United States Department of Labor
Employees' Compensation Appeals Board

J.D., Appellant	)	
	)	**Docket No. 07-124**
and	)	**Issued: March 19, 2007**
	)	
DEPARTMENT OF THE NAVY, LONG BEACH NAVAL SHIPYARD, Long Beach, CA, Employer	)	

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 17, 2006 appellant filed a timely appeal from the Office of Workers' Compensation Programs' merit decision dated August 10, 2006, which granted him a schedule award for a two percent monaural hearing loss. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the schedule award in this case.

ISSUE

The issue is whether appellant has more than a two percent monaural hearing loss for which he received a schedule award.

FACTUAL HISTORY

On July 31, 2002 appellant, then a 63-year-old retired marine pipefitter, filed a claim for compensation benefits alleging that he sustained a hearing loss due to his federal employment.

He became aware of his hearing loss on February 23, 2000 and realized his condition was causally related to his employment on March 2, 2001. Appellant retired in 1994.[1]

In a statement dated July 8, 2002, appellant noted that he worked at the naval shipyard commencing in 1972 as a pipefitter. He sustained a work-related injury to his head and back and was totally disabled from August 18, 1983 to January 12, 1992. Appellant indicated that he returned to work in 1992 to a part-time clerical position and retired in 1994. During his employment as a pipefitter he worked both in and out of ships and in the shop area and was exposed to noisy equipment from tools, grinder chippers for 8 hours per day and 40 hours per week. Appellant indicated that he used earplugs and experienced substantial hearing loss and ringing in his ears.

In support of his claim, appellant submitted treatment notes from Kaiser Permanente dated August 29, 1989 to July 8, 2002. In a July 8, 2002 report, Dr. David Cheng, a Board-certified otolaryngologist, noted appellant's complaints of tinnitus. He reviewed prior audiograms which revealed progressive bilateral sensory neural hearing loss and diagnosed sensory neural hearing loss with a history of noise exposure probably related to his age and presbycusis.

By letter dated March 12, 2003, the Office referred appellant and a statement of accepted facts to Dr. Eugene U. Taw, a Board-certified otolaryngologist, for an otologic examination and an audiological evaluation. Dr. Taw performed an otologic evaluation of appellant on May 12, 2003 and audiometric testing was conducted on his behalf on March 31, 2003. Testing at the frequency levels of 500, 1,000, 2,000 and 3,000 cycles per second revealed the following: right ear 10, 15, 20 and 35 decibels; left ear 15, 20, 30 and 45 decibels. He determined that appellant sustained bilateral high frequency sensorineural hearing loss that appeared to be progressive and tinnitus. Dr. Taw opined that appellant's hearing loss was medically related to the factors of his federal employment and that his tinnitus was caused by the high frequency sensorineural hearing loss. Additional impedance testing was performed on Dr. Taw's behalf on May 12, 2003 by an audiologist, which revealed normal tympanograms and ear canal volumes bilaterally. The audiologist noted that the ipsilateral acoustic reflexes were present for both ears.

In a report dated July 14, 2003, the Office medical adviser opined that appellant's condition of bilateral sensorneural hearing loss was consistent with hearing loss due to noise exposure. He noted that the schedule award determination should be deferred until the Office obtains audiograms from Kaiser Permanent approximate to appellant's date of retirement for evaluation.

On August 16, 2003 appellant indicated that he was not aware of his hearing condition or its relationship to his employment until he was treated by Dr. Cheng in March 2001. He submitted a duplicate report from Dr. Cheng dated July 8, 2002 and a duplicate audiogram dated June 3, 1992, which revealed left sensorneural hearing loss at 2000 Hz.

[1] Appellant filed a claim for an injury sustained on August 18, 1983, which was accepted by the Office in file number 13-2061182.

In a decision dated August 20, 2003, the Office denied appellant's claim on the grounds that the evidence of record failed to demonstrate that his claim was timely filed in accordance with 5 U.S.C. § 8122.

By letter dated September 10, 2003, appellant requested an oral hearing before an Office hearing representative. The hearing was held on April 19, 2004. He testified that he was part of an agency conservation program at the employing establishment. Appellant advised that he first sought treatment for ringing in his ears in 1998 and was made aware in 2000 that his hearing loss was due to noise exposure at his employment. He indicated that in 2000 the shipyard was closed and he was unsure of how to file a claim for his hearing loss.

By decision dated July 23, 2004, the Office hearing representative set aside the August 20, 2003 decision and remanded the case for further development. The hearing representative noted that appellant testified that he was a part of an agency hearing conservation program and advised that the Office failed to determine if there was a hearing conservation program at the employing establishment during appellant's employment and failed to obtain copies of audiograms performed during this period.

