United States Department of Labor
Employees' Compensation Appeals Board

E.H., Appellant	)	
	)	
and	)	**Docket No. 10-1334**
	)	**Issued: March 11, 2011**
DEPARTMENT OF THE TREASURY,	)	
INTERNAL REVENUE SERVICE,	)	
Denver, CO, Employer	)	
	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On April 14, 2010 appellant filed a timely appeal from a February 17, 2010 merit decision 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 the case.

ISSUE

The issue is whether appellant has more than 26 percent permanent binaural hearing loss causally related to his employment.

FACTUAL HISTORY

On October 15, 1997 appellant, then a 53-year-old criminal investigator, filed an occupational disease claim for binaural, noise-induced hearing loss. A March 19, 1996 audiogram exhibited the following decibel (dBA) losses at 500, 1,000, 2,000, 4,000 and 8,000 Hertz (Hz): 30, 35, 30, 30 and 60 for the right ear; and 30, 45, 45, 45 and 60 for the left ear. Appellant retired effective January 3, 1998. The Office accepted his claim and authorized

hearings aids on October 5, 1998. By decision dated February 2, 1999, it granted a schedule award for 26 percent binaural hearing loss for the period August 25, 1998 to August 23, 1999.

Post-retirement audiograms dated August 25 and September 22, 1998 exhibited the following losses at 500, 1,000, 2,000, 3,000, 4,000 and 8,000 Hz: 35, 50, 40, 40, 45 and 55 dBA for the right ear; and 40, 50, 50, 45, 45 and 65 dBA for the left ear. Testing at the same frequency levels, an October 4, 2001 audiogram showed losses of 35, 45, 40, 40, 50 and 65 dBA for the right ear and 40, 45, 50, 50, 55 and 85 dBA for the left ear.

In a March 3, 2007 statement, appellant asserted that his hearing loss worsened in the past few years and sought an additional schedule award. He filed a claim for compensation and submitted a February 27, 2007 audiogram exhibiting the following losses at frequencies of 500, 1,000, 2,000, 3,000, 4,000 and 8,000 Hz: 55, 65, 55, 55, 60 and 75 dBA for the right ear; and 50, 65, 60, 60, 60 and 85 dBA for the left ear.

The Office informed appellant on July 7, 2008 that the evidence was insufficient and advised him about the evidence needed to establish his claim for an additional schedule award. It did not receive a response. By decision dated September 17, 2008, the Office denied the claim, finding that the medical evidence did not demonstrate causal relationship between his federal employment and progression in hearing impairment.

Appellant timely requested an oral hearing, which was held on March 9, 2009. He testified that the worsening of his hearing loss was attributable to his work-related noise exposure. Following the hearing, appellant submitted an April 2, 2009 report from Dr. William Wallace Webster, a Board-certified otolaryngologist, which detailed appellant's history of occupational hearing loss and recent deterioration. Dr. Webster examined appellant and did not observe any irregularities. He noted that the February 27, 2007 audiogram showed downsloping, mild to severe sensorineural hearing loss across all frequencies. Dr. Webster reviewed appellant's audiometric records and found progressive hearing loss that was "consistent with occupational-induced hearing loss both in its progressive pattern and its frequency pattern." He further commented that "noise-induced hearing loss can be progressive over many years and hearing loss can be related to noise exposure many years prior."

By decision dated May 22, 2009, the Office hearing representative set aside the September 17, 2008 decision and remanded the case for further development.

On June 25, 2009 the Office referred appellant for a second opinion to Dr. Craig K. Hertler, a Board-certified otolaryngologist. In a July 23, 2009 report, Dr. Hertler noted that appellant's physical examination was normal and audiometric testing showed the following losses at 500, 1,000, 2,000, 3,000 and 8,000 Hz: 60, 65, 55, 60 and 90 dBA for the right ear; and 45, 60, 60, 55 and 90 dBA for the left ear. He pointed out that the pattern of low frequency loss was atypical of a noise-induced condition, which "spares the low frequency from significant noise[-]induced damage." In addition, Dr. Hertler remarked that noise-induced damage typically showed the worst hearing at around 4,000 Hz and either flattening of loss or recovery at 8,000 Hz, whereas the July 23, 2009 audiogram demonstrated even greater damage at 8,000 Hz. He advised that appellant's hearing loss did not show this pattern. Dr. Hertler requested additional

audiometric data before he could answer whether appellant's worsened hearing was employment related.

On September 9, 2009 the Office sent Dr. Hertler copies of appellant's audiograms dated March 19, 1996, August 25 and September 22, 1998 and October 4, 2001.

