United States Department of Labor
Employees' Compensation Appeals Board

CHARLIE A. PENNEY, Appellant	)	
and	)	**Docket No. 04-1432**
	)	**Issued: October 5, 2004**
DEPARTMENT OF THE NAVY, MILITARY SEALIFT COMMAND, Virginia Beach, VA, Employer	)	

Appearances:
Charlie A. Penney, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Member
DAVID S. GERSON, Alternate Member
A. PETER KANJORSKI, Alternate Member

JURISDICTION

On May 7, 2004 appellant filed a timely appeal from a decision of the Office of Workers' Compensation Programs dated April 15, 2004, in which the Office found that his employment-related hearing loss was not ratable for schedule award purposes and that he was not entitled to hearing aids. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d), the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether appellant is entitled to a schedule award for his employment-related bilateral sensorineural hearing loss; and (2) whether the Office properly denied authorization for hearing aids.

FACTUAL HISTORY

On June 26, 2003 appellant, then a 55-year-old able seaman, filed an occupational disease claim alleging that factors of employment caused bilateral hearing loss. In an attached statement,

appellant described the employment conditions he believed caused his condition. Appellant also submitted audiograms dated March 4, 1998, July 21, 1999, January 5, 2001 and February 18, 2003.[1]

By letter dated July 14, 2003, the Office referred appellant, along with the medical record and a statement of accepted facts, to Dr. James S. Milligan, a Board-certified otolaryngologist, for a second opinion evaluation to include an audiogram. Appellant retired effective July 31, 2003.

Dr. Milligan submitted a report dated August 14, 2003 detailing his examination. He diagnosed mild bilateral high frequency sensorineural hearing loss, left worse than right and opined that the condition was due to employment-related noise exposure. Dr. Milligan advised that maximum medical improvement had been reached that day and that hearing aids were not recommended. He also submitted results of audiometric testing performed by a certified audiologist. The audiogram reflected testing at the frequency levels of 500, 1,000, 2,000 and 3,000 cycles per second and revealed the following: right ear 15, 15, 25 and 20 decibels; left ear 15, 25, 30 and 25 decibels, respectively.

In a report dated October 31, 2003, an Office medical adviser opined that appellant had mild binaural hearing loss that was not ratable for schedule award purposes. On November 5, 2003 the Office accepted that he sustained employment-related left sensorineural hearing loss. An Office medical consult then reviewed the records and, in a December 1, 2003 report, advised that appellant's hearing loss was caused by conditions of his federal employment and diagnosed bilateral high frequency neurosensory hearing loss. He opined that the hearing loss was not ratable for schedule award purposes and that appellant did not require hearing aids.

By decision dated December 23, 2003, the Office found that appellant had no compensable impairment secondary to his employment-related hearing loss on the left. On December 30, 2004 he requested reconsideration and authorization for a hearing device. He submitted a report from David Groom, a hearing instrument specialist, and audiograms dated December 30, 2003 and January 14, 2004. In the latter report, from the Ear, Nose & Throat Consultants of Nevada, a physician whose signature is illegible, advised that appellant required hearing amplification.

In a decision dated April 15, 2004, the Office modified the December 23, 2003 decision to reflect that appellant had an accepted bilateral employment-related hearing loss, but again found that the hearing loss was not ratable for schedule award purposes. The Office also denied authorization for hearing aids.

LEGAL PRECEDENT -- ISSUE 1

Section 8107 of the Federal Employees' Compensation Act[2] specifies the number of weeks of compensation to be paid for permanent loss of use of specified members, functions and

[1] Appellant also submitted medical evidence not relevant to the instant claim.

[2] 5 U.S.C. §§ 8101-8193.

organs of the body.[3] 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 which rests in the sound discretion of the Office. 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 the frequencies of 500, 1,000, 2,000 and 3,000 cycles per second, the losses at each frequency are added and averaged.[6] The "fence" of 25 decibels is then 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]

[3] *Id.* at § 8107(c).

[4] *Renee M. Straubinger*, 51 ECAB 667 (2000).

[5] A.M.A., *Guides* at 250 (5th ed. 2001). In addition to these standards by which it computes the percentage of hearing loss, the Office has delineated requirements for the type of medical evidence used in evaluating hearing loss. The requirements, as set forth in the Office's Federal (FECA) Procedure Manual, are, *inter alia*, that the employee undergo both audiometric and otologic examination; that the audiometric testing precede the otologic examination; that the audiometric testing be performed by an appropriately certified audiologist; that the otologic examination be performed by an otolaryngologist certified or eligible for certification by the American Academy of Otolaryngology; that the audiometric and otologic examination be performed by different individuals as a method of evaluating the reliability of the findings; that all audiological equipment authorized for testing meet the calibration protocol contained the accreditation manual of the American Speech and Hearing Association; that the audiometric test results include both bone conduction and pure tone air conduction thresholds, speech reception thresholds and monaural discrimination scores; and 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. *See* Federal (FECA) Procedure Manual, Part 3 -- Requirements for Medical Reports, *Special Conditions*, Chapter 3.600.8(a) (September 1995); *Raymond Van Nett*, 44 ECAB 480 (1993). The procedural requirements were met in the instant case regarding the August 14, 2003 audiogram.

