

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

J.P., Appellant

and

**DEPARTMENT OF THE ARMY,
DEPARTMENT OF MILITARY SCIENCE,
NORTHWESTERN STATE UNIVERSITY,
Natchitoches, LA, Employer**

)
)
)
)
)
)
)
)
)
)

**Docket No. 09-1520
Issued: March 1, 2010**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On May 11, 2009 appellant filed a timely appeal from an April 6, 2009 merit decision of the Office of Workers' Compensation Programs regarding 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 the case.

ISSUE

The issue is whether appellant established that she sustained greater than 10 percent binaural (both ears) hearing loss for which she received a schedule award.

On appeal, appellant contends that she is entitled to a schedule award for 14.75 percent binaural hearing loss, including 5 percent for tinnitus, as found by Dr. Donna Breen, a Board-certified otolaryngologist. She also argued that her schedule award should have commenced on July 1, 2008, the time the claim was processed.

FACTUAL HISTORY

On June 19, 2008 appellant, then a 46-year-old human resources technician, filed an occupational disease claim (Form CA-2) alleging that she sustained hearing loss while employed as an air conditioning and refrigeration mechanic with the Federal Government from April 1985 through November 1989. She first became aware of her hearing loss on December 1, 1989 but did not realize it was related to her federal employment until December 21, 2007.

On July 9, 2008 appellant filed a claim for a schedule award (Form CA-7).

In a January 21, 2008 medical report, Reem J. Toma, an audiologist, opined that the results of a January 10, 2008 audiogram revealed mild-to-moderate sensorineural hearing loss bilaterally. Ms. Toma stated that, according to the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) (5th ed. 2001), appellant sustained 15 percent right ear hearing loss, 30 percent left ear hearing loss and 17 percent binaural hearing loss. She recommended binaural amplification.

The Office referred appellant, together with a statement of accepted facts and her medical record, to Dr. Breen, a Board-certified otolaryngologist, for a second opinion evaluation.

In an October 27, 2008 medical report, Dr. Breen reviewed appellant's occupational and medical history. She stated that appellant exhibited a binaural sensorineural loss in both ears, which was greater than at the beginning of her employment and, to an extent, atypical for presbycusis at her age. Dr. Breen opined that appellant's workplace exposure during her employment as an air conditioning and refrigeration mechanic was sufficient in intensity to have caused her hearing loss. She diagnosed bilateral sensorineural hearing loss and opined that appellant's employment-related noise exposure played a small part in her present levels of hearing. Dr. Breen recommended hearing amplification, especially for the left ear. She attached an October 7, 2008 audiogram with a recent calibration certificate. The audiogram showed hearing levels of 25, 25, 35 and 40 decibels in the right ear and 25, 30, 40 and 40 decibels in the left ear at hertz (Hz) levels of 500, 1,000, 2,000 and 3,000, respectively. Auditory discrimination scores were 96 percent in the right ear and 92 percent in the left ear. Dr. Breen calculated that appellant sustained 9 percent monaural hearing impairment in the right ear and 13.5 percent monaural hearing impairment in the left ear. She added 5 percent impairment for tinnitus and found that appellant sustained a total of 14.75 percent binaural hearing impairment. Dr. Breen noted a maximum medical improvement date of October 7, 2008.

By decision dated November 26, 2008, the Office accepted appellant's claim for bilateral hearing loss.

On November 26, 2008 the Office referred Dr. Breen's medical report to an Office medical adviser for an impairment rating in accordance with the A.M.A., *Guides*.