In a September 16, 2009 supplemental report, Dr. Hertler reviewed appellant's records and concluded that his increased hearing loss from August 25, 1998 to July 23, 2009 was not due to industrial noise exposure. He explained that presbycusis normally entailed high frequency hearing loss of approximately 79 dBA per ear. In view of appellant's losses, across all frequencies, of 125 dBA in the right ear and 65 dBA in the left ear, Dr. Hertler opined that a separate, unidentified pathological cause also contributed to appellant's condition. Dr. Hertler explained: "presbycusis typically affects the high frequency hearing rather than the low frequency hearing where [appellant] has had a significant progression of his hearing loss. The presence of this low frequency hearing loss in the first place and certainly its progression over time is consistent with my opinion that there is a condition other than noise exposure and other than simply aging that is the cause of his hearing loss. In summary, I do not think that his bilaterally worsened hearing between the audiogram of August 25, 1998 and the audiogram of July 23, 2009, is causally related to his federal employment."

By decision dated September 25, 2009, the Office denied appellant's claim on the grounds that the weight of the medical evidence did not support a causal relationship between his progressive hearing loss and prior occupational noise exposure.

Appellant requested a review of the written record. In a February 17, 2010 decision, the Office affirmed its September 25, 2009 decision.

LEGAL PRECEDENT

The schedule award provision of the Federal Employees' Compensation Act[1] and its implementing regulations[2] set forth the number of weeks of compensation payable to employees sustaining permanent impairment from loss of 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.[3] 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 uniform standards applicable to all claimants. The American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*)[4] (hereinafter) has been

[1] 5 U.S.C. § 8107.

[2] 20 C.F.R. § 10.404.

[3] 5 U.S.C. § 8107(c)(13).

[4] A.M.A., *Guides* (6th ed. 2008).

adopted by the implementing regulations as the appropriate standard for evaluating schedule losses.[5]

The Board has long recognized that if a claimant's employment-related hearing loss worsens in the future, he or she may apply for an additional schedule award for any increased permanent impairment. The Board has also recognized that a claimant may be entitled to a schedule award for increased hearing loss, even after exposure to hazardous noise has ceased, if causal relationship is supported by the medical evidence of record.[6]

Causal relationship is a medical issue and the evidence generally required to establish causal relationship is rationalized medical opinion evidence. Rationalized medical opinion evidence is evidence which includes a physician's opinion on the issue of whether there is a causal relationship between the claimant's diagnosed condition and the implicated employment factors. The opinion of the physician must be based on a complete factual and medical background, must be one of reasonable medical certainty and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.[7]

ANALYSIS

The evidence supports that appellant sustained 26 percent binaural hearing loss as a result of occupational noise exposure and received a schedule award for the period August 25, 1998 to August 23, 1999. The evidence also supports that his condition worsened without renewed exposure between August 25, 1998 and July 23, 2009. As part of his claim for an additional schedule award, appellant submitted Dr. Webster's April 2, 2009 report noting that audiometric data was consistent with occupational hearing loss. The Office subsequently referred him for a second opinion to Dr. Hertler, who opined in his July 23 and September 16, 2009 reports that prior industrial noise exposure did not cause appellant's progression.

The Board finds that Dr. Hertler's well-reasoned reports constitute the weight of the medical evidence. The weight of the medical evidence is determined by its reliability, its probative value, its convincing quality, the care of analysis manifested and the medical rationale expressed in support of the physician's opinion.[8] After reviewing and comparing appellant's audiograms for the period August 25, 1998 and July 23, 2009, Dr. Hertler identified considerable low frequency damage as well as downsloping dBA losses beyond 4,000 Hz. He specified that noise-induced hearing loss featured at least three characteristics: (1) an absence of significant low frequency damage; (2) the intensity of loss climaxing at 4,000 Hz; and (3) a plateau or recovery at 8,000 Hz. As the findings were to the contrary, Dr. Hertler concluded that appellant's previous noise exposure did not contribute to his worsening condition. In his

[5] *Supra* note 2. *See also Mark A. Holloway*, 55 ECAB 321, 325 (2004).

[6] *J.R.*, 59 ECAB 710 (2008); *Paul R. Reedy*, 45 ECAB 488 (1994). *See also* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.7(b) (September 2010).

[7] *I.J.*, 59 ECAB 408 (2008); *Victor J. Woodhams*, 41 ECAB 345, 352 (1989).

