United States Department of Labor
Employees' Compensation Appeals Board

T.B., Appellant	)	
and	)	**Docket No. 09-1504**
	)	**Issued: April 12, 2010**
DEPARTMENT OF DEFENSE, MARINE CORPS BASE, Quantico, VA, Employer	)	

Appearances:
Alan J. Shapiro, Esq., for the appellant
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 May 11, 2009 appellant, through his attorney, filed a timely appeal of the October 3, 2008 and April 7, 2009 schedule award decisions of the Office of Workers' Compensation Programs. 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 appellant has more than a six percent monaural (right ear) hearing loss, for which he received a schedule award.

FACTUAL HISTORY

On January 22, 2008 appellant, then a 55-year-old engineering equipment operator, filed an occupational disease claim alleging that on November 5, 2007 he first became aware of his tinnitus and hearing loss. He attributed his conditions to noise exposure while using a bulldozer in the performance of his work duties. Appellant did no stop work.

Appellant submitted a history of his employment and noise exposure. Audiograms from the employing establishment were performed on December 3, 2003, January 2005, April 19, 2006, April 16 and December 3, 5 and 21, 2007. In a November 24, 2008 narrative statement, the employing establishment acknowledged that appellant was exposed to noise while operating a bulldozer six to eight hours per day. A December 11, 2007 noise survey report indicated that he was exposed to noise from 94 to 96 decibels.

In a January 9, 2007 medical report, Dr. Robert G. Weaver, an attending Board-certified otolaryngologist, provided normal findings on physical examination of both ears. Audiometric studies revealed mildly sloping bilateral symmetrical sensorineural hearing loss. Speech discrimination scores were 100 percent and 96 percent, respectively. Impendence studies were normal. Dr. Weaver opined that appellant sustained tinnitus by history, which included his exposure to workplace noise on April 14, 2006 and mild bilateral sensorineural hearing loss. He advised that the tinnitus could be permanent; however, since he did not have audiogram test results prior to the April 14, 2006 injury, he could not fully address whether appellant's condition was indeed an acoustic injury. Dr. Weaver advised that appellant's hearing was very serviceable at that time with no need of hearing amplification.

By letter dated June 12, 2008, the Office referred appellant, together with a statement of accepted facts, the case record and a list of questions to be addressed to, Dr. Edward D. Marion, a Board-certified otolaryngologist, for an otologic examination and audiological evaluation. In a June 25, 2008 report, Dr. Marion reviewed a history of appellant's workplace noise exposure and medical background. He provided normal findings on otologic examination. Dr. Marion reviewed the December 21, 2007 audiogram noting that appellant declined a repeat audiogram. He stated that a new audiogram was unnecessary as the December 21, 2007 audiogram showed a symetrical high frequency hearing loss between 3,000 to 8,000 cycles per second (cps) with normal hearing in the lower and mid speech range. Testing of the left ear at frequency levels of 500, 1,000, 2,000 and 3,000 cps revealed decibel losses of 25, 20, 20 and 30, respectively and in the right ear decibel losses of 25, 25, 30 and 35, respectively. Dr. Marion determined, based on the American Academy of Otolaryngology, *Guides for the Evaluation of Hearing Handicap*, that appellant had zero percent hearing loss in his left ear and six percent hearing loss in his right ear, resulting in a one percent binaural hearing loss. He diagnosed appellant as having bilateral presbycusis pattern sensorineural hearing loss. Dr. Marion opined that appellant's tinnitus could have been caused by loud noise exposure but his audiograms were not typical for a noise induced hearing loss. He advised that appellant's tinnitus was not incapacitating as he continued to perform his normal employment duties and it did not interfere with restful sleep. Dr. Marion opined that, while appellant's hearing loss was not work related, his subjective tinnitus was work related. Hearing aids were not recommended. Dr. Marion advised that appellant continue wearing hearing protection while operating loud machinery. He stated that the issue of whether appellant had reached maximum medical improvement was not applicable, as no improvement or change had occurred.

By letter dated July 25, 2008, the Office accepted appellant's claim for bilateral tinnitus. On August 25, 2008 appellant filed a claim for a schedule award.

On July 29, 2008 an Office medical adviser reviewed Dr. Marion's report and the December 21, 2007 audiogram. He agreed that appellant reached maximum medical improvement on December 21, 2007. The medical adviser rated impairment under the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*);[1] finding six percent hearing loss to appellant's right ear and zero percent hearing loss in his left ear (A.M.A., *Guides* 248, Table 11-2). He further determined that appellant sustained a .933 binaural hearing loss (A.M.A., *Guides* 278, Table 11-1). The medical adviser opined that appellant had ratable monaural sensorineural hearing loss in his right ear, as it was due at least in part to his work-related noise exposure. He authorized a hearing aid and recommended yearly audiograms and hearing protection and amplification for the right ear.

By decision dated October 3, 2008, the Office granted appellant a schedule award for six percent hearing loss in his right ear. The period of the award was from December 21, 2007 to January 11, 2008, representing 21.84 days of compensation.

On October 13, 2008 appellant's attorney requested a telephonic oral hearing before an Office hearing representative.

In a January 29, 2009 progress note, Kimberly S. Weichel, an audiologist, provided the results of an audiogram performed that day. Appellant had zero percent hearing loss in each ear. He sustained bilateral mild high frequency sensorineural type hearing loss with reported bilateral constant high frequency tinnitus.

