United States Department of Labor
Employees' Compensation Appeals Board

DONELL GRIMES, Appellant	)	
and	)	**Docket No. 06-735**
	)	**Issued: July 18, 2006**
DEPARTMENT OF DEFENSE, DEFENSE LOGISTICS AGENCY, FORT BELVOIR, VA	)	
Employer	)	

Appearances:
Donell Grimes, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On February 7, 2006 appellant filed a timely appeal from the Office of Workers' Compensation Programs' decision dated December 7, 2005 which granted a schedule award for binaural hearing loss. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of appellant's schedule award.

ISSUE

The issue is whether appellant has greater than seven percent binaural hearing loss for which he received a schedule award. On appeal he contends that the beginning date of the award is incorrect.

FACTUAL HISTORY

On April 9, 2004 appellant, then a 49-year-old materials handler, filed an occupational disease claim alleging that he sustained a hearing loss due to factors of his federal employment

which involved exposure to noise from construction work, machinery and heavy equipment noise. He previously filed a claim, but had to open a new case.[1]

The Office subsequently referred appellant, together with an amended statement of accepted facts, to Dr. Michael Jacobson, a Board-certified otolaryngologist, for an examination. In an October 19, 2004 report, he opined that he had a 46.5 percent bilateral hearing loss comprised of 41.25 percent bilateral sensorineural hearing loss and a 5 percent loss due to tinnitus as a result of noise exposure in his federal employment. The date of maximum medical improvement was noted to be October 19, 2004. Bilateral hearing aids were recommended along with audiograms every six months and the continual aggressive hearing preservation. The accompanying October 19, 2004 audiogram reflected testing at the frequency levels of 500, 1,000, 2,000 and 3,000 cycles per second (cps) and revealed decibel losses on the left of 10, 15, 50 and 70, respectively and on the right of 10, 10, 35 and 60, respectively.

By letter dated November 26, 2004, the Office accepted the claim for bilateral hearing loss. The record was forwarded to an Office medical adviser so that the percentage of permanent impairment could be assessed.

In a November 20, 2004 report, the Office medical adviser applied the Office standards for evaluating the extent of hearing loss to Dr. Jacobson's October 19, 2004 audiogram. Testing of the right ear at the frequency levels of 500, 1,000, 2,000 and 3,000 cps were noted to have decibel losses of 10, 10, 35 and 60 respectively. These decibels were totaled at 115 and were divided by 4 to obtain the average hearing loss at those cycles of decibels. The average of 28.75 decibels was then reduced by 25 decibels to equal 4 which was multiplied by the established factor of 1.5 to compute a 5.6 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 cps were noted to have decibel losses of 10, 15, 50 and 60 respectively. These decibels were totaled at 135 and were divided by 4 to obtain the average hearing loss at those cycles of 33.75 decibels. The average of 33.75 decibels was then reduced by 25 decibels to equal 8.75 which was multiplied by the established factor of 1.5 to compute a 13.125 percent loss of hearing for the left ear. The Office medical adviser then computed the binaural hearing loss by multiplying the lesser loss, 5.625 by 5, added this to the greater loss, 13.125 and divided this figure by 6 to arrive at a 6.875 percent binaural hearing loss. The Office medical adviser concluded that appellant had a 7 percent bilateral hearing loss based upon the October 19, 2004 report by Dr. Jacobson. He opined that the date of maximum medical improvement was October 19, 2004 and concurred with Dr. Jacobson's recommendations that appellant utilize aggressive hearing protection, bilateral hearing aids and recheck his hearing every six months until it appears that the hearing has stabilized. Dr. Jacobson's finding of tinnitus was not addressed.

On May 2, 2005 appellant filed a claim for a schedule award. On May 31, 2005 he retired from the employing establishment.

[1] The record indicates that appellant previously filed a claim under case number A25-561039 for exposure to the same work factors from 1977 to May 24, 2000, but was found to have no ratable hearing loss at that time.

In a decision dated December 7, 2005, the Office granted a schedule award for seven percent loss of use, of both ears. The Office awarded compensation for a period of 14 weeks from October 19, 2004 to January 24, 2005.

