United States Department of Labor
Employees' Compensation Appeals Board

J.S., Appellant	)	
and	)	**Docket No. 11-234**
	)	**Issued: August 1, 2011**
DEPARTMENT OF LABOR, MINE SAFETY & HEALTH ADMINISTRATION, Mount Hope, WV, Employer	)	

Appearances:
Jeffrey P. Zeelander, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
RICHARD J. DASCHBACH, Chief Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On November 8, 2010 appellant filed a timely appeal from the Office of Workers' Compensation Programs' (OWCP) merit decision dated October 15, 2010. Pursuant to the Federal Employees' Compensation Act (FECA)[1] and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the schedule award decision.

ISSUE

The issue is whether appellant has more than a two percent binaural hearing loss for which he received a schedule award.

FACTUAL HISTORY

On April 29, 2010 appellant, then a 56-year-old mine safety and health specialist, filed an occupational claim for compensation benefits alleging that he sustained hearing loss due to his

[1] 5 U.S.C. § 8101 *et seq.*

federal employment. He first became aware of his hearing loss on June 1, 2000 and continued to be exposed to noise in his federal employment.

By letter dated May 18, 2010, OWCP advised appellant of the evidence needed to establish his claim.

Appellant submitted medical documentation, including audiogram studies from 1995 to May 3, 2010. The May 3, 2010 audiogram was ostensibly performed at the request of Dr. David A. Phillips, a Board-certified otolaryngologist; however, this audiogram was unsigned and did not provide any verification information regarding the audiometric testing.

By letter dated September 7, 2010, OWCP referred appellant and a statement of accepted facts to Dr. Albert James Paine, Jr., a Board-certified otolaryngologist. Audiologist Kathryn J. Teolenberg, performed audiometric testing of appellant on September 21, 2010 at the request of Dr. Paine. Testing at the frequency levels of 500, 1,000, 2,000 and 3,000 cycles per second revealed the following: right ear 15, 20, 15 and 60 decibels; left ear 15, 20, 10 and 60 decibels. Dr. Paine determined that appellant sustained bilateral high frequency sensorineural hearing loss, due to noise exposure encountered in his federal employment. The loss was in excess of that expected from presbycusis. Dr. Paine determined that the workplace exposures as described were sufficient intensity and duration to have caused the loss in question. He recommended binaural hearing aids and no further testing. Dr. Paine's report included audiometric testing verification documentation.

By decision dated October 7, 2010, OWCP accepted that appellant sustained bilateral hearing loss due to workplace exposure to noise. On the same date, an OWCP's medical adviser reviewed Dr. Paine's report and the audiometric test of September 21, 2010. The medical adviser concluded that, in accordance with the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*), appellant had a two percent binaural sensorineural hearing loss. He noted that the date of maximum medical improvement was September 21, 2010.

On October 8, 2010 appellant filed a claim for a schedule award.

In a decision dated October 15, 2010, OWCP granted appellant a schedule award for a two percent binaural sensorineural hearing loss. The period of the award was from September 22 to October 19, 2010.

LEGAL PRECEDENT

The schedule award provision of FECA[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, FECA does not specify the manner in which the percentage of loss shall be determined. For consistent results

[2] 5 U.S.C. § 8107.

[3] 20 C.F.R. § 10.404 (1999).

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 A.M.A., *Guides* has been adopted by the implementing regulation as the appropriate standard for evaluating schedule losses.[4]

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

The requirements of the evidence to be used in evaluating occupational hearing loss claims are defined by the Federal (FECA) Procedure Manual. It provides that the employee should undergo audiological evaluation and otological examination; that the audiological testing precede the otologic examination; that the audiological evaluation and otologic examination be performed by different individuals as a method of evaluating the reliability of the findings; that the clinical audiologist and otolaryngologist be certified; that all audiological equipment authorized for testing meet the calibration protocol contained in the accreditation manual of the American Speech and Hearing Association; that the audiometric test results include both bone conduction and pure-tone air conduction thresholds, speech reception thresholds and monaural discrimination scores; and that the otolaryngologist's report include the date and hour of examination; date and hour of the employee's last exposure to loud noise; and rationalized medical opinion regarding the relationship.[6]

ANALYSIS

OWCP relied on the second opinion physician, Dr. Paine, to accept appellant's claim. An OWCP medical adviser applied OWCP's standardized procedures to the September 21, 2010 audiogram performed for Dr. Paine. Testing for the right ear at the frequency levels of 500, 1,000, 2,000 and 3,000 cycles per second revealed decibel losses of 15, 20, 15 and 60, respectively. These decibels were totaled at 110 and were divided by 4 to obtain an average hearing loss at those cycles of 27.5 decibels. The average of 27.5 decibels was then reduced by 25 decibels (the first 25 decibels were discounted as discussed above) to equal 2.5 which was

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

[5] *J.H.*, Docket No. 08-2432 (issued June 15, 2009); *J.B.*, Docket No. 08-1735 (issued January 27, 2009).

[6] *Joshua A. Holmes*, 42 ECAB 231 n.2 (1990).

multiplied by the established factor of 1.5 to compute a 3.75 percent monaural loss of hearing for the right ear.[7]

Testing for the left ear at the frequency levels of 500, 1,000, 2,000 and 3,000 cycles per second revealed decibel losses of ear 15, 20, 10 and 60, respectively. These decibels were totaled at 105 and were divided by 4 to obtain the average hearing loss at those cycles of 26.25 decibels. The average of 26.25 decibels was then reduced by 25 decibels (the first 25 decibels were discounted as discussed above) to equal 1.25, which was multiplied by the established factor of 1.5 to compute a 1.875 percent hearing monaural loss for the left ear.

The binaural loss was calculated by taking the lesser loss, 1.875, multiplying it by 5, (9.375) then adding it to the greater loss of 3.75 (13.125) with the total divided by 6 to arrive at the amount of the binaural hearing loss of 2.1876 which equals 2 percent after rounding.

Under FECA, the maximum award for 100 percent binaural hearing loss is 200 weeks of compensation.[8] In this case, appellant is entitled to two percent of 200 weeks or 4 weeks of compensation.[9]

The Board finds that Dr. Phillips' report lacks probative value because, as mentioned above, the audiological evaluation must be conducted by an audiologist and cosigned by a physician, and must meet the calibration protocol requirement. Dr. Phillips' evaluation report was unsigned and did not contain information regarding calibration of the audiometric equipment.

A claimant retains the right to file for a schedule award or increased schedule award, at any time, based on new exposure or on medical evidence indicating progression of an employment-related condition, resulting in permanent impairment or increased impairment.

CONCLUSION

The Board finds that appellant has failed to establish that he has more than two percent binaural hearing loss.

[7] A mistake in calculation resulted the percentage to be 3.875. The mistake is immaterial, however, as it did not affect the result of the final percentage calculation.

[8] *E.S.*, 59 ECAB 249 (2007).

[9] It is well established, however, that, if calculations based on the monaural hearing loss result in greater compensation, then the monaural hearing loss calculation should be used. *Id*. The maximum number of weeks of compensation for hearing loss in one ear is 52 weeks. *Id*. The Board finds that the hearing loss in appellant's right ear should be rounded to four percent, the nearest whole number. Four percent of 52 weeks equals 2.1 weeks of compensation and two percent of 52 is 1.04 weeks. Since the binaural loss results in a greater number of weeks, the Office properly based the award on binaural hearing loss.

ORDER

IT IS HEREBY ORDERED THAT the October 15, 2010 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 1, 2011
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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