

U.S. Department of Labor

Office of Administrative Law Judges
5100 Village Walk, Suite 200
Covington, LA 70433

(985) 809-5173
(985) 893-7351 (FAX)



Issue Date: 22 May 2012

CASE NO.: 2011-LHC-01043

OWCP NO.: 07-189717

IN THE MATTER OF

**KENNY FELTON,
Claimant**

v.

**HUNTINGTON INGALLS INC.,
formerly NORTHROP GRUMMAN SHIPYARDS, INC.
AVONDALE INDUSTRIES, INC.,
Self-insured Employer**

APPEARANCES:

**EDWARD RAPIER, JR., ESQ.
ARTHUR BREWSTER, ESQ.**

For the Claimant

TRACI CASTILLE, ESQ.

For the Employer

**Before: CLEMENT J. KENNINGTON
Administrative Law Judge**

DECISION AND ORDER

This is a claim for benefits under the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901, *et seq.*, (herein the Act), brought by Kenny Felton (Claimant) against Huntington Ingalls Inc. (Employer).

The issues raised by the parties could not be resolved administratively and the matter was referred to the Office of Administrative Law Judges for hearing. Pursuant thereto, Notice of Hearing was issued scheduling a formal hearing on January 31, 2012, in Covington, Louisiana. All parties were afforded a full opportunity to adduce testimony, offer documentary evidence and submit post-hearing briefs. Claimant offered 12 exhibits and Employer proffered 11 exhibits

which were admitted into evidence along with 1 Joint exhibit. This decision is based upon a full consideration of the entire record.¹

Post-hearing briefs were received from the Claimant and the Employer. Based upon the stipulations of Counsel, the evidence introduced, my observations of the demeanor of the witnesses, and having considered the arguments presented, I make the following Findings of Fact, Conclusions of Law, and Order.

I. STIPULATIONS

At the commencement of the hearing, the parties stipulated (JX-1), and I find:

1. That the Claimant was injured on August 25, 2010 (i.e., the date of last employment/alleged exposure to noise prior to date of filing audiogram).
2. That Claimant's hearing loss occurred in the course and scope of employment.
3. That Claimant was exposed to workplace noise which could have caused hearing loss.
4. That there existed an employer/employee relationship at the time of Claimant's alleged hearing loss.
5. That Employer was notified of Claimant's hearing loss on September 17, 2010.
6. That Employer filed Notices of Controversion on September 23, 2010 and January 12, 2011.
7. That an informal conference before the District Director was held on January 6, 2011.
8. That Claimant underwent audiograms on August 26, 2010 (administered by Audiologist Daniel Bode and showing 15.3% binaural impairment plus additional 4% for tinnitus) and October 14, 2010 (administered by Michael Seidemann, Ph.D. and showing 5.6% binaural impairment).
9. That Claimant is currently employed at Avondale.
10. That Claimant's average weekly wage at the time of injury was \$877.29 with a compensation rate of \$584.86 per week.
11. That Employer has paid Claimant \$12,282.06 in compensation (for a 10.5% binaural hearing loss).

¹ References to the transcript and exhibits are as follows: Transcript: Tr.____ ; Claimant's Exhibits: CX-____ ; Employer's Exhibits: EX-____ ; and Joint Exhibit: JX-____.

12. That Employer has accepted liability for medical benefits and has purchased hearing aids for Claimant from Claimant's choice of specialist.

II. ISSUES

The unresolved issues presented by the parties are:

1. Extent of compensable impairment.
2. Liability for and amount of attorney fees.

III. STATEMENT OF THE CASE

Testimonial Evidence

Claimant

Claimant testified he has a twelfth grade education and has worked at Northrop Grumman since 1994. For approximately the last sixteen years, Claimant has worked as a painter/sandblaster. (Tr. 11). Claimant stated that his work puts him in close proximity to noisy equipment including the painting pot, fan, power, tools, and air blower. (Tr. 12).

Claimant testified that he began to experience hearing problems approximately four years ago. He stated that he started having problems with people speaking to him, often having to ask them to repeat what they had said. (Tr.12). Claimant also stated that around that same time he began to experience ringing in his ears sounding like a bell. He noted that the ringing comes and goes and can last for as long as a week or two. The ringing is more noticeable in the mornings and when Claimant is in quiet places. (Tr. 13).

