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R.D., Appellant)	
)	
and)	Docket No. 06-547
)	Issued: October 4, 2006
TENNESSEE VALLEY AUTHORITY,)	
WIDOWS CREEK FOSSIL PLANT,)	
Stevenson, AL, Employer)	
)	

Case Submitted on the Record

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge

On January 11, 2006 appellant filed a timely appeal from a June 28, 2005 decision of the Office of Workers' Compensation Programs denying an augmented schedule award claim and a November 29, 2005 decision affirming this denial. Pursuant to 20 C.F.R. §§ 501.2(c) and 501(d)(3), the Board has jurisdiction over the merits of the claim.

The issue is whether appellant has established that he sustained greater than a 13 percent binaural hearing loss, for which he received a schedule award.

On November 4, 1998 appellant, then a 53-year-old maintenance mechanic machinist, filed an occupational disease claim Form CA-2 asserting that he sustained binaural hearing loss in the performance of duty on or before January 1, 1988 due to hazardous noise exposure. Appellant continued to work at the employing establishment from 1988 to 1998 and did not stop work at the time of his claim. He submitted annual audiometric test results from 1974 to 1998

showing a gradually worsening high frequency bilateral hearing loss. The employing establishment acknowledged that appellant was frequently exposed to tool and machine noise from 76 to 100 decibels from 8 to 15 hours a day, 5 to 7 days per week and that he was last exposed to hazardous noise on November 4, 1998.

On July 22, 1999 the Office referred appellant and a statement of accepted facts to Dr. Jeffrey Paffrath, a Board-certified otolaryngologist, for a second opinion examination. In an August 6, 1999 report, Dr. Paffrath opined that appellant had a binaural high frequency sensorineural hearing loss with “associated tinnitus bilaterally,” caused by prolonged hazardous noise exposure at work. He also obtained audiometric test results. Testing for the right ear at the frequency levels of 500, 1,000, 2,000 and 3,000 cycles per second (cps) revealed decibel losses of 15, 20, 25 and 65 respectively. Testing for the left ear at the frequency levels of 500, 1,000, 2,000 and 3,000 cps revealed decibel losses of 20, 35, 65 and 60 respectively.

On August 20, 1999 the Office referred the record to an Office medical adviser to determine the extent of appellant’s hearing loss. In an August 23, 1999 report, the Office medical adviser determined that appellant had a ratable bilateral sensorineural hearing loss. Testing for the right ear at the frequency levels of 500, 1,000, 2,000 and 3,000 cps revealed decibel losses of 15, 20, 25 and 65 respectively. These decibels were totaled at 125 and divided by 4 to obtain the average hearing loss at those cycles of 31.25 decibels. The average of 31.25 decibels was then reduced by 25 decibels to equal 6.25, which was multiplied by the established factor of 1.5 to compute a 9.38 percent 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 cps revealed decibel losses of 20, 35, 65 and 60 respectively. These decibels were totaled at 180 and were divided by 4 to obtain the average hearing loss at those cycles of 45 decibels. The average of 45 decibels was then reduced by 25 decibels to equal 20, which was multiplied by the established factor of 1.5 to compute a 30 percent loss of hearing for the left ear. The Office medical adviser then computed the binaural hearing loss by multiplying the lesser loss, 9.38 by 5, added this to the greater loss of 30 and divided this figure by 6 to arrive at a 12.81 percent binaural hearing loss, rounded up to equal a 13 percent binaural hearing loss.

On October 6, 1999 appellant claimed a schedule award.

By decision dated November 15, 1999, the Office awarded appellant a schedule award for a 13 percent binaural hearing loss. The period of the award ran from August 6, 1999 to February 3, 2000.

Appellant retired from the employing establishment on December 1, 1999.

On April 26, 2005 appellant filed a claim for an additional schedule award and submitted additional medical evidence.¹

In a February 4, 2005 report, Dr. John J. Jernigan, an attending Board-certified otolaryngologist, provided a history of 27 years of industrial noise exposure at the employing

¹ Appellant also submitted medical records regarding knee and wrist conditions. These reports do not address appellant’s hearing loss.

establishment. Dr. Jernigan related appellant's complaints of social problems associated with his hearing loss, with communication "almost impossible in the left ear." He noted "tinnitus in both ears," greater on the left. Dr. Jernigan obtained audiometry and diagnosed a high frequency bilateral sensorineural hearing loss, mild to profound on the right and moderately severe to profound on the left. Speech discrimination was 56 percent on the right and 44 percent on the left.

In a February 4, 2005 report, Haley Wagner, an audiologist, noted audiometric findings. Testing for the right ear at the frequency levels of 500, 1,000, 2,000 and 3,000 cps revealed decibel losses of 15, 25, 30 and 75 respectively. Testing for the left ear at the frequency levels of 500, 1,000, 2,000 and 3,000 cps revealed decibel losses of 25, 25, 65 and 90 decibels. Ms. Wagner opined that these losses equaled a 13.1 percent hearing loss in the right ear and a 35.6 percent loss of hearing in the left ear. Ms. Wagner calculated a binaural hearing loss of 16.9 percent, with an additional 5 percent for tinnitus.²

By decision dated June 28, 2005, the Office denied appellant's April 26, 2005 schedule award claim on the grounds that additional hazardous occupational noise exposure from August 6 to December 1, 1999 constituted new work factors such that he must file a new occupational disease claim.