By letter dated September 21, 2004, the Office requested that the employing establishment provide information regarding hearing conservation programs during appellant's employment and any accompanying audiograms.

In a letter dated October 21, 2004, the employing establishment indicated that during appellant's employment there were no hearing surveillance program and, therefore, no available audiograms. The employing establishment noted that appellant's service compensation date was April 15, 1972 and his separation date was August 14, 1996. It was further noted that there were only a few medical reports in appellant's personnel file which reflected that appellant's hearing was normal.

In a decision dated December 16, 2004, the Office accepted appellant's claim for bilateral high frequency neurosensory hearing loss. In an accompanying memorandum, the Office determined that appellant sustained work-related bilateral high frequency neurosensory hearing loss. The Office noted that it was unclear whether the agency sponsored a program for hearing loss detection; however, the evidence supports that appellant was exposed to noise while working as a pipefitter from 1972 to 1982. The Office further determined that appellant became aware of his hearing condition in 2000 and filed a timely claim for hearing loss on July 31, 2002, which was within three years of awareness of his relationship between the claimed condition and his federal employment.

On July 22, 2005 appellant filed a claim for a schedule award. He submitted audiograms from Kaiser Permanente dated December 2, 1998 and March 21, 2001, which revealed mild high frequency hearing loss. The December 2, 1998 audiogram did not include frequencies at 3000 Hz.

On May 31, 2006 an Office medical adviser reviewed the medical records and determined that the diagnosed condition of bilateral high frequency neurosensory hearing loss was consistent with hearing loss due to noise exposure. He noted that the earliest audiogram in

the record was dated September 27, 1971, which revealed normal hearing. The medical adviser indicated that subsequent screening audiograms confirmed a progressive bilateral high frequency hearing loss. He noted that audiograms performed for Kaiser Permanente in 1992 and 1998 revealed a mild high frequency hearing loss in the left ear; however, it did not include frequencies at 3000 Hz. The medical adviser opined that for schedule award purposes he would use the audiogram dated March 21, 2001 as the representative audiogram because it was a complete test that included all the required frequencies and it was the first complete audiogram after the date of retirement. The March 21, 2001 audiogram revealed testing at the frequency levels of 500, 1,000, 2,000 and 3,000 cycles per second which revealed the following: right ear 15, 15, 25 and 35 decibels; left ear 15, 15, 30 and 45 decibels. He concluded that, in accordance with the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*, (A.M.A., *Guides*), appellant had a 0 percent monaural hearing loss in the right ear and a 1.9 percent monaural hearing loss in the left ear, for a .3 percent binaural hearing loss. He authorized hearing aids for the left ear.

In a decision dated August 10, 2006, the Office granted appellant a schedule award for a two percent monaural hearing loss for the left ear. The Office indicated that the highest rating for loss of one ear was used and was rounded to a two percent maximum award. The period of the award was from March 21 to 28, 2001.

LEGAL PRECEDENT

The schedule award provision of the Federal Employees' Compensation Act[2] and its implementing regulation[3] 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 regulation as the appropriate standard for evaluating schedule losses.[4]

The Office evaluates industrial hearing loss in accordance with the standards contained in the A.M.A., *Guides*.[5] Using the frequencies of 500, 1,000, 2,000 and 3,000 cycles per second, the losses at each frequency are added up and averaged.[6] 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.[7] The remaining

[2] 5 U.S.C. § 8107.

[3] 20 C.F.R. § 10.404 (1999).

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

[5] A.M.A., *Guides* 250 (5th ed. 2001).

[6] *Id.*

[7] *Id.*

amount is multiplied by a factor of 1.5 to arrive at the percentage of monaural hearing loss.[8] 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.[9] The Board has concurred in the Office's adoption of this standard for evaluating hearing loss.[10]

ANALYSIS

In the present case, the Office medical consultant did not calculate appellant's schedule award based on the audiogram dated March 31, 2003, which was performed on behalf of Dr. Taw. Rather, the Office medical consultant reviewed an earlier audiogram dated March 21, 2001 obtained by Kaiser Permanente after appellant's retirement in 1994.

Office procedures also contemplate that, while noise-induced hearing loss does not typically progress after exposure to noise ceases, an Office medical adviser or consultant will provide a well-rationalized opinion for selecting one audiogram over another.[11] The Board finds that Dr. Schindler provided sufficient rationale for selecting the March 21, 2001 audiogram over other available audiograms.