Claimant stated that during his hearing tests with Daniel Bode, he was asked to fill out a questionnaire concerning the ringing in his ears. Claimant testified that he answered truthfully and was cooperative during the testing by Mr. Bode. (Tr. 14). When asked how the ringing affects him Claimant testified that it makes him irritable, upset, and feel like he has no control over it. (Tr. 15).

Claimant further testified that he cooperated fully with Dr. Michael F. Seidemann during hearing tests and was never told by Dr. Seidemann that he was being uncooperative. (Tr. 16).

On cross-examination, Claimant was asked whether he was forced to make any life changes as a result of ringing in his ears. Claimant recalled that at his deposition he had stated that his life hadn't changed much because of the ringing but that things were different because of his inability to hear. (Tr. 17).

Claimant went on to testify that he was prescribed and was currently using hearing aids from Mr. Bode. (Tr. 17). He did not have to pay for them and he stated that they were helping. (Tr. 18).

The Audiological/Medical Evidence

Daniel Bode

Mr. Daniel Bode, a licensed Clinical Audiologist, performed an audiological evaluation of Claimant on August 26, 2010, and issued a report on that same day. (CX-5). After visually inspecting Claimant's ears and assuring that any blockages were cleared, Mr. Bode performed impedance audiometry, pure-tone air conduction testing, objective DPOAE testing assessments, bone conduction testing, speech reception threshold testing, and speech discrimination testing. (CX-5, p. 1). The pure-tone air conduction test indicated mild to moderately severe, sloping, high frequency hearing loss, bilaterally. (CX-5, p. 1). The DPOAE testing was consistent with hearing loss in the high frequencies in each ear. (CX-5, p. 1). Bone conduction tests corroborated the sensorineural nature of the hearing loss, bilaterally. (CX-5, p.1). Speech reception thresholds were obtained at twenty-five decibels (25 dB HTL), bilaterally. (CX-5, p. 1). Speech discrimination scores were excellent bilaterally when presented at a loud conversational speech level of seventy-five decibels (75 dB HL). (CX-5, p. 1). Mr. Bode opined in his report that these results were consistent with high frequency, sensorineural hearing loss which is the outcome of continuous exposure to excessively loud noises. (CX-5, p. 1). Mr. Bode reported that Claimant's percentage of hearing loss is approximately 16.9% the left ear and 15.0% the right ear with a 15.3% binaural impairment according to current AMA guidelines. (CX-5, p. 1).

As part of his evaluation of Claimant, Mr. Bode performed a Tinnitus Handicap Inventory (THI), which revealed a score of Grade 4. (CX-5, p. 1). Due to this score, Mr. Bode opined that Claimant's moderate tinnitus would add 4% to his overall impairment. (CX-5, p. 1). Accordingly, Mr. Bode placed Claimant's total impairment at 19.3%. (CX-5, p. 1). Mr. Bode estimated the cost of mid level digital hearing devices for Claimant would cost \$5,400.00 plus tax. (CX-5, p. 1).

At the hearing, Mr. Bode testified that he has been in private practice since 1981 doing mostly clinical work with litigation referrals making up approximately 25 percent of his business. (Tr. 20-21). His practice is made up of four offices and employs two audiologists and four or five support staff. (Tr. 20-21). Mr. Bode is currently on staff at St. Tammany Hospital. (Tr. 21).

Mr. Bode explained that pure-tone air testing assesses the frequencies that make up speech. (Tr. 23). He described how an audiometer is used to subjectively test a patient's hearing by requiring them to push a button when they hear a tone. (Tr. 23). Mr. Bode further stated that there are three different methods used in tone testing, Houston Westlake, ascending, and descending. (Tr. 23-24). Mr. Bode was of the opinion that the Houston Westlake method that relies on averaging is more consistent and reliable than either the ascending or descending methods. (Tr. 24). He stated that it is possible for the patient to anticipate a tone using ascending or descending tests thereby resulting in inaccurate test data. (Tr. 24). No matter which method is employed, pure-tone testing is a subjective and results can be influenced by a number of external factors according to Mr. Bode. (Tr. 25-26).

