

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

L.R., Appellant)

and)

DEPARTMENT OF AGRICULTURE,)
AGRICULTURAL MARKETING SERVICE,)
Washington, DC, Employer)

**Docket No. 10-1692
Issued: April 7, 2011**

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 June 7, 2010 appellant filed a timely appeal of an April 2, 2010 schedule award decision of the Office of Workers' Compensation Programs. Pursuant to the Federal Employees' Compensation Act¹ and 20 C.F.R. §§ 501.2(c) and 501.3(d), the Board has jurisdiction over the schedule award issue.

ISSUE

The issue is whether appellant has more than 13.1 percent hearing loss of the left ear for which he received a schedule award.

FACTUAL HISTORY

On December 15, 2006 appellant, then a 52-year-old meat grader, filed an occupational disease claim for hearing loss caused by noise exposure at work. He noted that he was exposed

¹ 5 U.S.C. § 8101 *et seq.*

to chronic repetitive daily noise including meat grinding and patty machines on a daily basis. Appellant did not stop work

The Office continued to develop the claim and, by letter dated July 3, 2007, referred appellant for a second opinion, along with a statement of accepted facts, a set of questions and the medical record to Dr. Paul Loeffler, a Board-certified otolaryngologist.

In his August 6, 2007 report, Dr. Loeffler noted appellant's history findings on examination. An audiogram was also performed on his behalf on that date. Dr. Loeffler determined that appellant had sensorineural hearing loss bilaterally at 3,000, 4,000, 6,000 and 8,000 hertz (Hz) which was moderately severe. He explained that appellant's left ear was worse than the right with a 15 to 20 decibels (dB) gap in 3,000, 4,000 and 6,000 Hz. Dr. Loeffler advised that the tympanograms were normal and that acoustic reflexes were not present at 4,000 Hz. He explained that appellant could possibly have an acoustic neuroma as well as overlying sensorineural hearing loss that appeared to be related to his job exposure. Dr. Loeffler requested a magnetic resonance imaging (MRI) scan to determine whether any of this could be related to an acoustic neuroma. Regarding the right ear, he advised that it was the better ear, but found that appellant's sensorineural hearing loss was in excess of what would be expected with normal presbycusis. Dr. Loeffler recommended hearing aids, yearly audiograms and hearing protection.

An August 21, 2007 MRI scan read by Dr. Kevin Legendre, a Board-certified diagnostic radiologist, revealed no abnormality in the region of the auditory canal on either side with no evidence of acoustic neuroma. It also revealed paranasal sinus disease.

In an August 24, 2007 report, Dr. Loeffler indicated that appellant was evaluated and found to have an asymmetric hearing loss. He explained that there were no abnormalities on the MRI scan that would account for the hearing loss and no evidence of an acoustic neuroma. Dr. Loeffler advised that appellant had sensorineural hearing loss bilaterally, worse on the left than on the right with a 15 to 20 dB gap at 3,000, 4,000 and 5,000 Hz. He explained that appellant's hearing loss was in excess of what would be found from normal presbycusis and opined that it was related to his job exposure. Dr. Loeffler recommended hearing protection, yearly audiograms and hearing aids. The audiological evaluation was performed on August 6, 2007 by Angela Roberts, a certified audiologist, who found that appellant sustained hearing loss to the right ear at 500, 1,000, 2,000 and 3,000 Hz of 10, 10, 15 and 65 dB, respectively and to the left ear at 500, 1,000, 2,000 and 3,000 Hz frequencies of 20, 15, 20 and 80 dB, respectively. Dr. Loeffler completed a hearing evaluation form and utilized the American Medical Association, *Guides to the Evaluation of Permanent Impairment*, (5th ed. 2001). He determined that appellant reached maximum medical improvement on August 6, 2007 and had 13.5 percent monaural impairment on the left, 0 percent monaural impairment on the right and 2.25 percent binaural hearing impairment.

On September 14, 2007 the Office accepted appellant's claim for binaural sensorineural hearing loss.

On February 18, 2009 appellant filed a claim for a schedule award.

In an April 6, 2009 report, an Office medical adviser reviewed the evidence from Dr. Loeffler and found that he prescribed hearing aids for appellant and findings of sustained hearing loss to the right ear and to the left ear. He found an impairment of 13.1 percent for the left ear and 0 percent for the right ear. The Office medical adviser noted that appellant reached maximum medical improvement on August 6, 2007.

On August 26, 2009 the Office requested that the Office medical adviser clarify his April 6, 2009 report for a schedule award.

In a September 7, 2009 report, an Office medical adviser referred to his previous report of April 6, 2009 and opined that appellant had a hearing loss of 13.1 percent in the left ear and 0 percent in the right ear. He noted that, because the hearing loss was significantly greater in the left ear, Dr. Loeffler had obtained an MRI scan which ruled out an acoustic neuroma. The Office medical adviser concurred that appellant's hearing loss was related to his job exposure and recommended approval for binaural hearing aids.

On January 26, 2010 the Office requested that the Office medical adviser utilize Dr. Loeffler's August 6, 2007 report in accordance with the A.M.A., *Guides*.²

In a February 17, 2010 report, an Office medical adviser noted the history of injury and treatment, and reviewed Dr. Loeffler's hearing evaluation of August 6, 2007. He utilized the A.M.A., *Guides* and determined that there was no difference compared to the earlier edition. The Office medical adviser determined that appellant had left ear impairment of 13.1 percent under the A.M.A., *Guides*. He recommended approving hearing aids.

