United States Department of Labor
Employees' Compensation Appeals Board

M.H., Appellant	)	
and	)	**Docket No. 09-1689**
	)	**Issued: March 10, 2010**
DEPARTMENT OF JUSTICE, FEDERAL BUREAU OF INVESTIGATION, Charlotte, NC, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On June 25, 2009 appellant filed a timely appeal from an April 20, 2009 merit decision of the Office of Workers' Compensation Programs denying his claim for an additional schedule award. Under 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 has more than a 56 percent monaural (right ear) hearing loss for which he received a schedule award.

FACTUAL HISTORY

By decision dated January 29, 1997, the Office, in File No. xxxxxx929, granted appellant a schedule award for 56 percent monaural (right ear) loss of hearing causally related to factors of his federal employment in his capacity as a special agent. On November 24, 2008 appellant, a retired 63-year-old special agent, filed an occupational disease claim alleging additional hearing

loss as a result of his federal employment. He noted that since his retirement in 1997 he had experienced a continued degradation in his hearing loss. The employing establishment noted that he retired on August 1, 1997. Since September 2007 appellant worked part time for Homeland Security as a consultant. He also filed a claim for an increased schedule award on November 24, 2008. The Office assigned File No. xxxxxx974 to this claim.

By letter dated December 11, 2008, the Office asked appellant to submit further information. In response, appellant submitted results of hearing tests and medical examinations from May 2, 1971 to May 15, 1996.

By letter dated February 16, 2009, the Office referred appellant to Dr. Stan D. Phillips, a Board-certified otolaryngologist, for a second opinion. Dr. Phillips was asked to address whether there was an increased hearing loss and, if so, whether it was caused or accelerated by the previous work exposure. On March 3, 2009 he noted that appellant complained of worsening hearing which now included the left ear. Dr. Phillips diagnosed sensorineural hearing loss completely due to appellant's employment noise exposure. He noted that appellant's hearing loss had significantly worsened from the last audiogram. A March 2, 2009 audiogram revealed air testing for the right ear at the frequency levels of 500, 1,000, 2,000 and 3,000 cycles per second (cps) revealed decibel losses of 65, 70, 80 and 90, respectively. Air testing for the left ear at frequency levels of 500, 1,000, 2,000 and 3,000 cps revealed decibel losses of 60, 60, 65 and 75, respectively. Dr. Phillips did not provide a hearing loss estimate based on the audiogram performed. He recommended hearing aids.

On March 11, 2009 the Office medical adviser reviewed the report from Dr. Phillips. He noted that the date of appellant's retirement in 1997 was critical in determining whether the increased hearing loss was employment related. The Office medical adviser found that, because noise-induced hearing loss does not worsen if there is no exposure to noise, and appellant was not further exposed to noise due to his federal employment after 1997, he was not entitled to an additional schedule award due to noise-induced sensorineural hearing loss.

By decision dated April 20, 2009, the Office denied appellant's claim for an additional schedule award based on the Office medical adviser's finding that he did not have further exposure to noise and, thus, his noise-induced hearing loss would not have worsened. It found that appellant's increased hearing loss was due to the normal aging process or presbycusis.

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, or loss of use, of scheduled members or functions of the body. However, the Act does not specify the manner in which the percentage of loss should be determined. For consistent results and to ensure equal justice under the law for all claimants, the Office has adopted the American Medical Association, *Guides to the Evaluation of*

[1] 5 U.S.C. § 8107.

[2] 20 C.F.R. § 10.404.

Permanent Impairment as the uniform standards applicable to all claimants.[3] Office procedures direct the use of the fifth edition of the A.M.A., *Guides*, issued in 2001, for all decisions made after February 1, 2001.[4]

A claimant retains the right to file a claim for an increased schedule award based on new exposure or on medical evidence indicating that the progression of an employment-related condition, without new exposure to employment factors, has resulted in a greater permanent impairment than previously calculated.[5]

ANALYSIS

The Office accepted that appellant sustained a monaural, right ear, hearing loss due to hazardous noise exposure in the course of his federal employment. It granted a schedule award for 56 percent impairment in his right ear under File No. xxxxxx929. With respect to appellant's subsequent claim for an increased schedule award under File No. xxxxxx974, the Office found that the medical evidence did not establish a greater impairment.