In a December 24, 2008 medical report, Dr. H. Mobley, the Office's medical adviser, determined that, based upon Dr. Breen's medical report and the A.M.A., *Guides*, appellant sustained 10 percent binaural hearing loss. He reviewed the October 7, 2008 audiogram, added up and averaged appellant's left ear hearing levels of 25, 30, 40 and 40 at 500, 1,000, 2,000 and

3,000 Hz, which totaled 33.8. Dr. Mobley then subtracted a 25-decibel fence and multiplied the balance of 8.8 by 1.5 to find 13 percent left ear monaural loss. He then averaged appellant's right ear hearing levels of 25, 25, 35 and 40 decibels at 500, 1,000, 2,000 and 3,000 Hz, which totaled 31.3. After subtracting out a 25-decibel fence, Dr. Mobley multiplied the remaining 6.3 balance by 1.5 to calculate a 10 percent right ear monaural hearing loss. He then calculated 10 percent binaural loss by multiplying the lesser right ear loss of 10 percent by 5, adding the greater 13 percent left ear loss and dividing this sum by 6.

By decision dated April 6, 2009, the Office granted appellant a schedule award for 10 percent binaural hearing loss commencing October 7, 2008, the date of maximum medical improvement.

LEGAL PRECEDENT

The schedule award provision of the Federal Employees' Compensation Act¹ provides compensation to employees sustaining permanent loss or loss of use, of specified members of the body. The Act, however, does not specify the manner in which the percentage loss of a member shall be determined. The method used in making such a determination is a matter which results in the sound discretion of the Office. For consistent results and to insure equal justice, the Board has authorized the use of a single set of tables so that there may be uniform standards applicable to all claimants. The A.M.A., *Guides* has been adopted by the Office for evaluating schedule losses and the Board has concurred in such adoption.²

The Office evaluates industrial hearing loss in accordance with the standards contained in the A.M.A., *Guides*.³ 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.⁴ The remaining amount is multiplied by a factor of 1.5 to arrive at the percentage of monaural hearing loss.⁵ 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.⁶ The Board has concurred in the Office's adoption of this standard for evaluating hearing loss.⁷

¹ 5 U.S.C. §§ 8101-8193.

² See 20 C.F.R. § 10.404; *Bernard A. Babcock, Jr.*, 52 ECAB 143 (2000).

³ A.M.A., *Guides* at 250.

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ *Donald E. Stockstad*, 53 ECAB 301 (2002); *petition for recon., granted (modifying prior decision)*, Docket No. 01-1570 (issued august 13, 2002); *Reynaldo R. Lichtenberger*, 52 ECAB 462 (2001).

ANALYSIS

The issue is whether appellant has more than a 10 percent binaural hearing loss.

The January 21, 2008 report from Ms. Toma, an audiologist, found that appellant sustained 17 percent binaural impairment. The Board has held that an audiologist is not a physician as defined under the Act. Therefore, this report is not probative medical evidence.⁸ Further, Ms. Toma did not include a supporting audiogram certified by a physician. As such, the Board finds that her findings cannot be used to determine the percentage of appellant's hearing loss.⁹

The Office referred appellant to Dr. Breen, a Board-certified otolaryngologist, for a second opinion evaluation. She diagnosed bilateral sensorineural hearing loss due to appellant's employment-related noise exposure. Dr. Breen attached an October 7, 2008 audiogram, with a recent calibration certificate, showing hearing levels of 25, 25, 35 and 40 decibels in the right ear and 25, 30, 40 and 40 decibels in the left ear at Hz levels of 500, 1,000, 2,000 and 3,000, respectively. She calculated a 14.75 percent binaural hearing loss, based on 9 percent right ear and 13.5 percent left ear monaural hearing loss and 5 percent hearing loss for tinnitus. Dr. Breen indicated a maximum medical improvement date of October 7, 2008.

The Board notes that Dr. Breen did not provide a proper impairment rating in accordance with the A.M.A., *Guides*. Regarding tinnitus, the A.M.A., *Guides* states, "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."¹⁰ Although Dr. Breen included five percent impairment for tinnitus, she did not diagnose tinnitus or describe how this condition impacted appellant's activities of daily living. Further, appellant's discrimination scores of 96 percent in the right ear and 92 percent in the left ear do not demonstrate a substantial impairment of her speech discrimination.¹¹ As the record does not contain evidence that appellant developed tinnitus, which impacted the activities of her daily living, she is not entitled to an additional schedule award for this condition.¹²

The Office properly referred the medical evidence to Dr. Mobley, an Office medical adviser, for a rating of permanent impairment in accordance with the A.M.A., *Guides*.¹³

⁸ See *Thomas Lee Cox*, 54 ECAB 509 (2003).

