U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JESSE J. RHODES and DEPARTMENT OF THE ARMY, PINE BLUFF ARSENAL, Pine Bluff, AR

Docket No. 00-1607; Submitted on the Record;
Issued May 11, 2001

DECISION and ORDER

Before MICHAEL J. WALSH, MICHAEL E. GROOM,
PRISCILLA ANNE SCHWAB

The issues are: (1) whether appellant sustained more than a 24 percent hearing loss of the left ear for which he received a schedule award; and (2) whether the Office of Workers' Compensation Programs abused its discretion in denying appellant's January 27, 2000 request for a review of the written record as untimely filed.

On January 25, 1999 appellant, then a 47-year-old chemical equipment repairer, filed an occupational disease claim alleging that he sustained hearing loss causally related to factors of his federal employment. By decision dated November 9, 1999, the Office accepted appellant's claim for left ear hearing loss. Hearing aids were not authorized.

By decision dated December 7, 1999, the Office granted appellant a schedule award for a 24 percent loss of hearing in his left ear. By letter dated January 27, 2000, appellant requested a review of the written record. By decision dated March 13, 2000, the Office denied appellant's request on the grounds that it was untimely filed. The Office also denied appellant's request on the grounds that the issue involved could be equally well addressed by requesting reconsideration.

The Board has duly reviewed the evidence of record and finds that this case is not in posture for decision on the issue of whether appellant has more than a 24 percent hearing loss of the left ear for which he received a schedule award.

The Federal Employees' Compensation Act,[1] schedule award provisions set forth the number of weeks for compensation to be paid for permanent loss of use of the members of the body that are listed in the schedule.[2] 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 a

[1] 5 U.S.C. § 8101 *et seq.*

[2] 5 U.S.C. § 8107.

determination is a matter which rests in the sound discretion of the Office.[3] However, as a matter of administrative practice, the Board has stated: "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."[4]

The Office evaluates industrial hearing loss in accordance with the standards in the American Medical Association (A.M.A.,) *Guides to the Evaluation of Permanent Impairment* (4th ed. rev., 1995).[5] 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.[6] 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.[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]

In addition to the standard by which it computes the actual percentage of hearing loss, the Office has set forth requirements for the medical evidence used in evaluating hearing loss. The requirements, contained in the Federal (FECA) Procedure Manual, provide that the claimant undergo audiological evaluation and otological examination, that the audiological testing precede the otological examination and be performed by different individuals, that the audiologist and otolaryngologist be certified and that audiological testing equipment meet calibration requirements established by the American Speech and Hearing Association.[11]

Further, the procedure manual requires that audiometric testing include both bone conduction and pure tone air conduction thresholds, speech reception thresholds and monaural discrimination scores.[12] Additionally, the otolaryngologist's report must include the date and hour of examination, the date and hour of the employee's last exposure to loud noise, a

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[3] *Richard Larry Enders*, 48 ECAB 184 (1996); *Danniel C. Goings*, 37 ECAB 781, 783 (1986).

[4] *See Richard Larry Enders*, *supra* note 3 at 186.

[5] *George L. Cooper*, 40 ECAB 296, 302 (1988).

[6] A.M.A., *Guides* 224 (4th ed. rev., 1995).

[7] *Id.*

[8] *Id.*

[9] *Id.*

[10] *Donald A. Larson*, 41 ECAB 947, 951 (1990).

[11] Federal (FECA) Procedure Manual, Part 3, Medical, *Schedule Awards*, Chapter 3.0700.4(b) Exhibit 3 (October 1990).

[12] *Id.*

rationalized medical opinion regarding the relationship between hearing loss and employment-related noise exposure and a statement regarding the reliability of the test.[13]

The Board finds that the Office, in its December 7, 1999 decision granting appellant a schedule award, improperly considered a May 17, 1999 audiogram obtained by Dr. Robert N. McGrew, a Board-certified otolaryngologist.

