

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

D.T., Appellant

and

**DEPARTMENT OF THE NAVY, NORFOLK
NAVAL SHIPYARD, Portsmouth, VA, Employer**

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**Docket No. 07-59
Issued: March 19, 2007**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On October 6, 2006 appellant filed a timely appeal from an August 4, 2006 nonmerit decision of the Office of Workers' Compensation Programs, which denied his request for an oral hearing and a January 20, 2006 decision, which denied his schedule award claim. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over both the merit and nonmerit decisions.

ISSUES

The issues are: (1) whether appellant is entitled to a schedule award for hearing loss; and (2) whether the Office properly denied appellant's request for an oral hearing as untimely.

FACTUAL HISTORY

On August 17, 2004 appellant, then a 65-year-old shipwright, filed an occupational disease claim alleging that he developed bilateral hearing loss during his employment. He first became aware of his hearing loss and related it to his employment on July 21, 1994. Appellant did not stop work.

In support of his claim, appellant submitted an August 11, 2004 report from Dr. John T. Kalafsky, a Board-certified otolaryngologist, who concluded that appellant had “asymmetric sensorineural hearing loss with the left ear more affected than the right.” He informed Dr. Kalafsky that he was exposed to noise during his tenure as a shipwright and was currently driving a forklift, a position in which he was exposed to diesel engine noise. Dr. Kalafsky conducted tests to rule out biological causes of appellant’s hearing loss and found that appellant’s speech reception, discrimination and tympanograms were essentially normal. He opined that appellant’s hearing loss had a “noise-induced component.”

Appellant also submitted audiograms conducted on May 14 and 24, 2004 and a May 14, 2004 report from Dr. Kalafsky. The May 14, 2004 audiogram reflected testing at the 500, 1,000, 2,000 and 3,000 Hertz (Hz) levels and recorded the following decibel losses: 5, 15, 20, 20 for the right ear and 5, 15, 20 and 55 for the left ear. The May 24, 2004 audiogram was incomplete, as speech and tympanogram tests were not performed; however, the audiogram reflected testing at the 500, 1,000, 2,000 and 3,000 Hz levels and revealed the following decibel losses: 10, 10, 25 and 20 for the right ear and 10, 15, 25 and 55 for the left ear. The audiologist stated that appellant’s hearing loss had remained “essentially unchanged” since the May 14, 2004 audiogram.

Appellant submitted an August 17, 2004 statement and audiograms covering the period from 1975 through 2004. He worked for the employing establishment from October 1976 through 2004 and was exposed to noise from various industrial sources, including “chipping, grinding steel, deck grinding and sandblasting.” Appellant indicated that he was also exposed to noise from large machinery such as forklifts and cranes, as well as to noise from small power tools including “drills, band saws, wood planers, radial arm saws.” He stated that he wore earplugs whenever he was exposed to loud noise.

On September 30, 2004 the Office requested additional information concerning appellant’s claim.

On October 14, 2004 appellant responded to the Office’s request for information and submitted an October 7, 2004 report from Dr. Kalafsky, noting that appellant had a long history of noise exposure at work and that appellant currently had asymmetric bilateral sensorineural hearing loss.

The employing establishment submitted position descriptions, additional copies of appellant’s audiograms and medical records and a supervisor’s statement concurring with appellant’s statements. The employing establishment also submitted an undated report from Dr. Andrea Palencar, an occupational physician with the Norfolk Naval Shipyard Branch Medical Clinic. Dr. Palencar stated that appellant had been exposed to noise from saws over the course of his employment and that he did not have any hobbies involving loud noises.

On October 6, 2004 the Office referred appellant for otologic evaluation. In a November 8, 2004 report, Dr. Alan S. Keyes, a Board-certified otolaryngologist and Office referral physician, noted examining appellant on that date. Dr. Keyes referenced a November 8, 2004 audiogram performed on his behalf. He concluded that appellant had sensorineural hearing

loss, “which was most likely noise induced.” The audiogram reflected testing at the 500, 1,000, 2,000 and 3,000 Hz levels and revealed the following decibel losses: 0, 15, 15 and 20 for the right ear and 5, 15, 25 and 55 for the left ear.

On December 1, 2004 the Office accepted appellant’s claim for binaural hearing loss. Appellant requested a schedule award on December 13, 2004.

On March 29, 2005 an Office medical adviser reviewed Dr. Keyes’ audiometric test results and concluded that appellant had a nonratable hearing loss. The medical adviser stated that appellant’s hearing loss was sensorineural and related to noise exposure he encountered as a federal employee. Appellant’s date of maximum medical improvement was November 18, 2004.

By decision dated January 20, 2006, the Office informed appellant that his hearing loss was not ratable for schedule award purposes.

Appellant requested an oral hearing on May 31, 2006. By decision dated August 4, 2006, the Office denied appellant’s hearing request as untimely. The Office expressed its discretion and determined that appellant’s case could be equally well addressed through a request for reconsideration.

LEGAL PRECEDENT -- ISSUE 1

The schedule award provision of the Federal Employees’ Compensation Act¹ and its implementing regulation² set forth the number of weeks of compensation payable to employees sustaining permanent impairment from loss or loss of use of schedule 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 American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) has been adopted by the implementing regulation as the appropriate standard for evaluating schedule losses.³

The Office evaluates industrial hearing loss in accordance with the standards contained in the A.M.A., *Guides*.⁴ Using the frequencies of 500, 1,000, 2,000 and 3,000 Hz, the losses at each frequency are added up and averaged.⁵ 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.⁶ The remaining amount is

¹ 5 U.S.C. § 8107.

