United States Department of Labor
Employees' Compensation Appeals Board

JOHN E. MORNINGSTAR, Appellant	)	
and	)	**Docket No. 05-523**
	)	**Issued: July 5, 2005**
DEPARTMENT OF THE NAVY, NAVAL AIR DEPOT, Jacksonville, FL, Employer	)	

Appearances:
John E. Morningstar, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chairman
COLLEEN DUFFY KIKO, Member
DAVID S. GERSON, Alternate Member

JURISDICTION

On December 27, 2004 appellant filed a timely appeal from the November 2, 2004 merit decision of the Office of Workers' Compensation Programs, which found that he did not sustain a ratable hearing loss entitling him to a schedule award and denied authorization for hearing aids. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this schedule award case.

ISSUES

The issues are: (1) whether appellant has established that he sustained a ratable hearing loss entitling him to a schedule award; and (2) whether the Office properly denied authorization for hearing aids.

FACTUAL HISTORY

On August 16, 2004 appellant, then a 60-year-old machinist, filed an occupational disease claim alleging that on April 13, 2004 he first realized that his hearing loss and tinnitus was caused by his federal employment. He stated that for 38 years he worked in the machine

shop and for the last 22 years he was exposed to excessive machine noise for a minimum of 8 hours a day, 5 days a week. Appellant became aware of his hearing loss when he had to ask people to repeat what they said.

By letter dated August 20, 2004, the Office requested that the employing establishment respond to appellant's allegation and provide information about the locations of the alleged noise exposure, the decibel and frequency level of noise at each job site and the period of exposure and type of ear protection provided. The Office further requested a list of all positions held by appellant and dates worked, medical examinations pertaining to hearing or ear problems including a preemployment examination and all audiograms and the date of appellant's last exposure to hazardous noise.

By letter of the same date, the Office requested that appellant submit additional factual information including a history of his federal and nonfederal employment, military service and exposure to noise for each job. The Office also requested a description of safety devices provided to protect against noise exposure, the date of last exposure to hazardous noise, a history of all previous ear or hearing problems and medical treatment and a description of hobbies which involved exposure to loud noise.

The employing establishment submitted employment records which included appellant's current date-of-injury pay rate, audiogram results covering the period September 22, 1982 through April 13, 2004, a description of the machinist position and a list of jobs held by appellant. In an August 25, 2005 letter, appellant stated that he was still exposed to hazardous noise at work and that he had no previous ear or hearing problems.[1]

On September 27, 2004 the Office referred appellant together with his medical records, a statement of accepted facts and a list of questions to be addressed to Dr. Robert M. Loper, a Board-certified otolaryngologist, for a second opinion medical examination.

On October 15, 2004 Dr. Loper submitted a medical report noting that audiometric data from 1982 showed medically normal hearing bilaterally at all frequencies except at 3,000 hertz (Hz) in the left ear and 4,000 Hz in the right ear where there was a mild loss at 30 decibels. He further noted that present audiometric findings showed medically normal hearing to 2,000 Hz bilaterally with a moderate sensorineural hearing loss at 3,000 Hz and above. Dr. Loper stated that appellant's hearing loss was not consistent with presbycusis but that workplace exposure to noise was sufficient to have caused this hearing loss. He diagnosed moderate high frequency sensorineural hearing loss at 3,000 Hz and above bilaterally due to noise exposure in appellant's federal civilian employment. He explained that this was characteristic of a noise-induced hearing loss with hearing preserved in the low frequencies and a steep loss of hearing in the high frequencies. Dr. Loper recommended an annual audiometric evaluation and enrollment in a hearing conservation program. An October 12, 2004 audiogram performed by an audiologist whose signature is illegible accompanied Dr. Loper's report. Testing of the right ear at

[1] The Board notes that it appears appellant inadvertently dated his response August 25, 2005 rather than August 25, 2004 as he referenced the Office's August 20, 2004 developmental letter and the response was received by the Office on August 30, 2004.

frequency levels of 500, 1,000, 2,000 and 3,000 Hz revealed decibel losses of 10, 15, 10 and 50, respectively and in the left ear decibel losses of 5, 10, 20 and 50, respectively.

An investigation of appellant's claim by the employing establishment revealed that during his last 22 years of employment, he was potentially exposed to hazardous noise while working in the power plant areas. The employing establishment noted that its employees were enrolled in a hearing conservation program and that hearing protection had been made available to them for many years. The employing establishment further noted the level of noise exposure in the engine machine and mills shops and during the performance of parts programming and fuel accessories work. The employing establishment concluded that appellant had been significantly exposed to noise during the period October 4, 1982 when he began to work in its facility through the present. The exact extent of the exposure would depend on the particular day, operation being conducted, appellant's involvement with the operation and/or relative location and duration of the exposure. The employing establishment stated that appellant was a candidate for a hearing aid in both ears and recommended that he see his private otolaryngologist to rule out any underlying medical conditions.

On October 27, 2004 an Office medical adviser reviewed Dr. Loper's October 15, 2004 report and audiogram results to find that appellant reached maximum medical improvement on October 12, 2004 and he had a zero percent binaural sensorineural hearing loss for schedule award purposes. The Office medical adviser checked the block marked "no" in response to the question as to whether a hearing aid was authorized.

