U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of PHILLIP MARTIN and DEPARTMENT OF HOMELAND SECURITY, BUREAU OF CUSTOMS & BORDER PROTECTION, Miami, FL

Docket No. 03-2106; Submitted on the Record;

Issued December 11, 2003

DECISION and ORDER

ALEC J. KOROMILAS, DAVID S. GERSON

A. PETER KANJORSKI

The issues are: (1) whether appellant has a ratable hearing loss causally related to his federal employment; and (2) whether the Office of Workers' Compensation Programs properly determined that appellant would not benefit from the use of hearing aids.

On February 3, 2003 appellant, then a 49-year-old special agent/criminal investigator, filed an occupational disease claim, alleging that his hearing loss and tinnitus were employment related. In support of his claim, appellant submitted an accompanying statement in which he described his employment history and the employment conditions that he believed caused his condition and a medical report from Dr. Lee M. Mandel, a Board-certified otolaryngologist.

By letter dated February 19, 2003, the Office informed appellant of the type evidence needed to support his claim. In response he submitted a March 3, 2003 statement and *inter alia*, an audiogram dated January 27, 2003. Further, appellant included a duplicate of the January 27, 2003 report from Dr. Mandel, along with a February 24, 2003 report. In his February 24, 2003 report, Dr. Mandel indicated that appellant had tinnitus which was associated with his employment-related hearing loss and indicated that appellant would benefit from a hearing aid in his right ear.

On May 22, 2003, the Office referred appellant, along with the medical record and a statement of accepted facts, to Dr. Frederic Pullen, a Board-certified otolaryngologist, for an evaluation including an audiogram. Dr. Pullen submitted a report detailing his examination on

June 9, 2003, with an accompanying audiogram made on the same day.[1] The audiogram reflected 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, 15 and 55 decibels; left ear 10, 10, 10 and 10 decibels. Dr. Pullen diagnosed acoustic trauma and noise-induced hearing loss which he opined were employment related.

The case was then referred to an Office medical adviser on June 18, 2003 to determine if appellant was entitled to a schedule award. The Office medical adviser, on June 20, 2003, determined that appellant had bilateral sensorineural hearing loss with a zero percent schedule award. In response to whether a hearing aid was authorized he checked the box "no."

On July 1, 2003 the Office accepted that appellant sustained employment-related noise-induced hearing loss and found that appellant was not entitled to a schedule award as his hearing loss was not ratable.

The Board finds that appellant has not established a ratable hearing loss in the instant case.

Section 8107 of the Federal Employees' Compensation 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.[2] 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 under the law, good administrative practice requires the use of uniform standards applicable to all claimants. The implementing regulations have adopted the American Medical Association, *Guides to the Evaluation of Permanent Impairment* as the appropriate standard for evaluating schedule losses.[3]

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.[4] 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.[5] The remaining amount is multiplied by a factor of 1.5 to arrive at the percentage of monaural hearing loss.[6] The binaural loss is determined by calculating the loss in each ear using the formula for monaural loss; the lesser loss

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[1] The record also contains a certification of calibration of the audiometry equipment and of the audiologist, Constance Cebeza.

[2] 5 U.S.C. § 8107.

[3] 20 C.F.R. § 10.404 (1999). On January 29, 2001 the Office announced that, effective February 1, 2001, schedule awards would be determined in accordance with the A.M.A., *Guides* (5th ed. 2001). FECA Bulletin No. 01- 05 (January 29, 2001). This action was in accordance with the authority granted the Office under 20 C.F.R. § 10.404.

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

[5] *Id.*

[6] *Id.*

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.[7] The Board has concurred in the Office's adoption of this standard for evaluating hearing loss.[8]

In reviewing appellant's June 9, 2003 audiogram, the frequency levels recorded at 500, 1,000, 2,000 and 3,000 hertz for the right ear reveal decibel losses of 15, 15, 15 and 55, respectively, for a total of 100 decibels. When divided by 4, the result is an average hearing loss of 25 decibels, less the fence of 25 decibels which equates to 0. Appellant thus, does not demonstrate a ratable hearing loss in the right ear. Testing for the left ear at the frequency levels of 500, 1,000, 2,000 and 3,000 hertz revealed decibel losses of 10, 10, 10 and 10 respectively, for a total of 40 decibels. Thus, utilizing the same above-noted formula, the audiogram does not demonstrate a ratable hearing loss in the left ear.

Finally, appellant contends that he is entitled to compensation for his employment-related tinnitus. In his initial claim form, appellant described loss of hearing and tinnitus.

Regarding tinnitus, the A.M.A., *Guides* states:

> "*Tinnitus* in the presence of unilateral or bilateral hearing impairment may impair speech discrimination. Therefore, add up to 5 [percent] for tinnitus in the presence of measurable hearing loss if the tinnitus impacts the ability to perform activities of daily living."[9]

As appellant's hearing loss is not ratable in the instant case, a threshold element for entitlement to an award due to tinnitus, appellant is not entitled to a schedule award for his tinnitus.

The Board further finds this case is not in posture for decision regarding whether appellant is entitled to a hearing aid.

Section 8103(a) of the Act states in pertinent part "the United States shall furnish to an employee who is injured while in the performance of duty, the services, appliances and supplies prescribed or recommended by a qualified physician, which the Secretary of Labor considers likely to cure, give relief, reduce the degree or the period of any disability or aid in lessening the amount of any monthly compensation."[10] The Office must, therefore, exercise discretion in determining whether the particular service, appliance or supply is likely to effect the purposes specified in the Act.

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[7] *Id.*

[8] *Donald E. Stockstad*, 53 ECAB ___ (Docket No. 01-1570, issued January 23, 2002); *petition for recon.* granted (modifying prior decision), Docket No. 01-1570 (issued August 13, 2002).

[9] A.M.A., *Guides*, *supra* note 4 at 246.

[10] 5 U.S.C. § 8103(a).

In its denial of authorization for hearing aids, the Office made no reference to Dr. Mandel's January 27 or February 24, 2003 reports recommending at least a right-sided hearing aid.[11] Further, the second opinion physician did not address the issue of hearing aids and the Office medical adviser did not explain the basis for his reasoning that hearing aids were not advised. Proceedings under the Act are not adversarial in nature, nor is the Office a disinterested arbiter. The Office shares responsibility in the development of the evidence to see that justice is done.[12]

The unaddressed evidence of record reveals that appellant may require hearing aids, particularly on the right side. While the medical reports lack sufficient medical rationale, they are sufficient to require further development of the medical evidence.[13]

The Board will set aside in part the Office's July 1, 2003 decision and remand the case for further development of the evidence regarding hearing aids. The Office shall then properly exercise its discretion and issue an appropriate final decision of appellant's request for hearing aids.

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[11] The Office's procedure manual provides that hearing aids will be authorized when hearing loss has resulted from an accepted injury or disease if the attending physician so recommends. Trial or rental periods should be encouraged as many persons do not find their use satisfactory. Federal (FECA) Procedure Manual, Part 3 -- Medical, Medical Services and Supplies, Chapter 3.400(d)(2) (October 1995).

[12] Jimmy A. Hammons, 51 ECAB 219(1999).

[13] *Horrace Langhorne*, 29 ECAB 820 (1978).

The decision of the Office of Workers' Compensation Programs dated July 1, 2003 is hereby affirmed in part and remanded in part.

Dated, Washington, DC
December 11, 2003

Alec J. Koromilas
Chairman

David S. Gerson
Alternate Member

A. Peter Kanjorski
Alternate Member