[8] *I.R.*, 61 ECAB ___ (Docket No. 09-1229, issued February 24, 2010); *James Mack*, 43 ECAB 321, 329 (1991).

September 16, 2009 supplemental report, he advised that a portion, but not all, of the increased hearing loss was attributable to presbycusis. Dr. Hertler explained that presbycusis typically affects the high frequency hearing rather than the low frequency hearing where appellant had a significant progression of his hearing loss. He noted that the presence of this low frequency hearing loss in the first place and certainly its progression over time supported that "a condition other than noise exposure and other than simply aging that is the cause of his hearing loss." Dr. Hertler found no basis on which to attribute appellant's increased hearing loss to his workplace noise exposure that ceased in 1998.

Although Dr. Webster gave some support for causal relationship, finding that, the hearing loss was consistent with work-induced hearing loss in its progressive and frequency patterns, his opinion is of limited probative value as it lacks sufficient explanation to establish that the increased hearing loss is due to appellant's workplace noise exposure. He stated that noise-induced hearing loss "can be progressive over many years" is conclusory in nature and the physician did not explain the medical reasons or rationale, supporting his conclusion.[9] In contrast to Dr. Hertler, he did not clearly describe the audiometric frequency pattern that he found to be consistent with appellant's condition and explain how this supported causal relationship. Accordingly, the Board finds that the medical evidence does not establish that the increase in his hearing loss is causally related to his employment.

On appeal, appellant asserts that he established his schedule award claim since the Office accepted his binaural hearing loss claim in 1998, previously paid him a schedule award and subsequently covered his injury-related expenses. It is his burden of proof to establish that he sustained an additional permanent impairment to a scheduled member.[10] Payment of compensation does not, by itself, establish acceptance of another benefit such as schedule award compensation.[11] While appellant may be entitled to a schedule award for increased hearing loss after exposure to hazardous noise has ceased, causal relationship must be established by the medical evidence.[12] In this case the medical evidence is insufficient. Appellant questioned Dr. Hertler's opinion but, as discussed, Dr. Hertler provided a reasoned opinion negating causal relationship. Although he accused Dr. Hertler of bias, he submitted no evidence supporting his allegation.[13] Appellant further asserted that there is a medical conflict between Drs. Webster and Hertler necessitating his referral to an impartial specialist.[14] However, a simple disagreement

[9] *See Kenneth J. Deerman*, 34 ECAB 641 (1983) (medical evidence required to prove causal relation is that necessary to convince the adjudicator that the conclusion drawn is rational, sound and logical); *see also George Randolph Taylor*, 6 ECAB 986, 988 (1954) (where the Board found that a medical opinion not fortified by medical rationale is of little probative value).

[10] *A.L.*, 60 ECAB ___ (Docket No. 08-1730, issued March 16, 2009).

[11] *See Gary L. Whitmore*, 43 ECAB 441 (1992) (payments by the Office do not, in and of themselves, constitute acceptance of a particular condition or disability in the absence of evidence supporting that the particular condition or disability has been accepted as work related).

[12] *See supra* note 6.

[13] *See J.C.*, 60 ECAB ___ (Docket No. 08-1833, issued March 23, 2009) (mere allegations insufficient to establish bias; there must be evidence of actual bias).

[14] *See* 5 U.S.C. § 8123(a); 20 C.F.R. § 10.321; *R.H.*, 59 ECAB 382, 386-87 (2008).

between two physicians does not, of itself, establish a conflict. A conflict only exists when there are opposing medical reports of virtually equal weight and rationale.[15] As noted, Dr. Webster's opinion is of limited probative value as he provided insufficient medical reasoning explaining the basis of his conclusion on casual relationship. Thus, the reports of Drs. Hertler and Webster are not of virtually equal weight. Appellant also contends that the Office acted improperly by providing Dr. Hertler additional evidence to review prior to his supplemental report without providing such to Dr. Webster. Office procedures detail that the Office should provide a second opinion physician with copies of pertinent medical reports from the case record and seek further clarification if the physician does not address the specified medical issue.[16] The Office properly adjudicated the claim in accordance with its procedures. Appellant also is not precluded from providing his records to his physician.

CONCLUSION

The Board finds that appellant did not sustain more than 26 percent permanent binaural hearing loss causally related to his employment.

ORDER

IT IS HEREBY ORDERED THAT the February 17, 2010 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 11, 2011
Washington, DC

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

[15] *John D. Jackson*, 55 ECAB 465 (2004).

[16] Federal (FECA) Procedure Manual, *supra* note 6 at Chapter 2.810.9(a), (j) (September 2010).