

**United States Department of Labor
Employees' Compensation Appeals Board**

CHARLES G. JOHNSON, Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Omaha, NE, Employer**

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**Docket No. 03-2176
Issued: February 24, 2004**

Appearances:
Charles G. Johnson, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

COLLEEN DUFFY KIKO, Member
WILLIE T.C. THOMAS, Alternate Member
MICHAEL E. GROOM, Alternate Member

JURISDICTION

On September 8, 2003 appellant filed a timely appeal from decisions of the Office of Workers' Compensation Programs dated February 27 and July 28, 2003 which denied his schedule award claim. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the schedule award issue.

ISSUES

The issues are: (1) whether appellant has a hearing loss of sufficient degree to entitle him to a schedule award under the Federal Employees' Compensation Act; and (2) whether appellant is entitled to wage-loss compensation for tinnitus related to his employment.

FACTUAL HISTORY

This case has twice previously been before the Board on appeal. By decision dated July 2, 1996, the Board adopted the finding and conclusions of an April 5, 1994 decision of an Office hearing representative that found appellant was not entitled to a schedule award and found that the evidence did not establish that appellant's tinnitus prevented him from performing his

former position of tour superintendent.¹ By decision dated July 1, 2002, the Board found that appellant's April 4, 2000 request for reconsideration was not timely filed and did not demonstrate clear evidence of error.² The Board denied appellant's petition for reconsideration by order dated October 8, 2002.

Appellant submitted additional factual and medical evidence. In an April 15, 2002 report, which was accompanied by an audiogram of the same date, Dr. Britt A. Thedinger, a Board-certified otolaryngologist, diagnosed mild to moderate high frequency noise-induced sensorineural hearing loss of each ear and "bilateral high pitched nonpulsatile tinnitus dating back to 1988." Dr. Thedinger stated that the tinnitus was a direct result of appellant's hearing loss and that the noise and employment at the employing establishment was the direct cause of his tinnitus. A July 12, 2002 report from Dr. Thedinger stated that the limbic system located in the brainstem was the area that was causing him to be aware of his tinnitus.

In a June 26, 2002 report, Dr. Lee F. McNamara, a family practitioner, stated that appellant's diagnosed conditions of myocardial infarction, constant tinnitus, chronic fatigue syndrome, acute prostatitis, irritable bowel syndrome, ASHD (arteriosclerotic heart disease) with hypertension, chronic ulcerative colitis with chronic colon contractions, anxiety depression, esophagitis, gastritis and hiatal hernia was permanently disabling and "severely limit his physical activities, and the ability to perform sedentary work." In an October 28, 2002 report, Dr. McNamara stated that he first diagnosed appellant's tinnitus in June 1990 and that his "employment[-]related injury would have been as restrictive and disabling in November 1992 as it is presently."

In a June 13, 2002 affidavit, appellant testified that he would have to stop working on the occasions that his tinnitus increased in intensity and that the tinnitus interfered with his sleep. April 5 and August 22, 2001 decisions of the Social Security Administration denied appellant's claim for disability benefits on the basis that he was not disabled for his prior job. A September 25, 2002 decision of an administrative law judge found that appellant had been disabled as defined by the Social Security Act since October 19, 2000 and that he had impairments considered severe under Social Security regulations, namely, coronary artery disease, status post myocardial infarction; essential hypertension; mild to moderate high frequency noise-induced, bilateral sensorineural hearing loss; and chronic inflammation of the colon.

By letter dated January 17, 2003, appellant requested reconsideration. By decision dated February 27, 2003, the Office found that the evidence did not establish a ratable hearing loss and that there was no objective evidence that his claimed tinnitus was caused or contributed by his noise exposure or that it caused or contributed to a ratable hearing loss.

By letter received July 9, 2003, appellant requested reconsideration, stating that the ringing became more elevated and intense when he tried to think and that, when he retired in November 1992, he was afraid of not being able to do his job or of his employment being

¹ Docket No. 94-2115.

² Docket No. 01-1297.

terminated without retirement benefits. Appellant contended that he had been mentally disabled since the ringing began in 1988 and that his tinnitus affected his concentration, speech, thinking and energy levels. Appellant submitted copies of portions of transcripts of testimony in his age discrimination suit against the employing establishment and a letter from Nebraska Vocational Rehabilitation, stating that he had a multitude of work limitations: being easily distracted by ringing in his ears, difficulty concentrating on a task, a production rate lower than in the past and a feeling of being dizzy/lightheaded/nauseous that affected work.

Appellant also submitted additional medical evidence. In a report dated November 3, 2000, which was accompanied by an October 30, 2000 audiogram, Dr. Thedinger stated that noise exposure at the employing establishment was the cause of appellant's tinnitus. In a March 6, 2003 report, Dr. Thedinger diagnosed "severe disabling bilateral high pitched nonpulsatile tinnitus" which "may have an affect on your concentration, speech, thinking and underlying energy levels." In an April 7, 2003 report, which was accompanied by an audiogram of the same date, Dr. Gary F. Moore, a Board-certified otolaryngologist, stated that appellant had a high-pitched, nonpulsatile tinnitus as a result of noise-induced hearing loss." In a May 6, 2003 report, Dr. Moore stated that the process of aging sometimes causes decreased hearing and that this would make the tinnitus seem to increase.

