United States Department of Labor
Employees' Compensation Appeals Board

S.H., Appellant	)	
and	)	**Docket No. 10-1585**
	)	**Issued: February 7, 2011**
DEPARTMENT OF HOMELAND SECURITY, U.S. SECRET SERVICE, Washington, DC, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On May 24, 2010 appellant filed a timely appeal from the Office of Workers' Compensation Programs' merit decision dated February 4, 2010, which denied his request for a schedule award and a March 26, 2010 decision denying his request for an oral hearing. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.

ISSUES

The issues are: (1) whether appellant has a ratable hearing loss warranting a schedule award; and (2) whether the Office properly denied appellant's request for an oral hearing.

FACTUAL HISTORY

On September 10, 2009 appellant, then a 40-year-old secret service agent, filed a claim alleging that he sustained permanent hearing loss while in the performance of duty. He became aware of his hearing loss on August 20, 2009. Appellant did not stop work.

Appellant submitted a January 29, 2009 employing establishment audiogram together with a report of the same date by Dr. Steven P. Fong, a Board-certified family practitioner, who advised that the audiogram revealed mild effusion/erythema of the tympanic membrane on the left and mild effusion of the tympanic membrane on the right.[1] Dr. Fong noted that the source of appellant's noise exposure was on the weapons range and from sirens. A September 2, 2009 audiogram performed by Robin Robinson, an audiologist, revealed normal hearing on the right to 2,000 hertz (Hz) precipitously sloping to severe noise notch at 6,000 Hz and normal hearing on the left to 2,000 Hz sloping to moderate noise notch at 6,000 Hz. Appellant reported a sudden onset of constant tinnitus in the right ear after providing instruction at a target range. Ms. Robinson noted ostoscopy examination was normal bilaterally and recommended hearing protection. In a September 2, 2009 report, she diagnosed noise-induced sensorineural hearing loss and noted that appellant's condition was causally related to his employment activity.

The employing establishment submitted a September 28, 2009 statement from Stuart Allison, appellant's supervisor, who noted that appellant was assigned to the James J. Rowley Training Center and the Patuxent Research Refuge and used the outdoor rifle range and shoot house. Appellant was exposed to noise from flashbangs at 180 decibels and gunfire with undetermined decibel exposure, for three to four hours per day, two to three days a week. Mr. Rowley noted that appellant was provided with foam earplugs and earmuffs.

An October 20, 2009 statement of accepted facts noted appellant worked as a border patrol agent from January 20, 1997 to June 5, 1999 and was exposed to gunfire at the academy and during quarterly requalification. From June 6, 1999 to the present, he worked as a special agent and was exposed to firearms training three days a week for one to three hours a day. After the academy, appellant was exposed to quarterly requalification courses, pistols, rifles and flash bang training. He was provided with hearing protection.

On October 29, 2009 the Office referred appellant to Dr. John A. Ruth, Jr., a Board-certified otolaryngologist, for an otologic examination and an audiological evaluation. In a November 13, 2009 report, Dr. Ruth provided findings on examination and noted appellant's exposure to noise was generated from gunfire and diversionary devices up to 180 decibels. Appellant reported using earplugs and headsets for hearing protection and that his tinnitus did not interfere with daily activities. Dr. Ruth diagnosed noise-induced sensorineural hearing loss which was due to the noise exposure in appellant's job. He noted vocal quality was good, external auditory canals were clear, tympanic membranes were pearly and mobile, no nasal mucopusor polyps, no oral lesions, the pharynx was benign and there was no cervical adenopathy or thyromegaly. Dr. Ruth performed an otologic evaluation on November 13, 2009 and audiometric testing was conducted on his behalf. Testing at the frequency levels of 500, 1,000, 2,000 and 3,000 cycles per second revealed the following: right ear 5, 5, 10 and 30 decibels; left ear 5, 5, 5 and 25 decibels. Dr. Ruth noted tympanometry revealed normal tracings bilaterally and the audiogram revealed noise-induced sensorineural hearing loss bilaterally and advised that appellant would not benefit from amplification at this time.