⁹ If an audiogram is performed by an audiologist and not a physician as defined in the Act, it must be certified by a physician as being accurate before it can be used to determine the percentage of hearing loss. See *Jerre R. Rinehart*, 45 ECAB 518 (1994).

¹⁰ A.M.A., *Guides* at 246.

¹¹ *Id.* See also *S.G.*, 58 ECAB 383 (2007).

¹² See *R.D.*, 59 ECAB ____ (Docket No. 07-379, issued October 2, 2007).

¹³ See *Hildred I. Lloyd*, 42 ECAB 944 (1991).

In a December 24, 2008 medical report, Dr. Mobley applied the findings of the October 7, 2008 audiogram to calculate 10 percent binaural hearing loss. In accordance with page 247 of the A.M.A., *Guides*, he averaged appellant's hearing levels of 25, 30, 40 and 40 decibels in the left ear and 25, 25, 35 and 40 decibels in the right ear at Hz levels of 500, 1,000, 2,000 and 3,000, respectively, to find average hearing levels of 33.8 on the left and 31.3 on the right.¹⁴ Dr. Mobley then subtracted a 25-decibel fence¹⁵ and multiplied the remaining balance, of 8.8 on the left and 6.3 on the right, by 1.5 to calculate 13 percent left ear monaural loss and 10 percent right ear monaural loss.¹⁶ Using page 250 of the A.M.A., *Guides*, he calculated 10 percent binaural hearing loss by multiplying the lesser right ear monaural loss of 10 percent by 5, adding the greater 13 percent left ear loss and dividing this sum by 6.¹⁷ The Board finds that Dr. Mobley properly applied the A.M.A., *Guides* in calculating that appellant sustained 10 percent binaural hearing loss.

It is well established that, when the examining physician does not provide an estimate of impairment conforming to the A.M.A., *Guides*, the Office may rely on the impairment rating provided by a medical adviser.¹⁸ As Dr. Mobley properly applied the A.M.A., *Guides* in calculating appellant's impairment rating, the Office correctly relied on his opinion to find that appellant sustained 10 percent binaural hearing loss.¹⁹ The Board finds that there is no evidence of greater impairment.

On appeal, appellant contends that her schedule award should have commenced on July 1, 2008, the date her claim was processed. The Board has held that a schedule award commences on the date of "maximum medical improvement" or the point at which the injury has stabilized and will not improve further.²⁰ That determination is based on the medical evidence and is usually the date of the medical examination, which determined the extent of the hearing loss.²¹ In the instant case, appellant's schedule award properly commenced on October 7, 2008, the date of the audiological examination conducted for Dr. Breen, the results of which were used as the basis of the schedule award.²²

¹⁴ A.M.A., *Guides* at 247.

¹⁵ The A.M.A., *Guides* provides that when the average of the hearing levels at 500, 1,000, 2,000 and 3,000 Hz is 25 decibels or less, the ability to hear everyday sounds under everyday listening conditions is not impaired. The subtraction of the 25 decibel fence represents this finding. *Id.* at 250.

¹⁶ *Id.*

¹⁷ *Id.* at 250.

¹⁸ *J.Q.*, 59 ECAB ____ (Docket No. 06-2152, issued March 5, 2008).

¹⁹ *See Linda Beale*, 57 ECAB 429 (2006).

²⁰ *Marie J. Born*, 27 ECAB 623 (1976).

²¹ *See James L. Thomas*, 31 ECAB 1088 (1980).

²² *See Richard Larry Enders*, 48 ECAB 184 (1996).

CONCLUSION

The Board finds that appellant did not establish that she sustained greater than 10 percent binaural hearing loss for which she received a schedule award.

ORDER

IT IS HEREBY ORDERED THAT the April 6, 2009 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 1, 2010
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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