United States Department of Labor
Employees' Compensation Appeals Board

FRANK WILLIAMS, JR., Appellant	)	
and	)	**Docket No. 03-2085**
	)	**Issued: April 8, 2004**
DEPARTMENT OF THE NAVY, LONG BEACH NAVAL SHIPYARD, Long Beach, CA, Employer	)	

Appearances:
Frank Williams, Jr., pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Member
DAVID S. GERSON, Alternate Member
A. PETER KANJORSKI, Alternate Member

JURISDICTION

On August 22, 2003 appellant filed a timely appeal from a merit decision of the Office of Workers' Compensation Programs dated July 22, 2003. Under 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue on appeal is whether appellant has more than a 34 percent binaural hearing loss for which he has received schedule awards.

FACTUAL HISTORY

On November 13, 1998 appellant, then a 76-year-old former federal employee, filed a notice of occupational disease alleging he sustained a hearing loss while in the performance of duty. Appellant initially retired from the shipyard as a production shop planner (rigger) on September 1, 1981, but was subsequently rehired to the same position from March 28, 1982 to July 11, 1986. According to the employing establishment's summary of appellant's noise

exposure, appellant worked from 1956 as a helper rigger, progressing to the position of production shop planner (rigger) in May 1977. Appellant retired from this position on September 1, 1981, but was rehired to that position from March 29, 1982 to July 11, 1986. Appellant noted that his last exposure was in 1977, implying that the position of production shop planner did not expose him to hazardous noise.

On March 9, 2000 the Office noted that appellant had been awarded a six percent schedule award for binaural hearing loss for a 1973 claim and therefore referred him to Dr. Eugene Y. Taw, a Board-certified otolaryngologist, to determine if his noise exposure from the date of his initial hearing loss award in 1973 to 1977, the date of his last exposure, caused an increase in his hearing loss.

In a March 21, 2000 report, Dr. Taw advised that test results from a March 17, 2000 audiogram supported a progression in binaural high frequency hearing loss from 1973. Pure tone thresholds revealed the following: right ear, 30 decibels at 500 cycles per second, 50 decibels at 1,000 cycles per second, 55 decibels at 2,000 cycles per second, 60 decibels at 3,000 cycles per second, on the left, 35 decibels at 500 cycles per second, 50 decibels at 1,000 cycles per second, 50 decibels at 2,000 cycles per second and 55 decibels at 3,000 cycles per second. Dr. Taw also recommended hearing aids.

On March 28, 2000 the Office referred the case record and a statement of accepted facts to Dr. David N. Schindler, an Office medical adviser and a Board-certified otolaryngologist, to determine whether appellant had sustained an increase in hearing loss impairment from the prior award. In a report dated April 28, 2000, Dr. Schindler relied on the report of Dr. Taw and advised that appellant had a 34 percent binaural hearing loss which was "in part aggravated by the conditions of federal employment." He therefore recommended an additional 28 percent hearing loss based on appellant's prior 6 percent binaural hearing loss impairment.[1] He also recommended hearing aids. In a decision dated May 23, 2000, the Office awarded appellant an additional 28 percent schedule award for binaural hearing loss. The period of award ran for 56 weeks from March 17, 2000 to April 13, 2001. In a report of a telephone call dated May 24, 2000, the Office advised appellant that it authorized hearing aids.

On June 13, 2002 appellant alleged that his hearing loss was getting worse and requested additional compensation. On August 9, 2002 appellant requested additional compensation and new hearing aids.

On October 2, 2002 the Office requested additional information from his health care provider. In a letter dated November 18, 2002, Dr. Khoi Nguyen, Board-certified in internal medicine, stated that appellant had a permanent moderate to severe sensorineural binaural hearing loss and required hearing aids for communication.

On May 13, 2003 the Office referred appellant to Dr. Henry Bikhazi, a Board-certified otolaryngologist, to evaluate his work-related hearing loss. In a report dated May 30, 2003,

[1] On July 25, 1974 the Office awarded appellant a six percent schedule award for binaural hearing loss. Appellant then filed a request for reconsideration and the Office, in a decision dated May 19, 1975, denied modification of its July 25, 1974 award.