[1] The January 29, 2009 audiogram revealed decibel losses for the right ear, at the frequency levels of 500, 1,000, 2,000 and 3,000 cycles per second, of 10, 5, 5 and 15 decibels, while the left ear showed losses of 5, 0, 0 and 5 decibels.

On January 6, 2010 an Office medical adviser reviewed the medical evidence. The medical adviser referred to the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*,[2] (A.M.A., *Guides*), to find that appellant's hearing loss was nonratable. The Office medical adviser determined that his hearing loss was not severe enough for a schedule award after applying the Office's current standards for evaluating hearing loss to the results of the November 13, 2009 audiogram. He noted that appellant reached maximum medical improvement on November 13, 2009.

On February 4, 2010 the Office accepted appellant's claim for bilateral sensorineural hearing loss due to noise exposure.

In a decision dated February 4, 2010, the Office found that, although appellant's hearing loss was employment related, it was not severe enough to be ratable for purposes of a schedule award.

In a letter dated March 1, 2010 and postmarked March 15, 2010, appellant requested an oral hearing.

In a decision dated March 26, 2010, the Office denied appellant's request for an oral hearing. It found that the request was not timely filed. Appellant was informed that his case had been considered in relation to the issues involved and that the request was further denied for the reason that the issues in this case could be addressed by requesting reconsideration from the Office and submitting evidence not previously considered.

LEGAL PRECEDENT -- ISSUE 1

The schedule award provision of the Federal Employees' Compensation Act[3] and its implementing regulations[4] 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 regulations 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 Hz, the losses at each frequency are added up and averaged.[7] Then, the "fence" of 25 decibels is deducted

[2] A.M.A., *Guides* (6th ed. 2008).

[3] 5 U.S.C. § 8107.

[4] 20 C.F.R. § 10.404 (1999).

[5] *Id. See also Jacqueline S. Harris*, 54 ECAB 139 (2002).

[6] *Supra* note 2 at 250.

[7] *Id.*

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]

ANALYSIS -- ISSUE 1

The Office accepted that appellant sustained bilateral hearing loss due to noise exposure from his federal employment. The issue is whether appellant sustained a ratable impairment in accordance with the A.M.A., *Guides*.

The Office referred appellant to Dr. Ruth for examination and diagnostic testing. An Office medical adviser reviewed Dr. Ruth's findings and agreed that appellant's hearing loss was aggravated by his employment. The medical adviser applied the Office's standardized procedures to the November 13, 2009 audiogram performed for Dr. Ruth to determine if the extent of hearing loss was ratable for schedule award purposes. Testing for the right ear at the frequency levels of 500, 1,000, 2,000 and 3,000 Hz revealed decibels losses of 5, 5, 10 and 30, respectively. These decibels totaled 50 and were divided by 4 to obtain an average hearing loss at those cycles of 12.50 decibels. The average of 12.50 decibels was then reduced by 25 decibels (the first 25 decibels were discounted as discussed above) to equal zero percent hearing loss for the right ear. Testing for the left ear at the frequency levels of 500, 1,000, 2,000 and 3,000 Hz revealed decibels losses of 5, 5, 5 and 25 respectively. These decibels were totaled at 40 and were divided by 4 to obtain the average hearing loss at those cycles of 10 decibels. The average of 10 decibels was then reduced by 25 decibels (the first 25 decibels were discounted as discussed above) to 0, which was multiplied by the established factor of 1.5 to compute a 0 percent hearing loss for the left ear.