During the February 4, 2009 telephonic hearing, appellant addressed several problems due to his tinnitus. He stated that certain noises set him off and that he experienced sleep problems. The constant ringing in appellant's ears made it hard for him to concentrate on any one thing and he could not have a conversation with someone in a loud environment. If there was any background noise, he tended to shut all of it out. Appellant had to turn the television up pretty loud.

By decision dated April 7, 2009, an Office hearing representative affirmed the October 3, 2008 decision. The evidence submitted by appellant did not establish that he had more than six percent hearing loss to his right ear.

LEGAL PRECEDENT

The schedule award provision of the Federal Employees' Compensation Act[2] and its implementing regulations[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 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

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

[2] 5 U.S.C. § 8107.

[3] 20 C.F.R. § 10.404 (1999).

uniform standards applicable to all claimants. The A.M.A., *Guides* has been adopted by the implementing regulations as the appropriate standard 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]

In some instances, an Office medical adviser's opinion can constitute the weight of the medical evidence. This occurs in schedule award cases where an opinion on the percentage of permanent impairment and a description of physical findings is on file from an examining physician, but the percentage estimate by this physician is not based on the A.M.A., *Guides*. In this instance, a detailed opinion by the Office medical adviser which gives a percentage based on reported findings and the A.M.A., *Guides* may constitute the weight of the medical evidence.[11]

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 tinnitus impacts the ability to perform activities of daily living.[12] However, subjective information regarding the impact of tinnitus on daily life should not be the sole criteria for determining impairment. Objective data must be integrated with the subjective data to estimate the degree of impairment.[13]

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[4] *Id. See also Jacqueline S. Harris*, 54 ECAB 139 (2002).

[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).

[11] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Developing and Evaluating Medical Evidence*, Chapter 2.810.7(h) (April 1993).

[12] *Id.*

[13] *Robert E. Cullison*, 55 ECAB 570 (2004).

ANALYSIS

The Board finds that appellant has no greater than a six percent monaural (right ear) hearing loss for which he received a schedule award. Dr. Marion, the Office referral physician, examined appellant and submitted a June 25, 2008 report finding that he sustained bilateral presbycusis pattern sensorineural hearing loss. He applied the standardized procedures of the American Academy of Otolaryngology's *Guides* to the employing establishment's December 21, 2007 audiogram to determine that appellant sustained six percent hearing loss in his right ear and zero percent hearing loss in his left ear. The Board notes that the American Academy of Otolaryngology's *Guides* formula for determining the extent of hearing loss is the same as that provided in the A.M.A., *Guides*.

The Office medical adviser properly applied the Office's standardized procedures to the December 21, 2007 audiogram. Testing of the right ear at frequency levels of 500, 1,000, 2,000 and 3,000 cps revealed decibel losses of 25, 25, 30 and 35, respectively for a total of 115 decibels. When divided by 4, the result is an average hearing loss of 28.75 decibels. The average loss of 28.75 is reduced by 25 decibels to equal 3.75, which, when multiplied by the established factor of 1.5, results in a 5.6 rounded to six percent hearing loss for the right ear. Testing of the left ear at the same above-noted frequency levels revealed decibel losses of 25, 20, 20 and 30, respectively for a total of 95 decibels. When divided by 4, the result is an average hearing loss of 23.75 decibels. The average loss of 23.75 decibels is reduced by 25 decibels to equal 0, which, when multiplied by the established factor of 1.5, results in a 0 percent hearing loss for the left ear.

The Board finds that the Office medical adviser properly applied the A.M.A., *Guides* to the findings by Dr. Marion and the December 21, 2007 audiogram, resulting in a six percent monaural hearing loss.[14] The Board notes that the Office medical adviser agreed with Dr. Marion that the December 21, 2007 audiogram conformed to the Office's standards.[15]

The January 29, 2009 progress note and audiogram of Ms. Weichel, an audiologist, does not constitute probative medical evidence. An audiologist is not considered to be a physician as defined under the Act.[16]

[14] The Board notes that the Office medical adviser determined that appellant sustained a .933 binaural hearing loss rounded to 1 percent based on the A.M.A., *Guides*. Appellant would only receive compensation for .074 days or .52 weeks which is less than the 21.84 days or 3.12 weeks he received in the October 3, 2008 schedule award for his right ear monaural hearing loss.

[15] *See* Federal (FECA) Procedure Manual, Part 3 -- Medical, *Requirement for Medical Reports*, Chapter 3.600.8(a) (September 1994).

[16] *See* 5 U.S.C. § 8101(2); *Herman L. Henson*, 40 ECAB 341 (1988) (an audiologist is not considered a physician under the Act). *See also Robert E. Cullison*, 55 ECAB 570 (2004) (the Office does not have to review every uncertified audiogram, which has not been prepared in connection with an examination by a medical specialist); *Charley V.B. Harley*, 2 ECAB 208, 211 (1949) (where the Board held that medical opinion, in general, can only be given by a qualified physician).

Appellant contends that his tinnitus adversely affects his activities of daily living. Dr. Weaver, the attending physician stated in a January 9, 2007 report that appellant's speech discrimination scores were 100 percent on the right and 96 percent on the left. Further, Dr. Marion advised that appellant's tinnitus was not incapacitating and did not interfere with his normal employment or sleep. The Board finds, therefore, that the medical evidence does not establish that tinnitus is impacting appellant's speech discrimination. Accordingly, the Board finds that appellant is not entitled to an additional schedule award for tinnitus.

CONCLUSION

The Board finds that appellant has no more than a six percent monaural (right ear) hearing loss for which he received a schedule award.

ORDER

IT IS HEREBY ORDERED THAT the April 7, 2009 and October 3, 2008 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: April 12, 2010
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