

**United States Department of Labor
Employees' Compensation Appeals Board**

L.Q., Appellant)

and)

DEPARTMENT OF THE ARMY, ARMY)
DEPOT, Corpus Christi, TX, Employer)

**Docket No. 07-788
Issued: July 5, 2007**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On January 30, 2007 appellant filed a timely appeal from the Office of Workers' Compensation Programs' March 28, 2006 merit decision granting a schedule award for a hearing loss and the Office's June 2, 2006 nonmerit decision denying his request for a hearing before an Office hearing representative. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over these decisions.

ISSUES

The issues are: (1) whether appellant met his burden of proof to establish that he has more than an eight percent hearing loss in his left ear, for which he received a schedule award; and (2) whether the Office properly denied appellant's request for a hearing under section 8124 of the Federal Employees' Compensation Act.

FACTUAL HISTORY

On October 28, 2005 appellant, then a 58-year-old metal tube manufacture, installation and repair supervisor, filed an occupational disease claim alleging that he sustained hearing loss

due to exposure to hazardous noise at work. He claimed that since 1981 he had been exposed to noise from pipe cutting saws, pressure relief valves, fork lifts, hammers, rivet guns, sanders and other electric tools.

The Office referred appellant for otologic and audiologic testing to Dr. James M. Motes, a Board-certified otolaryngologist, who completed testing on December 2, 2005 which showed that appellant sustained a high-frequency noise-induced hearing loss that was related, in whole or part, to his noise exposure during federal employment. Dr. Motes noted that 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, 30 and 40 respectively and that 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, 20, 25 and 35 respectively. He calculated that appellant had an eight percent hearing loss in his left ear.¹

On December 20, 2005 the Office accepted that appellant sustained bilateral noise-induced hearing loss. On January 4, 2006 the Office medical adviser reviewed the otologic and audiologic testing performed on December 2, 2005 by Dr. Motes and agreed that, under the standards of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) (5th ed. 2001), appellant had an eight percent hearing loss in his left ear.

On December 28, 2005 appellant claimed a schedule award due to his hearing loss. In an award of compensation dated March 28, 2006, the Office granted appellant a schedule award for an eight percent hearing loss of his left ear. The award ran for 4.16 weeks from December 1 to 30, 2005.²

In a letter dated May 12, 2006 and postmarked May 13, 2006, appellant requested a hearing before an Office hearing representative.

In a June 2, 2006 decision, the Office denied appellant's request for a hearing under section 8124 of the Act. The Office found that appellant's request was untimely as it was effectuated more than 30 days after the issuance of the Office's March 28, 2006 decision. It indicated that it had considered the matter in relation to the issue involved and had denied appellant's hearing request on the basis that the issue in the case could be resolved by submitting additional medical evidence to establish that he was entitled to greater schedule award compensation for hearing loss.

¹ Dr. Motes stated that appellant's "audiograms were not consistent with the previous findings on October 5, 2005" as the speech reception thresholds and pure tones did not match. He indicated that appellant was "brought back in on December 2, 2005 and the audio was repeated" and noted that the results of the December 2, 2005 testing "matched almost perfectly" the results of the October 5, 2005 testing.

² The Office inadvertently indicated that the award ran for 29.12 weeks rather than 4.16 weeks.

LEGAL PRECEDENT -- ISSUE 1

The schedule award provision of the Act³ and its implementing regulation⁴ 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 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. The A.M.A., *Guides* has been adopted by the implementing regulation as the appropriate standard for evaluating schedule losses.⁵

The Office evaluates industrial hearing loss in accordance with the standards contained in the A.M.A., *Guides*.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 One audiogram may not be arbitrarily chosen over another to evaluate hearing loss, but an explanation must be given as to why a particular audiogram is selected.¹²

ANALYSIS -- ISSUE 1

On January 4, 2006 the Office medical adviser reviewed the otologic and audiologic testing performed on December 1, 2005 by Dr. Motes, a Board-certified otolaryngologist. He applied the Office’s standardized procedures to this evaluation. Testing for the left ear at the

³ 5 U.S.C. § 8107.

⁴ 20 C.F.R. § 10.404 (1999).

⁵ *Id.*

⁶ A.M.A., *Guides* 224-25 (4th ed. 1993); A.M.A., *Guides* at 226-51 (5th ed. 2001).

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Donald Stockstad*, 53 ECAB 301 (2002); *petition for recon. granted (modifying prior decision)*, Docket No. 01-1570 (issued August 13, 2002).