Appellant submitted a May 17, 1999 audiogram obtained by Dr. McGrew showing the following left ear decibel losses at the 500, 1,000, 2,000 and 3,000 Hertz (Hz) levels: 30, 30, 40 and 80. The report noted that the results were "poor." The audiogram showed the following right ear decibel losses at the 500, 1,000, 2,000 and 3,000 Hz levels: 25, 25, 30 and 50. Dr. McGrew advised that the May 17, 1999 audiogram "showed inconsistent responses" and recommended further testing.

In his July 4, 1999 report, the Office medical adviser concluded that the May 17, 1999 audiogram could not be used by the Office for adjudication because appellant's responses were inconsistent, "making the test unreliable." He recommended further testing.

Subsequently, appellant submitted an August 25, 1999 audiogram obtained by Dr. McGrew showing the following left ear decibel losses at the 500, 1,000 and 2,000 Hz levels: 25, 25 and 35. The audiogram showed the following right ear decibel losses at the 500, 1,000 and 2,000 Hz levels: 10, 25 and 25. The reliability of the audiogram was "ok." In a report dated October 7, 1999, Dr. McGrew stated:

> "We feel at this time that sufficient audiometric testing has been done to be confident that [appellant] has a proven bilateral neurosensory hearing loss due to noise exposure which is mild in low frequencies dropping to severe levels at high frequencies above 3,000 Hz with a definite acoustic trauma pattern. We continue to believe that he also has microvascular disease of the ear and possible elsewhere and strongly recommend a serum lipid profile because of his varying responses and change in discrimination scores. Our previous report summarizes his diagnoses accurately in our opinion."

In his October 25, 1999 report, the Office medical adviser opined that the August 25, 1999 audiogram was sufficiently reliable for adjudication, but did not include decibel losses at the required 3,000 Hz level. He requested that the Office obtain the 3,000 Hz reading from Dr. McGrew. He advised the Office to use the May 17, 1999 audiogram for the 3,000 Hz level.

In his November 4, 1999 report, Dr. Meador found that appellant sustained the following left ear decibel losses at the 500, 1,000, 2,000 and 3,000 Hz frequency levels: 25, 25, 35 and 80. Next, he totaled appellant's left ear decibel loss at 165 and divided by 4 to obtain a 41.25, decibel loss for the left ear. The 41.25 decibel average was reduced by 25 which resulted in a 24.4 percent monaural loss for the left ear. Dr. Meador found that appellant sustained the following right ear decibel losses at the 500, 1,000, 2,000 and 3,000 Hz frequency levels: 0, 25, 25 and 50. He totaled appellant's right ear decibel loss at 100 and divided by 4 to obtain a 24

[13] *Id.*

decibel loss for the right ear. The 25 decibel average was reduced by 25, as discussed above, which resulted in a zero percent loss for the right ear. Dr. Meador found that appellant reached maximum medical improvement on August 25, 1999.

Dr. Meador correctly applied the Office's procedures for calculating hearing loss, but used the unreliable May 17, 1999 audiogram for the 3,000 Hz level. Because both Dr. McGrew and Dr. Meador deemed the May 17, 1999 audiogram unreliable, the Office improperly relied upon those results when calculating appellant's hearing loss.

On remand, the Office shall obtain a reliable audiogram from Dr. McGrew or other Board-certified otolaryngologist. After such further development as deemed necessary, the Office shall recalculate appellant's schedule award for hearing loss and issue a *de novo* decision.[14] Based on this finding, the second issue on appeal is moot.

The March 13, 2000 and December 7, 1999 decisions of the Office of Workers' Compensation Programs are set aside and the case remanded for further proceedings consistent with this opinion.

Dated, Washington, DC
May 11, 2001

Michael J. Walsh
Chairman

Michael E. Groom
Alternate Member

Priscilla Anne Schwab
Alternate Member

[14] The Board notes that the record contains medical evidence, which was received by the Office after it issued its December 7, 1999 decision granting appellant a schedule award. However, the Board may not consider the evidence on appeal because the Board's jurisdiction to decide appeals from final decisions of the Office is limited to reviewing the evidence that was before the Office at the time of its final decision. *Syed M. Jawaid*, 49 ECAB 627 (1998); 20 C.F.R. § 501.2(c).