

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of VAL DUNCAN and DEPARTMENT OF THE ARMY,  
DIRECTORATE OF PUBLIC WORKS, Fort Stewart, GA

*Docket No. 02-1435; Submitted on the Record;  
Issued February 21, 2003*

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DECISION and ORDER

Before ALEC J. KOROMILAS, DAVID S. GERSON,  
MICHAEL E. GROOM

The issues are: (1) whether the Office of Workers' Compensation Programs abused its discretion in denying appellant's request for an oral hearing; and (2) whether appellant sustained more than a 12 percent binaural hearing loss for which he received a schedule award.

The Office accepted appellant's claim filed on July 2, 2001 for binaural hearing loss and referred appellant for a second opinion evaluation to determine the extent of permanent impairment. The Office asked its medical adviser to review the report of Dr. Thomas M. Crews, a Board-certified otolaryngologist. Based on appellant's September 4, 2001 audiogram, the Office medical adviser found a 12 percent bilateral hearing loss.

On October 30, 2001 the Office issued a schedule award for a 12 percent binaural hearing loss. The award ran from September 4, 2001 to February 4, 2002.

On November 27, 2001 appellant requested reconsideration and submitted an audiogram dated November 26, 2001. He also submitted a statement that the employing establishment terminated him in a reduction-in-force on July 28, 2001. On December 20, 2001 appellant requested a hearing. On February 20, 2002 the Office denied appellant's hearing request as untimely filed.

On June 10, 2002 the Office denied modification of its prior decision on the grounds that the evidence appellant submitted was insufficient to establish his entitlement to more than the 12 percent schedule award he had received for his hearing loss. The Office noted that the November 26, 2001 audiogram did not meet the Office's requirements for evaluating hearing loss.

The Board finds that appellant is not entitled to an oral hearing because his request was not timely filed.

Section 8124(b)(1) of the Federal Employees' Compensation Act<sup>1</sup> provides:

“Before review under section 8128(a) of this title, a claimant for compensation not satisfied with a decision of the Secretary under subsection (a) of this section 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.”<sup>2</sup>

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. The Office must exercise this discretionary authority in deciding whether to grant a hearing.<sup>3</sup> The Office's procedures, which require the Office to exercise its discretion to grant or deny a hearing request when such a request is untimely or made after reconsideration or an oral hearing, are a proper interpretation of the Act and Board precedent.<sup>4</sup>

In this case, appellant's request for a hearing was dated December 20, 2001, well beyond the 30-day limitation of section 8421(b)(1) and its implementing regulation.<sup>5</sup> Because appellant failed to request an oral hearing within 30 days of the Office's October 30, 2001 decision, he is not entitled to an oral hearing as a matter of right.

While the Office 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 October 30, 2001 decision, stated that it had reviewed appellant's request and determined that whether appellant was entitled to a higher schedule award could be resolved with a request for reconsideration and evidence demonstrating that his hearing loss was greater than the 12 percent rating.

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.<sup>6</sup> The record does not indicate that the Office acted in any manner in denying appellant's request for a hearing that could be found to be an abuse of discretion. Therefore, the Office properly denied appellant's request for a hearing as untimely.

The Board finds that appellant has no more than a 12 percent bilateral hearing loss.

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<sup>1</sup> 5 U.S.C. §§ 8101-8193.

<sup>2</sup> 5 U.S.C. § 8124(b)(1).

<sup>3</sup> *Bonnie Goodman*, 50 ECAB 139, 145 (1998).

<sup>4</sup> *Martha A. McConnell*, 50 ECAB 129, 130 (1998); *Michael J. Welsh*, 40 ECAB 994, 997 (1989).

<sup>5</sup> 5 U.S.C. § 8421(b)(1); 20 C.F.R. § 10.616(a).

<sup>6</sup> *Linda J. Reeves*, 48 ECAB 373, 377 (1997).

Section 8107 of the Act sets forth the number of weeks of compensation to be paid for the permanent loss of use of specified members, functions and organs of the body.<sup>7</sup> The Act, however, does not specify the manner by which the percentage loss of a member, function or organ shall be determined. To ensure consistent results and equal justice for all claimants under the law, good administrative practice requires the use of uniform standards applicable to all claimants.<sup>8</sup> The Act's implementing regulation has adopted the American Medical Association, *Guides to the Evaluation of Permanent Impairment* as the appropriate standard for evaluating schedule award losses.<sup>9</sup>

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 hertz (Hz).<sup>10</sup> 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.<sup>11</sup>

The amount of loss remaining for each ear is then multiplied by 1.5. The hearing loss of the better ear is multiplied by five and added to the amount of hearing loss of the worse ear. This total is then divided by six to arrive at the percentage of binaural hearing loss.<sup>12</sup>

In this case, the audiogram dated September 4, 2001 showed losses for the right ear of 15, 15, 40 and 60 Hz, totaling 130 Hz and for the left ear 10, 20, 40 and 65 Hz, totaling 135. Dr. Crews interpreted this audiogram as showing a mid-range to high-frequency symmetrical hearing loss, which was noise induced over the past 10 years.

The 130 total loss in the right ear was divided by 4 to obtain the average hearing loss at the 500, 1,000, 2,000 and 3,000 cycles of 32.50. The average was then reduced by 25 decibels to equal 7.5, which was then multiplied by 1.5 to show an 11.25 percent hearing loss for the right ear.