The Office referred appellant to Dr. Phillips, a Board-certified otolaryngologist, for a second opinion, who advised that appellant had a work-related sensorineural hearing loss. Dr. Phillip reported that appellant's hearing loss had significantly worsened from the last audiogram. While noting that appellant's hearing loss had worsened since the last audiogram, he did not evaluate the audiogram performed. Dr. Phillips offered no opinion on whether appellant sustained an increased hearing loss although he did recommend hearing aids. He did not fully respond to the questions submitted by the Office.

The Office referred the record to an Office medical adviser who reviewed Dr. Phillips' report. The Office medical adviser advised that appellant's continued hearing loss since his retirement in 1997 was not attributable to his employment.

The Board finds that the Office medical adviser's report is insufficient to support the denial of appellant's claim for an additional schedule award for his hearing loss. The Office medical adviser stated that the employee's noise-induced hearing loss would not have progressed because he was not exposed to noise after 1997 and that noise-induced hearing loss does not worsen if there is no further noise exposure. In *Kenneth W. Morgan*,[6] the Board stated that, in general, a noise-induced sensorineural hearing loss does not progress after exposure to hazardous occupational noise ceases. However, the Board did not enunciate this principle as a general rule but based the particular decision on the opinions of the medical specialists of record. In

[3] *Id*. at § 10.404(a).

[4] Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 4 (June 2003). *See S.K.*, 60 ECAB ___ (Docket No. 08-848, issued January 26, 2009).

[5] *A.A.*, 59 ECAB ___ (Docket No. 08-951, issued September 22, 2008); *Tommy R. Martin*, 56 ECAB 273 (2005).

[6] 28 ECAB 569 (1977).

Adelbert E. Buzzell,[7] the Board cautioned against an Office medical adviser providing a blanket, unrationalized statement that hearing loss does not progress following the cessation of hazardous noise exposure.[8] The Office medical adviser's opinion, without a rationalized opinion supporting his conclusion that appellant's hearing loss did not worsen due to his lack of noise exposure, is of diminished probative value.

Dr. Phillips noted that appellant's hearing had significantly worsened since the last audiogram and opined that appellant's hearing loss was employment related. However, he failed to evaluate the March 2, 2009 audiogram to determine whether appellant sustained an increased hearing loss. Dr. Phillips did not provide any opinion to the Office as to whether appellant sustained an increase in his hearing loss and, if so, if any such increase was attributable to his employment. In this regard, he did not address the questions submitted by the Office. Proceedings under the Act are not adversarial in nature, nor is the Office a disinterested arbiter.[9] While the claimant has the burden to establish entitlement to compensation, the Office shares responsibility in the development of the evidence to see that justice is done.[10] Once the Office undertakes to develop the medical evidence further, it has the responsibility to do so in the proper manner.[11]

Since Dr. Phillips failed to address whether appellant's hearing loss had worsened or if the hearing loss was employment related, the April 20, 2009 decision will be set aside and the case record remanded to the Office. After such development, as is deemed necessary, the Office should issue a *de novo* decision on appellant's claim to an additional schedule award for his employment-related hearing loss.

CONCLUSION

The Board finds that this case is not in posture for a decision.

[7] 34 ECAB 96 (1982). *See also Armando Bello*, 34 ECAB 1739 (1983) (the Board does not take positions on medical questions of general application, but relies on the medical evidence in each case).

[8] *Id.*

[9] *P.K.*, 60 ECAB ___ (Docket No. 08-2551, issued June 2, 2009); *Donald R. Gervasi*, 57 ECAB 281 (2005).

[10] *J.B.*, 60 ECAB ___ (Docket No. 08-1735, issued January 27, 2009); *William B. Webb*, 56 ECAB 156 (2004).

[11] *P.K.*, *supra* note 9.

ORDER

IT IS HEREBY ORDERED THAT the April 20, 2009 decision of the Office of Workers' Compensation Programs be set aside. The case is remanded for further proceedings consistent with this decision of the Board.

Issued: March 10, 2010
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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