U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JERRY W. JONES and DEPARTMENT OF THE ARMY, AVIATION MISSILE COMMAND, Redstone, AL

Docket No. 01-1217; Submitted on the Record;
Issued January 25, 2002

DECISION and ORDER

Before MICHAEL J. WALSH, MICHAEL E. GROOM,
PRISCILLA ANNE SCHWAB

The issues are: (1) whether appellant has no more than a 16 percent binaural hearing loss for which he received a schedule award; and (2) whether the Office of Workers' Compensation Programs properly refused to reopen appellant's case for reconsideration.

On November 30, 1998 appellant, then a 50-year-old boiler plant mechanic, filed a claim alleging that he sustained permanent hearing loss while in the performance of duty. He stopped work on May 21, 1997 and retired on February 20, 1998.

Accompanying appellant's claim were employing establishment audiograms dated November 11, 1973 to September 2, 1993; and reports from Dr. Mark Hagood, a Board-certified otolaryngologist, dated November 5, 1998 and January 13, 1999. The employing establishment's audiograms revealed progressive hearing loss. Dr. Hagood performed an otologic examination and determined that appellant sustained a symmetrical sensorineural hearing loss. He noted a history of acoustic trauma most likely related to occupational exposure to noise. Dr. Hagood's January 13, 1999 report indicated that appellant sustained irreversible bilateral sloping high frequency sensorineural hearing loss secondary to exposure at the work environment. Dr. Hagood also diagnosed appellant with tinnitus and noted this condition was also a result of work exposure to noise. He recommended hearing aids.

Appellant submitted a narrative statement indicating that he began working for the employing establishment in 1973 and was exposed to loud noise from a variety of machinery including bench grinders, welders, jackhammers, coal crushers, pulverizers of coal, coal conveyers, broken high pressure steam and gas lines, feed water pumps, forced draft fans, backhoes, drill presses, front-end loaders, forklifts, air chisels and hammers. He noted that he was exposed to noise levels from 85 to 115 decibels daily. Appellant indicated that hearing protection was not readily available until 1977 when a hearing conservation program was initiated at the employing establishment. He noted that in 1985 he obtained a new position as an engineering aide and was exposed to noise from aircraft, tanks, generators, grinders, fans, drill presses and hammers. Appellant indicated that the noise levels were 80 to 120 decibels.

The employing establishment submitted a memorandum indicating a hearing conservation program was initiated.

In a statement of accepted facts dated February 23, 1999, the Office noted from 1968 to 1970 appellant served in the U.S. Army as an aircraft turbine mechanic and was exposed to noise from aircraft eight hours a day, five to seven days a week; and from 1973 to 1998 appellant was an industrial equipment operator, boiler plant mechanic and operator and was exposed to noise from grinders, welders, jackhammers, coal crushers, coal pulverizers, coal conveyers, fans, pumps, drill presses, backhoes and forklifts. The decibel level for his trade ranged from 80 to 120 decibels.

By letter dated July 23, 1999, the Office referred appellant to Dr. Robert Peden, a Board-certified otolaryngologist, for otologic examination and audiological evaluation.[1] The Office provided Dr. Peden with a statement of accepted facts, available exposure information and copies of all medical reports and audiograms.

Dr. Peden performed an otologic evaluation of appellant on September 2, 1999 and audiometric testing was conducted on his behalf, on the same date. Testing at the frequency levels of 500, 1,000, 2,000 and 3,000 revealed the following: right ear 35, 30, 40 and 70 decibels; left ear 35, 30, 25 and 45 decibels. Dr. Peden determined that appellant sustained bilateral sensorineural hearing loss with tinnitus, consistent with a history of chronic noise exposure in the work environment.

On September 27, 1999 an Office medical adviser reviewed Dr. Peden's report and the audiometric test of September 2, 1999. The medical adviser determined that the date of maximum medical improvement was September 2, 1999. The medical adviser evaluated the audiogram performed on behalf of Dr. Peden and testing at the frequency levels of 500, 1,000, 2,000 and 3,000 revealed the following: right ear 35, 30, 40, 70 decibels; left ear 35, 30, 25, 45 decibels. The medical adviser concluded that appellant sustained employment-related bilateral sensorineural hearing loss of 16 percent.

