U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JAMES W. SCHAFFNER and DEPARTMENT OF THE NAVY, PHILADELPHIA NAVAL BUSINESS CENTER, Philadelphia, PA

Docket No. 03-170; Submitted on the Record;
Issued June 26, 2003

DECISION and ORDER

Before ALEC J. KOROMILAS, DAVID S. GERSON,
A. PETER KANJORSKI

The issue is whether appellant has more than an eight percent hearing loss in his right ear, for which he received a schedule award.

This is the second appeal in the present case. In the prior appeal, the Board issued a decision and order[1] on November 3, 2000 in which it affirmed the October 19, 1998 decision of the Office of Workers' Compensation Programs on the grounds that appellant did not have a ratable hearing loss in his left ear.[2] The Board found that the Office medical adviser properly applied the appropriate standards to the July 1998 findings of Dr. Henry Kean, a Board-certified otolaryngologist who served as an Office referral physician, in order to determine that appellant had no ratable hearing loss in his left ear. The Board set aside the Office's June 24, 1999 decision on the grounds that there was a continuing conflict in the medical evidence regarding whether appellant had an employment-related hearing loss in his right ear. The Board determined that there was a conflict between Dr. Kean and Dr. David N. Schwartz, an attending Board-certified otolaryngologist, regarding whether the hearing loss in appellant's right ear was

[1] Docket No. 03-170.

[2] On April 15, 1998 appellant, then a 46-year-old pipe fitter, filed an occupational disease claim alleging that he sustained hearing loss in both ears due to exposure to noise in the course of his federal employment. He indicated that he first became aware that he had an employment-related hearing loss in September 1996. The Office found that appellant sustained an employment-related hearing loss in his left ear, but that it did not constitute a ratable hearing loss. The Office further determined, based on the findings of Dr. Kean, that the hearing loss in appellant's right ear was not caused by employment factors.

caused by employment factors.[3] The Board remanded the case to the Office for referral to an impartial medical specialist for an examination and opinion on this matter, to be followed by an appropriate Office decision. The facts and the circumstances of the case up to that point are set forth in the Board's prior decision and are incorporated herein by reference.

On remand the Office referred appellant and the case record to Dr. Arnold K. Brenman, a Board-certified otolaryngologist, for an examination and opinion regarding whether the hearing loss in his right ear was caused, in whole or in part, by employment factors. In a report dated March 22, 2001, Dr. Brenman determined that employment factors partially contributed to the hearing loss in appellant's right ear.[4] In a report dated May 10, 2001, an Office medical adviser determined that appellant had an employment-related hearing loss in his right ear which entitled him to a schedule award for an eight percent permanent impairment of the hearing in his right ear. The Office accepted that appellant sustained an employment-related hearing loss in his right ear and, by award of compensation dated May 29, 2001, the Office granted him a schedule award for an eight percent permanent impairment of the hearing in his right ear. By decision dated and finalized July 11, 2002, an Office hearing representative affirmed the Office's May 29, 2001 decision.[5]

The Board finds that appellant has no more than an eight percent hearing loss in his right ear, for which he received a schedule award.

The schedule award provisions of the Act[6] and its implementing regulation[7] 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*

[3] Section 8123(a) of the Federal Employees' Compensation Act provides in pertinent part: "If there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination." When there are opposing reports of virtually equal weight and rationale, the case must be referred to an impartial medical specialist, pursuant to section 8123(a) of the Act, to resolve the conflict in the medical evidence. *William C. Bush*, 40 ECAB 1064, 1975 (1989); 5 U.S.C. § 8123(a). In situations where there exist opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight. *Jack R. Smith*, 41 ECAB 691, 701 (1990); *James P. Roberts*, 31 ECAB 1010, 1021 (1980).

[4] Dr. Brenman performed audiologic testing on March 7, 2001.

[5] The Office hearing representative indicated that the audiologic testing performed by Dr. Kean was of diminished probative value.

[6] 5 U.S.C. § 8107.