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

[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)* (issued August 13, 2002).

ANALYSIS -- ISSUE 1

The Board finds that the evidence of record does not establish that appellant is entitled to a schedule award due to his accepted bilateral hearing loss because the only audiogram that comports with established Office procedures,[11] the August 14, 2003 test indicates that his hearing loss was nonratable. While appellant submitted audiograms dated March 4, 1998, July 21, 1999, January 5, 2001, February 18 and December 30, 2003 and January 14, 2004, these studies do not conform to the testing requirements found in Office procedures.[12] For example, calibration information did not accompany the audiograms, nor did the audiograms indicate the date and time of appellant's most recent exposure to loud noise. Furthermore, the recorded values of the earliest examinations do not demonstrate a ratable impairment. The Board, therefore, finds these studies do not establish that appellant is entitled to a schedule award.

In reviewing appellant's August 14, 2003 audiogram submitted by Dr. Milligan, the frequency levels recorded at 500, 1,000, 2,000 and 3,000 cycles per second on the right revealed decibel losses of 15, 15, 25 and 20 decibels respectively, for a total of 75 decibels. This figure, when divided by 4, results in an average hearing loss of 18.75 decibels. The average of 18.75 decibels when reduced by 25 decibels results in a 0 percent monaural hearing loss of the right ear. 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 15, 25, 30 and 25, respectively, for a total loss of 95 decibels; 95 decibels divided by 4 results in an average of 23.75 decibels, which when reduced by the 25 decibel fence, also results in a 0 percent monaural hearing loss of the left ear. As this audiogram comports with established Office procedures for these studies,[13] the Board finds that the Office medical consultant properly applied the standardized procedures of the Office to the findings as stated in Dr. Milligan's report and the accompanying August 13, 2003 audiogram in determining that appellant's hearing loss was not ratable. Thus, the Office properly determined that appellant was not entitled to a schedule award as the extent of his hearing loss is not ratable.

LEGAL PRECEDENT -- ISSUE 2

Section 8103 of the Act provides that the United States shall furnish to an employee who is injured while in the performance of duty, the services, appliances and supplies prescribed or recommended by a qualified physician, which the Office considers likely to cure, give relief, reduce the degree or the period of disability or aid in lessening the amount of the monthly compensation.[14] To be entitled to reimbursement for medical expenses, a claimant must establish that the expenditures were incurred for treatment of the effects of an employment-related injury. Proof of causal relationship must include supporting rationalized medical evidence.[15] In interpreting this section of the Act, the Board has recognized that the Office has

[11] *Supra* note 5.

[12] *Id.*

[13] *Id*.

[14] 5 U.S.C. § 8103; *see Thomas W. Stevens*, 50 ECAB 288 (1999).

[15] *Cathy B. Millin*, 51 ECAB 331 (2000).

broad discretion in approving services provided under the Act with the only limitation on the Office's authority being that of reasonableness.[16]

Abuse of discretion is generally shown through proof of manifest error, clearly unreasonable exercise of judgment or actions taken which are contrary to both logic and probable deductions from established facts. It is not enough to merely show that the evidence could be construed so as to produce a contrary factual conclusion.[17]

ANALYSIS -- ISSUE 2

In this case, the Office accepted that appellant sustained employment-related bilateral sensorineural hearing loss. The record, however, does not support that hearing aids are necessary. In his August 14, 2003 report, Dr. Milligan, the Office referral physician, advised that hearing aids were not necessary for appellant's hearing loss. The Office medical adviser checked "no" in response to a form question as to whether a hearing aid was authorized. Likewise, the Office medical consultant advised that hearing aids were not indicated. While appellant submitted an undated report in which David Groom, a hearing instrument specialist, recommended hearing aids, a hearing instrument specialist is not considered a physician under the Act[18] and the Board finds his report is of no probative value in assessing the need for hearing aids. Appellant also submitted a report dated January 14, 2004 which contains an illegible signature. In that report, hearing testing results were provided and it contained an impression, "sensory hearing loss -- needs amplification." The Board finds this brief comment insufficient to establish that hearing aids are needed as it does not contain a rationalized explanation of why hearing aids are needed.[19] There is, therefore, no probative medical evidence of record recommending that appellant be provided with hearing aids for his employment-related bilateral hearing loss. Should the need for hearing aids arise in the future, appellant may file an appropriate claim at that time.

CONCLUSION

The Board finds that the Office followed standardized procedures in evaluating appellant's hearing loss and properly denied a schedule award for permanent impairment on the grounds that his hearing loss was not ratable. The Board further finds that the Office did not abuse its discretion in denying authorization for hearing aids.

[16] *James R. Bell*, 52 ECAB 414 (2001).

[17] *Claudia L. Yantis*, 48 ECAB 495 (1997).

[18] Section 8101(2) defines "physician" to include surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors and osteopathic practitioners within the scope of their practice as defined by State law. 5 U.S.C. § 8102(c); *see generally Leon Thomas*, 52 ECAB 202 (2001).

[19] *Cathy B. Millin, supra* note 15.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated April 15, 2004 be affirmed.

Issued: October 5, 2004
Washington, DC

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

A. Peter Kanjorski
Alternate Member