

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

E.O., Executrix of the Estate of J.O., Appellant)	
)	
and)	Docket No. 08-2255
)	Issued: June 18, 2009
DEPARTMENT OF THE ARMY, NATIONAL GUARD BUREAU, Pineville, LA, Employer)	
)	

Appearances:
Appellant, 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
COLLEEN DUFFY KIKO, Judge

JURISDICTION

On August 4, 2008 appellant filed a timely appeal from a June 6, 2008 decision of the Office of Workers' Compensation Programs concerning a schedule award for a loss of hearing. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether the employee sustained greater than a four percent monaural (right ear) hearing loss, for which he received a schedule award.

FACTUAL HISTORY

This case has previously been before the Board. In an August 26, 1992 decision, the Board affirmed an August 5, 1991 decision of the Office finding that the employee was only entitled to a schedule award for a four percent hearing loss in his right ear for the period April 30 to May 14, 1991, and that there was no ratable impairment to the employee's left ear. The Office had accepted that the employee sustained binaural hearing loss while working as a heavy mobile equipment and vehicle mechanic. In this position, the employee was exposed to loud noise from vehicle engines, heavy equipment and exhaust fans for eight to nine hours a day, four days a

week, and was not required to wear hearing protection. The Office referred the employee to Dr. William Cutrer, a Board-certified otolaryngologist, for a second opinion evaluation of the employee's hearing loss. The employee underwent a physical examination and audiometric testing. The testing results at 500, 1,000, 2,000 and 3,000 cycles per second (cps) for the left ear were 15, 15, 30 and 35 decibels, respectively, and in the right ear were 15, 20, 40 and 35 decibels, respectively. The Board found that the Office medical adviser properly calculated these test results in accordance with the current edition of the A.M.A., *Guides*, to determine no ratable impairment in the left ear and four percent permanent impairment to hearing in the right ear.¹ The facts and the history of the prior appeal are hereby incorporated by reference.

On September 19, 2006 the employee filed an occupational disease claim (Form CA-2) alleging that he sustained headaches, ringing in his ears and loss of hearing. He stated that during his federal employment he was exposed to noisy areas without hearing protection and that tank engines were tested in the same area. The employee indicated that he was first aware of the condition on July 23, 1982, which was the same day he realized the condition was caused or aggravated by his employment.

In an undated statement, the employee alleged that he began his employment on December 12, 1978 and his duties included rebuilding diesel engines. He stated that he was exposed to shop noise eight hours a day, five days a week, which was constant and very high. Several years later the employee began working four, 10-hour days. There was no hearing protection provided and no training on hearing protection from 1978 to 1986. In 1982, the employee began to have trouble hearing. He stated that the hearing in his right ear was completely gone and the left ear was 50 percent or more gone.

In a telephone memorandum dated December 7, 2006, the Office noted that the employee mistakenly filed a Form CA-2 for a new injury instead of a Form CA-7 for an increased schedule award.

On January 3, 2007 the employee filed a claim for a schedule award (Form CA-7). The Office determined that a second opinion evaluation was required and scheduled an appointment for April 17, 2007.

On March 30, 2007 the employing establishment notified the Office that the employee had died on February 23, 2007.

In an undated note, appellant contended that the record contained sufficient information to grant the employee's claim for a schedule award. In an undated medical report, an audiologist diagnosed moderate to severe, gradually sloping left sensorineural hearing loss. She opined that the employee's hearing loss was not caused by a result of military noise exposure based on her finding that pure tone thresholds were clinically normal on military records. The audiologist also stated that the current hearing loss had significantly decreased over the past year, suggesting a progressive late onset etiology, probably in conjunction with occupational noise exposure. She noted that the employee's tinnitus was probably a result of the same etiology. The results of a pure tone audiometric test of the right ear showed 80, 70, 70, 60 and 65 decibel loss at 500, 1,000, 2,000, 3,000 and 4,000 cps, respectively.

¹ Docket No. 92-262 (issued August 26, 1992).

On February 11, 2008 the Office referred the employee's file and a statement of accepted facts to the Office medical adviser to determine the extent and degree of any additional hearing loss.

In a medical report dated May 2, 2008, the Office medical adviser, Dr. Ronald Blum, noted that the employee received a schedule award for four percent permanent impairment to the right ear on May 14, 1991 and that he retired on July 2, 1987. He opined that the undated copy of the hearing evaluation was inadequate to determine hearing loss and impairment. Further, Dr. Blum stated that the employee retired in 1987 and had an index hearing evaluation performed in 1991, which "would indicate there was no further exposure to excess noise due to federal employment after 1991." He found that, because noise-induced hearing loss does not worsen if there is no exposure to noise and the employee was not further exposed to noise due to his federal employment after 1991, the employee was not entitled to a further schedule award due to noise-induced sensorineural hearing loss.

By decision dated June 6, 2008, the Office denied the employee's claim for an additional schedule award based on Dr. Blum's finding that he did not have further exposure to noise and, thus, his noise-induced hearing loss would not have worsened.