Mr. Bode testified that otoacoustic emissions (OAE) testing is a very objective test in that it eliminates any part the patient may have in influencing the results. (Tr. 30). OAE testing is the standard in current audiological assessments. (Tr. 31). Mr. Bode stated that OAE tests can be used to corroborate the subjective pure-tone test results. (Tr. 31). Regarding his examination of Claimant, Mr. Bode testified that the OAE test revealed hearing loss in both right and left ears and was consistent with the amount of loss that Mr. Bode found. (Tr. 32).

Mr. Bode stated that he asked Claimant whether he experienced ringing in his ears, to which Claimant replied he did very often although not at the time of his appointment with Mr. Bode. (Tr. 33). Mr. Bode explained that tinnitus is not a disease but rather generally a symptom of sensorineural hearing loss. (Tr. 34). Tinnitus is diagnosed by way of subjective assessment of the patient using a standardized scale. (Tr. 35). Mr. Bode testified that there are two types of tinnitus patients, those that experience major problems in their lives because of the symptoms and those whose tinnitus is secondary to their hearing loss. (Tr. 37).

Regarding rating the Claimant's impairment due to his tinnitus, Mr. Bode testified that the AMA guidelines allow for an additional 5 % impairment depending on the severity of the symptoms and their effect on the patient. (Tr. 37). According to Mr. Bode, Claimant achieved a score of 64 corresponding to a rating of severe tinnitus and an entitlement to an additional 4 % impairment. (Tr. 37). With this additional finding, Mr. Bode placed Claimant's total impairment at 19.3 %. (Tr. 38).

Mr. Bode testified, as it concerned Dr. Seidemann's methodologies and report, that Dr. Seidemann does not conduct objective OAE testing. (Tr. 39, 56). Further, Mr. Bode rejects Dr. Seidemann's assertion that a patient cannot hear worse than their best test. (Tr. 42). He explains that such an assertion presupposes that the best test is the valid test and fails to account for subjective factors that may have influenced the patients test results. (Tr. 42-44). Mr. Bode stated that these factors require additional objective testing to corroborate the test results. (Tr. 44). Mr. Bode noted that he cannot speak to the validity of Dr. Seidemann's test since he was not present for it and does not know what testing technique or methods Dr. Seidemann used. (Tr. 39). However, Mr. Bode did state that Dr. Seidemann is a reputable audiologist. (Tr. 39).

As it concerns Dr. Seidemann's evaluation of Claimant's tinnitus, Mr. Bode testified that the scholarly material cited by Dr. Seidemann is not current with what is being taught in the field of audiology. (Tr. 46). Mr. Bode contests Dr. Seidemann's assertion that tinnitus is pathological and offers instead that the generally accepted view is that tinnitus is concomitant to the issue of sensorineural hearing loss. (Tr. 47). Furthermore, that tinnitus is not always present and is more psychological and physiological, occurring as a result of the absence of sound. (Tr. 48). Mr. Bode did admit that under the *AMA Guidelines*, currently there is no scientific way to evaluate tinnitus. (Tr. 54).

Testing and Report by Michael F. Seidemann, Ph.D.

Michael Seidemann, Ph.D, performed an audiological evaluation of Claimant on October 14, 2010. (EX-5). Dr. Seidemann's report notes Claimant's family history shows no signs of

hearing loss and Claimant presented a negative history of exposure to intense noise for prolonged durations from a non-occupational standpoint. (EX-5, p. 1). Dr. Seidemann's evaluation showed that according to the AMA *Guidelines*, Claimant has binaural hearing of impairment of 5.6%. (EX-5, p. 2). Dr. Seidemann stated that Claimant perceived intermittent tinnitus, noting that it is not pathological and therefore, according to the AMA guidelines, not compensable. (EX-5, p. 1).

Dr. Seidemann's testing and report also indicated that Claimant's hearing was within normal limits in each ear in the low frequencies, and to 1000 Hz, with a mild to moderate sensorineural hearing loss in the higher frequencies. (EX-5, p. 1). Claimant's speech reception thresholds of 20 dB in each ear were reported to be within normal limits and were consistent with Dr. Seidemann's pure tone test findings. (EX-5, pp. 1-2). Additionally, speech discrimination was noted as excellent in the right ear at 92% and good in the left ear at 88%. (EX-5, p. 2).

Dr. Seidemann found that Claimant was a candidate for digital (programmable) hearing aids at a cost of \$1,800.00 a pair. (EX-5, p. 2). In conclusion, Dr. Seidemann opined that absent definitive sound level exposure information, it was unlikely that Claimant's protected noise exposure at Northrop Grumman contributed to his current hearing loss. (EX-5, p. 2).

