U.S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MARCO A. PADILLA and DEPARTMENT OF THE TREASURY, U.S. CUSTOMS SERVICE, Terminal Island, CA

Docket No. 98-1296; Submitted on the Record;
Issued December 6, 1999

DECISION and ORDER

Before GEORGE E. RIVERS, DAVID S. GERSON, WILLIE T.C. THOMAS

The issues are: (1) whether appellant has greater than a four percent bilateral hearing loss causally related to his federal employment; and (2) whether appellant's housing allowance while living overseas should be included in his pay rate for compensation purposes.

On April 15, 1995 appellant, a former special agent and criminal investigator, filed a claim asserting that he sustained a hearing loss in the performance of his duties while qualifying in target ranges. Appellant worked for the employing establishment from 1960 to 1981.

The Office of Workers' Compensation Programs referred appellant, together with copies of pertinent information from the case record and a statement of accepted facts, to Dr. Charles Schneider, a Board-certified otolaryngologist, for audiologic and otologic evaluation. Dr. Schneider examined appellant on December 12, 1995. He noted appellant's history of exposure to loud sound, primarily gunfire and reported that appellant had no exposure to loud sound during the last 11 years. Appellant's physical examination was essentially unremarkable. Audiometric studies revealed a presbycusis-like hearing curve. Speech reception thresholds were in the normal range. Impedance studies showed some restriction in the eardrum. Dr. Schneider reported that in comparison with an audiogram performed in 1989, which was also some years after appellant's loud noise exposure, "there has been further progression of the low-tone hearing loss, consistent with his presbycusis." Dr. Schneider concluded as follows: "My impression is that it is possible that [appellant] sustained some high frequency hearing damage associated with his noise exposure, but age consistent at the age of 69, the hearing that he has is both functional and, on the basis of speech reception threshold, still considered in the normal range."

On March 19, 1996 Dr. David N. Schindler, a Board-certified otolaryngologist and Office medical consultant, reviewed appellant's records. He noted that the earliest audiogram, dated January 3, 1974, revealed a bilateral high frequency hearing loss. He noted that other audiograms generally revealed a fluctuating and progressive high frequency hearing loss. He

noted that appellant had a complete audiogram on July 13, 1989 and was evaluated by Dr. Schneider on December 12, 1995. Dr. Schindler concluded that the condition found in the examinations of July 13, 1989 and December 12, 1995 was aggravated by appellant's federal employment. He diagnosed bilateral high frequency neurosensory hearing loss consistent in part with noise exposure.

For schedule award purposes, Dr. Schindler used the audiogram of July 13, 1989 because it most approximated appellant's date of retirement. The July 13, 1989 audiogram showed losses in the right ear of 15, 20, 25 and 60 decibels at 500, 1,000, 2,000 and 3,000 hertz (Hz) respectively. The audiogram also showed losses in the left ear of 10, 15, 30 and 55 decibels at 500, 1,000, 2,000 and 3,000 Hz. Dr. Schindler reported that this represented a 7.5 percent monaural loss in the right ear and a 3.8 percent monaural loss in the left ear, for a four percent binaural neurosensory hearing loss.

On October 3, 1996 the Office issued a schedule award for a four percent permanent impairment of binaural hearing, entitling appellant to eight weeks of compensation. The Office calculated compensation based on a weekly pay rate of $942.35.

Disagreeing with the pay rate used and the percentage of impairment found, appellant requested reconsideration.

The Office further developed the factual evidence on appellant's rate of pay at the time of his retirement in 1981. The Office also received additional audiograms not previously considered. In a December 3, 1996 report, Dr. John W. House, appellant's otologist, stated that appellant had a 40-decibel loss in the right ear and a 43-decibel loss in the left ear, which was approximately a 30 percent hearing impairment.

On January 23, 1997 Dr. Schindler again reviewed appellant's records. He noted that the earliest audiogram, dated January 3, 1974, revealed a bilateral high frequency hearing loss. He noted that there were several other audiograms in the record that indicated a unilateral high frequency hearing loss or bilateral high frequency hearing loss or no hearing loss. Unfortunately, he stated, many of these audiograms were not dated. Dr. Schindler again noted the audiogram of July 13, 1989, which, he stated, was a complete audiogram, including pure tone air and bone conduction scores and speech testing. This audiogram was performed on a calibrated machine and showed that appellant had a four percent binaural neurosensory hearing loss.

Dr. Schindler reported that Dr. Schneider's December 12, 1995 audiogram was similar but somewhat worse. Audiograms obtained by Dr. House on April 3, 1995 and November 15, 1996 were also somewhat worse than the audiogram of July 13, 1989 and showed that appellant's hearing had deteriorated. He explained that he used the July 13, 1989 audiogram because it was the earliest audiogram after appellant's retirement. Appellant's hearing loss since retirement, he stated, was not the result of noise exposure with the federal government but was the result of aging.

