WCAT Decision Number: WCAT-2004-00034-RB
WCAT Decision Date: **January 08, 2004**
Panel: Anthony F. Stevens, Vice Chair

Introduction

The worker appeals the April 17, 2002 decision of a hearing claims officer of the Workers' Compensation Board (Board). The hearing claims officer noted that the worker's claim for occupational noise-induced hearing loss had previously been accepted, with hearing aids and a pension being provided to him by the Board. The hearing claims officer reviewed the worker's claim in relation to subsequent audiogram results, which revealed deterioration in the worker's hearing loss. That said, the hearing claims officer also noted that the worker had retired in 1990 and because a July 1989 audiogram was taken closest to his last exposure to hazardous occupational noise concluded that a change in his pension entitlement was not indicated. Specifically, the hearing claims officer said:

> As you retired from the work force in 1990, this means that any deterioration in your hearing in the future cannot be attributed to your exposure to hazardous occupational noise.

The worker requested an oral hearing, which was denied on a preliminary basis. I reviewed the matter and concluded that an oral hearing is not necessary in order to properly adjudicate this appeal, since the issue to be determined is primarily based on an application of Board policy.

Issue(s)

The issue in this appeal is whether the worker is entitled to an increase in his pension for occupational noise-induced hearing loss. This includes the question of whether the deterioration in the worker's hearing loss was likely due to occupational noise exposure.

Jurisdiction

This appeal was filed with the Workers' Compensation Review Board (Review Board). On March 3, 2003, the Board's Appeal Division and the Review Board were replaced by the Workers' Compensation Appeal Tribunal (WCAT). As a Review Board panel had not considered this appeal before that date, it has been decided as a WCAT appeal (See the *Workers Compensation Amendment Act (No. 2), 2002*, section 38).

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Under section 250 of the *Workers Compensation Act* (Act), effective March 3, 2003, WCAT may consider all questions of fact and law arising in an appeal, but is not bound by legal precedent. It must make its decision based on the merits and justice of the case, but in so doing it must apply policies of the board of directors of the Board which apply to the case, except in circumstances as outlined in section 251 of the Act.

This is an appeal by way of rehearing, rather than a hearing *de novo* or an appeal on the record. WCAT has jurisdiction to consider new evidence, and to substitute its own decision for the decision under appeal.

Background and Evidence

This claim was established for occupational noise-induced hearing loss. The worker undertook his claim to the Board on November 29, 1987 to contend that his hearing loss was attributable to noise on construction sites in his employment as an electrician. His previous employment history also included work as a laborer in a mill, a meat cutter, a signaler, a truck driver/tractor operator, a trainer, an elevator installer helper, and a sheet metal worker.

An audiogram performed on July 26, 1988 revealed a 20 decibel loss on the right side and a 28 decibel loss on the left.

By decision dated August 30, 1988 the Board advised the worker that pursuant to section 7 of the Act he was entitled to an award for industrial noise-induced hearing loss. In a further decision issued on October 18, 1988 the worker was provided with a lump sum pension of $1,265.33. That award was based on the Board's conclusion that only the hearing loss in the worker's left ear was sufficient to warrant an award pursuant to Schedule D of the Act, with entitlement for that hearing loss being 0.30 percent of total.

The worker appealed the October 18, 1988 decision of the Board, contending that the lump sum amount was too low. He also disputed the rate of compensation utilized by the Board to calculate his pension entitlement.

In findings issued on August 10, 1989 a Review Board panel denied the worker's appeal and found no error respecting his award. The Review Board panel concluded that the worker's entitlement was appropriately established to be 0.30 percent, and that the rate of compensation was appropriately referenced to the earnings that he had in the one year prior to his claim. The panel noted, however that there was information to suggest that the worker's hearing loss in his left ear had deteriorated and recommended that the worker approach the Board in that regard.

The worker did not appeal the Review Board findings to the Board's Appeal Division.

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According to an August 18, 2000 telephone memorandum on file the Review Board vice chair who undertook the August 10, 1989 findings advised the Board that the information suggesting there was deterioration in the worker's hearing came from a "little card clmt showed him". The Board next wrote the worker on September 8, 1989 to indicate that if he felt that his hearing had deteriorated then he should contact a particular hearing clinic, the address and telephone number of which was provided to him.

No further information was sent to the Board around that time and there is no indication that the worker contacted the Board around that time to contend that deterioration in his hearing had occurred compared to his previous assessment.

Other information on file included the results of a July 1989 audiogram, which revealed an 18.33 decibel loss in the worker's right ear and a 31.66 loss in his left ear. A subsequent April 7, 1998 audiogram revealed a 20.33 decibel loss in the worker's right ear and a 33.33 decibel loss in his left ear.

The worker retired in 1990.

On March 18, 2002 the worker wrote the Board to contend that the previous pension calculations had been in error. In particular, he contended that he had higher income in 1988, 1989 and 1990, and further, that inflation should be reflected in the award.