The Contentions of the Parties

Claimant contends that, based on the findings of his treating audiologist, he is entitled to compensation for 15.3% binaural impairment and an additional 4% impairment due to the severity of his tinnitus. In support of this claim, Claimant argues that the tests, reports, and testimony of Mr. Bode clearly establish an overall all impairment of 19.3% and that this determination is supported by both subjective and objective evidence. Accordingly, Claimant asserts that the tests and report of Dr. Seidemann must be disregarded and greater weight given to the findings of Mr. Bode.

Employer argues that, according to testing done by Dr. Seidemann and AMA *Guidelines*, Claimant's binaural hearing impairment is 5.6%. Further, since Claimant only experiences intermittent tinnitus, it is not pathological and therefore not compensable. Employer contends that Claimant has failed to offer proof as to the causal relationship between his intermittent tinnitus and employment. Additionally, Claimant's perceived tinnitus does not meet the conditions set forth in the AMA *Guidelines* to warrant assignment of an additional impairment. Employer asserts that Claimant has been voluntarily compensated for 10.5% impairment and that Employer has paid for hearing aids recommended by Claimant's audiologist. Accordingly, Employer argues that Claimant should be entitled to no additional benefits.

IV. DISCUSSION

It has been consistently held that the Act must be construed liberally in favor of the Claimant. *Voris v. Eikel*, 346 U.S. 328, 33 (1953); *J.B. Vozzolo, Inc. v. Britton*, 377 F.2d 144 (D.C. Cir. 1967). However, the United States Supreme Court has determined that the "true-doubt" rule, which resolves factual doubt in favor of the Claimant when the evidence is evenly balanced, violates Section 7(c) of the Administrative Procedure Act, 5 U.S.C. § 556(d), which

specifies that the proponent of the rule or position has the burden of proof and, thus, the burden of persuasion. *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 114 S.Ct. 2251 (1994), *aff'g*. 990 F.2d 730 (3rd Cir. 1993).

Extent of Disability

In this case, the parties agree that Claimant has sustained compensable hearing loss but disagree as to the extent of that loss and whether Claimant's intermittent tinnitus is causally related to his employment and if it is compensable. In support of their respective positions, a total of two audiograms and the reports of two expert witnesses have been introduced. The burden of proving the extent of his disability rests with the Claimant. *Trask v. Lockheed Shipbuilding Construction Co.*, 17 BRBS 56, 59 (1980).

Section 8(c)(13)(E) of the Act requires that hearing loss determinations be made in accordance with the AMA *Guidelines*. See *Reggiannini v. General Dynamics Corp.*, 17 BRBS 254, 256 (1985).

Under the LHWCA, as amended, and the implementing regulations, an audiogram provides presumptive evidence of the extent of a claimant's hearing loss if the following conditions are met:

- (1) The audiogram was administered by a licensed or certified audiologist, by a physician certified by the American Board of Otolaryngology ...;
- (2) The employee was provided the audiogram and a report thereon at the time it was administered or within thirty (30) days thereafter.
- (3) No one has provided a contrary audiogram of equal probative value (meaning one performed using the standards described herein)...within thirty (30) days thereof where noise exposure continues or within six (6) months where exposure to excessive noise levels does not continue.

20 C.F.R. § 702.441(b)(1)-(3). The regulations further provide:

- (d) . . . the evaluator shall use the criteria for measuring and calculating hearing impairment as published . . . by the American Medical Association in the *Guides to the Evaluation of Permanent Impairment*, using the most currently revised edition . . . In addition, the audiometer used . . . must be calibrated according to current American National Standard Specifications for Audiometers . . .

20 C.F.R. § 702.441 (d).

The claimant "is entitled to benefits for the totality of his occupational hearing loss based on the most credible evidence of record." *Steevens v. Umpqua River Navigation*, 35 BRBS 129,

133 (2001). If there is more than one credible audiogram, it is within the administrative law judge's authority to determine the amount of hearing loss by averaging the results of the audiograms. *Steevens*, 35 BRBS at 133. The two audiograms on record indicate that Claimant suffers from some amount of hearing loss, though they are inconsistent on the amount of impairment.

