

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

E.D., Appellant)
and) Docket No. 11-174
DEPARTMENT OF THE TREASURY,) Issued: July 26, 2011
INTERNAL REVENUE SERVICE, Austin, TX,)
Employer)

)

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

Case Submitted on the Record

DECISION AND ORDER

Before:
RICHARD J. DASCHBACH, Chief Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On October 27, 2010 appellant filed a timely appeal from a September 24, 2010 Office of Workers' Compensation Programs' (OWCP) schedule award decision. 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 this case.

ISSUE

The issue is whether appellant met her burden of proof to establish that she had a ratable hearing loss entitling her to a schedule award.

On appeal appellant contends that her original audiological test revealed a hearing loss of "35% in one ear and 30% in the other ear."

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On March 3, 2010 appellant, then a 45-year-old revenue officer, filed a traumatic injury claim (Form CA-1) alleging that she sustained cuts, bruises, whiplash, anxiety, neck and back sprain after a small aircraft crashed into her work building on February 18, 2010.

By decision dated March 23, 2010, OWCP accepted appellant's claim for acute reaction to stress, predominant disturbance of emotions, sprain of back, lumbar region and neck sprain.

In March 8 and 9, 2010 medical reports, Dr. Jennifer Clark, a Board-certified internist, diagnosed decreased hearing and referred appellant to an audiologist.

In an April 13, 2010 audiological report, Dr. Douglas W. Martin, an otolaryngologist, indicated that an audiogram showed a bilateral middle high-frequency sensorineural hearing loss compatible with acoustic injury.

By letter dated May 19, 2010, OWCP requested additional evidence from appellant in order to expand her claim to include hearing loss.

On May 25, 2010 appellant filed a schedule award claim.

In a May 11, 2010 progress report, Dr. Martin reported that appellant's audiogram was unchanged.

On August 4, 2010 OWCP referred appellant, together with a statement of accepted facts, to Dr. William Carl Smith, a Board-certified otolaryngologist, for a second opinion examination.

In an August 25, 2010 medical report, Dr. Smith diagnosed bilateral high-frequency sensorineural hearing loss and attributed it to noise exposure at work. An August 25, 2010 audiogram performed on his behalf showed the following decibel losses at frequencies of 500, 1,000, 2,000 and 3,000 hertz (Hz): 10, 10, 20 and 30 for the right ear and 10, 10, 25 and 35 for the left ear. Dr. Smith determined that appellant suffered from a bilateral high-frequency sensorineural hearing loss in excess of what would be normally predicted with a presbycusis hearing loss alone.

On September 21, 2010 OWCP's medical adviser, Dr. H. Mobley, agreed with Dr. Smith's conclusion that appellant's bilateral sensorineural hearing loss was caused by occupational noise exposure and identified August 25, 2010 as the date of maximum medical improvement. Applying the standard provided by the American Medical Association, *Guides to the Evaluation of Permanent Impairment*² (A.M.A., *Guides*) (hereinafter) to the August 25, 2010 audiometric findings, he found that appellant had no ratable monaural or binaural hearing loss and authorized hearing aids.

² A.M.A., *Guides* (6th ed. 2009).

By decisions dated September 24, 2010, OWCP expanded appellant's claim to include acoustic trauma hearing loss, but denied appellant's schedule award claim, finding that her hearing loss was not severe enough to be considered ratable. It authorized hearing aids.³

LEGAL PRECEDENT

The schedule award provision of FECA⁴ and its implementing regulations⁵ 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. An employee is entitled to a maximum award of 52 weeks of compensation for complete loss of hearing of one ear and 200 weeks of compensation for complete loss of hearing of both ears.⁶ However, FECA 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 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.⁷

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 Hz, the losses at each frequency are added up and averaged. Then, the fence of 25 dBA is deducted because, as the A.M.A., *Guides* points out, losses below 25 dBA 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 concurred in OWCP's adoption of this standard for evaluating hearing loss.⁸

ANALYSIS

OWCP has accepted that appellant sustained acoustic trauma hearing loss causally related to her federal employment. In order to determine whether appellant was entitled to compensation for that hearing loss through a schedule award, OWCP referred appellant to Dr. Smith. On August 25, 2010 Dr. Smith examined appellant and reviewed an audiogram

³ Following appellant's October 27, 2010 appeal to the Board, OWCP issued a December 9, 2010 decision denying her a schedule award. As this decision was issued after the Board took jurisdiction of the case, it is null and void. The Board and OWCP may not have simultaneous jurisdiction over the same issue. *See Douglas E. Billings*, 41 ECAB 880 (1990); *see also* 20 C.F.R. § 501.3(c)(3).

⁴ 5 U.S.C. § 8107.

⁵ 20 C.F.R. § 10.404.

⁶ 5 U.S.C. § 8107(c)(13).

⁷ 20 C.F.R. § 10.404. *See also* *Mark A. Holloway*, 55 ECAB 321, 325 (2004).

⁸ W.S., Docket No. 10-2063 (issued May 10, 2011); J.Q., Docket No. 10-1660 (issued April 5, 2011).

conducted on his behalf. He diagnosed bilateral high-frequency sensorineural hearing loss and opined that the hearing loss resulted from noise exposure at appellant's work.

On September 21, 2010 OWCP's medical adviser, Dr. Mobley, concurred with Dr. Smith's assessment and applied its standard procedures to the August 25, 2010 audiogram. The audiogram recorded decibel losses at 500, 1,000, 2,000 and 3,000 cycles per second and recorded decibel losses of 10, 10, 20 and 30 respectively in the right ear. The total decibel loss in the right ear is 70 decibels. When divided by 4, the result is an average hearing loss of 17.5 decibels. The average loss of 17.5 decibels is reduced by the fence of 25 decibels to equal 0, which when multiplied by the established factor of 1.5 resulted in 0 percent impairment of the right ear. The audiogram tested decibel losses for the left ear at 500, 1,000, 2,000 and 3,000 cycles a second and recorded decibel losses of 10, 10, 25 and 35 respectively for a total decibel loss of 80 decibels. When divided by 4, the result is an average of 20 decibels. The average loss of 20 decibels is reduced by the fence of 25 to equal 0, which when multiplied by the established factor of 1.5, resulted in 0 percent impairment of the left ear. The Board finds that OWCP's medical adviser properly applied the standards to the findings of Dr. Smith's August 25, 2010 audiogram and concluded that appellant did not have a ratable hearing loss for schedule award purposes.

On appeal appellant contends that her original audiological test revealed a 35 percent hearing loss in one ear and 30 percent hearing loss in the other ear. As discussed above, medical evidence in the record establishes that, although appellant has an employment-related hearing loss, it is not significant enough to be ratable for schedule award purposes. The Board recognizes the employment-related hearing loss, but there is a certain threshold which must be reached before becoming eligible for compensation benefits through a schedule award.

Appellant may request a schedule award or increased schedule award based on evidence of a new exposure of medical evidence showing progression of an employment-related condition resulting in permanent impairment or increased impairment.

CONCLUSION

The Board finds that appellant does not have a ratable hearing loss for schedule award purposes.

ORDER

IT IS HEREBY ORDERED THAT the September 24, 2010 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 26, 2011
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board