By an award of compensation dated April 2, 2010, the Office granted appellant a schedule award for 13.1 percent monaural hearing loss for 6.76 weeks of compensation for the period August 6 to September 22, 2007.

LEGAL PRECEDENT

The schedule award provision of the Act³ and its implementing regulations⁴ 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 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.⁵

² Effective May 1, 2009, schedule awards are determined in accordance with the A.M.A., *Guides* (6th ed. 2008).

³ 5 U.S.C. § 8107.

⁴ 20 C.F.R. § 10.404.

⁵ *Id.*

The Office evaluates industrial hearing loss in accordance with the standards contained in the A.M.A., *Guides*.⁶ Using the frequencies of 500, 1,000, 2,000 and 3,000 Hz, the losses at each frequency are added up and averaged.⁷ Then, the fence of 25 dB is deducted. The remaining amount is multiplied by a factor of 1.5 to arrive at the percentage of monaural hearing loss.⁸ 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.⁹ The Board has concurred in the Office's adoption of this standard for evaluating hearing loss.¹⁰

ANALYSIS

Appellant filed a claim for hearing loss and the Office developed the claim by referring him to Dr. Loeffler who found that appellant's hearing loss was due to noise exposure encountered in his workplace. Dr. Loeffler had an audiogram performed on his behalf and recommended hearing aids.

The Office medical adviser reviewed the results of audiometric testing performed on August 6, 2007. Testing for the right ear at frequency levels of 500, 1,000, 2,000 and 3,000 Hz revealed hearing losses of 10, 10, 15 and 65 dB, respectively. These decibel losses were totaled at 100 dB and divided by 4, to obtain the average hearing loss of 25 dB. This average was then reduced by 25 dB to obtain the average hearing loss of 0, which when multiplied by the established factor of 1.5 resulted in a zero percent monaural loss. Testing for the left ear at the frequency levels of 500, 1,000, 2,000 and 3,000 Hz revealed decibel losses of 20, 15, 20 and 80, respectively. These decibel losses were totaled at 135 dB and were divided by 4, to obtain the average hearing loss of 33.75 dB. This average of 33.75 dB, was then reduced by 25 dB to equal 8.75, which when multiplied by the established factor of 1.5 resulted in a 13.125 percent hearing loss in the left ear.¹¹

⁶ Federal (FECA) Procedure Manual, Part 3 -- Schedule Awards, *Special Determinations*, Chapter 2.700.4(b) (January 2010); A.M.A., *Guides* 250 (6th ed. 2008). The sixth edition of the A.M.A., *Guides* became applicable as of May 1, 2009.

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ See *Donald Stockstad*, 53 ECAB 301 (2002), *petition for recon. granted (modifying prior decision)*, Docket No. 01-1570 (issued August 13, 2002).

¹¹ Dr. Loeffler calculated 13.5 percent left ear impairment based on the August 6, 2007 audiogram. However, as explained, *infra*, application of the Office's standardized formula results in 13.125 percent impairment using the findings set forth in the August 6, 2007 audiogram.

The Office medical adviser concluded that appellant had 13.1 percent hearing loss in the left ear and the Office's April 2, 2010 schedule award decision states that appellant has 13.1 percent impairment. The Board notes, however, that Office policy is to round the calculated percentage of impairment to the nearest whole number.¹² Thus, appellant's left ear hearing loss should be rounded to 13 percent impairment. This error is harmless as the Office's April 2, 2010 decision reflects that the period of the award, August 6 to September 22, 2007, represents the number of weeks' compensation was paid in proportion to the percentage loss of use for permanent loss of appellant's hearing. The amount of compensation is paid in proportion to the percentage loss of use when the loss of use is less than 100 percent.¹³ The compensation schedule in the Act provides that the maximum number of weeks of compensation for hearing loss in one ear is 52 weeks.¹⁴ Thirteen percent of 52 weeks is 6.76 weeks of compensation, which is the period that the Office paid appellant.

On appeal, appellant disagreed with the amount of his schedule award. He alleged that a coworker with a similar hearing loss received a sizably larger award and suggested that his race may have been a factor. However, there is no medical evidence of record supporting any greater impairment or indicating that the claim was not properly developed. As explained, for a 13 percent monaural loss of hearing, 6.76 weeks of compensation is payable which is what the Office awarded appellant. Under the schedule provisions, he is entitled to no more.¹⁵ Appellant also submitted new evidence with his appeal. The Board has no jurisdiction to review this evidence for the first time on appeal.¹⁶

CONCLUSION

The Board finds that appellant has no more than a 13 percent monaural hearing loss of the left ear for which he received a schedule award.

¹² Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.3(b) (October 1990). See *J.H.*, Docket No. 08-2432 (issued June 15, 2009).

¹³ See *J.H.*, *id.*

¹⁴ 5 U.S.C. § 8107(c)(13)(a).

¹⁵ See *A.M.*, Docket No. 09-1895 (issued April 23, 2010) (the terms of the Act are specific as to the method and amount of payment of compensation; neither the Office nor the Board has the authority to, enlarge upon the terms of the Act, nor to make an award of benefits under any terms other than those specified in the statute).

¹⁶ 20 C.F.R. § 501.2(c); *James C. Campbell*, 5 ECAB 35 (1952).

ORDER

IT IS HEREBY ORDERED THAT the April 2, 2010 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 7, 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