The Board finds that the Office medical adviser applied the proper standards to Dr. Ruth's November 13, 2009 audiogram. The result is a zero percent monaural hearing loss and a zero percent binaural hearing loss. Although the record contains other audiograms submitted by appellant, these are insufficient to establish a ratable hearing loss. The January 29, 2009 audiogram reviewed by Dr. Fong shows lesser hearing loss at the pertinent frequency levels

[8] *Id.*

[9] *Id.*

[10] *Id.*

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

than did the audiogram performed for Dr. Ruth.[12] The remaining audiograms submitted by appellant are of no probative value as they were not certified by a physician as accurate.[13]

On appeal, appellant asserts that the Office decision was incorrect and he should have been granted a schedule award because he has constant ringing in his ears. As noted, the extent of his hearing impairment is not ratable under the standards used by the Office. The Board has noted that a schedule award for tinnitus is not appropriate in the absence of a ratable hearing loss.[14]

LEGAL PRECEDENT -- ISSUE 2

Section 8124(b)(1) of the Act provides that "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] Section 10.617 and 10.618 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 by a representative of the Secretary.[16] A claimant is entitled to a hearing or review of the written record as a matter of right only if the request is filed within the requisite 30 days as determined by postmark or other carrier's date marking and before the claimant has requested reconsideration.[17] Although there is no right to a review of the written record or an oral hearing if not requested within the 30-day time period, the Office may within its discretionary powers grant or deny appellant's request and must exercise its discretion.[18] The Office's procedures require that it exercise its discretion to grant or deny a hearing when the request is untimely or made after reconsideration under section 8128(a).[19]

ANALYSIS -- ISSUE 2

Appellant requested a hearing in an appeal form dated March 1, 2010 but postmarked March 15, 2010. As the envelope containing the request was postmarked more than 30 days

[12] *See supra* note 1.

[13] *See Joshua A. Holmes*, 42 ECAB 231, 236 (1990) (if an audiogram is prepared by an audiologist, it must be certified by a physician as being accurate before it can be used to determine the percentage of hearing loss). *See also James A. England*, 47 ECAB 115, 118 (1995) (finding that an audiogram not certified by a physician as being accurate has no probative value; the Office need not review uncertified audiograms).

[14] *See L.S.*, 57 ECAB 725 (2006).

[15] 5 U.S.C. § 8124(b)(1).

[16] 20 C.F.R. §§ 10.616, 10.617.

[17] *Id*. at § 10.616(a).

[18] *Eddie Franklin*, 51 ECAB 223 (1999); *Delmont L. Thompson*, 51 ECAB 155 (1999).

[19] *See R.T.*, 60 ECAB ___ (Docket No. 08-408, issued December 16, 2008); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Hearings and Reviews of the Written Record*, Chapter 2.1601.4(b)(3) (October 1992).

after issuance of the February 4, 2010 Office decision, his request for an oral hearing was untimely filed.

The Office also notified appellant that it had considered the matter in relation to the issue involved and indicated that additional argument and evidence could be submitted with a request for reconsideration. It has broad administrative discretion in choosing means to achieve its general objective of ensuring that an employee recovers from his or her injury to the fullest extent possible in the shortest amount of time. An abuse of discretion is generally shown through proof of manifest error, a clearly unreasonable exercise of judgment or actions taken which are contrary to both logic and probable deductions from established facts.[20] There is no indication that the Office abused its discretion in this case in finding that appellant could further pursue the matter through the reconsideration process.[21]

CONCLUSION

The Board finds the Office properly denied appellant's claim for a schedule award for hearing loss. It further finds that the Office properly denied his request for a hearing as untimely.

[20] *Samuel R. Johnson*, 51 ECAB 612 (2000).

[21] The Board notes that on May 4, 2010 appellant appealed the Office decisions dated February 4 and March 26, 2010 and submitted a timely request for oral argument. In an order dated September 23, 2010, the Board denied his request for oral argument on the grounds that it would further delay issuance of a Board decision and not serve a useful purpose. On October 23, 2010 appellant filed a response to the Boards Order.

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs decisions dated March 26 and February 4, 2010 are affirmed.

Issued: February 7, 2011
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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