Mr. Bode's pure tone threshold audiogram yielded a binaural impairment of 19.3% when episodic tinnitus was added to his results. Dr. Seidemann found a 5.6% binaural loss with no reported tinnitus. The AMA *Guidelines* allow additional percentages for tinnitus, if the tinnitus condition impairs or interferes with the patient's hearing or daily living. The instant record does not support such a finding since Claimant did not report sleep disturbance or tiredness because of his intermittent tinnitus to Mr. Bode, or an inability to enjoy social activities. Further, Claimant testified that his hearing loss and not the tinnitus has been the cause of changes in his life. Accordingly, I find Claimant is not entitled to any additional loss percentage for his tinnitus condition.

Mr. Bode raised issues with the extent of Dr. Seidemann's testing methods although he could not go as far as to say that Dr. Seidemann's results contained any errors or were flawed in anyway so as to invalidate his results. However, Mr. Bode's extensive testimony concerning the importance of objective testing in order to corroborate the results of subjective tests was persuasive. Specifically, Mr. Bode discussed in detail how a patient can unintentionally manipulate the test results of subjective tests in order to make it appear as if they have less of a hearing impairment than they actually do. Mr. Bode made it clear that, absent strict protocol on the part of audiologist conducting the test, it is very possible for manipulation by the patient to occur. Since Mr. Bode's audiogram testing was the only one of the two conducted on Claimant that included objective testing methods, I find that Mr. Bode's test results are the most credible and that there is no reason to average the impairment determinations of Mr. Bode's and Dr. Seidemann's audiograms. Accordingly, I find that Claimant has a 15.3% hearing loss.

V. INTEREST

Although not specifically authorized in the Act, it has been an accepted practice that interest at the rate of six per cent per annum is assessed on all past due compensation payments. *Avallone v. Todd Shipyards Corp.*, 10 BRBS 724 (1974). The Benefits Review Board and the Federal Courts have previously upheld interest awards on past due benefits to insure that the employee receives the full amount of compensation due. *Watkins v. Newport News Shipbuilding & Dry Dock Co.*, *aff'd in pertinent part and rev'd on other grounds, sub nom. Newport News v. Director, OWCP*, 594 F.2d 986 (4th Cir. 1979). The Board concluded that inflationary trends in our economy have rendered a fixed six per cent rate no longer appropriate to further the purpose of making Claimant whole, and held that ". . . the fixed per cent rate should be replaced by the rate employed by the United States District Courts under 28 U.S.C. § 1961 (1982). This rate is periodically changed to reflect the yield on United States Treasury Bills . . ." *Grant v. Portland Stevedoring Company, et al.*, 16 BRBS 267 (1984).

Effective February 27, 2001, this interest rate is based on a weekly average one-year constant maturity Treasury yield for the calendar week preceding the date of service of this

Decision and Order by the District Director. This Order incorporates by reference this statute and provides for its specific administrative application by the District Director.

VI. ATTORNEY FEES

No award of attorney's fees for services to the Claimant is made herein since no application for fees has been made by the Claimant's counsel. Counsel is hereby allowed thirty (30) days from the date of service of this decision to submit an application for attorney's fees. A service sheet showing that service has been made on all parties, including the Claimant, must accompany the petition. Parties have twenty (20) days following the receipt of such application within which to file any objections thereto. The Act prohibits the charging of a fee in the absence of an approved application.

VII. ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law, and upon the entire record, I enter the following Order:

1. Employer shall pay Claimant compensation for permanent partial disability based on a fifteen and three-tenths percent (15.3%) binaural hearing loss and Claimant's average weekly wage of \$877.29 in accordance with the provisions of Section 8(c) of the Act. 33 U.S.C. § 908(c)(13).
2. Employer shall receive credit for all compensation heretofore paid.
3. Employer shall pay interest on any sums determined to be due and owing at the rate provided by 28 U.S.C. § 1961 (1982); *Grant v. Portland Stevedoring Co.*, 16 BRBS 267 (1984).
4. Claimant's attorney shall have thirty (30) days from the date of service of this decision by the District Director to file a fully supported fee application with the Office of Administrative Law Judges; a copy must be served on Claimant and opposing counsel who shall then have twenty (20) days to file any objections thereto.

SO ORDERED this 22nd day of May, 2012, at Covington, Louisiana.

A

CLEMENT J. KENNINGTON
Administrative Law Judges