Dr. Bikhazi noted that appellant worked for the employing establishment from 1956 to 1986 and that he had a previously awarded 28 percent work-related hearing loss. He further noted that, based on the results of an audiogram taken that day by Michael J. Davis, an audiologist, appellant had moderate sensorineural hearing loss, bilateral, which represented essentially no change in hearing thresholds from the March 17, 2000 audiogram. Appellant's May 30, 2003 audiogram results as reported by Mr. Davis were as follows: right ear -- 45 decibels at 500 cycles per second, 55 decibels at 1,000 cycles per second, 55 decibels at 2,000 cycles per second and 60 decibels at 3,000 cycles per second; left ear -- 50 decibels at 500 cycles per second, 55 decibels at 1,000 cycles per second, 55 decibels at 2,000 cycles per second, and 55 decibels at 3,000 cycles per second. Dr. Bikhazi, however, noted in his report that appellant's left ear decibel loss was 45 rather than 50 decibels at 500 cycles per second and 60 decibels rather than 55 at 3,000 cycles per second.

On June 12, 2003 the Office referred the medical record to Dr. Schindler, the Office medical adviser, for an impairment determination. On June 26, 2003 Dr. Schindler stated that he had reviewed appellant's history of injury including the prior 34 percent schedule awards for binaural hearing loss and Dr. Bikhazi's May 30, 2003 report. Dr. Schindler advised that appellant's decrease in hearing from March 17, 2000 which was long after his retirement was not the result of work-related noise exposure. He noted that appellant's further hearing loss after he retired in 1986 was the result of presbycusis. Dr. Schindler stated that no further schedule award was indicated. However, he recommended hearing aids.

By decision dated July 22, 2003, the Office denied appellant's request for additional compensation on the grounds that the evidence failed to establish that he sustained a greater hearing loss than the previously awarded 34 percent binaural hearing loss. The Office did not indicate whether hearing aids were authorized.

LEGAL PRECEDENT

The schedule award provision of the Federal Employees' Compensation Act[2] and its implementing federal regulation[3] 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 loss shall be determined. For consistent results and to ensure equal justice under the law to all claimants, good administrative practice requires the use of a single set of tables so that there may be uniform standards applicable to all claimants.

The Office evaluates industrial hearing loss in accordance with the standards contained in the American Medical Association, *Guides to the Evaluation of Permanent Impairment,* using the frequencies of 500, 1,000, 2, 000 and 3,000 cycles per second.[4] The losses at each frequency

[2] 5 U.S.C. §§ 8101-8193.

[3] 20 C.F.R. § 10.404.

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

are added and averaged.[5] A "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 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 loss.[8] The Board has concurred in the Office's adoption of this standard for evaluating hearing losses for schedule award purposes.[9]

ANALYSIS

In the present case, the Office had awarded appellant a 34 percent binaural hearing loss schedule award. However, with respect to appellant's subsequent claim for an increase in his impairment rating, the Office found that the medical evidence at the time of his claim was insufficient to establish an impairment rating greater than the 34 percent impairment rating that he had received.

The Office therefore referred appellant for an evaluation to Dr. Bikhazi, an Office second opinion physician, who indicated that appellant had a work-related moderate sensorineural hearing loss, bilateral secondary to acoustic trauma. Dr. Bikhazi indicated that appellant worked at the employing establishment from 1956 to 1986, however, he did not take into account that appellant retired in 1981 and was reemployed in 1982. He also failed to evaluate correctly the audiogram data taken on May 30, 2003 to determine if appellant's hearing loss had increased since the prior March 17, 2000 audiogram. He also failed to indicate whether appellant required hearing aids.

The May 30, 2003 audiogram test results conducted by Mr. Davis, an audiologist, for the right ear at frequency levels of 500, 1,000, 2,000 and 3,000 cycles per second revealed decibel losses of 45, 45, 55 and 60 decibels respectively. Testing for the left ear at frequency levels of 500, 1,000, 2,000 and 3,000 cycles per second revealed decibel losses of 50, 55, 55 and 55 decibels respectively. The audiogram test results that Dr. Bikhazi recorded in his report differ from the test results recorded by Mr. Davis. In left ear findings, Dr. Bikhazi noted a 45 decibel

[5] *Id*.

[6] *Id*.