LEGAL PRECEDENT

The schedule award provision of the Federal Employees' Compensation Act[2] and its implementing regulation[3] sets forth the number of weeks of compensation payable to employees sustaining permanent impairment from loss or loss of use, of schedule members or functions of the body. The Act, however, does not specify the manner in which the percentage loss of a member 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* (5th ed.) has been adopted by the Office for evaluating schedule losses.[4]

The Office evaluates industrial hearing loss in accordance with the standards contained in the A.M.A., *Guides*.[5] Using the frequencies of 500, 1,000, 2,000 and 3,000 cps, the losses at each frequency are added up and averaged.[6] 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.[7] The remaining amount is multiplied by a factor of 1.5 to arrive at the percentage of monaural hearing loss.[8] 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.[9] The Board has concurred in the Office's adoption of this standard for evaluating hearing loss.[10]

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[2] 5 U.S.C. § 8107.

[3] 20 C.F.R. § 10.404.

[4] *See* 20 C.F.R. § 10.404; *see also David W. Ferrall*, 56 ECAB ___ (Docket No. 04-2142, issued February 23, 2005).

[5] A.M.A., *Guides* 250.

[6] *Id.*

[7] *Id.*

[8] *Id.*

[9] *Id.*

[10] *Donald E. Stockstad*, 53 ECAB 301 (2002); *petition for recon. granted* (*modifying prior decision*), Docket No. 01-1570 (issued August 13, 2002).

ANALYSIS

To determine the nature and extent of appellant's hearing loss, the Office referred him to Dr. Jacobson, who concluded that he had sustained a 46.5 percent binaural hearing impairment and tinnitus resulting from exposure to noise in federal employment. On November 20, 2004 the Office medical adviser reviewed the otologic and audiologic testing performed by Dr. Jacobson on October 19, 2004 and applied the Office's standardized procedures to this evaluation to obtain a seven percent bilateral hearing loss.

The Board finds that application of the standards contained in the A.M.A., *Guides*, to Dr. Jacobson's October 19, 2004 audiologic testing results in an eight percent binaural hearing loss. The losses at the frequencies of 500, 1,000, 2,000 and 3,000 cps are added and averaged and the "fence of 25 decibels" is deducted. The remaining amount is then multiplied by 1.5 to arrive at the percentage of monaural hearing loss. In this case, testing of the right ear at the frequency levels of 500, 1,000, 2,000 and 3,000 cps were noted to have decibel loss of 10, 10, 35, 60 respectively and the above formula derives 5.625 monaural loss. Testing of the left ear at the frequency level of 500, 1,000, 2,000 and 3, 000 cps were properly noted to have decibel loss of 10, 15, 50 and 70. Utilizing the above formula with the proper decibel losses derives 16.875 percent monaural loss. The 5.625 percent hearing loss for the right ear (the ear with the lesser loss) when multiplied by 5 yields a product of 28.125. The 28.125 is then added to the 16.875 percent hearing loss for the left ear (the ear with the greater loss) to obtain a total of 45, which when divided by 6 represents a binaural loss of hearing of 7.5 percent. This figure is rounded to the closest whole number, 8.0 percent.[11]

The Board notes that, while Dr. Jacobson properly calculated the right ear as having a 5.625 monaural loss, he improperly calculated the left ear as having a 13.12 percent monaural loss. In applying the calculation for binaural hearing impairment, he not only utilized the incorrect monaural loss for the left ear, but also failed to divide his total of 41.25 by the standard of 6. Thus, Dr. Jacobson's opinion that appellant has a 41.25 percent binaural hearing loss is not properly calculated under the standards contained in the A.M.A., *Guides*.

The Board notes that the Office medical adviser noted that testing of the left ear at the frequency level of 3000 cps revealed a decibel loss of 60 as opposed to 70. Although the Office medical adviser calculated the binaural hearing loss using the standards contained in the A.M.A., *Guides*, his opinion that appellant had a 7 percent bilateral hearing loss is based on an incorrect value for testing of the left ear at the frequency level of 3,000 cps. The Board finds that appellant is entitled to a schedule award for an eight percent binaural hearing loss.