Testing for the left ear revealed a total loss of 135 decibels. This figure was divided by 4 to obtain the average hearing loss at those cycles of 33.75 decibels. The average was then reduced by the 25 decibel fence and the result, 8.75 was multiplied by 1.5 to compute a 13.13 percent loss of hearing for the left ear. Because appellant had hearing loss in both ears, the loss in the better ear was multiplied by five and added to the loss in the worse ear. The total was then divided by 6 for a 11.56 binaural loss, which was rounded off to 12 percent.

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<sup>7</sup> 5 U.S.C. § 8107.

<sup>8</sup> *Ausbon N. Johnson*, 50 ECAB 304, 311 (1999), citing *Danniel C. Goings*, 35 ECAB 781, 783 (1986).

<sup>9</sup> 20 C.F.R. § 10.404 (1999).

<sup>10</sup> *Donald C. Swiger*, 50 ECAB 462, 463 (1999).

<sup>11</sup> *Johnson*, *supra* note 8.

<sup>12</sup> *Stacy L. Walker*, 48 ECAB 353, 355 (1997).

The Board finds that the Office medical adviser properly applied the A.M.A., *Guides* to the audiometric findings reported by Dr. Crews. Under the Act, the compensation schedule provides a maximum of 200 weeks of compensation for a complete (100 percent) binaural hearing loss. Appellant received 24 weeks of compensation under the October 30, 2001 schedule award or 12 percent of 200 weeks.<sup>13</sup>

With his reconsideration request, appellant submitted a November 26, 2001 audiogram, an audiological evaluation record dated June 28, 2001, a position description for an electrician, a copy of medical records dated February 2 and 16, 1993, a description of the noise to which appellant was exposed at work and two other medical forms dated February 2 and 8, 1993. All but the latest audiogram had been considered by the Office in its October 30, 2001 decision or is not relevant to the issue.<sup>14</sup>

In addition to the standard by which it computes the actual percentage of loss of hearing, the Office has also set forth requirements for the medical evidence to be used in evaluating hearing loss.<sup>15</sup> These are: that the claimant undergo audiological evaluation and otological examination; that the audiological testing precede the otological examination; that the audiological evaluation and otological examination be performed by different individuals as a method of evaluating the reliability of the findings; that the audiologist and otolaryngologist be certified; that all audiological equipment authorized for testing meet the calibration protocol contained in the accreditation manual of the American Speech and Hearing Association; that the audiometric test results include both bone conduction and pure tone air conduction thresholds, speech reception thresholds and monaural discrimination scores; and that the otolaryngologist's report include the date and hour of examination, the date and hour of the employee's last exposure to loud noise, a rationalized medical opinion regarding the relation of the hearing loss to employment-related noise exposure and a statement of the reliability of the tests.<sup>16</sup>

In *James A. England*, the Board held that an audiogram prepared by an audiologist must be certified by a physician as being accurate before it can be used to determine the percentage loss of hearing.<sup>17</sup> Although an Office medical adviser may review any audiogram submitted to the record, appellant has the burden of proof to submit a properly certified audiogram for review if he or she objects to the audiogram selected by the Office to determine the degree of hearing loss.<sup>18</sup>

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<sup>13</sup> See 5 U.S.C. § 8107(c)(13)(B); Federal (FECA) Procedure Manual, Part 3 -- *Schedule Awards*, Chapter 3.700, Exhibit One (December 1994); *Richard Larry Enders*, 48 ECAB 184, 187 (1996).

<sup>14</sup> See *Eugene L. Turchin*, 48 ECAB 391, 397 (1997) (finding that evidence submitted on reconsideration regarding the occurrence of several industrial accidents was irrelevant to appellant's burden of proof to establish the timely filing of his claim and was therefore insufficient to warrant merit review by the Office).

<sup>15</sup> *George L. Cooper*, 40 ECAB 296, 303 (1988).

<sup>16</sup> Federal (FECA) Procedure Manual, Part 3 -- *Medical*, Chapter 3.600, Exhibit 4 (December 1994); see also Chapter 3.700.4.b (September 1994).

<sup>17</sup> 47 ECAB 115, 118 (1995).

<sup>18</sup> *Joshua A. Holmes*, 42 ECAB 231, 236 (1990).

In this case, the Office medical adviser reviewed the audiogram submitted by appellant and found that, while the testing would result in a greater hearing loss -- 30 percent in the right ear and 26 percent in the left ear for a total of 46 percent, the audiogram did not conform to the Office's standards. There was no signature by a certified audiologist, no review by a Board-certified otolaryngologist, no certification of the equipment and no medical report. The Office's specialist added that the November 26, 2001 audiogram was done two months after the September 9, 2001 audiogram and such significant worsening of hearing loss in that short length of time would not be expected.

Given the foregoing standards for determining hearing loss cases and the medical evidence of record, the Board finds that the November 26, 2001 audiogram is insufficient to establish any greater hearing loss. The examination of appellant by Dr. Crews, a Board-certified otolaryngologist, and testing performed by William W. Perrine, a certified audiologist, conform to the medical requirements established by the Office for hearing loss cases and establish the 12 percent hearing loss for which appellant received a schedule award.

The June 10 and February 20, 2002 and the October 30, 2001 decisions of the Office of Workers' Compensation Programs are affirmed.

Dated, Washington, DC  
February 21, 2003

Alec J. Koromilas  
Chairman

David S. Gerson  
Alternate Member

Michael E. Groom  
Alternate Member