On July 23, 2003 an Office medical adviser stated that the evidence did not indicate that appellant had an audiogram, which showed a ratable hearing loss.

By decision dated July 28, 2003, the Office found that the evidence did not demonstrate a ratable hearing loss.

LEGAL PRECEDENT

The schedule award provision of the Federal Employees' Compensation Act³ and its implementing regulation⁴ 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 Federal Employees' Compensation 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* (A.M.A., *Guides*) has been adopted by the implementing regulation as the appropriate standard for evaluating schedule losses.⁵

The Office evaluates industrial hearing loss in accordance with the standards contained in the A.M.A., *Guides* 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 and the "fence" of 25 decibels is deducted since, as the A.M.A., *Guides* points out, losses below 25 decibels result in no impairment in the

³ 5 U.S.C. § 8107.

⁴ 20 C.F.R. § 10.404 (1999).

⁵ *Id.*

ability to hear everyday speech in everyday conditions. 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.

The A.M.A., *Guides* points out that tinnitus may impair speech discrimination and provides for addition of “up to 5 [percent] for tinnitus in the presence of measurable hearing loss if the tinnitus impacts the ability to perform activities of daily living.”⁶ The Board has repeatedly held that there is no basis for paying a schedule award for a condition such as tinnitus unless the evidence establishes that the condition caused or contributed to a ratable permanent loss of hearing.⁷ Appellant could also receive compensation for tinnitus by establishing that the tinnitus was disabling and caused a loss of wage-earning capacity.⁸

ANALYSIS

On a prior appeal the Board affirmed an Office medical adviser’s finding that appellant had not established that he had a ratable hearing loss. Since that time, appellant has submitted three reports from Board-certified otolaryngologists that were accompanied by audiograms: two from Dr. Thedinger and one from Dr. Moore. Although an Office medical adviser stated that on July 23, 2003 that appellant had not had an audiogram that showed a ratable hearing loss, the Office medical adviser did not compute the percentage of hearing loss shown by Dr. Thedinger’s October 30, 2000 and April 15, 2002 audiograms or Dr. Moore’s April 7, 2003 audiogram. This is contrary to the dictates of the Office’s procedure manual, which indicates that an Office medical adviser should calculate the percentage of impairment shown by audiograms meeting the Office’s standards.⁹ The case will be remanded to the Office for such calculation and, if a ratable hearing loss is shown, for consideration of appellant’s entitlement to a schedule award, including the addition of up to five percent for tinnitus as provided in the A.M.A., *Guides*.

Appellant has not shown that his tinnitus caused disability for his former position of tour superintendent. The test of “disability” is whether an employment-related impairment prevents the employee from engaging in the kind of work he or she was doing when injured.¹⁰ Whether a particular injury or condition causes an employee to be disabled for employment is a medical question, which must be resolved by competent medical evidence.¹¹

Dr. McNamara stated, in a June 26, 2002 report, that appellant was permanently disabled, but listed many medical conditions as the reason for his disability. This report does not explain

⁶ A.M.A., *Guides*, 5th edition, section 11.2a, p. 246.

⁷ *Richard Larry Enders*, 48 ECAB 184 (1996).

⁸ *Norman R. Stephenson*, 32 ECAB 623 (1981).

⁹ Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.4(b) (June 2003).

¹⁰ *David H. Goss*, 32 ECAB 24 (1980).

¹¹ *Debra A. Kirk-Littleton*, 41 ECAB 703 (1990).

how appellant's tinnitus disabled appellant for his former position. Dr. Thedinger, in a March 6, 2003 report, stated that appellant's tinnitus "may" affect his concentration, speech, thinking and energy levels. This report is speculative and does not explain how appellant's tinnitus disabled him for his former position. Appellant has not established that his tinnitus precluded him from continuing to work as a tour superintendent, a position from which he retired for reasons other than disability.

CONCLUSION

The case is remanded to the Office for review of the audiograms submitted in conjunction with appellant's requests for reconsideration to determine if they show a ratable hearing loss and, if so, for consideration of appellant's entitlement to a schedule award, including additional impairment for tinnitus. Appellant has not established that his tinnitus resulted in a loss of wage-earning capacity.

ORDER

IT IS HEREBY ORDERED THAT the July 28 and February 27, 2003 decisions of the Office of Workers' Compensation Programs are set aside with regard to the denial of a schedule award. The decisions are affirmed with regard to the denial of compensation for wage loss.

Issued: February 24, 2004
Washington, DC

Colleen Duffy Kiko
Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member