

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

<hr style="border: 0; border-top: 1px solid black; margin-bottom: 5px;"/>		
SUE HOWARD, Administratrix for the Estate of)	
JIMMIE L. HOWARD, Appellant)	
)	
and)	Docket No. 04-815
)	Issued: September 24, 2004
)	
TENNESSEE VALLEY AUTHORITY,)	
Drakesboro, KY, Employer)	
<hr style="border: 0; border-top: 1px solid black; margin-top: 5px;"/>)	

Appearances:
Ronald K. Bruce, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chairman
DAVID S. GERSON, Alternate Member
WILLIE T.C. THOMAS, Alternate Member

JURISDICTION

On February 10, 2004 appellant filed a timely appeal from an Office of Workers' Compensation Programs' merit decision dated November 10, 2003 in which the Office affirmed a May 6, 2003 Office decision granting the employee a schedule award for a bilateral hearing loss. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the November 10 and May 6, 2003 decisions.

ISSUE

The issue is whether the employee has more than a three percent hearing loss for which he received a schedule award.

FACTUAL HISTORY

On December 20, 2002 the employee, then a 73-year-old former heavy equipment operator, filed an occupational disease claim alleging that he sustained a hearing loss in 1990 due to factors of his employment. He retired on January 7, 1992. On January 10, 2003 the employee

filed a claim for a schedule award. On April 25, 2003 the Office accepted his claim for a bilateral hearing loss. The employee died on July 29, 2003.

In a report dated March 14, 2003, Dr. Linda Mumford, an otolaryngologist and an Office referral physician, indicated that the employee had a work-related bilateral sensorineural hearing loss. She provided the results of audiometric testing that revealed losses of 15, 15, 30 and 45 decibels (dBs) in the right ear at 500, 1,000, 2,000 and 3,000 hertz (Hz) and 25, 20, 30 and 45 in the left ear at the same levels.

In a report dated April 23, 2003, the Office medical adviser applied the Office's standardized procedures to Dr. Mumford's evaluation. He totaled the dBs of 15, 15, 30 and 45 in the right ear at 105 dBs and divided it by 4 to obtain the average hearing loss of 26.25 dBs. This average was then reduced by 25 dBs to equal 1.25 dBs which was multiplied by the established factor of 1.5 to compute a 1.88 percent hearing loss in the right ear. The Office medical adviser totaled the losses of 25, 20, 30 and 45 in the left ear at 120 dBs and divided it by 4 to obtain the average hearing loss of 30 dBs. This average was then reduced by 25 dBs to equal 5 which was multiplied by the established factor of 1.5 to compute a 7.5 hearing loss in the left ear. The Office medical adviser then multiplied the 1.88 percent loss in the left ear (the ear with the lesser loss) by 5, added it to the 7.5 percent loss in the right ear (the ear with the greater loss) and divided the sum by 6 which equals 2.81, which he rounded up to 3 percent in accordance with Office procedures.

By decision dated May 6, 2003, the Office granted the employee a schedule award for six weeks based on a three percent binaural hearing loss for the period March 14 to April 24, 2003.

On May 15, 2003 the employee requested an oral hearing on the issue of the percentage of hearing loss in the Office's May 6, 2003 schedule award decision.

As noted above, the employee died on July 29, 2003. His wife, appellant, attended the oral hearing scheduled for October 2, 2003 and submitted additional medical evidence.

By decision dated November 10, 2003, the Office hearing representative affirmed the Office's May 6, 2003 decision on the grounds that appellant's entitlement to further benefits based on the employee's schedule award ceased as of the date of his death.

LEGAL PRECEDENT

The schedule award provision of the Federal Employees' Compensation Act¹ and its implementing regulation² sets 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*

¹ 5 U.S.C. § 8107.

² 20 C.F.R. § 10.404.

