United States Department of Labor
Employees' Compensation Appeals Board

J.B., Appellant	)	
and	)	**Docket No. 10-1987**
	)	**Issued: June 3, 2011**
DEPARTMENT OF HOMELAND SECURITY, CUSTOMS & BORDER PROTECTION, Richford, VT, 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
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On July 29, 2010 appellant filed a timely appeal from an April 21, 2010 schedule award decision of the Office of Workers' Compensation Programs. Pursuant to the Federal Employees' Compensation Act[1] and 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 one percent permanent binaural hearing loss.

FACTUAL HISTORY

On April 24, 2000 appellant, then a 48-year-old border patrol agent, filed an occupational disease claim alleging that he sustained binaural hearing loss due to noise exposure from gunfire.

[1] 5 U.S.C. § 8101 *et seq.*

He first became aware of his condition and its relationship to his employment on August 18, 1998, when he was examined after conducting indoor semi-automatic pistol training. Appellant denied any preexisting condition and maintained that his hearing had been normal as demonstrated by preemployment and subsequent biannual testing.

A May 24, 1996 audiogram exhibited the following decibel (dBA) losses at frequencies of 500, 1,000, 2,000 and 3,000 hertz (Hz): 20, 15, 20 and 20 dBA for the right ear; and 20, 15, 20 and 35 dBA for the left ear. Dr. George White, a Board-certified occupational physician, commented on June 3, 1996 that the results were essentially normal. An August 18, 1998 audiogram demonstrated the following losses at 500, 1,000, 2,000 and 3,000 Hz: 5, 10, 15 and 10 dBA for the right ear; and 0, 10, 15 and 30 dBA for the left ear. An August 24, 1998 nursing report noted that this audiogram was consistent with mild, bilateral high frequency hearing loss.

The Office referred appellant for a second opinion to Dr. William J. Brundage a Board-certified otolaryngologist. In a December 6, 2000 report, appellant presented with bilateral tinnitus and progressive hearing loss and related a history of significant, prolonged gunfire exposure as an instructor. Dr. Brundage noted that a December 6, 2000 audiogram, which exhibited losses of 10, 20, 25 and 20 dBA for the right ear and 5, 15, 25 and 40 dBA for the left ear at 500, 1,000, 2,000 and 3,000 Hz, indicated "mild sloping high frequency sensorineural hearing loss with excellent discrimination bilaterally." He added that appellant's 1996 and 1998 audiograms demonstrated slight progression. Dr. Brundage diagnosed bilateral high frequency sensorineural hearing loss caused either by presbycusis, noise exposure or "more likely both."

The Office accepted appellant's claim on March 17, 2001 for bilateral high frequency sensorineural hearing loss, but determined on May 11, 2001 that he was not entitled to a schedule award because the condition was not ratable. An Office hearing representative affirmed denial of the award in a November 8, 2002 decision.

On December 29, 2007 appellant filed another occupational disease claim for binaural hearing loss and tinnitus due to loud noise emanating from 60 hours of annual gunfire exposure and daily "incessant barking directly behind my head" in his capacities as a firearms instructor, range officer and canine handler. He retired effective December 31, 2007 and filed a claim for a schedule award on January 9, 2008. Appellant submitted audiograms dated January 9, 2002 and July 1, 2003.

On November 7, 2008 the Office advised appellant that additional evidence was needed to establish his claim.

In October 8 and 30, 2008 reports, Dr. Brundage stated that appellant sustained bilateral high frequency sensorineural hearing loss and tinnitus for several years.[2] He specified that appellant had a significant history of noise exposure as a firearms instructor and range officer. Dr. Brundage did not observe any abnormalities on physical examination and reviewed findings from an October 8, 2008 audiogram. He opined, "This bilateral high frequency sensorineural hearing loss certainly may be noise related. There also may be some genetic component; however, given no family history of hearing loss, that seems unlikely."

[2] The record suggests that Dr. Brundage was appellant's treating physician at this time.