In a merit decision dated February 21, 1997, the Office found that the weight of the medical evidence did not establish that appellant had greater than a four percent binaural hearing

loss. The Office found that appellant was entitled to a recalculation of his schedule award at the weekly pay rate of $963.60. The Office further found that appellant was entitled to have housing allowance included in the pay rate once the Office could establish the proper amount of that allowance.

On May 5, 1997 appellant requested reconsideration concerning the percentage of impairment and the period of the award. Although he stated that he was satisfied with the salary used to arrive at the amount of the award, he contended that his housing allowance should be considered.

In a decision dated May 28, 1997, the Office reviewed the merits of appellant's claim and found that the evidence submitted in support of appellant's application was insufficient to warrant modification of the prior decision. The Office noted that the separate maintenance allowance authorized by 5 U.S.C. § 5924(3) was excluded from rate of pay because it was a cost-of-living allowance paid to an employee in a foreign area and, therefore, appellant's housing allowance, while living in Italy, was excluded from his pay rate for compensation purposes.

The Board finds that the evidence of record fails to establish that appellant has greater than a four percent bilateral hearing loss causally related to his federal employment.

The compensation schedule of the Federal Employees' Compensation Act[1] specifies the number of weeks of compensation to be paid for permanent loss of use of various members or functions of the body. The Act, however, does not specify the manner by which a percentage loss shall be determined. The method used in making such a determination is a matter that rests in the sound discretion of the Office.[2] 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.[3]

The Office evaluates hearing loss in accordance with the standards contained in the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed. 1993) using hearing levels recorded at frequencies of 500, 1,000, 2,000 and 3,000 Hz. Decibel threshold levels at each frequency are totaled for each ear separately and the sum is compared to values in Table 1, page 225, for monaural hearing impairment and to values in Table 2, page 226, for binaural hearing impairment. The A.M.A., *Guides* explains that if the average of

[1] 5 U.S.C. § 8107.

[2] *Danniel C. Goings*, 37 ECAB 781 (1986); *Richard Beggs*, 28 ECAB 387 (1977).

[3] *Henry L. King*, 25 ECAB 39, 44 (1973); *August M. Buffa*, 12 ECAB 324, 325 (1961).

the hearing levels at 500, 1,000, 2,000 and 3,000 Hz is 25 decibels or less, no impairment is considered to exist in the ability to hear everyday sounds under everyday listening conditions.[4]

Dr. Schindler, the Office medical consultant, selected the audiogram of July 13, 1989 to determine appellant's employment-related hearing loss because it was the earliest audiogram after appellant's retirement. He explained that appellant's hearing loss since retirement was not the result of noise exposure with the federal government but was the result of aging. The Board finds that Dr. Schindler provided sound medical reasoning for selecting the July 13, 1989 audiogram on the grounds that it was more representative of appellant's employment-related hearing loss than were the audiograms obtained by Dr. House in 1995 and 1996.[5] The earliest audiogram, dated January 3, 1974, could not compensate appellant for his future occupational exposure to hazardous noise and Dr. Schindler reported that several other audiograms of record were inconsistent and undated. Dr. Schindler supported the reliability of the audiogram of July 13, 1989 by noting that it was a complete audiogram, that it included pure tone air and bone conduction scores and speech testing and that it was performed on a calibrated machine.

Testing for the right ear at frequencies of 500, 1,000, 2,000 and 3,000 Hz showed losses of 15, 20, 25 and 60 decibels respectively, for a total of 120. Testing for the left ear at frequencies of 500, 1,000, 2,000 and 3,000 Hz showed losses of 10, 15, 30 and 55 decibels respectively, for a total of 110. Under Table 2, page 226 of the A.M.A., *Guides*, a total decibel loss of 120 in one ear and 110 in the other constitutes a 4.4 percent binaural hearing impairment, which the Office rounded to four percent.[6]

Appellant questions the limited period of his schedule award. The compensation schedule of the Act specifies a maximum of 200 weeks of compensation for total binaural hearing loss.[7] The schedule compensates partial loss of hearing at a proportionate rate.[8] Accordingly, compensation for a 4 percent binaural hearing loss is 4 percent of 200 weeks, or 8 weeks of compensation, which the Office awarded.

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[4] A.M.A., *Guides* 224 (4th ed. 1993). Previous editions of the A.M.A., *Guides* deducted this "fence" of 25 decibels as part of a mathematical calculation of hearing impairment. The fourth edition incorporates the "fence" into Tables 1 and 2. If the sum of the threshold levels is 100 decibels or less (an average of 25 decibels or less), the percentage monaural impairment under Table 1 is zero. Thus, an employee may sustain a hearing loss causally related to federal employment and yet may not be entitled to a schedule award because the impairment is below the threshold of a compensable loss.

[5] *See Irving Brichke*, 32 ECAB 1044 (1981) (Office medical adviser provided no rationale for selecting one evaluation of the four that were conducted within a span of five months); *John C. Messick*, 25 ECAB 333 (1974) (when several audiograms are in the case record and all are made within approximately two years of one another and are submitted by more than one physician, the Office should give an explanation for selecting one audiogram over the others).

