

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of WILLIAM T. DOSS and TENNESSEE VALLEY AUTHORITY,
PARADISE FOSSIL PLANT, Drakesboro, KY

*Docket No. 02-1440; Submitted on the Record;
Issued June 16, 2003*

DECISION and ORDER

Before ALEC J. KOROMILAS, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issue is whether appellant has established that he sustained more than a four percent monaural (right ear) hearing loss for which he received a schedule award.

On June 17, 1999 appellant, then a 64-year-old maintenance mechanic/machinist, filed an occupational disease claim (Form CA-2) alleging that he sustained hearing loss in both ears due to exposure to noise in the course of his federal employment. He stated that he first became aware that he had a hearing loss problem and related it to his employment on June 30, 1992. The employing establishment stated that appellant was last exposed to the conditions alleged to have caused his hearing loss at the time he retired on September 30, 1999.

Accompanying the claim were an October 14, 1999 employing establishment letter controverting appellant's claim; a record of appellant's employment history and noise exposure; and employing establishment audiograms covering the period 1984 to 1999.

On March 24, 2000 the Office of Workers' Compensation Programs received appellant's employment history and audiograms covering 1984 to 1998. Also on March 24, 2000 the Office referred appellant, along with the case record, and a statement of accepted facts to Dr. Shawn C. Jones, a Board-certified otolaryngologist, for an examination and evaluation of medical records.

On April 12, 2000 the Office requested additional information from appellant.

On April 28, 2000 the Office received appellant's response to the request for additional information.

On May 11, 2000 the Office received Dr. Jones' May 5, 2000 report of his examination of appellant that day, and the report of audiologic evaluation performed for Dr. Jones on April 18, 2000. In his report, Dr. Jones stated, "[appellant's] hearing at the beginning of his Federal civilian employment demonstrated a moderately severe sensorineural hearing loss in the high frequencies on the right associated with mild loss in the high frequencies on the left." He

also found that appellant's hearing in the pure tone averages in the high frequencies had deteriorated when comparing the present to the beginning of exposure, but not in excess of what would normally be predicated on the basis of presbycusis. Dr. Jones diagnosed mild to moderate sensorineural hearing loss on the left and within normal limits sloping to severe sensorineural hearing loss on the right. He concluded that the "sensorineural hearing loss seen is in part or all, in my opinion, not due to noise exposure encountered in [appellant's] [f]ederal civilian employment." Dr. Jones explained that appellant had significant hearing loss upon entry to federal employment which change, but not greater than what would normally be predicated on the basis of presbycusis.

Dr. Jones found that testing at the frequency levels of 500, 1,000, 2,000 and 3,000 cycles per second: in the right ear decibel levels of 20, 10, 20 and 60, respectively; and in the left ear, decibel levels of 35, 25, 15 and 20, respectively.

The Office referred the record to an Office medical adviser for an opinion on whether appellant was entitled to a schedule award. In a July 3, 2000 report, the Office medical adviser found that "A review of serial audiograms from April 17, 1984 through December 8, 1998 does show significant progression of the hearing loss in excess of presbycusis (normal aging). Thus, the hearing loss does seem due in part to federal employment in my view." The Office medical adviser applied the standards of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* to the findings of Dr. Jones to determine that appellant had sustained a four percent monaural (right ear) sensorineural hearing loss causally related to factors of his federal employment. The Office medical adviser indicated the date of maximum medical improvement was April 18, 2000.

By decision dated July 6, 2000, the Office advised appellant that it had accepted his claim for bilateral sensorineural hearing loss.

By decision dated July 26, 2000, the Office granted appellant a schedule award for a four percent loss of hearing in the right ear. The Office determined that appellant was entitled to an award of compensation of 2.08 weeks for the period April 18 to May 2, 2000.

Appellant requested an oral hearing before an Office hearing representative, which was held on April 27, 2001.

On May 31, 2001 subsequent to the hearing, appellant submitted a May 20, 2001 letter stating that he was enclosing a May 17, 2001 medical report from Dr. John D. Loucks, a Board-certified otolaryngologist, and a May 17, 2001 audiogram performed by David A. Mann, an audiologist. Dr. Loucks stated that prior to his employment with the employing establishment appellant had no significant noise exposure, that over a period of time appellant had noticed a gradual onset of hearing loss and that recent audiometric evaluations show bilateral sensorineural hearing loss in the high frequencies. He concluded that "[g]iven his strong history of noise exposure," appellant had a sensorineural hearing loss consistent with noise exposure.