LEGAL PRECEDENT

The schedule award provision of the Federal Employees' Compensation Act² and its implementing regulations³ 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, the Office has adopted the A.M.A., *Guides*, fifth edition, as the standard to be used for evaluating scheduled losses.⁴

A claimant retains the right to file a claim for an increased schedule award based on new exposure or on medical evidence indicating that the progression of an employment-related condition, without new exposure to employment factors, has resulted in a greater permanent impairment than previously calculated.⁵

ANALYSIS

The Office accepted that the employee sustained binaural hearing loss due to hazardous noise exposure in the course of his federal employment and granted a schedule award for four percent impairment in his right ear. The issue in the instant case is whether the employee is entitled to an additional schedule award due to the progression of his employment-related hearing loss.

² 5 U.S.C. § 8107.

³ 20 C.F.R. § 10.404.

⁴ *Id.*

⁵ *Tommy R. Martin*, 56 ECAB 273 (2005).

In an undated statement, the employee alleged that the hearing in his right ear was completely gone and his hearing in his left ear was 50 percent or more gone. He filed a claim for an additional schedule award. The Office determined that the employee should undergo a second opinion evaluation to determine the extent of his hearing loss; however, the employee expired on February 23, 2007, prior to the second opinion evaluation.

Appellant contended that the evidence of record was sufficient to establish the employee's claim and further submitted a medical report from an audiologist who opined that the employee's hearing loss was not caused by military noise exposure and that the late onset of the hearing loss suggested that the etiology was related to occupational noise exposure. She also submitted the results of an audiogram of the employee's right ear showing an 80, 70, 70, 60 and 65 decibel loss at 500, 1,000, 2,000, 3,000 and 4,000 cps, respectively. The Office submitted this report and appellant's file to Dr. Blum, an Office medical adviser, who determined that appellant was not entitled to a further schedule award due to noise-induced hearing loss, as he retired in 1987 and had an index hearing evaluation performed in 1991, which indicated no further noise exposure after that date.

The Board finds that Dr. Blum was correct in finding that the undated medical report and audiogram from an audiologist was insufficient to determine the employee's hearing loss. A claimant has the burden to submit a properly certified audiogram for review by the Office in order to establish entitlement to a schedule award.⁶ The Board has held that, if an audiogram is prepared by an audiologist, it must be certified by a physician as being accurate before it can be used to determine a percentage of hearing loss.⁷ Here, the only audiogram submitted in support of the claim was undated and not certified by a physician. Thus, the Board finds that appellant did not establish that the employee sustained an increase in his work-related hearing loss, entitling him to an additional schedule award.⁸

The Board notes that Dr. Blum explained that the employee's noise-induced hearing loss would not have progressed because he was not exposed to noise after 1987 and that noise-induced hearing loss does not worsen if there is not further noise exposure. In *Kenneth W. Morgan*,⁹ the Board stated that, in general, a noise-induced sensorineural hearing loss does not progress after exposure to hazardous occupational noise ceases. However, the Board did not enunciate this principle as a general rule but based the particular decision on the opinions of the medical specialists of record. In *Adelbert E. Buzzell*,¹⁰ the Board cautioned against an Office medical adviser providing a blanket, unrationalized statement that hearing loss does not progress

⁶ *Joshua A. Holmes*, 42 ECAB 231 (1990).

⁷ *See id.*

⁸ The Board notes that, on appeal, appellant submitted additional evidence, including several audiograms, which were not contained in the record at the time of the Office's June 6, 2008 decision. Pursuant to 20 C.F.R. § 501.2(c), the Board is precluded from reviewing evidence for the first time on appeal. However, appellant may resubmit evidence to the Office with a written request for reconsideration under 5 U.S.C. § 8128(a) and 20 C.F.R. § 10.606.

⁹ 28 ECAB 569 (1977).

¹⁰ 34 ECAB 96 (1982). *See also Armando Bello*, 34 ECAB 1739 (1983) (the Board does not take positions on medical questions of general application, but relies on the medical evidence in each case).

following the cessation of hazardous noise exposure.¹¹ Thus, Dr. Blum's opinion, without a rationalized opinion supporting his assumption that appellant's hearing loss did not worsen due to his lack of noise exposure, would not in itself be sufficient to deny a further schedule award.¹² However, the burden to prove additional hearing loss was with appellant and because there was no probative medical evidence submitted to support the employee's progression of his employment-related hearing loss, the Board finds that appellant is not entitled to an additional schedule award.¹³

CONCLUSION

The Board finds that the employee did not sustain a hearing loss greater than four percent, for which he received a schedule award.

ORDER

IT IS HEREBY ORDERED THAT the June 6, 2008 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 18, 2009
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

¹¹ *Id.*

¹² *See J.R.*, 59 ECAB ___ (Docket No. 08-1008, issued September 11, 2008).

¹³ *See Joshua A. Holmes*, *supra* note 6.