Dr. Schindler selected the audiogram of March 21, 2001 to determine appellant's employment-related hearing loss because it was the earliest complete 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. The Board finds that Dr. Schindler provided sound medical reasoning for selecting the March 21, 2001 audiogram on the grounds that it was more representative of appellant's employment-related hearing loss and it was the first complete audiogram after the date of retirement that included all the required frequencies. Dr. Schindler specifically noted that the December 2, 1998 audiogram was not used for schedule award purposes, even though it was closer in time to appellant's retirement date in 1994, because it did not include frequencies at 3000 Hz.[12] The earliest audiogram, dated June 3, 1992, could not compensate appellant for his future occupational exposure to hazardous noise and Dr. Schindler reported that other audiograms of record were incomplete and failed to provide frequencies at 3000 Hz. Dr. Schindler supported the reliability of the audiogram of March 21, 2001 by noting

[8] *Id.*

[9] *Id.*

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

[11] *See John C. Messick*, 25 ECAB 333 (1974) (holding that 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).

[12] *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).

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.[13]

An Office medical adviser applied the Office's standardized procedures to the March 21, 2001 audiogram performed for Kaiser Permanente. Testing for the right ear at the frequency levels of 500, 1,000, 2,000 and 3,000 cycles per second revealed decibels losses of 15, 15, 25 and 35 respectively. These decibels were totaled at 90 and were divided by 4 to obtain an average hearing loss at those cycles of 22.50 decibels. The average of 22.50 decibels was then reduced by 25 decibels (the first 25 decibels were discounted as discussed above) to equal 0, which was multiplied by the established factor of 1.5 to compute a 0 percent monaural 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 cycles per second revealed decibels losses of 15, 15, 30 and 45 respectively. These decibels were totaled at 105 and were divided by 4 to obtain the average hearing loss at those cycles of 26.25 decibels. The average of 26.25 decibels was then reduced by 25 decibels (the first 25 decibels were discounted as discussed above) to equal 1.25, which was multiplied by the established factor of 1.5 to compute a 1.9 percent monaural hearing loss for the left ear. The lesser loss of 0 is multiplied by 5, then added to the greater loss of 1.9 and the total is divided by 6 to arrive at the amount of the binaural hearing loss of .3 percent.

On appeal, appellant asserts that the Office improperly based his schedule award on an audiogram performed on March 21, 2001 rather than audiograms performed on behalf of Dr. Taw on March 31 and May 12, 2003 or Dr. Cheng. As noted above, Dr. Schindler selected the audiogram of March 21, 2001 to determine appellant's employment-related hearing loss because it was the earliest complete 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. Dr. Schindler further noted that the audiogram of December 2, 1998 was incomplete and the audiogram of June 3, 1992 could not compensate appellant for his future occupational exposure to hazardous noise until his retirement in 1996. Likewise, the audiogram performed on behalf of the second opinion physician, Dr. Taw on March 31, 2003 would not be representative of appellant's work-related hearing loss in 1996 and the examination on May 12, 2003 was not an audiogram, but rather acoustic reflex testing.

Appellant also generally contends that his schedule award did not compensate him for the appropriate number of weeks. A schedule award under the Act is paid for permanent impairment involving the loss or loss of use of certain members of the body. The schedule award provides for the payment of compensation for a specific number of weeks as prescribed in the statute.[14] With respect to schedule awards for hearing impairments, the pertinent provision of the Act provides that, for a total or 100 percent loss of hearing in one ear, an employee shall receive 52 weeks of compensation.[15] In the instant case, appellant does not have a total or 100 percent monaural hearing loss, but rather at most a 1.9 percent monaural hearing loss, which the Office

[13] *See Marco A. Padilla*, 51 ECAB 202, (1999) (where the Office medical adviser provided sufficient rationale for selecting an audiogram on the grounds that it was more representative of appellant's employment-related hearing loss than were those submitted prior to retirement and those that were incomplete and undated).

[14] 5 U.S.C. § 8107.

[15] *Id*. at § 8107(c)(13)(A).

has determined was employment related. As appellant has no more than a 1.9 percent loss of use of his left ear, he is entitled to 1.9 percent of the 52 weeks of compensation, which is .988 weeks. The Office, therefore, properly determined the number of weeks of compensation for which appellant is entitled.

The Board finds that the Office medical adviser applied the proper standards to the March 21, 2001 audiogram. Under the Office's standardized procedures, there is no basis on which to grant more than a two percent monaural hearing loss.

CONCLUSION

The Board finds that the Office properly determined that appellant sustained a two percent monaural hearing loss.

ORDER

IT IS HEREBY ORDERED THAT the August 10, 2006 decision of the Office of Workers' Compensation Programs is 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