By decision dated August 23, 2001, the hearing representative affirmed the July 26, 2000 decision. The hearing representative stated that the Office medical adviser found that appellant's

bilateral high frequency sensorineural hearing loss was related to his federal employment and properly applied the Office standards to the April 18, 2000 audiogram performed for Dr. Jones.

By letter dated January 30, 2002, appellant requested reconsideration of the August 23, 2001 decision. Appellant resubmitted the May 17, 2001 audiogram by Mr. Mann, together with a December 19, 2001 letter from Mr. Mann, who stated, "Using the fifth edition A.M.A., [*Guides*] for physical impairment, this hearing loss calculates to 28.1 percent in the left ear and 24.4 percent in the right ear. Binaural impairment is 25 percent with a [w]hole [p]erson impairment of 9 percent."

On February 12, 2002 the claims examiner requested that the Office medical adviser review Mr. Mann's letter and the May 17, 2001 audiogram regarding the degree and extent of appellant's hearing loss. He opined that the substantial hearing loss indicated by Mr. Mann in little over a year would be highly unusual and noted that the audiogram was not done within the prescribed guidelines and cannot be used for an increased rating.

By decision dated March 5, 2002 the Office, after a merit review, found that Mr. Mann's opinion was not supported by medical rationale or objective findings and Dr. Jones's report and accompanying audiogram were performed according to the Office's standard procedures.

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

The schedule award provisions of the Federal Employees' Compensation Act¹ and its implementing regulation² 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 A.M.A., *Guides* has been adopted by the implementing regulation as the appropriate standard for evaluating schedule losses.³

The Office evaluates industrial hearing loss in accordance with the standards contained in the A.M.A., *Guides*.⁴ 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.⁵ 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.⁶ The remaining

¹ 5 U.S.C. § 8107.

² 20 C.F.R. § 10.404 (1999).

³ *Id.*

⁴ A.M.A., *Guides*, 250 (5th ed. 2001).

⁵ *Id.*

⁶ *Id.*

amount is multiplied by a factor of 1.5 to arrive at the percentage of monaural hearing loss.⁷ 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.⁸ The Board has concurred in the Office's adoption of this standard for evaluating hearing loss.⁹

In addition, the Office has set forth requirements for the medical evidence to be used in evaluating occupational hearing loss claims. The requirements in the Office's Federal (FECA) Procedure Manual provide that the employee undergo audiological evaluation and otological examination; that the audiological testing precede the otologic examination; that the audiological evaluation and otologic examination be performed by different individuals as a method of evaluating the reliability of the findings; that the clinical audiologist and otolaryngologist be certified; that all audiological equipment authorized for testing meet the calibration protocol contained in the accreditation manual of the American Speech and Hearing Association; that the audiometric test results include both bone conduction and pure-tone air conduction thresholds, speech reception thresholds and monaural discrimination scores; and that the otolaryngologist's report include the date and hour of examination, the date and hour of the employee's last exposure to loud noise, a rationalized medical opinion regarding the relationship of the hearing loss to employment-related noise exposure and a statement on the reliability of the tests conducted.

Dr. Jones, the Board-certified otolaryngologist to whom the Office referred appellant, reported on May 5, 2000 that appellant's hearing loss at the commencement of his federal employment was a moderately severe sensorineural loss in the high frequencies on the right and a mild loss in the high frequencies on the left. He diagnosed mild-to-moderate sensorineural hearing loss on the left and within normal limits sloping to severe sensorineural loss on the right. Dr. Jones concluded that such loss was not greater than that normally due to presbycusis. The Office medical adviser concluded that the sensorineural loss of hearing was, at least in part, employment related and applied the Office's standard procedures to the April 18, 2000 audiogram performed for Dr. Jones. Testing for the right ear at the frequency levels of 500, 1,000, 2,000 and 3,000 cycles per second revealed losses of 20, 10, 20 and 60 decibels respectively. These losses were totaled at 110 decibels and were divided by 4 to obtain the average hearing loss at those cycles of 27.50 decibels. The average of 27.50 decibels was then reduced by 25 decibels (the first 25 decibels were discounted as discussed above) to equal 2.50 which was multiplied by the established factor of 1.5 to compute a 3.75 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 cycles per second revealed losses of 35, 25, 15 and 20 decibels respectively. These losses were totaled at 95 decibels and were divided by 4 to obtain the average hearing loss at those cycles of 23.15 decibels. The average of decibels was then reduced by 25 decibels, as discussed above, to