[6] *See* Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter, 3.700.3.b. (October 1990) (the policy of the Office is to round the calculated percentage of impairment to the nearest whole point).

[7] 5 U.S.C. § 8107(c)(13)(B).

[8] *Id*. at § 8107(c)(19).

The Office followed standardized procedures in calculating appellant's binaural hearing loss at four percent and correctly applied schedule compensation provisions in awarding appellant eight weeks of compensation. The Board will affirm the Office's May 28, 1997 decision on these issues.

The Board finds, however, that the Office erroneously excluded appellant's housing allowance from his rate of pay.

The terms of the Act are specific as to the method and amount of payment of compensation; neither the Office nor the Board has the authority to enlarge terms of the Act nor to make an award of benefits under any terms other than those specified in the statute. Unless the statute authorizes the inclusion of a housing allowance when determining rate of pay, the Office's exclusion of such must be affirmed.[9]

The applicable provisions of the Act specify that compensation for disability shall be computed on the basis of the employee's monthly pay as defined in the Act.[10] There is no authority for computing compensation on any other basis.[11] Section 8114(e) of the Act, relating to monthly pay, states as follows:

> "The value of subsistence and quarters and of any other form of remuneration in kind for services if its value can be estimated in money and premium pay under section 5545(c)(1) of this title are included as part of the pay, but account is not taken of:
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> (1) overtime pay;
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> (2) additional pay or allowance authorized outside the United States because of differential in cost of living or other special circumstances; or
>
> (3) bonus or premium pay for extraordinary service including bonus or pay for particularly hazardous service in time of war."[12]

This section of the Act expressly authorizes the inclusion of the value of quarters as part of the pay and in the past the Office has included a foreign housing allowance in its determination of an employee's rate of pay.[13] Further, the Office has not established the

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[9] *See Helen A. Pryor*, 32 ECAB 1313 (1981).

[10] 5 U.S.C. §§ 8101(4), 8114.

[11] *Helen A. Pryor*, *supra* note 9.

[12] 5 U.S.C. § 8114(e).

[13] *See Helen S. Forman*, 39 ECAB 212 (1987) (where the Office computed the employee's monthly pay by using her annual salary divided by 12 plus her monthly housing allowance while living in Bangkok, Thailand. The Board affirmed the Office's exclusion of the payment school fees set forth in the employee's contract with the employing establishment on the grounds that such a payment was "additional pay or allowance" under section 8114(e)(2) of the Act).

applicability of the exclusion provision of section 8114(e)(2); the Office has offered no evidence to show that appellant's housing allowance constituted additional pay or allowance authorized outside the United States because of differential in cost of living or other special circumstances.

In its May 28, 1997 decision, the Office noted that the separate maintenance allowance authorized by 5 U.S.C. § 5924(3) was excluded from rate of pay because it was a cost-of-living allowance paid to an employee in a foreign area. This statute, however, relates to the additional expense of maintaining the employee's spouse or dependents or both elsewhere than at the employee's post of assignment in a foreign area, which has not arisen as a specific issue in the present case.[14]

Because section 8114(e) of the Act expressly authorizes the inclusion of the value of quarters as part of the pay, because the Office has in the past included a foreign housing allowance in its determination of an employee's rate of pay and because the Office has not shown that the exclusion provision of 8114(e)(2) applies to the circumstances of appellant's case, the Board will reverse the Office's May 28, 1997 decision on the issue of rate of pay.[15]

[14] Section 5924(3) provides that certain cost-of-living allowances may be granted, when applicable, to an employee in a foreign area, including "a separate maintenance allowance to assist an employee who is compelled or authorized, because of dangerous, notably unhealthful, or excessively adverse living conditions at the employee's post of assignment in a foreign area, or for the convenience of the government, or who requests such an allowance because of special needs or hardship involving the employee or the employee's spouse or dependents, to meet the additional expenses of maintaining, elsewhere than at the post, the employee's spouse or dependents, or both."

[15] Although a claimant has the burden to establish entitlement to compensation benefits, the Office shares responsibility in the development of the evidence, particularly when such evidence is of the character normally obtained from the employing establishment or other government source. *Robert A. Redmond*, 40 ECAB 796 (1989). The record shows that the Office attempted to obtain relevant information on appellant's housing allowance from the Department of State. Having begun this investigation, the Office must pursue the evidence as far as is reasonably possible, particularly when such evidence is in the possession of the government employing establishment and is, therefore, more readily accessible to the Office. *Leon C. Collier*, 37 ECAB 378 (1986); *William J. Cantrell*, 34 ECAB 1233 (1983); *James M. Weems*, 9 ECAB 315 (1957).

The May 28, 1997 decision of the Office of Workers' Compensation Programs is affirmed on the issues of percentage of impairment and period of award but is reversed on the issue of rate of pay.

Dated, Washington, D.C.
December 6, 1999

George E. Rivers
Member

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member