By decision dated November 2, 2004, the Office accepted appellant's claim for bilateral sensorineural hearing loss. The Office, however, found that he did not sustain a ratable hearing loss based on the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (5th ed. 2001). The Office determined that appellant was not entitled to a schedule award under the Federal Employees' Compensation Act. Further, the Office found that the weight of the medical evidence established that he would not benefit from hearing aids and, therefore, denied his claim for additional medical benefits.

LEGAL PRECEDENT -- ISSUE 1

The schedule award provision of the Act[2] and its implementing regulation[3] sets forth the number of weeks of compensation to be paid for permanent loss, or loss of use of the members of the body listed in the schedule. Where the loss of use is less than 100 percent, the amount of compensation is paid in proportion to the percentage of loss of use.[4] However, neither the Act nor the regulations specify the manner in which the percentage of impairment shall be determined. For consistent results and to ensure equal justice for all claimants, the Office

[2] 5 U.S.C. §§ 8101-8193; *see* 5 U.S.C. § 8107(c).

[3] 20 C.F.R. § 10.404.

[4] 5 U.S.C. § 8107(c)(19).

adopted the A.M.A., *Guides* as a standard for determining the percentage of impairment and the Board has concurred in such adoption.[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 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

Dr. Loper, the second opinion specialist, examined appellant and submitted a report on October 15, 2004 finding that he sustained moderate high frequency bilateral sensorineural hearing loss related to exposure to noise in the course of his federal employment. The Office medical adviser applied the Office's standardized procedures to the October 12, 2004 audiogram obtained by Dr. Loper. Testing of the right ear at frequency levels of 500, 1,000, 2,000 and 3,000 Hz revealed decibel losses of 10, 15, 10 and 50, respectively for a total of 85 decibels. When divided by 4, the result is an average hearing loss of 21.25 decibels. The average loss of 21.25 is reduced by 25 decibels to equal 0, which, when multiplied by the established factor of 1.5, results in a 0 percent hearing loss for the right ear.

Testing of the left ear at the same above-noted frequency levels, revealed decibel losses of 5, 10, 20 and 50, respectively, for a total 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 25 decibels to equal 0, which, when multiplied by the established factor of 1.5, results in a 0 percent hearing loss for the left ear.

The Board finds that the Office medical adviser properly applied the Office's standards to the findings provided in Dr. Loper's October 15, 2004 report and accompanying audiogram.

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[5] 20 C.F.R. § 10.404 (1999); *Donald E. Stockstad,* 53 ECAB 301 (2002), *petition for recon. granted* (*modifying prior decision*), Docket No. 01-1570 (issued August 13, 2002).

[6] A.M.A., *Guides* at 250.

[7] *Id.*

[8] *Id.*

[9] *Id.*

[10] *Id.*

[11] *See Donald E. Stockstad, supra* note 5.

This resulted in a calculation of zero percent binaural hearing loss in the right and left ears, which is not ratable under these standards and, therefore, is not compensable for schedule award purposes.

The audiograms performed by the employing establishment are not probative on the issue of appellant's entitlement to a schedule award as they are not accompanied by an otological evaluation[12] and did not otherwise conform to the Office's standards. Therefore, the Board finds that they are insufficient to meet appellant's burden of proof in establishing entitlement to a schedule award.

Regarding appellant's allegation that he sustained tinnitus due to factors of his federal employment, the A.M.A., *Guides* provides that tinnitus in the presence of unilateral or bilateral hearing impairment may impair speech discrimination: "Therefore, the [A.M.A.,] *Guides* instruct that one should add up to five percent for tinnitus in the presence of measurable hearing loss if the tinnitus impacts the ability to perform activities of daily living."[13] As the October 12, 2004 audiogram reveals no unilateral or bilateral hearing impairment, appellant is not entitled to schedule award compensation for tinnitus.

LEGAL PRECEDENT -- ISSUE 2

Section 8103(a) of the Act provides that 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.[14] 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.[15]

ANALYSIS -- ISSUE 2

Dr. Loper opined that appellant sustained an employment-related moderate high frequency bilateral sensorineural hearing loss but that hearing aids were not recommended at that time. He recommended annual audiometric evaluations and enrollment in a hearing conservation program. After having reviewed Dr. Loper's report and accompanying audiogram, the Office medical adviser checked the block marked "no" in response to the question as to whether a hearing aid was authorized. There is no medical evidence of record recommending that appellant be provided with a hearing aid or any other medical treatment for his employment-related hearing loss. Therefore, the Board finds that under these circumstances, the Office acted well within its discretion under section 8103(a) to deny authorization for hearing aids. Should the need for such medical care arise in the future, appellant may file an appropriate claim at that time.

[12] *See George L. Cooper*, 40 ECAB 296 (1988).

[13] A.M.A., *Guides* at 246.

[14] 5 U.S.C. § 8103(a).

[15] *Marjorie S. Geer*, 39 ECAB 1099 (1988) (the Office has broad discretionary authority in the administration of the Act and must exercise that discretion to achieve the objectives of section 8103).

CONCLUSION

The Board finds that appellant has failed to establish that he sustained a ratable hearing loss entitling him to a schedule award. The Board further finds that the Office properly denied authorization for hearing aids.

ORDER

IT IS HEREBY ORDERED THAT the November 2, 2004 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 5, 2005
Washington, DC

Alec J. Koromilas
Chairman

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member