In a November 12, 2005 letter, appellant requested reconsideration. He submitted additional evidence.³

In October 7, 2005 reports, Dr. Jernigan diagnosed a high frequency bilateral sensorineural hearing loss, left worse than right, "consistent with exposure to hazardous noise levels." Dr. Jernigan opined that the February 2005 audiometry "reveal[ed] a minimal amount of progression since the test done in 1998."

On November 22, 2005 the Office referred Dr. Jernigan's report and the February 4, 2005 audiogram to an Office medical adviser to determine if appellant had an increased binaural hearing loss. The Office requested that the Office medical adviser indicate if appellant had an increased hearing loss "as a result of the work injury of November 4, 1998, beyond the previously award[ed] 18 percent." In a November 23, 2005 report, the Office medical adviser opined that the February 4, 2005 audiogram demonstrated a 17 percent binaural hearing loss according to the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*). He stated that, therefore, there was "no increase beyond prior award of 18 percent."

By decision dated November 29, 2005, the Office denied modification on the grounds that the additional evidence submitted did not demonstrate an increased hearing loss. The Office

² Ms. Wagner recommended binaural digital behind-the-ear hearing aids with directional microphones and digital feedback suppression. The Office authorized purchase of these hearing aids on March 17, 2005.

³ In October 25 and November 12, 2005 statements, appellant contended that the Office should have relied on Dr. Jernigan's opinion and not that of Dr. Paffrath. He also submitted unsigned May 22, 1998 audiometric test results. As this form contains no signature identifying its author, it cannot constitute probative medical evidence in this case. *Merton J. Sills*, 39 ECAB 572 (1988).

found that the additional occupational noise exposure from August 6 to December 1, 1999 necessitated filing a new occupational disease claim.

LEGAL PRECEDENT

The schedule award provision of the Federal Employees' Compensation Act⁴ provides for compensation to employees sustaining permanent loss, or loss of use, of specified members 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 Board has authorized the use of a single set of tables so that there may be uniform standards applicable to all claimants. The A.M.A., *Guides* (5th ed. 2001), has been adopted by the Office for evaluating schedule losses 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 cps the losses at each frequency are added up and averaged.⁷ The remaining 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

The Office accepted that appellant sustained a 13 percent binaural high frequency sensorineural hearing loss, for which he received a schedule award on November 15, 1999. He later claimed an augmented schedule award and submitted new medical evidence. Dr. Jernigan, an attending Board-certified otolaryngologist, submitted February 4 and October 7, 2005 reports opining that appellant's hearing loss had worsened since 1998 and that this loss was due to appellant's history of hazardous occupational noise exposure.

⁴ 5 U.S.C. §§ 8101-8193.

⁵ See 20 C.F.R. § 10.404; *Bernard A. Babcock, Jr.*, 52 ECAB 143 (2000).

⁶ A.M.A., *Guides* 250.

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Reynaldo R. Lichtenberger*, 52 ECAB 462 (2001). The Board notes that while the November 15, 1999 schedule award was calculated while the fourth edition of the A.M.A., *Guides* was still in effect, this is nondispositive on the present appeal.

In a June 28, 2005 decision, the Office denied appellant's claim for an augmented schedule award on the grounds that presumed additional occupational noise exposure from August 6 to December 1, 1999 required him to file a new occupational disease claim. However, the Board finds that this decision was in error. The employing establishment stated that appellant was last exposed to hazardous noise on November 4, 1998. Thus, there is no evidence of any hazardous occupational noise exposures from August 6 to December 1, 1999.

Pursuant to appellant's November 12, 2005 request for reconsideration, the Office referred Dr. Jernigan's reports to an Office medical adviser to determine if the accepted binaural hearing loss had worsened. However, in its referral letter, the Office misstated the accepted percentage of hearing loss. Appellant received a schedule award for a 13 percent binaural hearing loss, but the Office stated that appellant had a "previously award[ed] 18 percent." In his November 23, 2005 report, the Office medical adviser opined that Dr. Jernigan's findings demonstrated a 17 percent binaural hearing loss. This is clearly greater than the 13 percent previously awarded, but the Office medical adviser repeated the Office's error and found "no increase beyond prior award of 18 percent."

The Office then denied modification by November 29, 2005 decision, finding both that the medical evidence did not demonstrate an increased hearing loss and that appellant needed to file a new occupational disease claim for workplace noise exposure from August 6 to December 1, 1999. The Board finds that this decision is in error. The medical evidence demonstrated a four percent increase in binaural hearing loss, which Dr. Jernigan opined was related to hazardous noise exposure. Appellant was not required to file a new occupational disease claim if he was not claiming that he was exposed to additional noise at work.

Therefore, the case must be returned to the Office for a determination of whether there is any increase in binaural hearing loss causally related to appellant's work exposure covered by the current claim.

CONCLUSION

The Board finds that, as the medical evidence indicates that appellant has a 17 percent binaural hearing loss, the Office must determine whether appellant has sustained any increase in employment-related hearing loss.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated November 29 and June 28, 2005 are set aside and the case remanded to the Office for further action consistent with this opinion.

Issued: October 4, 2006
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board