

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

J.G., Appellant

and

**TENNESSEE VALLEY AUTHORITY,
Paradise Plant, KY, Employer**

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**Docket No. 08-698
Issued: August 7, 2008**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
COLLEEN DUFFY KIKO, Judge

JURISDICTION

On January 10, 2008 appellant timely filed an appeal from the Office of Workers' Compensation Programs' December 20, 2007 merit decision, which denied his schedule award claim. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this claim.

ISSUE

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

FACTUAL HISTORY

On August 10, 2001 appellant, then a 59-year-old machinist, filed an occupational disease stating that he sustained a hearing loss as a result of his employment. On October 31, 2001 he requested a schedule award. Appellant was sent for a second opinion examination. In the accompanying statement of accepted facts, the Office noted that appellant worked at the employing establishment from April 1978 to August 1989 and was exposed to loud noises from

turbines for eight hours a day. Also noted was that appellant had an injury involving a busted eardrum, for which he filed a claim in 1992.

On January 18, 2002 the Office awarded appellant a six percent permanent impairment of his binaural hearing.¹ Appellant was paid for 12 weeks from January 8 to April 1, 2002. This is the third appeal of this case before the Board.

In a December 19, 2003 merit decision, the Board found that appellant had not established that his hearing loss exceeded the six percent bilateral hearing loss for which he received a schedule award.²

On September 20, 2006 appellant filed another schedule award claim by Form CA-7.

In an October 11, 2006 letter, the Office informed appellant that he was not entitled to an additional schedule award for his claim, however, if he wanted to establish an increase in the impairment rating he must file a new occupational disease claim and demonstrate that an additional loss had occurred due to additional noise exposure.

On January 29, 2007 appellant requested reconsideration.

On February 8, 2007 the Office denied appellant's request for reconsideration on the grounds that his request was not timely filed and he did not establish clear evidence of error by the Office in the December 19, 2003 decision.

In a March 2, 2007 letter, the Office informed appellant that he was not entitled to an additional schedule award but he may file an appeal.

On February 27, 2007 appellant appealed the Office's decision to the Board.

In a September 13, 2007 decision, the Board set aside the February 8, 2007 decision for further development to determine if appellant was entitled to an additional schedule award for his hearing loss.³ The Board noted that, if a claimant's hearing loss worsened in the future, the claimant could apply for an additional award even if the exposure causing the alleged worsening had ceased.

In a September 28, 2007 decision, the Office denied appellant's claim for an additional schedule award. It informed appellant that he must file a new occupational disease claim if he was claiming an additional impairment.

On October 9, 2007 appellant requested reconsideration and submitted medical evidence. In a September 10, 1991 operation note, Dr. Uday V. Dave, Board-certified in otolaryngology,

¹ The decision stating that appellant's claim was accepted for binaural hearing loss is not contained in the case record therefore the date is unknown.

² Docket No. 03-2048 (issued December 19, 2003).

³ Docket No. 07-1015 (issued September 13, 2007).

stated that a canaloplasty on the left side and a tympanoplasty with tympanic membrane reconstructive with temporalis fascia was performed. A September 11, 1991 note diagnosed chronic supportive otitis media in the left with perforation of tympanic membrane and stated that a tympanoplasty was performed on the left ear on September 10, 1991. A September 11, 1991 surgical pathology report noted a specimen that was taken. A January 29, 2002 hearing report revealed hearing losses of 55, 55, 50 and 50 for the right ear and 55, 40, 40 and 50 in the left ear at frequencies of 500, 1,000, 2,000 and 3,000 cycles per second (cps). The hearing history notes stated that the suspected cause of hearing loss was work related due to the turbine at appellant's employing establishment. An undated⁴ and unsigned audiogram recorded appellant's hearing losses.

In a July 16, 2007 clinic note, Dr. Dave stated that the audiologic evaluation revealed a hearing loss of 40 to 45 decibels in both ears and referenced the audiogram. He diagnosed binaural neurosensory hearing loss with a history of neurosensory hearing loss and a history of exposure to noises. Dr. Dave noted in the "work[-]related hearing loss" category of his report that appellant had worked for 12 years for the employing establishment and was around loud machinery in his work capacity. A July 16, 2007 audiogram revealed hearing losses of 45, 40, 35 and 45 for the right ear and 45, 35, 35 and 55 for the left ear at respective frequencies of 500, 1,000, 2,000 and 3,000 cps. In a July 16, 2007 note, appellant acknowledged that a medical evaluation was completed by Dr. Dave for hearing aids.

In a December 20, 2007 merit decision, the Office denied appellant's claim finding that the new evidence did not support a worsening of his hearing loss due to his accepted occupational exposure.