[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).

loss at 500 cycles per second and a 60 decibel loss at 3,000 cycles per second while Mr. Davis noted a 50 decibel and a 55 decibel loss, respectively.[10]

The Office then referred the record to Dr. Schindler, the Office medical adviser, who reviewed appellant's records and advised that appellant's continued hearing loss since his retirement in 1986 was attributable to presbycusis. The Office then denied appellant's claim in reliance of Dr. Schindler's opinion.

However, Dr. Bikhazi failed to evaluate the May 30, 2003 audiogram and to determine whether appellant sustained an increased hearing loss since his prior March 17, 2000 audiogram test. Consequently, he was unable to provide an opinion to the Office regarding whether appellant had sustained an increase in his hearing loss and, if so, if any such increase was attributable to his employment. Proceedings under the Act[11] are not adversarial in nature, nor is the Office a disinterested arbiter. While the claimant has the burden to establish entitlement to compensation, the Office shares responsibility in the development of the evidence to see that justice is done. Once the Office undertakes to develop the medical evidence further, it has the responsibility to do so in the proper manner.[12]

Since Dr. Bikhazi, the Office's second opinion physician, failed to explain whether appellant's binaural hearing loss had increased since his last audiogram, and if so, whether it was caused by his employment, the July 22, 2003 decision of the Office must be set aside and the case record remanded to the Office for further development. The Board further notes that the May 30, 2003 audiogram test results resulted in a 43 percent binaural hearing loss. Finally, Dr. Bikhazi did not indicate whether appellant should be authorized additional hearing aids.

CONCLUSION

Because Dr. Bikhazi failed to evaluate the May 30, 2003 audiogram test results and to have compared those results with the prior March 17, 2000 audiogram test, which would have resulted in a determination that appellant had a binaural hearing loss greater than 34 percent, and

[10] Using Mr. Davis' data, the right ear frequency levels of 500, 1,000, 2,000 and 3,000 cycles per second revealed decibel losses of 45, 55, 55 and 60 decibels respectively. These decibel losses total 215 and when divided by 4, the average hearing loss at those cycles results in a loss of 53.75 decibels. The average of 53.75 decibels when reduced by 25 decibels (the first 25 decibels were discounted as discussed above) equals 28.75 decibels which when multiplied by the established factor 1.5 computes to a 43.12 percent loss of hearing for the right ear. Testing for the left ear at frequency levels of 500, 1,000, 2,000 and 3,000 cycles per second revealed decibel losses of 50, 55, 55 and 55 decibels respectively. These decibel losses total 215, the same total as with appellant's right ear, and when also divided by 4 obtains the average hearing loss at those cycles of 53.75 decibels. This average of 53.75 decibels when reduced by 25 decibels equals 28.75 decibels which, when multiplied by 1.5 computes to a 43.13 percent loss of hearing for the left ear. The monaural loss for the right ear, 43.12 percent, (the formula requires the lower of the two values, however, the values are the same in this instance) when multiplied by 5 is 215.6, and when added to 43.13 percent, the monaural loss for the left ear, is 259 (258.7). This sum would then be divided by 6 to arrive at 43 percent binaural loss. Appellant's hearing loss calculated under Office standardized procedures is a 43 percent binaural hearing loss, an impairment rating which is greater than his previous award of 34 percent.

[11] *See supra* note 3.

[12] *Linda L. Newbrough*, 52 ECAB 323 (2001).

because he failed to explain whether any increase in hearing loss was attributable to appellant's employment, the Office's decision will be set aside and the case remanded for further development. On remand, the Office should refer the case record to Dr. Bikhazi to evaluate the May 30, 2003 audiogram test results and to compare them with the March 17, 2000 audiogram test results to determine whether appellant has sustained a greater than 34 percent binaural hearing loss since the prior test, and, if so, to provide a rationalized opinion as to whether he believes the increase is attributable to appellant's employment. Dr. Bikhazi should also determine whether additional hearing aids are recommended. After such development as the office deems appropriate, a *de novo* decision will be issued.

ORDER

IT IS HEREBY ORDERED THAT the July 22, 2003 decision of the Office of Workers' Compensation Programs be set aside and the case remanded for further development consistent with this opinion.

Issued: April 8, 2004
Washington, DC

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

A. Peter Kanjorski
Alternate Member