On June 24, 2009 the Office referred appellant for a second opinion to Dr. Kristofer Anderson, a Board-certified otolaryngologist. In a July 27, 2009 report, Dr. Anderson pointed out that audiometric findings in 1998 showed mild sensorineural hearing loss at the highest frequencies. He also observed a minimal progression of 10 dBA over the span of a decade, in view of a July 13, 2009 audiogram indicating dBA losses of 15, 25, 30, 30, 45 and 45 for the right ear and 15, 25, 30, 45, 45 and 45 for the left ear at 500, 1,000, 2,000, 3,000, 4,000 and 6,000 Hz. Dr. Anderson diagnosed mild to moderate high frequency sensorineural hearing loss due in part to occupational noise exposure on the basis that appellant's 1998 audiogram, which was taken after 10 years of such exposure, revealed hearing loss that exceeded what was normally predicated on presbycusis alone.

On August 30, 2009 an Office medical adviser agreed with Dr. Anderson that appellant's sensorineural hearing loss was caused by occupational noise exposure. Applying the standard provided by the American Medical Association, *Guides to the Evaluation of Permanent Impairment*[3] (hereinafter A.M.A., *Guides*) to the July 13, 2009 audiogram, he calculated that appellant sustained 0 percent monaural hearing loss in the right ear, 7.5 percent monaural hearing loss in the left ear or 0.9 percent binaural hearing loss.[4] The Office medical adviser listed July 13, 2009 as the date of maximum medical improvement.

The employing establishment notified the Office in an April 15, 2010 letter that appellant was last exposed to hazardous noise in the workplace on October 29, 2007.

By decision dated April 21, 2010, the Office granted appellant a schedule award for one percent binaural hearing loss for the period October 29 to November 11, 2007.

LEGAL PRECEDENT

The schedule award provision of the Act and its implementing regulations[5] 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.[6] 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.[7]

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

[4] *See infra* note 10.

[5] 20 C.F.R. § 10.404.

[6] 5 U.S.C. § 8107(c)(13).

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

The Office 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 cycles per second, 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 the Office's adoption of this standard for evaluating hearing loss.[8]

It is well established that the period covered by a schedule award commences on the date that the employee reaches maximum medical improvement from the residuals of the accepted employment injury. The Board has explained that maximum medical improvement means that the physical condition of the injured member of the body has stabilized and will not improve further. The determination of whether maximum medical improvement has been reached is based on the probative medical evidence of record and is usually considered to be the date of the evaluation by the attending physician which is accepted as definitive by the Office.[9]

ANALYSIS

Appellant filed a claim for binaural hearing loss and the Office developed the matter by referring him to Dr. Anderson. After reviewing the audiometric data, Dr. Anderson found that appellant sustained mild to moderate high-frequency sensorineural hearing loss causally related to his occupational noise exposure. The Office medical adviser concurred with these findings and calculated that appellant had 0.9 percent binaural hearing loss, which the Office rounded to one percent.

Applying the A.M.A., *Guides* standard to the July 13, 2009 audiogram, appellant's right ear recorded losses of 15, 25, 30 and 30 dBA. The total loss was 100 dBA. When divided by four, the result was an average hearing loss of 25 dBA. The average hearing of 25 dBA was reduced by the fence of 25 dBA to equal 0 dBA. This figure was then multiplied by the established factor of 1.5, yielding zero percent monaural impairment of the right ear. At the same frequency levels, appellant's left ear recorded losses of 15, 25, 30 and 45 dBA at 500, 1,000, 2,000 and 3,000 Hz, respectively. The total loss was 115 dBA. When divided by four, the result was an average hearing loss of 28.75 dBA. The average hearing of 28.75 dBA was reduced by the fence of 25 dBA to equal 3.75 dBA. This figure was then multiplied by the established factor of 1.5, yielding 5.625 percent monaural impairment of the left ear.[10] In calculating binaural hearing loss, the lesser monaural loss of zero percent for the right ear is first

[8] *J.H.*, Docket No. 08-2432 (issued June 15, 2009); *J.B.*, Docket No. 08-1735 (issued January 27, 2009).