LEGAL PRECEDENT

Section 8107 of the Federal Employees' Compensation Act sets forth the number of weeks of compensation to be paid for the permanent loss of use of specified members, functions and organs of the body.⁵ The Act, however, does not specify the manner by which the percentage loss of a member, function or organ shall be determined. To ensure consistent results and equal justice under the law, good administrative practice requires the use of uniform standards applicable to all claimants. The implementing regulations have adopted the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) (5th ed. 2001) as the appropriate standard for evaluating schedule losses.⁶ Effective February 1, 2001, schedule awards are determined in accordance with the A.M.A., *Guides* (5th ed. 2001).⁷

⁴ "2-03" entered in the name and date line.

⁵ The Act provides that, for complete or 100 percent loss of hearing in one ear, an employee shall receive 52 weeks' compensation. For complete loss of hearing of both ears, an employee shall receive 200 weeks' compensation. 5 U.S.C. § 8107(c)(13) (2000).

⁶ 20 C.F.R. § 10.404 (2006).

⁷ Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 (June 2003).

Using the frequencies of 500, 1,000, 2,000 and 3,000 cps, the losses at each frequency are added up and averaged.⁸ 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.⁹ The remaining amount is multiplied by a factor of 1.5 to arrive at the percentage of monaural hearing loss.¹⁰ 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 and then added to the greater loss and the total is divided by six to arrive at the amount of the binaural hearing loss.¹¹

The Board has recognized that, if a claimant's employment-related hearing loss worsens in the future, the employee may apply for an additional schedule award for any increased impairment.¹² The Board has also recognized that a claimant may be entitled to an award for an increased hearing loss, even after exposure to hazardous noise has ceased, if causal relationship is supported by the medical evidence of record.¹³

ANALYSIS

The Board finds that this case is not in posture for decision regarding whether appellant sustained a hearing loss greater than six percent causally related to his employment.

The Office accepted that appellant had binaural hearing loss due to his employment. On January 18, 2002 it granted appellant a schedule award based on a six percent permanent impairment of his binaural hearing. On September 20, 2006 appellant filed a new schedule award claiming that his hearing loss had worsened and submitted a July 16, 2007 audiogram. The audiogram revealed an increase in hearing loss. Dr. Dave's accompanying July 16, 2007 report stated that appellant's current hearing loss was work related. There is no contradictory medical evidence. As noted above, the Board has recognized that a claimant may be entitled to an award for an increased hearing loss, even after exposure to hazardous noise has ceased, if causal relation is supported by the medical evidence of record. The Board finds that the report from Dr. Dave regarding the causal relationship between appellant's current binaural hearing

⁸ A.M.A., *Guides* 250 (5th ed. 2001).

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Paul Fierstein*, 51 ECAB 381 (2000); *Paul R. Reedy*, 45 ECAB 488 (1994). Federal (FECA) Procedure Manual, Part 2 -- Claims, *Payment of Schedule Awards*, Chapter 2.0808.7(b)(2) (April 1995). "If, on the other hand, the claimant sustains increased impairment at a later date which is due to work-related factors, an additional award will be payable if supported by the medical evidence. In this case, the original award is undisturbed and the new award has its own date of maximum medical improvement, percent and period."

¹³ *Id.*

loss and his employment exposure is sufficient to require further development of the case record by the Office.¹⁴

The Office's own procedures state that "[t]he claims examiner will ask the DMA [district medical adviser] to evaluate cases when the case appears to be in posture for schedule award determination."¹⁵ Specifically, regarding hearing loss cases, the Office's procedures further state: "Loss of [h]earing. After a complete report is received, the percentage of hearing loss is calculated using Form CA-51 (Exhibit 3). The district medical adviser will then verify the calculation and provide an opinion regarding the causal relationship between any hearing loss and the employment...."¹⁶

The Office failed to properly develop the medical evidence to determine whether appellant's increased hearing loss was causally related to his noise exposure while working at the employing establishment by failing to request that the district medical adviser review the evidence of record.

On remand, the Office shall refer the medical records, for evaluation to the district medical adviser for determination of whether appellant's current level of hearing loss is due to his accepted employment-related noise exposure. Following such further development as may be necessary; the Office shall issue an appropriate final decision on this issue.

CONCLUSION

The Board finds that this case is not in posture for decision as to whether or not appellant has more than a six percent binaural hearing loss for which he received a schedule award.

¹⁴ See *Felix Flescha*, 52 ECAB 268 (2001); *John J. Carlone*, 41 ECAB 354 (1989); *Horace Langhorne*, 29 ECAB 820 (1978).

¹⁵ Federal (FECA) Procedure Manual, Part 3 -- Medical, *Medical Examinations*, Chapter 3.700.3 (November 1990).

¹⁶ *Id.* at Chapter 3.700.4 (b).

ORDER

IT IS HEREBY ORDERED THAT the December 20, 2007 decision of the Office of Workers' Compensation Programs is set aside and remanded for further development consistent with this decision.

Issued: August 7, 2008
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board