U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JOHN P. IBANEZ and DEPARTMENT OF LABOR,
MINE SAFETY & HEALTH ADMINISTRATION, Hyden, KY

Docket No. 00-1369; Submitted on the Record;
Issued September 24, 2001

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
BRADLEY T. KNOTT

The issue is whether appellant has met his burden of proof in establishing that he sustained more than a 17 percent binaural hearing loss, for which he received a scheduled award.

On May 14, 1998 appellant, then a 67-year-old supervisory coal mine safety and health inspector, filed a notice of occupational disease, alleging that he sustained bilateral hearing loss in the course of his federal employment. Appellant stated that he first became aware of his hearing loss on May 2, 1992 and related it to his employment on January 3, 1994. Appellant's supervisor indicated that appellant was still exposed to noise.

Accompanying the claim, the employing establishment submitted various personnel papers, audiograms from 1975 to 1998, a medical report of audiograms taken from May 1992 to August 1992, a supervisor's statement regarding exposure to noise, appellant's statement regarding his injury of May 1, 1992 and a copy of a 1994 Office of Workers' Compensation Programs' decision, accepting appellant's 1992 claim for a concussion and vertigo.

The Office referred appellant, a June 12, 1998 statement of accepted facts and medical records to Dr. Albert Cullum, a Board-certified otolaryngologist, for a second opinion. In a July 22, 1998 report, Dr. Cullum stated that he saw appellant that day. Dr. Cullum also stated:

> "[A]t the time of this evaluation, "[appellant's] [hearing] loss, is consistent with the history of occupational noise exposure and the several incidents of blows to the head. In brief, it consists of a mild low-tone sensorineural loss and a moderate to moderately severe high tone sensorineural hearing loss, in both ears, slightly more on the left side."

Dr. Cullum found a total hearing loss in the left ear of 185 decibels (dBs) and in the right ear 165 dBs and found a binaural hearing loss of 25.625 percent.

In an August 12, 1998 report, an Office medical adviser opined that Dr. Cullum's assessment of appellant's hearing loss was worse than any previous reporting source and that his findings were unreliable and could not be accepted. Therefore, appellant needed to be referred for another evaluation for adjudicative purposes.[1]

On August 27, 1998 the Office referred appellant to Dr. Manosh Vongvises, a Board-certified otolaryngologist, for a second opinion evaluation. In a September 21, 1998 report, Dr. Vongvises found that appellant suffered a 17 percent binaural noise-induced hearing loss and would benefit from hearing aids. He found a total hearing loss in the left ear of 195 and in the right ear 135 for a binaural hearing loss of 17 percent.[2]

In a September 29, 1998 report the same Office medical adviser, after reviewing Dr. Vongvises' report and accompanying September 29, 1998 audiogram, agreed with his findings that appellant suffered from a 17 percent noise-induced binaural hearing loss.

On October 7, 1998 the Office accepted appellant's claim for bilateral sensorineural hearing loss.

In a November 2, 1998 award of compensation, the Office granted appellant a 17 percent binaural hearing loss. The award ran from September 21, 1998 to May 16, 1999 for a total of 34 weeks.

By letter dated November 29, 1998, appellant requested a hearing before an Office hearing representative. The hearing was scheduled and held on July 9, 1999. In a decision dated November 4, 1999, the hearing representative affirmed the Office's November 2, 1998 decision.

The Board finds that this case is not in posture for decision.

The schedule award provision of the Federal Employees' Compensation Act[3] and its implementing regulation[4] set forth the number of weeks of compensation payable to employees sustaining permanent impairment from loss, or loss of use, of scheduled members or functions of the body. 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* has been adopted by the implementing regulation as the appropriate standard for evaluating schedule losses.

[1] The medical adviser stated that "Since the credibility of Dr. Cullum's reported audiogram in this case and multiple others recently reviewed by this Office has been questionable, the input from Dr. Cullum cannot be accepted." The medical adviser noted that a January 7, 1998 employing establishment audiogram revealed much less hearing loss, particularly in the low frequencies.

[2] The 16.87 percent was rounded up to 17 percent.

[3] 5 U.S.C. § 8107.

[4] 20 C.F.R. § 10.404 (1999).

Under the A.M.A., *Guides*, hearing loss is evaluated by determining decibel loss at the frequency levels of 500, 1,000, 2,000 and 3,000 hertz (Hz). The losses at each frequency are added up and averaged and a "fence" of 25 dBs is deducted since, as the A.M.A., *Guides* points out, losses below 25 dBs result in no impairment in the ability to hear everyday speech in everyday conditions.[5] The remaining amount is multiplied by 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.[6] The Board has concurred in the Office's adoption of this standard for evaluating hearing loss.[7]

In the present case, Dr. Cullum's July 22, 1998 report and audiogram supported a hearing loss of 10 to 15 dBs higher than previous sources. The Office medical adviser stated that Dr. Cullum's report and audiogram could not be used to adjudicate appellant's claim because Dr. Cullum found a higher impairment than previous medical sources,[8] in this case as well as other cases, therefore, Dr. Cullum's findings were not creditable. However, the medical adviser failed to provide sufficient explanation or evidence to support his allegation, such as the significance of a 10 to 15 dBs difference. The medical adviser did not suggest that Dr. Cullum's findings did not meet all the Office's standards, *e.g.*, the medical adviser did not suggest that there was anything wrong with the equipment used, or the testing procedures.[9]

Dr. Cullum's findings appear to be premised on his examination and testing of appellant and review of the record. A medical adviser may review any audiogram of record in determining which one most accurately reflects appellant's hearing loss, but must provide a rationalized explanation for his selection. When the only explanation given is a conclusion that a higher impairment of hearing loss was found, this is not sufficient to show that a report and audiogram do not constitute probative, reliable evidence.[10] In this case, the medical adviser's statement concerning Dr. Cullum's creditability is unsubstantiated.

In addition, the hearing representative affirmed the prior decision, but did not provide any additional explanation of why Dr. Cullum's July 22, 1998 report and audiogram were not probative. Therefore, until the Office provides sufficient explanation to demonstrate that Dr. Cullum's July 22, 1998 report and audiogram are not probative, reliable evidence, the Board is unable to make an informed decision in this case.

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[5] A.M.A., *Guides* at 224.

[6] *Id*; *see also Danniel C. Goings*, 37 ECAB 781 (1986).

[7] *Danniel C. Goings, supra* note 6.

[8] The Office medical adviser specifically referred to a January 7, 1998 audiogram performed for the employing establishment. However, the medical adviser did not comment on whether this audiogram met all the Office's standards.

[9] The Board also notes that the Office has not shown that Dr. Cullum is disqualified from participating as an Office second opinion physician.

[10] *See Roger Wilcox*, 45 ECAB 265 (1993).

The Board finds that the medical evidence is not sufficiently developed with regard to which audiogram most accurately reflects appellant's employment-related hearing loss.

Consequently, the case must be remanded for the Office to determine which audiogram most accurately reflects appellant's employment-related hearing loss. Following this and such other development as deemed necessary, the Office shall issue a *de novo* decision.

The November 4, 1999 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this decision.

Dated, Washington, DC
September 24, 2001

Michael J. Walsh
Chairman

David S. Gerson
Member

Bradley T. Knott
Alternate Member