In a decision dated December 1, 1999, the Office determined that appellant sustained a 16 percent bilateral hearing loss for the period September 2, 1999 to April 12, 2000.

In a letter dated March 27, 2000, appellant indicated that he was entitled to an additional schedule award for his tinnitus condition.

In a noted dated April 21, 2000, the medical adviser indicated that tinnitus could be a factor in an impairment estimate for severe unilateral hearing loss. However, the second opinion physician determined that appellant sustained bilateral hearing loss and tinnitus which was not considered severe.

[1] On March 2, 1999 the Office referred appellant to Dr. S. Kinney Copeland for otologic examination and audiological evaluation. In a note dated March 25, 1999, the district medical adviser indicated that the audiologist who performed the examination on behalf of Dr. Copeland on March 18, 1999 concluded the accuracy of the examination was poor and, therefore, the results were not valid. The Office then referred appellant to another second opinion physician for examination.

In a letter dated July 12, 2000, appellant requested reconsideration of the decision dated December 1, 1999 and submitted additional medical evidence. The report from Dr. Hagood dated July 5, 2000 indicated that appellant had bilateral high frequency sensorineural hearing loss and severe bilateral tinnitus. He noted that appellant's tinnitus should be considered ratable for schedule award purposes.

By decision dated August 18, 2000, the Office denied appellant's request for reconsideration on the grounds that the evidence was insufficient to warrant modification of its prior decision.

In a letter dated January 14, 2001, appellant requested review of the decision dated August 18, 2000 and submitted additional evidence. Appellant submitted three articles regarding tinnitus from The British Tinnitus Association, the Mayo Clinic and the Better Hearing Institute.

By decision dated February 27, 2001, the Office denied appellant's request for reconsideration on the grounds that the evidence submitted was insufficient to warrant review of the prior decision.

The Board finds that appellant has no more than a 16 percent work-related binaural hearing loss, for which he received a schedule award.

Section 8107(c) of the Federal Employees' Compensation Act[2] specifies the number of weeks of compensation to be paid for the permanent loss of use of specified members, functions and organs of the body. The Act, however, does not specify the manner by which the percentage of 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.[3] 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 permanent hearing loss in accordance with the standards contained in the A.M.A., *Guides*, using the hearing levels recorded at frequencies of 500, 1,000, 2,000 and 3,000 cycles per second. The losses at each frequency are added up and averaged and a "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 sounds under everyday conditions. Each amount is then multiplied by 1.5. The amount of the better ear is multiplied by five and added to the amount from the worse ear. The entire amount is then divided by six to arrive at a percentage of binaural hearing loss. The Board has concurred in the Office's adoption of this standard for evaluation of hearing loss for schedule award purposes.[5] In addition, the Federal (FECA) Procedure Manual requires that all claims for hearing loss due to its acoustic trauma require an

[2] 5 U.S.C. §§ 8101-8193, § 8107(c)

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

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

[5] *See Goings*, *supra* note 3.

opinion from a Board-certified specialist in otolaryngology.[6] The procedure manual further indicates that audiological testing is to be performed by persons possessing certification and ideology from the American Speed Language Hearing Association (ASHA), or state licensure as an audiologist.[7]

An Office medical adviser applied the Office's standard procedures to the September 2, 1999 audiogram performed for Dr. Peden. Testing for the right ear at the frequency levels of 500, 1,000, 2,000 and 3,000 hertz revealed decibels losses of 35, 30, 40 and 70 respectively. These decibels were totaled at 175 and were divided by four to obtain an average hearing loss at those cycles of 43.75 decibels. The average of 43.75 decibels was then reduced by 25 decibels (the first 25 decibels were discounted as discussed above) to equal 18.75, which was multiplied by the established factor of 1.5 to compute a 28.13 percent loss of hearing for the right ear. Testing for the left ear at the frequency levels of 500, 1,000, 2,000 and 3,000 hertz revealed decibels losses of 35, 30, 25 and 45 respectively. These decibels were totaled at 135 and were divided by 4 to obtain the average hearing loss at those cycles of 33.75 decibels. The average of 33.75 decibels was then reduced by 25 decibels (the first 25 decibels were discounted as discussed above) to equal 8.75, which was multiplied by the established factor of 1.5 to compute a 13.13 percent hearing loss for the left ear. The amount of the better ear, 13.13, is multiplied by 5 and added to the amount from the worse ear, 28.13. The entire amount is divided by 6 to arrive at a 16 percent binaural hearing loss.

