

**United States Department of Labor
Employees' Compensation Appeals Board**

J.B., Appellant

and

**DEPARTMENT OF THE NAVY, NAVAL
WEAPONS STATION, Goose Creek, SC,
Employer**

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**Docket No. 08-1735
Issued: January 27, 2009**

Appearances:

*David G. Jennings, Esq., for the appellant
Office of Solicitor, for the Director*

Case Submitted on the Record

DECISION AND ORDER

Before:

DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On May 27, 2008 appellant, through his representative, filed a timely appeal from an April 7, 2008 Office of Workers' Compensation Programs' schedule award decision. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the schedule award issue.

ISSUE

The issue is whether appellant met his burden of proof in establishing that he had a ratable hearing loss entitling him to a schedule award and whether he is entitled to hearing aids.

FACTUAL HISTORY

On September 9, 2007 appellant, then a 57-year-old retired firefighter, filed an occupational disease claim alleging that he sustained a loss of hearing in both ears due to high noise levels in the performance of duty. He first became aware of his hearing loss and related it to his employment on January 1, 1995, but was not aware that he could file a claim at that time.

The employing establishment stated that appellant's last exposure to workplace noise was June 30, 2007, the date on which he retired.

On November 5, 2007 the Office requested additional evidence. Subsequently, appellant and the employing establishment submitted evidence demonstrating that appellant was employed as a firefighter at the employing establishment from 1996-2007 and was exposed to noise from various sources during that period. Appellant was also a firefighter at the Charleston Naval Shipyard from 1983 to 1996 and exposed to noise from various sources. In addition, he submitted audiograms dated September 20, 1983, August 28, 1989, May 20, 2005 and June 28, 2006.

On February 22, 2008 the Office referred appellant, together with a statement of accepted facts, to Dr. Robert Marwick, Board-certified in otolaryngology, for a second opinion examination.

In a March 18, 2008 report, Dr. Marwick noted that a September 20, 1983 baseline audiogram revealed a moderate high tone loss in the left ear and a moderate-to-severe high tone loss in the right ear. He compared the baseline audiogram to the June 28, 2007 audiogram and stated that the findings exceeded the anticipated presbycusis curve of a 57 year old. Dr. Marwick concluded that the noise to which appellant was exposed in the workplace was sufficient to cause his hearing loss. He diagnosed mild-to-severe sensorineural hearing loss of the right ear and moderate to profound sensorineural hearing loss of the left ear. Dr. Marwick also recommended binaural amplification. A March 18, 2008 audiogram performed on his behalf showed the following decibel losses at frequencies of 500, 1,000, 2,000 and 3,000 hertz (Hz): 5, 15, 10 and 35 for the right ear and 5, 10, 10 and 60 for the left ear.

On April 4, 2008 an Office medical adviser reviewed Dr. Marwick's March 18, 2008 otologic examination report. Dr. Marwick applied the audiometric data to the Office's standard for evaluating hearing loss and determined that appellant had a zero percent monaural hearing loss in the left ear and a zero percent monaural hearing loss in the right ear. The medical adviser concluded that appellant had a nonratable binaural hearing loss. The medical adviser further opined that hearing aids should not be authorized.

In an April 7, 2008 decision, the Office denied appellant's schedule award claim and hearing aids, finding that his hearing loss was not severe enough to be considered ratable and that he would not benefit from hearing aids.

LEGAL PRECEDENT

The schedule award provision of the Federal Employees' Compensation Act¹ and its implementing regulations 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. The Act, however, does not specify the manner in which the percentage loss of a member shall be determined. The method used in making such determination is a matter which rests in the sound discretion of the Office. For consistent results and to ensure equal justice, the

¹ 5 U.S.C. §§ 8101-8193.

Board has authorized the use of a single set of tables so that there may be uniform standards applicable to all claimants. The American Medical Association, *Guides to the Evaluation of Permanent Impairment* (5th ed. 2001), has been adopted by the Office for evaluating schedule losses and the Board has concurred in such adoption.²

The Office evaluates industrial hearing loss in accordance with the standards contained in the A.M.A., *Guides*. 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. 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. The remaining amount is multiplied by a factor of 1.5 to arrive at the percentage of monaural hearing loss. 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. The Board has concurred in the Office’s adoption of this standard for evaluating hearing loss.³

ANALYSIS

Appellant submitted a claim for hearing loss and the Office developed the claim by referring him to Dr. Marwick. On March 18, 2008 Dr. Marwick opined that noise exposure in appellant’s workplace was sufficient to cause hearing loss in both ears. An audiogram was performed and Dr. Marwick recommended binaural amplification for appellant.