[9] *Mark A. Holloway*, *supra* note 7, at 325.

[10] The Board notes that, although the Office medical adviser correctly determined that appellant sustained zero percent monaural impairment of the right ear, he improperly calculated that appellant sustained 7.5 percent monaural impairment of the left ear. Application of the formula provided by the A.M.A., *Guides*, as explained, results in 5.625 percent monaural impairment of the left ear.

multiplied by five to equal zero. This amount is added to the greater monaural loss of 5.625 percent for the left ear to equal 5.625, which is then divided by six to arrive at 0.9375 percent binaural hearing loss. This was properly rounded up to one percent by the Office.[11]

When loss of use of a scheduled member or function of the body is less than 100 percent, the amount of compensation paid is in proportion to the percentage of loss of use.[12] The maximum award for binaural hearing loss is 200 weeks of compensation. Since appellant's binaural loss was one percent, he would be entitled to one percent of 200 weeks or two weeks of compensation. However, it is well established that, if calculations based on the monaural hearing loss would result in greater compensation, then the monaural hearing loss calculations should be used.[13] The maximum award for monaural hearing loss is 52 weeks of compensation. Since appellant's monaural loss was six percent, rounded up from 5.625,[14] he would be entitled to six percent of 52 weeks or 3.12 weeks of compensation. As this is greater than the two weeks of compensation for a binaural hearing loss, the Office should have issued a schedule award for six percent monaural hearing impairment. Appellant is entitled to an additional 1.12 weeks of compensation.

In deciding when the schedule award commenced, the Office selected October 29, 2007 as the date of maximum medical improvement. The Board has noted a reluctance to find a date of maximum medical improvement that is retroactive to the award, as retroactive awards often result in payment of less compensation benefits. The Board, therefore, requires persuasive proof for selection of a retroactive date of maximum medical improvement.[15] Here, the only evidence suggesting that October 29, 2007 was the appropriate choice was an April 15, 2010 letter from the employing establishment. The Office medical adviser selected July 13, 2009, the date of Dr. Anderson's medical evaluation. In light of Board precedent on this matter,[16] the Board will modify the Office's decision to reflect that July 13, 2009 is the date of maximum medical improvement.

Appellant argues on appeal that the schedule award should have accounted for his tinnitus. The A.M.A., *Guides* provides that if tinnitus interferes with activities of daily living such as sleeping, reading and other tasks requiring concentration, up to five percent may be added to a measurable binaural hearing impairment.[17] The Board has held, however, that a claimant is not entitled to an additional schedule award where the record contains no medical

[11] *See* Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards,* Chapter 3.700.4(b)(2) (January 2010) (fractions should be rounded down from .49 or up from .50).

[12] 5 U.S.C. § 8107(c)(19).

[13] *J.H.*, 59 ECAB 377 (2008); *E.S.*, 59 ECAB 249 (2007).

[14] *See supra* note 11.

[15] *J.C.*, 58 ECAB 258 (2007); *James E. Earle*, 51 ECAB 567 (2000).

[16] *See supra* note 9.

[17] A.M.A., *Guides*, *supra* note 3 at 249. *See also R.D.*, 59 ECAB 127, 131 (2007).

evidence directly addressing the impact of tinnitus on appellant's activities of daily living.[18] In this case, Dr. Brundage acknowledged that appellant presented with bilateral tinnitus, but he failed to discuss how this condition interfered with appellant's activities of daily living. No other physician addressed whether tinnitus interfered with appellant's activities of daily living. Appellant, therefore, is not entitled to further compensation due to tinnitus.

CONCLUSION

The Board finds that appellant is entitled to a schedule award for a six percent permanent monaural hearing loss of the left ear commencing July 13, 2009.

ORDER

IT IS HEREBY ORDERED THAT the April 21, 2010 decision of the Office of Workers' Compensation Programs is affirmed, as modified.

Issued: June 3, 2011
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

[18] *R.D., supra* note 17.