It was thereafter that the Board issued the April 17, 2002 decision that is the subject of the present appeal. In the surrounding memorandum the hearing claims officer noted that the worker had retired in 1990, and outlined:

> The industrial audiogram of July 1989, the audiogram taken closest in date to his last exposure to hazardous occupational noise shows an average decibel loss of 18.33 in the right ear and 31.66 in the left ear, which shows no change in the pension.

The worker next called the Board on May 1, 2002. In response, the Board issued a letter on May 3, 2002 to note that his pension in 1988 was provided to him as a lump sum payment, because in his case a monthly payment would have been too small. The hearing claims officer indicated that in order to convert a monthly pension into an equivalent lump sum the Board "applies an actuarial formula which takes into account indexing for the cost of living, interest which could be earned and life expectancy based on Workers' Compensation Board pensioner mortality experience".

The worker undertook two arguments in his appeal. His first argument was that the lump sum provided to him by the Board in his previous pension award did not take into account the effects of inflation. The worker suggested that by applying Stats Canada

inflation rates the $1,265.33 lump sum would be depleted by 2002, given the calculations he performed respecting monthly and yearly award values. The worker further argued that he should receive additional compensation on the basis that his hearing has worsened.

Reasons and Findings

At the outset, there is no argument available in this appeal as to the manner in which the Board provided the lump sum payment when the worker's initial pension entitlement was awarded. That issue was raised in the October 18, 1988 decision letter and the Review Board panel that considered the worker's appeal of that decision denied his appeal.

The issue available in the April 17, 2002 decision that the worker now appeals is whether the July 1989 audiogram results ought to continue to be used for determining pension entitlement, considering the fact that the worker retired in 1990 and was no longer exposed to industrial noise beyond that point.

I am assisted in my consideration of that issue by item #31.40 of the Board's *Rehabilitation Services and Claims Manual, Volume 1*, which provides:

> Hearing loss pensions are determined on the basis of audiometric tests conducted at the Audiology Unit of the Board or on the basis of prior audiometric tests conducted closer in time to when the worker was last exposed to hazardous occupational noise if in the Board's opinion the results of such earlier tests best represent the true measure of the worker's hearing loss which is due to exposure to occupational noise.

The April 17, 2002 decision included comment to indicate that the reference material relied upon by the hearing claims officer had been forwarded to the worker. Those reference materials include comment that noise-induced hearing loss will stabilize approximately two weeks after the last exposure. Other comment indicates that the greatest proportion of hearing loss occurs within about five to seven years from the time exposure began, the process slows down thereafter, and after about fifteen years there is no further progress unless the exposure time and/or level has changed. Of note, a Committee Report on Occupational Noise-Induced Hearing Loss as contained in the *Journal of Occupational Medicine, Volume 31, No. 12, December 1989* detailed that one characteristic of occupational noise-induced hearing loss is that:

> Once exposure to noise is discontinued, there is no significant further progression of hearing loss as a result of the noise exposure.

It is appropriate to note that pursuant to section 7(1) of the Act entitlement to compensation for non-traumatic hearing loss arises if the loss is greater than the minimum set out in Schedule D. In turn, Schedule D provides for no entitlement for losses that range from 0 to 27 decibels. When only one ear has a loss from 28 to 32 decibels entitlement is 0.3 percent of total, and 0.5 percent for a loss from 33 to 37 decibels. As such, were the worker to succeed in his appeal and the April 7, 1998 results be used the end result would be a net pension increase of 0.2 percent (i.e. 0.5 percent less the previous award of 0.3 percent).

In the worker's case specifically his initial pension entitlement was calculated with regard to the July 26, 1988 audiometric results, which revealed a 20 decibel loss in his right ear and a 28 decibel loss in his left ear. The July 1989 results revealed an 18.33 loss in the right ear and 31.66 in the left. As such, although there was deterioration in the left ear hearing by that time the 31.66 decibel loss warranted no change in pension entitlement, as it remained within the 28 to 32 decibel range provided for in Schedule D. In contrast, the April 7, 1998 results revealed a further deterioration, particularly in relation to the worker's left ear, to the extent that he had a 20.33 loss in his right ear and a 33.33 loss in his left ear. That deterioration would warrant an increase in the worker's pension in the circumstance that it was likely due to occupational noise exposure. However, the worker had no exposure to occupational noise subsequent to his 1990 retirement and in the result I accept that the Board appropriately declined to utilize the more recent audiometric results.

I find, given the reference material on file and the fact that the worker's exposure to occupational noise ended in 1990, that the audiometric test results of July 1989 more accurately reflect the worker's hearing loss due to occupational noise. As a result, I deny the worker's appeal and confirm the April 17, 2002 decision of the Board. No appeal expenses were requested and as none are apparent none are awarded.

Conclusion

I confirm the April 17, 2002 decision of the Board.

Anthony F. Stevens
Vice Chair

AFS/hba

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