United States Department of Labor
Employees' Compensation Appeals Board

D.D., Appellant	)	
and	)	**Docket No. 10-1467**
	)	**Issued: February 10, 2011**
DEPARTMENT OF THE NAVY, PORTSMOUTH NAVAL SHIPYARD, Kittery, ME, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On May 5, 2010 appellant filed a timely appeal from a March 11, 2010 schedule award decision of the Office of Workers' Compensation Programs. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.

ISSUE

The issue is whether appellant has more than three percent permanent binaural hearing loss.

FACTUAL HISTORY

On August 20, 2009 appellant, then a 59-year old retired electronics mechanic, filed an occupational disease claim alleging that he sustained binaural hearing loss due to occupational noise exposure. He first became aware of his condition on April 20, 1990 and first related it to his employment on April 18, 1994. Appellant retired effective January 3, 2007.

Appellant submitted a statement detailing his work and noise exposure history at the employing establishment. Also submitted were employing establishment audiograms and other

medical care records for the period August 18, 1975 to November 21, 2006. An August 18, 1975 audiogram exhibited the following decibel (dBA) losses at frequencies of 500, 1,000, 2,000 and 3,000 Hertz (Hz): 5, 0, 0, and 0 for the right ear and 5, 0, 0 and 5 for the left ear. Testing at the same frequencies, a June 25, 1982 audiogram showed dBA losses of 5, 5, 5 and 5 for the right ear and 15, 5, 0 and 10 for the left ear while a May 2, 2006 audiogram demonstrated losses of 0, 10, 15 and 50 for the right ear and 0, 5, 15 and 60 for the left ear.

A September 29, 2009 statement of accepted facts reported that appellant was employed as an electrical apprentice and electronics mechanic between 1975 and 2007. He was routinely exposed to industrial noise produced by grinders, welders, pneumatic tools, generators, power tools and equipment, cranes, sandblasters, alarms, whistles, and construction and emergency vehicles. Appellant regularly used earplugs and earmuffs. He was not subjected to loud noise prior to his federal employment.

On October 6, 2009 the Office referred appellant for a second opinion to Dr. David S. Hurst, a Board-certified otolaryngologist. In an October 23, 2009 report, Dr. Hurst noted that appellant worked at the employing establishment for 32 years and did not have any prior history of hearing loss. He examined appellant and did not observe any physical abnormalities. An audiogram performed for Dr. Hurst on October 22, 2009 recorded the following dBA losses at 500, 1,000, 2,000 and 3,000 Hz: 10, 15, 25 and 55 for the right ear and 15, 10, 25 and 65 for the left ear. Dr. Hurst noted that appellant's bilateral hearing was normal according to the August 18, 1975 audiogram, but began to deteriorate in or around 1982. He added that appellant's audiograms since 1982 implicated a classic pattern of noise-induced hearing loss. Dr. Hurst diagnosed bilateral sensorineural hearing loss caused by noise exposure at the workplace and recommended hearing aids.

By decision dated October 28, 2009, the Office accepted appellant's claim for binaural hearing loss.

On November 1, 2009 an Office medical adviser agreed with Dr. Hurst that appellant's sensorineural hearing loss was caused by occupational noise exposure. Based on the October 22, 2009 audiometric findings, he calculated that appellant sustained 3.8 percent monaural hearing loss in the right ear, 7.5 percent monaural hearing loss in the left ear or 2.5 percent binaural hearing loss.[1] The Office medical adviser listed October 22, 2009 as the date of maximum medical improvement.

In a November 2, 2009 letter, the Office notified appellant that he was entitled to a schedule award of compensation for his hearing loss, but must first file a claim. On November 16, 2009 appellant filed a claim requesting a schedule award.

By decision dated March 11, 2010, the Office granted appellant a schedule award for three percent binaural hearing loss for the period October 22 to December 2, 2009.

[1] *See* note 8, *infra*.

LEGAL PRECEDENT

The schedule award provision of the Federal Employees' Compensation Act[2] and its implementing regulations[3] set forth the number of weeks of compensation payable to employees sustaining permanent impairment from loss of or loss of use of scheduled members or functions of the body. An employee is entitled to a maximum award of 52 weeks of compensation for complete loss of hearing of one ear and 200 weeks of compensation for complete loss of hearing of both ears.[4] 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 American Medical Association, *Guides to the Evaluation of Permanent Impairment* (hereinafter A.M.A., *Guides*)[5] has been adopted by the implementing regulations as the appropriate standard for evaluating schedule losses.[6]

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 Hz, the losses at each frequency are added up and averaged. Then, the "fence" of 25 dBA is deducted because, as the A.M.A., *Guides* points out, losses below 25 dBA 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.[7]

It is well established that the period covered by a schedule award commences on the date that the employee reaches maximum medical improvement from the residuals of the accepted employment injury. The Board has explained that maximum medical improvement means that the physical condition of the injured member of the body has stabilized and will not improve further. The determination of whether maximum medical improvement has been reached is based on the probative medical evidence of record and is usually considered to be the date of the evaluation by the attending physician which is accepted as definitive by the Office.[8]

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[2] 5 U.S.C. § 8107.

