formula required in the regulations. Dr. Copeland noted that the frequencies for appellant's right and left ears at 500, 1,000, 2,000 and 3,000, but did not draw a conclusion using the statutory formula. Thus, his reasoning for finding that appellant's hearing loss is not work related is not well rationalized. While the claimant has the burden to establish entitlement to compensation, the Office shares responsibility in the development of the evidence.[11] The case should be remanded for Dr. Copeland to clarify his opinion, that is, if appellant's hearing loss is not work related because the degree of loss was too low, he needs to use the statutory formula to indicate the degree of the loss. If his finding is that, independent of the degree of appellant's hearing loss, appellant's hearing loss is not work related, he needs to so state and explain why. Upon further development that it deems necessary, the Office should issue a *de novo* decision. Since the case is being remanded for a further review on the merits, the Board need not address the issue of whether the Office properly refused to reopen appellant's case for consideration of the merits of the claim pursuant to 5 U.S.C. § 8128(a) in its nonmerit decisions.

[6] *Id*.

[7] *Id*.

[8] *Id*.

[9] *Id.*

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

[11] *Lourdes Davila,* 45 ECAB 139, 143 (1993).

The April 2 and January 14, 2003, October 2 and August 21, 2002 decisions of the Office of Workers' Compensation Programs are set aside and the case remanded for further action consistent with this decision.

Dated, Washington, DC
August 26, 2003

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member