The Board further notes that the Office medical adviser did not address Dr. Jacobson's finding of five percent impairment due to tinnitus. The A.M.A., *Guides* provides that tinnitus in the presence of unilateral or bilateral hearing impairment may impair speech discrimination. Therefore, add up to five percent for tinnitus in the presence of measurable hearing loss if the

[11] *See Marco A. Padilla*, 51 ECAB 202, 206 n.6 (1999) (the Office's policy is to round the calculated impairment percentage to the nearest whole number).

tinnitus impacts the ability to perform activities of daily living.[12] The A.M.A., *Guides* states, as follows:

> "Some impairment classes refer to limitations in the ability to perform daily activities. When this information is subjective and possibly misinterpreted, it should not serve as the sole criterion upon which decisions about impairment are made. Rather, obtain objective data about the severity of the findings and the limitations and integrate the findings with the subjective data to estimate the degree of permanent impairment."[13]

Dr. Jacobson estimated a five percent impairment of both ears due to tinnitus impacting the ability to perform the activities of daily living and noted a 92 percent right and an 88 percent left auditory discrimination score. The objective data on appellant's speech discrimination scores supported impairment and Dr. Jacobson accorded five percent impairment due to tinnitus. He, however, offered no rationale for his conclusion that appellant's tinnitus impacted his ability to perform activities of daily living. As Dr. Jacobson did not demonstrate how he integrated this information with the objective data on appellant's speech discrimination scores, the Board cannot find that he followed the procedure set forth in the fifth edition of the A.M.A., *Guides*.[14] Accordingly, the Office properly excluded a tinnitus impairment determination.

On appeal, appellant contends that the Office incorrectly determined October 19, 2004 to be the beginning date of his award. The Board disagrees. It is well established that the period covered by the schedule award commences on the date that the employee reaches maximum medical improvement from the residuals of the accepted employment injury. The Board has explained that maximum medical improvement means that the physical condition of the injured member of the body has stabilized and will not improve further. The determination of whether maximum medical improvement has been reached is based on the probative medical evidence of record and is usually considered to be the date of the evaluation by the attending physician, which is accepted as definitive by the Office.[15] The Board has noted a reluctance to find a date of maximum medical improvement, which is retroactive to the award, as retroactive awards often result in payment of less compensation. The Board, therefore, requires persuasive proof of maximum medical improvement for selection of a retroactive date of maximum medical improvement.[16] Both Dr. Jacobson and the Office medical adviser concluded that appellant reached maximum medical improvement on October 19, 2004, the date of the impairment

[12] A.M.A., *Guides* 246.

[13] *Id.*

[14] *Robert E. Cullison*, 55 ECAB ___ (Docket No. 04-641, issued June 2, 2004).

[15] *Mark A. Holloway*, 55 ECAB ___ (Docket No. 03-2144, issued February 13, 2004).

[16] *Marie J. Born*, 27 ECAB 623 (1976), *petition for recon. denied*, 28 ECAB 89 (1976).

evaluation by Dr. Jacobson. The Board finds that the Office correctly determined the date of maximum medical improvement as October 19, 2004.[17]

Appellant is entitled to a schedule award for an eight percent binaural hearing loss. The schedule award provisions of the Act specify the number of weeks of compensation to be paid for each impairment listed in the schedule.[18] Appellant is entitled to an 8 percent of 200 weeks or 16 weeks of compensation, but was awarded a 7 percent of 200 weeks or 14 weeks of compensation by the Office.

CONCLUSION

The Board finds that appellant has an eight percent binaural hearing loss.

ORDER

IT IS HEREBY ORDERED THAT the December 7, 2005 decision of the Office of Workers' Compensation Programs is affirmed, as modified.

Issued: July 18, 2006
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

[17] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Computing Compensation*, Chapter 2.901.14(a) (December 1995). The period of a schedule award commences on the date of maximum medical improvement, which means that the physical condition of the injured member of the body is stabilized and will not improve further. *See Eugenia L. Smith*, 41 ECAB 409 (1990).

[18] 5 U.S.C. § 8107. Section 8107(c)(13)(B) provides 200 weeks of compensation for loss of use of both ears.