¹² *See Herman L. Henson*, 40 ECAB 341, 347 (1988); *Harry Frank*, 33 ECAB 261, 263 (1981).

frequency levels of 500, 1,000, 2,000 and 3,000 cycles per second revealed decibel losses of 25, 25, 30 and 40 respectively. These decibel losses were totaled at 120 decibels and were divided by 4 to obtain the average hearing loss of 30 decibels. This average loss was then reduced by 25 decibels (25 decibels being discounted as discussed above) to equal 5 which was multiplied by the established factor of 1.5 to equal 7.5 which, when rounded up, equaled an 8 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, 20, 25 and 35 respectively. These decibel losses total 100 decibels and when divided by 4 result in an average hearing loss of 25 decibels. This average loss when reduced by 25 decibels (25 decibels being discounted as discussed above) equals 0 and, therefore, it was determined that appellant had a 0 percent hearing in the right ear.

On appeal, appellant alleged that Dr. Motes initially obtained audiometric testing which showed severe hearing loss in both ears, but that the next day he obtained audiometric testing which showed only moderate damage to the left ear. He suggested that Dr. Motes' use of the second test to assess the extent of his hearing loss was not justified. The Board notes, however, that Dr. Motes explained that the first audiometric testing he obtained was invalid because the speech reception thresholds and pure tones did not match previous testing obtained in October 2005. He had appellant retested on December 2, 2005 and found that the results of this audiometric testing "matched almost perfectly" the results of the October 5, 2005 testing.¹³ Therefore, Dr. Motes adequately explained why it was appropriate to use the December 2, 2005 audiogram in rating appellant's hearing loss. Appellant did not meet his burden of proof to establish that he has more than an eight percent hearing loss in his left ear, for which he received a schedule award.¹⁴

LEGAL PRECEDENT -- ISSUE 2

Section 8124(b)(1) of the Act, concerning a claimant's entitlement to a hearing before an Office representative, provides in pertinent part: "Before review under section 8128(a) of this title, a claimant for compensation not satisfied with a decision of the Secretary ... 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."¹⁵ As section 8124(b)(1) is unequivocal in setting forth the time limitation for requesting a hearing, a claimant is not entitled to a hearing as a matter of right unless the request is made within the requisite 30 days.¹⁶

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

¹³ The Board notes that the only audiogram of record is the December 2, 2005 audiogram.

¹⁴ Moreover, appellant appropriately received 4.16 weeks of schedule award compensation as this figure equals the product of eight percent times 52 weeks, the number of weeks of compensation for total hearing loss in one ear. *See* 5 U.S.C. § 8107(c)(13)(A), 5 U.S.C. § 8107(c)(19).

¹⁵ 5 U.S.C. § 8124(b)(1).

¹⁶ *Ella M. Garner*, 36 ECAB 238, 241-42 (1984).

whether to grant a hearing.¹⁷ Specifically, the Board has held that the Office has the discretion to grant or deny a hearing request on a claim involving an injury sustained prior to the enactment of the 1966 amendments to the Act which provided the right to a hearing,¹⁸ when the request is made after the 30-day period for requesting a hearing¹⁹ and when the request is for a second hearing on the same issue.²⁰

ANALYSIS -- ISSUE 2

Appellant's hearing request was made more than 30 days after the date of issuance of the Office's prior decision dated March 28, 2006 and, thus, he was not entitled to a hearing as a matter of right. He requested a hearing before an Office hearing representative in a document dated May 12, 2006 and postmarked May 13, 2006. The Office properly found that appellant was not entitled to a hearing as a matter of right because his May 13, 2006 hearing request was not made within 30 days of the Office's March 28, 2006 decision.

While the Office also has the discretionary power to grant a hearing when a claimant is not entitled to a hearing as a matter of right, the Office, in its June 2, 2006 decision, properly exercised its discretion by stating that it had considered the matter in relation to the issue involved and had denied appellant's hearing request on the basis that the issue in the case could be resolved by submitting additional medical evidence to establish that he was entitled to greater schedule award compensation for hearing loss. The Board has held that, as the only limitation on the Office's authority is reasonableness, 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 deduction from established facts.²¹ In the present case, the evidence of record does not indicate that the Office committed any act in connection with its denial of appellant's hearing request which could be found to be an abuse of discretion. For these reasons, the Office properly denied appellant's request for a hearing under section 8124 of the Act.

CONCLUSION

The Board finds that appellant did not meet his burden of proof to establish that he has more than an eight percent hearing loss in his left ear, for which he received a schedule award. The Board further finds that the Office properly denied appellant's request for a hearing under section 8124 of the Act.

¹⁷ *Henry Moreno*, 39 ECAB 475, 482 (1988).

¹⁸ *Rudolph Bermann*, 26 ECAB 354, 360 (1975).

¹⁹ *Herbert C. Holley*, 33 ECAB 140, 142 (1981).

²⁰ *Johnny S. Henderson*, 34 ECAB 216, 219 (1982).

²¹ *Daniel J. Perea*, 42 ECAB 214, 221 (1990).

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' June 2 and March 28, 2006 decisions are affirmed.

Issued: July 5, 2007
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

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

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board