Evaluation of Permanent Impairment (A.M.A., *Guides*) has been adopted by the implementing regulation as the appropriate standard for evaluating 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 Hz, the losses at each frequency are added up and averaged.⁵ Then, the “fence” of 25 dBs is deducted because, as the A.M.A., *Guides* points out, losses below 25 dBs 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 hearing loss.⁸ The Board has concurred in the Office’s adoption of this standard for evaluating hearing loss.⁹

ANALYSIS

The Office medical adviser reviewed the results of the audiometric testing performed on March 14, 2003 for Dr. Mumford and correctly applied the Office’s standardized procedures. In a report dated April 23, 2003, he totaled the dBs of 15, 15, 30 and 45 in the right ear for the frequency levels of 500, 1,000, 2,000 and 3,000 Hz at 105 dBs and divided it by 4 to obtain the average hearing loss of 26.25 dBs. This average was then reduced by 25 dBs to equal 1.25 dBs which was multiplied by the established factor of 1.5 to compute a 1.88 percent hearing loss in the right ear. The Office medical adviser totaled the losses of 25, 20, 30 and 45 in the left ear at 120 dBs and divided it by 4 to obtain the average hearing loss of 30 dBs. This average was then reduced by 25 dBs to equal 5 which was multiplied by the established factor of 1.5 to compute a 7.5 percent hearing loss in the left ear. He then multiplied the 1.88 percent loss in the left ear (the ear with the lesser loss) by 5, added it to the 7.5 percent loss in the right ear (the ear with the greater loss) and divided the sum by 6 which equals 2.81, which he rounded up to 3 percent in accordance with Office procedures.

The Board finds that the Office medical adviser correctly applied the procedures in the A.M.A., *Guides* and the Office’s procedure manual to the audiometric testing results obtained for Dr. Mumford and determined that the employee had a three percent bilateral hearing loss.

³ *Id.*

⁴ *Stuart M. Cole*, 46 ECAB 1011 (1995).

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

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).

Under the Act, the maximum award for binaural hearing loss is 200 weeks of compensation.¹⁰ Since the binaural hearing loss in this case is 3 percent, the employee would be entitled to 3 percent of 200 weeks or 6 weeks of compensation. The Office's May 6, 2003 decision awarded the employee six weeks of compensation for a three percent hearing loss.

The employee appealed the Office's May 6, 2003 schedule award decision but died before the scheduled hearing on October 2, 2003. Appellant attended the hearing and submitted additional medical evidence regarding the percentage of the employee's hearing loss. However, the Office's hearing representative did not consider the additional medical evidence and affirmed the Office's May 6, 2003 decision on the grounds that any further benefits related to the employee's schedule award ceased as of the date of his death.

Section 8109 of the Act provides that if an individual has sustained permanent impairment entitling him to compensation under section 8107, has filed a valid claim in his lifetime and dies from a nonwork-related injury before the end of the period specified by the schedule, the unpaid schedule award compensation at the time of his death shall be paid to specific dependents of the deceased employee.¹¹

In *Michael Vining (Kevin M. Vining)*, the Board found that the employee's widow was entitled to claim a posthumous schedule award under section 8109 of the Act. In the instant case, the employee filed a schedule award claim prior to his death and was granted a schedule award based on a three percent hearing loss. He contested the percentage of hearing loss of the schedule award decision and requested an oral hearing but died prior to the hearing. The employee's widow attended the hearing and presented medical evidence supporting more than a three percent hearing loss. The Board finds that appellant was entitled, under section 8109, to pursue a claim for posthumous benefits based on the employee's schedule award and established by competent medical evidence.¹²

CONCLUSION

The Board finds that the Office, in its November 10, 2003 decision, improperly denied appellant's right to contest the Office's May 6, 2003 schedule award decision and pursue the decedent employee's claim for a revised schedule award based on a higher percentage of hearing loss. On remand, the Office should consider all the medical evidence of record and issue an appropriate decision as to whether the employee sustained more than a three percent bilateral hearing loss.

¹⁰ 5 U.S.C. § 8107(c)(13)(B).

¹¹ 5 U.S.C. § 8109(a).

¹² See *Cheryl R. Holloway (Wryland R. Holloway)*, 54 ECAB ____ (Docket No. 02-2153, issued February 28, 2003) (the Office erred in denying a schedule award because the employee had died where the employee filed a schedule award claim in his lifetime and the claim was under development at the time of the employee's death).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated November 10, 2003 is set aside and the case is remanded for further action consistent with this decision.

Issued: September 24, 2004
Washington, DC

Alec J. Koromilas
Chairman

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member