[7] 20 C.F.R. § 10.304.

Impairment (A.M.A., *Guides*) has been adopted by the Office, and the Board has concurred in such adoption, as the appropriate standard for evaluating schedule losses.[8]

The Office evaluates industrial hearing loss in accordance with the standards contained in the A.M.A., *Guides*.[9] 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.[10] 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.[11] The remaining amount is multiplied by a factor of 1.5 to arrive at the percentage of monaural hearing loss.[12] The Board has concurred in the Office's adoption of this standard for evaluating hearing loss.[13]

In the present case, the Board determined that there was a conflict between Dr. Kean, a Board-certified otolaryngologist who served as an Office referral physician, and Dr. Schwartz, an attending Board-certified otolaryngologist, regarding whether the hearing loss in appellant's right ear was caused by employment factors. On remand the Office referred appellant and the case record to Dr. Brenman, a Board-certified otolaryngologist, for an examination and opinion regarding whether the hearing loss in his right ear was caused, in whole or in part, by employment factors. Based on the March 22, 2001 opinion of Dr. Brenman, the Office accepted that appellant sustained a hearing loss in his right ear due to employment factors.[14]

In May 2001, an Office medical adviser then calculated that appellant had an eight percent hearing loss in his right ear. The Office medical adviser reviewed the March 2001 otologic and audiologic testing performed on appellant by Dr. Brenman and properly applied the Office's standardized procedures to this evaluation. Testing for the right ear at the frequency levels of 500, 1,000, 2,000 and 3,000 cycles per second revealed decibel losses of 10, 15, 40 and 55 respectively. These decibel losses were totaled at 120 decibels and were divided by 4 to obtain the average hearing loss of 30 decibels. This average was reduced by 25 decibels (25 decibels being discounted as discussed above) to equal 5, a figure that was multiplied by the established factor of 1.5 to equal 7.5, which after rounding would constitute an 8 percent hearing loss in the right ear.

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[8] *Lena P. Huntley*, 46 ECAB 643, 645 (1995).

[9] A.M.A., *Guides* 224-25 (4th ed. 1993); A.M.A., *Guides* at 226-51 (5th ed. 2001); *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).

[10] *Id.*

[11] *Id*.

[12] *Id*.

[13] *Donald E. Stockstad*, *supra* note 9.

[14] In his March 22, 2001 report, Dr. Brenman explained that appellant's hearing loss mostly predated his employment with the employing establishment, but that the nature of his work-related noise exposure and the progression of his hearing loss showed that some portion of his loss was due to employment factors.

Appellant has argued that the Office should have based its schedule award for his right ear on the audiologic testing performed on July 13, 1998 by Dr. Kean, testing which suggested that appellant had a 15 percent hearing loss in his right ear. However, it was appropriate for the Office medical adviser to use the audiologic testing performed by Dr. Brenman in March 2001. In his well-rationalized March 22, 2001 report, Dr. Brenman indicated that he had considered whether it would be appropriate to use audiologic testing performed prior to his March 2001 testing for evaluating the extent of appellant's right hearing loss. He explained that occupational hearing loss is permanent and does not improve with time and that, therefore, the most recent testing of March 2001 (which had the lowest hearing loss results) would be the most reliable source for evaluating appellant's permanent hearing loss.[15]

For these reasons, the Board finds that appellant has no more than an eight percent hearing loss in his right ear, for which he received a schedule award.

The July 11, 2002 decision of the Office of Workers' Compensation Programs is affirmed.

Dated, Washington, DC
June 26, 2003

Alec J. Koromilas
Chairman

David S. Gerson
Alternate Member

A. Peter Kanjorski
Alternate Member

[15] The record contains numerous other results of audiologic testing, but none of this testing was certified by a physician as accurate. *See Joshua A. Holmes*, 42 ECAB 231, 236 (1990) (finding that an audiogram must be certified by a physician as being accurate before it can be used to determine the percentage of hearing loss).