An Office medical adviser applied the Office’s standard procedures to the March 18, 2008 audiogram. It tested decibel losses at 500, 1,000, 2,000 and 3,000 cycles per seconds and recorded decibel losses of 5, 15, 10 and 35 respectively in the right ear. The total decibel loss in the right ear is 65 decibels. When divided by 4, the result is an average hearing loss of 16.25 decibels. The average loss of 16.25 decibels is reduced by the fence of 25 decibels to equal 0, which when multiplied by the established factor of 1.5, resulted in 0 percent impairment of the right ear. The audiogram tested decibel losses for the left ear at 500, 1,000, 2,000 and 3,000 cycles per second and recorded decibel losses of 5, 10, 10 and 60 respectively for a total decibel loss of 85 decibels. When divided by 4, the result is an average hearing loss of 21.25 decibels. The average loss of 21.25 decibels is reduced by the fence of 25 decibels to equal 0, which when multiplied by the established factor of 1.5, resulted in 0 percent impairment of the left ear. The Board finds that the Office medical adviser properly applied the standards to the findings of the March 18, 2008 audiogram and concluded that appellant did not have a ratable hearing loss for schedule award purposes.

On appeal, appellant disputes the Office’s denial of his request for hearing aids. The Board notes that, following medical evaluation of a claim, if the hearing loss is determined to be nonratable for schedule award purposes, other benefits may still be payable if any causally

² *R.D.*, 59 ECAB ____ (Docket No. 07-379, issued October 2, 2007); *Bernard Babcock, Jr.*, 52 ECAB 143 (2000).

³ *E.S.*, 59 ECAB ____ (Docket No. 07-1587, issued December 10, 2007); *Donald Stockstad*, 53 ECAB 301 (2002), *petition for recon. granted (modifying prior decision)*, Docket No. 01-1570 (issued August 13, 2002).

related hearing loss exists, such as a hearing aid.⁴ Dr. Marwick's report indicated that the noise at appellant's workplace was sufficient to cause his hearing loss and he recommended binaural amplification for appellant. However, the Office medical adviser noted that hearing aids should not be authorized but did not provide any explanation for his disagreement with Dr. Marwick. The Office's decision denying hearing aids provided no findings for why hearing aids were not authorized. Therefore, the record is unclear regarding the reason why it declined to authorize hearing aids.

The Board notes that proceedings under the Act are not adversarial in nature. The Office shares in the responsibility to develop the evidence and has an obligation to see that justice is done.⁵ Accordingly, the case will be remanded to the Office for further development on the question of whether appellant is entitled to hearing aids. Following this and such other development as is deemed necessary, the Office shall issue an appropriate merit decision regarding appellant's entitlement to hearing aids.

CONCLUSION

The Board finds that appellant does not have a ratable hearing loss for schedule award purposes. The Board also finds that the case must be remanded to the Office for further development on the question of whether hearing aids should be authorized.⁶

⁴ See Federal (FECA) Procedure Manual, Part 3 -- Medical, *Medical Services and Supplies*, Chapter 3.400.3(d)(2) (October 1990); *Raymond VanNett*, 44 ECAB 480 (1993).

⁵ *Lyle Dayberry*, 49 ECAB 369, 372 (1998). See also *VanNett*, *id.* at 483 (where the Office began to develop appellant's hearing loss claim but did not complete such development, the case was remanded for further evidentiary development).

⁶ The Board notes that appellant submitted new evidence after the Office issued its decision. However, the Board may only review evidence that was in the record at the time the Office issued its final decision. See 20 C.F.R. § 501.2(c).

ORDER

IT IS HEREBY ORDERED THAT April 7, 2008 decision of the Office of Workers' Compensation Programs is affirmed, in part, and set aside and remanded in part.

Issued: January 27, 2009
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

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

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