Appellant further contends that he is entitled to compensation for his tinnitus condition. However, while the A.M.A., *Guides* allow for an award for tinnitus under disturbances of vestibular function, no additional ratable permanent hearing loss above the 16 percent binaural loss has been identified or documented in the medical evidence. There is no medical evidence that appellant's tinnitus was caused or contributed to by his federal employment noise exposure or that it has caused or contributed to his ratable hearing loss. Dr. Hagood's January 13, 1999 and July 5, 2000 reports indicated that appellant's tinnitus was severe; however, there was no evidence of disequilibrium or evidence that appellant cannot perform his usual activities of daily living was presented.[8] Appellant would be entitled to compensation if it were established that his tinnitus resulted in a loss of wage-earning capacity; however, there is no evidence of record that appellant sustained a loss of wage-earning capacity as a result of his tinnitus.[9]

The Board finds that the Office medical adviser applied the proper standards to the findings stated in Dr. Peden's report and the September 2, 1999 audiogram. The result is a 16 percent binaural hearing loss as set forth above.

[6] Federal (FECA) Procedural Manual, Part 2 -- Claims, *Causal Relationship*, Chapter 2.805.3(d)(6) (June 1995).

[7] Federal (FECA) Procedural Manual, Part 3 -- Medical, *Requirement for Medical Reports,* Chapter 3.600.8(a)(2) (September 1994).

[8] *See Charles H. Potter*, 39 ECAB 645 (1988).

[9] See *Leonard J. Dragon, Sr.*, 48 ECAB 481 (1997); *Richard Larry Enders*, 48 ECAB 184 (1996).

The Board further finds that the Office in its February 27, 2001 decision properly denied appellant's request for reconsideration on the merits under 5 U.S.C. § 8128(a) on the basis that his request for reconsideration did not meet the requirements set forth under section 8128.[10]

Under section 8128(a) of the Act,[11] the Office has the discretion to reopen a case for review on the merits. The Office must exercise this discretion in accordance with the guidelines set forth in section 10.606(b)(2) of the implementing federal regulations,[12] which provides that a claimant may obtain review of the merits if her written application for reconsideration, including all supporting documents, sets forth arguments and contain evidence that:

> "(i) Shows that Office erroneously applied or interpreted a specific point of law; or
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> "(ii) Advances a relevant legal argument not previously considered by the Office; or
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> "(iii) Constitutes relevant and pertinent new evidence not previously considered by the Office."

Section 10.608(b) provides that any application for review of the merits of the claim which does not meet at least one of the requirements listed in section 10.606(b) will be denied by the Office without review of the merits of the claim.[13]

In this case, the Office denied appellant's claim without conducting a merit review on the grounds that the evidence submitted was cumulative and insufficient. In support of his request for reconsideration, appellant submitted three articles addressing tinnitus from The British Tinnitus Association, the Mayo Clinic and the Better Hearing Institute. However, this evidence is not relevant nor pertinent to appellant's specific claim, rather it provides a general overview of the condition of tinnitus.[14] Appellant submitted no other medical evidence in support of his claim. Therefore, the Office properly determined that this evidence did not constitute a basis for reopening the case for a merit review. Appellant neither showed that the Office erroneously applied or interpreted a point of law; advanced a point of law or fact not previously considered by the Office; nor did he submit relevant and pertinent evidence not previously considered by the Office."[15] Therefore, appellant did not submit relevant evidence not previously considered by the Office.

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[10] *See* 20 C.F.R. § 10.606(b)(2)(i-iii) (1999).

[11] 5 U.S.C. § 8128(a).

[12] 20 C.F.R. § 10.606(b).

[13] 20 C.F.R. § 10.608(b).

[14] *See Helen E. Tschantz*, 39 ECAB 1382 (1988).

[15] 20 C.F.R. § 10.606(b).

The decisions of the Office of Workers' Compensation Programs dated February 27, 2001 and August 18, 2000 are hereby affirmed.

Dated, Washington, DC
January 25, 2002

Michael J. Walsh
Chairman

Michael E. Groom
Alternate Member

Priscilla Anne Schwab
Alternate Member