² 20 C.F.R. § 10.404 (2002).

³ *Id.*

⁴ A.M.A., *Guides* at 250 (5th ed. 2001).

⁵ *Id.*

⁶ *Id.*

multiplied by a factor of 1.5 to arrive at the percentage of monaural hearing loss.⁷ 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.⁸ The Board has concurred in the Office's adoption of this standard for evaluating hearing loss.⁹

ANALYSIS -- ISSUE 1

The Office medical adviser applied the Office's standardized procedures to the November 8, 2004 audiogram obtained for Dr. Keyes. The audiogram recorded frequency levels at the 500, 1,000, 2,000 and 3,000 Hz levels and recorded decibel losses of 0, 15, 15 and 20 for the right ear. The total decibel loss in the right ear is 50 decibels. When divided by 4, the result is an average hearing loss of 12.5 decibels. The average loss of 12.5 decibels is reduced by the "fence" of 25 decibels to equal -12.5 decibels, which when multiplied by the established factor of 1.5, results in a -18.75 percent monaural hearing loss for the right ear, rounded to 0 percent.

Testing for the left ear at the frequencies of 500, 1,000, 2,000 and 3,000 Hz revealed decibel losses of 5, 15, 25 and 55 decibels respectively, for a total decibel loss of 100 decibels. When divided by 4, the result is an average hearing loss of 25 decibels. The average loss of 25 decibels is reduced by the "fence" of 25 decibels, to equal 0 decibels, which when multiplied by the established factor of 1.5, yields a 0 percent monaural hearing loss for the left ear.

The Board notes that appellant submitted two uncertified audiograms, conducted on May 14 and 24, 2004. These audiograms were not conducted under the supervision of a physician and consequently, although the Office medical adviser may certify them, the Office is not required to review them.¹⁰ The Board has held that it is appellant's burden to submit a properly certified audiogram to the Office for review or if appellant objects to the audiogram selected by the Office for the determination of the degree of appellant's hearing loss.¹¹ The Office does not have to review an audiogram which has not been certified by a physician. The May 14, 2004 audiogram is not ratable and the May 24, 2004 audiogram is incomplete. Dr. Kalafsky did not certify the audiograms or explain the May 24, 2004 audiogram's incomplete status.

LEGAL PRECEDENT -- ISSUE 2

Section 8124(b)(1) of the Act provides that before review under section 8128(a) of this title, a claimant for compensation not satisfied with a decision of the Secretary is entitled, on

⁷ *Id.*

⁸ *Id.*

⁹ *Donald E. Stockstad*, 53 ECAB 301 (2002), *petition for recon. granted (modifying prior decision)*, Docket No. 01-1570 (issued August 13, 2002).

¹⁰ *Joshua A. Holmes*, 42 ECAB 231 (1990).

¹¹ *Id.*

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.¹² Section 10.615 of the federal regulations implementing this section of the Act provides that a claimant shall be afforded a choice of an oral hearing or a review of the written record.¹³ The Office's regulations provide that the request must be sent within 30 days of the date of the decision for which a hearing is sought and also that the claimant must not have previously submitted a reconsideration request (whether or not it was granted) on the same decision.¹⁴

Additionally, the Board has held that the Office, in its broad discretionary authority in the administration of the Act,¹⁵ 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 whether to grant a hearing.¹⁶ The Office's procedures, which require the Office to exercise its discretion to grant or deny a hearing when the request is untimely or made after reconsideration, are a proper interpretation of the Board precedent.¹⁷

ANALYSIS -- ISSUE 2

The Board finds that the Office properly denied appellant's oral hearing request, as it was untimely filed. Appellant requested an oral hearing in response to a decision issued on January 20, 2006. His oral hearing request was dated May 30, 2006 and postmarked May 31, 2006, more than 30 days after the decision was issued.

Although the Office determined that appellant's request was untimely, it nevertheless exercised its discretion by examining appellant's request for an appeal. The Office determined that the appellant's case would be best served by his submission of a request for reconsideration along with new supporting evidence. Accordingly, the Board finds that the Office acted within its discretion in denying appellant's hearing request as untimely, because appellant failed to file the request within the statutory time.

CONCLUSION

The Board finds that appellant has not met his burden of proof in establishing that he has a ratable binaural hearing loss and that the Office properly denied appellant's hearing request as untimely.

¹² 5 U.S.C. § 8124(b)(1).

¹³ 20 C.F.R. § 10.615.

¹⁴ *Id.* at § 10.616(a).

¹⁵ 5 U.S.C. §§ 8101-8193.

¹⁶ *Marilyn F. Wilson*, 52 ECAB 347 (2001).

¹⁷ *Teresa M. Valle*, 57 ECAB __ (Docket No. 06-438, issued April 19, 2006). See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Hearings and Reviews of the Written Record*, Chapter 2.1601.4(b)(3) (October 1992).

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated August 4 and January 20, 2006 are affirmed.

Issued: March 19, 2007
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

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