United States Department of Labor
Employees' Compensation Appeals Board

J.H., Appellant	)	
and	)	**Docket No. 06-1157**
	)	**Issued: August 15, 2006**
DEPARTMENT OF THE NAVY, PUGET SOUND NAVAL SHIPYARD, WA, Employer	)	

Appearances:
John Eiler Goodwin, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On April 17, 2006 appellant filed a timely appeal from an August 19, 2005 decision of the Office of Workers' Compensation Programs awarding him a schedule award for a two percent monaural hearing loss in the left ear. Pursuant to 20 C.F.R. §§ 501.2(c) and 501(d)(3), the Board has jurisdiction over the merits of the claim.

ISSUE

The issue is whether appellant has established that he sustained greater than a two percent hearing loss in the left ear, for which he received a schedule award. On appeal, appellant contends that the Office failed to provide his attorney with a copy of the Office medical adviser's report as requested. Appellant also contends that the Office erred by failing to send a copy of the August 19, 2005 decision to his attorney or include findings of fact.

FACTUAL HISTORY

The Office accepted that on or before May 9, 2003 appellant, then a 52-year-old machinist, sustained a bilateral hearing loss due to hazardous noise exposure at work from 1980 to 2003.

In developing the claim, the Office obtained a second opinion from Dr. James C. Rockwell, a Board-certified otolaryngologist, who submitted an April 1, 2004 report diagnosing an asymmetric bilateral high frequency sensorineural hearing loss due to occupational noise exposure.[1] Dr. Rockwell obtained an audiogram. On the left, at the frequencies of 500, 1,000, 2000 and 3,000 cycles per second (cps), appellant had losses of 15, 5, 30 and 55 decibels (db) respectively, for a total of 105 db. He then divided the total of 105 by 4, resulting in 26.25 db. Dr. Rockwell then subtracted the "fence" of 25 db, leaving a monaural loss of 1.25 percent. When multiplied by the 1.5 monaural loss factor, this equaled a 1.875 percent monaural loss of hearing in the left ear, rounded up 1.88 percent. At the frequencies of 500, 1,000, 2000 and 3,000 cps on the right, appellant had losses of 15, 5, 0 and 5 db, for a total of 25 db. Dr. Rockwell then subtracted the "fence" of 25 db, leaving a monaural loss of 0 percent.

In a December 14, 2004 letter, appellant authorized his attorney to represent him before the Office. The Office acknowledged appellant's appointment of representative on January 18, 2005.

In May 16 and June 2, 2005 letters, appellant's attorney requested a copy of the Office medical adviser's review of Dr. Rockwell's findings as soon as it became available.

On June 24, 2005 the Office referred the April 1, 2004 audiogram to an Office medical adviser for calculation of the percentage of hearing loss. In a July 3, 2005 report, the Office medical adviser reviewed Dr. Rockwell's April 1, 2004 audiogram according to the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*). He affirmed Dr. Rockwell's calculations. The medical adviser found that appellant had a 1.88 percent loss of hearing in the left ear and a nonratable impairment in the right ear according to Table 11-1, page 247. The adviser also found that, according to Table 11-2, page 248, appellant had a .3 percent binaural hearing loss.

On July 21, 2005 appellant claimed a schedule award. By decision dated August 19, 2005, the Office awarded appellant a schedule award for a two percent hearing loss in the left ear. The Office sent the decision to appellant at his address of record, with a copy to the employing establishment.

LEGAL PRECEDENT

A claimant may authorize an individual to represent him in any proceeding before the Office.[2] A properly appointed representative who is recognized by the Office may make a request or give direction to the Office regarding the claims process, including a hearing.[3] The authority includes presenting or eliciting evidence, making arguments of facts or the law and obtaining information from the case file, to the same extent as the claimant.[4] Any notice

[1] An April 16, 2004 magnetic resonance imaging scan ordered by Dr. Rockwell to rule out an acoustic tumor was negative.

[2] 5 U.S.C. § 8127(a).

[3] 20 C.F.R. § 10.700(c).

[4] *Id*.

requirement contained in the regulation or the Federal Employees' Compensation Act[5] is fully satisfied if served on the representative and has the same force and effect as if sent to the claimant.[6] Any letter intended for a claimant should be sent to the authorized attorney or legal representative.[7]

ANALYSIS

In this case, the Office addressed the August 19, 2005 schedule award decision only to appellant and the employing establishment. The evidence, therefore, demonstrates that the Office failed to mail appellant's attorney a copy of the August 19, 2005 decision.[8] This is contrary to the Office's procedures, which provide that where an "employee has an attorney or other legal representative, the original of any letter to the claimant should be sent to that person, with a copy to the claimant. Similarly, where the claimant is sent a copy of a letter, the attorney or other representative should receive a copy as well."[9] Thus, the August 19, 2005 decision must be set aside and the case remanded to the Office for issuance of an appropriate decision, transmitted to appellant's appointed representative.[10]

The Board notes that appellant's attorney requested a copy of the Office medical adviser's report in May 16 and June 2, 2005 letters. However, the Office failed to do so. This is contrary to the Office's regulations, which states that a "properly appointed representative who is recognized by [the Office] may" obtain "information from the case file, to the same extent as the claimant."[11] Therefore, on remand of the case, the Office shall provide appellant's authorized representative with a copy of the Office medical adviser's July 3, 2005 report.

CONCLUSION

The Board finds that the Office improperly issued its August 19, 2005 decision. Thus, the case must be remanded to the Office for issuance of an appropriate decision. On remand of the case, the Office shall also provide appellant's authorized legal representative with a copy of the Office medical adviser's report.

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[5] 5 U.S.C. §§ 8101-8193.

[6] *Supra* note 3; *see also Sara K. Pearce*, 51 ECAB 517 (2000).

[7] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Communications, Regular Correspondence*, Chapter 2.300.4e (February 2000).

[8] *See Michelle Lagana*, 52 ECAB 187, 189 (2000). (Under the mailbox rule, it is presumed, in the absence of evidence to the contrary, that a notice mailed to an individual in the ordinary course of business was received by that individual. This presumption arises when it appears from the record that the notice was properly addressed and duly mailed.)

[9] *Supra* note 7.

[10] *Katherine E. Crews*, 53 ECAB 421 (2002).

[11] *Supra* note 3; *see also Travis L. Chambers*, 54 ECAB 533 (2003).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated August 19, 2005 is set aside and the case returned to the Office for appropriate action consistent with this decision and order.

Issued: August 15, 2006
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board