⁷ *Id.*

⁸ *Id.*

⁹ *Donald E. Stockstad*, 53 ECAB ____ (Docket No. 01-1570, issued January 23, 2002); *petition for recon. granted (modifying prior decision)*, Docket No. 01-1570 (issued August 13, 2002).

equal 0 which indicated a 0 percent loss of hearing in the left ear. The Office medical adviser arrived at a 3.75 (rounded to 4 percent) percent right ear hearing loss.

The Board notes, however, that there appears to be other evidence of record tending to show that appellant had greater than a four percent monaural (right ear) loss of hearing for which he received a schedule award. In this regard, prior to the issuance of the Office hearing representative's decision and on reconsideration, appellant submitted a May 17, 2001 audiogram by Mr. Mann, an audiologist prepared for Dr. Loucks, who concluded in his May 17, 2001 report that appellant's sensorineural hearing loss was consistent with his history of noise exposure. Subsequently, on reconsideration, appellant submitted a December 19, 2001 report from Mr. Mann in which he applied the A.M.A., *Guides* in an effort to interpret his May 17, 2001 audiogram. He concluded that appellant had a 28.1 percent loss in the left ear and a 24.4 percent loss in the right ear. In reviewing Dr. Loucks' report and the audiogram prepared on his behalf by Mr. Mann, the Office medical adviser stated that Dr. Jones' April 18, 2000 audiogram "was performed under [the Office's] standard protocol, designed to minimize inaccuracies and misinterpretations" and that it was deemed valid by Dr. Jones. He further concluded that Dr. Loucks' May 17, 2001 audiogram "is substantially different (worse) from above-noted April 18, 2000 study, and *I seriously question its validity.*" (Emphasis in the original). The medical adviser went on to state that "this much change in a little over a year would be highly unusual and it was not done within prescribed guidelines."

Although the Office medical adviser concluded that, in view of the foregoing, the May 17, 2001 audiogram could not be used for an increased impairment rating, he did not explain what about the manner in which appellant's hearing was tested was not in accordance with the Office's procedures, why the audiogram did not meet the Office's guidelines or what made it "substantially different (worse) from the April 18, 2000 audiogram. Moreover, in explaining why he questioned the "validity" of the May 17, 2001 audiogram, the medical adviser only noted that the significant change in appellant's hearing "in a little over a year" was "highly unusual." In essence, he offered a conclusion without offering a detailed explanation addressing as to what factor or factors may have contributed to appellant's increased hearing impairment. Such an explanation would be particularly necessary given that both physicians concluded that appellant sustained an employment-related loss of hearing and their reports and audiograms were within a little more than a year apart. As the Board has held, when several audiograms are contained in the case record and all are made within approximately two years of one another and are submitted by more than one physician, the Office should give an explanation for selecting one audiogram over the others.¹⁰ It is well established that proceedings under the Act are not adversarial in nature, and while the claimant has the burden to establish entitlement to compensation, the Office shares responsibility in the development of the evidence.¹¹ Since the Office medical adviser did not adequately explain why Dr. Jones' report and audiogram were more reliable than Dr. Loucks', the Board finds that further medical development is necessitated.

¹⁰ See *Paul M. Sawko*, 50 ECAB 365, 367 n.1 (1999).

¹¹ See *Horace L. Fuller*, 53 ECAB ____ (Docket No. 02-1181, issued September 6, 2002).

The case should be remanded to the Office for further development concerning the extent and degree of appellant's employment-related loss of hearing, including explanations as to why one audiogram was selected over another. Following this and any necessary further development, the Office should issue a *de novo* decision relative to appellant's hearing impairment.

The decisions of the Office of Workers' Compensation Programs dated March 5, 2002 and August 23, 2001 are hereby set aside; the case is remanded for further proceedings consistent with this decision of the Board.

Dated, Washington, DC
June 16, 2003

Alec J. Koromilas
Chairman

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member