[3] 20 C.F.R. § 10.404.

[4] 5 U.S.C. § 8107(c)(13).

[5] A.M.A., *Guides* (6th ed. 2008).

[6] 20 C.F.R. § 10.404. *See also Mark A. Holloway*, 55 ECAB 321, 325 (2004).

[7] *J.H.*, 60 ECAB ___ (Docket No. 08-2432, issued June 15, 2009); *J.B.*, 60 ECAB ___ (Docket No. 08-1735, issued January 27, 2009).

[8] *Holloway*, *supra* note 6 at 325.

ANALYSIS

Appellant filed a claim for hearing loss and the Office developed the matter by referring him to Dr. Hurst. The otolaryngologist conducted a physical examination, reviewed appellant's history and audiograms and opined that his hearing loss was due to occupational noise exposure. The Office medical adviser concurred with Dr. Hurst and determined that appellant sustained 2.5 percent binaural hearing loss, which was rounded up to 3 percent by the Office in its March 11, 2010 decision granting the schedule award.

Applying the Office's standard procedures to the October 22, 2009 audiogram, appellant's right ear recorded losses of 10, 15, 25 and 55 dBA at 500, 1,000, 2,000 and 3,000 Hz, respectively. The total loss was 105 dBA. When divided by 4, the result was an average hearing loss of 26.25 dBA. The average hearing of 26.25 dBA was reduced by the fence of 25 dBA to equal 1.25 dBA. This figure was then multiplied by the established factor of 1.5, yielding 1.875 percent monaural impairment of the right ear. At the same frequencies, appellant's left ear recorded losses of 15, 10, 25 and 65 dBA. The total loss was 115 dBA. When divided by 4, the result was an average hearing loss of 28.75 dBA. The average hearing of 28.75 dBA was reduced by the fence of 25 dBA to equal 3.75 dBA. This figure was then multiplied by the established factor of 1.5, yielding 5.626 monaural impairment of the left ear.[9]

In calculating binaural hearing loss, the lesser monaural loss of 1.875 percent of the right ear is first multiplied by five to equal 9.375. This amount is added to the greater monaural loss of 5.626 percent of the left ear to equal 15.001, which is then divided by six to arrive at 2.5002 percent binaural hearing loss. This was properly rounded up to three percent by the Office.[10] Consequently, the evidence of record does not establish that appellant has greater than three percent binaural hearing loss.

Appellant argues on appeal that he started losing his hearing in the 1980s but that his schedule award was only for six weeks, October 22 to December 2, 2009. When loss of use of a scheduled member or function of the body is less than 100 percent, the amount of compensation paid is in proportion to the percentage of loss of use.[11] Under the Act, the maximum award for binaural hearing loss is 200 weeks of compensation. Since appellant's loss was three percent, he was entitled to three percent of 200 weeks of compensation, which amounted to 6 weeks of compensation. His schedule award ran from October 22, 2009, the date of maximum medical improvement,[12] through December 2, 2009, which equates to six weeks. Furthermore, factors such as employability or limitations on daily activities have no bearing on the calculation of

[9] The Board notes that the Office medical adviser incorrectly determined that appellant sustained right and left ear monaural losses of 3.8 and 7.5 percent, respectively. Application of the Office's standardized formula, as explained results in 1.875 percent monaural impairment of the right ear and 5.626 monaural impairment of the left ear. Nevertheless, he properly found that appellant sustained 2.5 percent binaural hearing loss.

[10] *See* Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards,* Chapter 3.700.4(b)(2) (January 2010).

[11] 5 U.S.C. § 8107(c)(19).

[12] *See supra* note 7.

impairment for schedule award purposes.[13] The Office, therefore, properly determined the number of weeks of compensation for which appellant is entitled.

CONCLUSION

The Board finds that appellant failed to establish that he has more than three percent binaural hearing loss.

ORDER

IT IS HEREBY ORDERED THAT the March 11, 2010 schedule award decision of the Office of Workers' Compensation Programs is affirmed, as modified.

Issued: February 10, 2011
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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

[13] *See J.H., supra* note 7.