

GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

VINCENT C. GRAY
MAYOR



F. THOMAS LUPARELLO
INTERIM DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 13-147

**RONALD LEIDELMEYER,
Claimant-Respondent/Cross Petitioner,**

v.

**NBC NEWS and ELECTRIC INSURANCE COMPANY,
Employer/Insurer-Petitioner/Cross Respondent**

DEPT. OF EMPLOYMENT
SERVICES
COMPENSATION REVIEW
BOARD
2014 APR 29 PM 12 00

Appeal from an October 31, 2013 Compensation Order on Remand by
Administrative Law Judge Karen R. Calmeise
AHD No. 10-279B, OWC No. 654170

Robert G. Blackford for the Claimant
W. John Vernon for the Employer-Carrier

Before: HENRY W. MCCOY, MELISSA LIN JONES, and HEATHER C. LESLIE, *Administrative Appeals Judges.*

HENRY W. MCCOY for the Compensation Review Board.

DECISION AND REMAND ORDER

PROCEDURAL HISTORY AND FACTS OF RECORD

The instant appeal and cross-appeal follow the issuance on October 31, 2013 of a Compensation Order on Remand (COR) from the Administrative Hearings Division (AHD), Office of Hearings and Adjudication in the District of Columbia Department of Employment Services (DOES). In that COR, Claimant was awarded permanent partial disability benefits of 60% to the right ear and 65% to the left ear for loss of hearing.

Claimant was working for NBC News as a camera operator at the Atlanta Summer Olympics on July 27, 1996 when a bomb exploded near him with shrapnel striking him in the

back of his head. In addition to the shrapnel wounds, Claimant also complained of hearing loss. Claimant filed a claim for permanent partial disability benefits for loss of hearing in both ears and for a disfigurement award.¹

In a January 16, 2013 Compensation Order (CO), Claimant's request for permanent partial impairment for loss of hearing in both ears was denied, but he was granted an award of \$250.00 for disfigurement to his head.² Claimant filed an appeal with the Compensation Review Board (CRB) challenging the decision to deny him permanent partial disability benefits. In an April 18, 2013 Decision and Remand Order (DRO), the CRB determined the Administrative Law Judge (ALJ) did not properly analyze the record evidence when after finding Claimant did show he had sustained some degree of permanent hearing loss in part of the audible spectrum she denied the claim on the basis that he did not prove impairment of the full hearing spectrum.³

On remand, the ALJ reevaluated the evidence and determined that Claimant sustained a 55% loss of hearing in the right ear and a 60% loss in the left ear. After adding an additional 5% impairment to each ear for ongoing tinnitus, the ALJ granted Claimant a schedule award for permanent partial impairment due to loss of hearing at 60% for the right ear and 65% for the left ear. In addition, the ALJ ruled that insofar as each ear was rated separately, compensation under the schedule would be paid for 52 weeks for each ear, as opposed to 200 weeks for loss of hearing to both ears.⁴ Both parties filed a timely application for review (AFR) and an opposition.

Filing its AFR on November 27, 2013, Employer seeks to have the Compensation Order on Remand (COR) reversed because the ALJ's award for permanent partial disability benefits is arbitrary, capricious, and not supported by substantial evidence; the ALJ failed to consider Claimant's future wage loss; and, the COR violates the "law of the case" doctrine. In opposition to Employer's assignments of error, Claimant argues there is no basis in the COR to support Employer's arguments.

In his AFR filed on November 29, 2013, Claimant appeals only that portion of the COR pertaining to the number of weeks of compensation awarded for the loss of hearing in both ears. Claimant argues the ALJ erred in calculating the percentage loss for each ear at 52 weeks instead of calculating the percentage loss of hearing for both ears at 200 weeks as required by the statute. In its opposition to Claimant's AFR, Employer does not address the issue of the number of weeks of compensation awarded but instead further details its argument that the ALJ's percentage impairment awards to each of Claimant's ears is not supported by substantial evidence in the record.

¹ A third issue at the formal hearing sought a determination as to Claimant's average weekly wage.

² *Leidelmeyer v. NBC News*, AHD 10-279B, OWC No. 654170 (January 16, 2013) (CO).

³ *Leidelmeyer v. NBC News*, CRB No. 13-012, AHD 10-279B, OWC No. 654170 (April 18, 2013) (DRO).

⁴ *Leidelmeyer v. NBC News*, AHD 10-279B, OWC No. 654170 (October 31, 2013) (COR).

ANALYSIS

The scope of review by the CRB, as established by the Act and as contained in the governing regulations, is limited to making a determination as to whether the factual findings of the Compensation Order are based upon substantial evidence in the record, and whether the legal conclusions drawn from those facts are in accordance with applicable law.⁵ See D.C. Workers' Compensation Act of 1979, as amended, D.C. Code §§ 32-1501 to 32-1545 (2005), at § 32-1521.01(d)(2)(A). Consistent with this standard of review, the CRB and this Review Panel are constrained to uphold a Compensation Order that is supported by substantial evidence, even if there is also contained within the record under review substantial evidence to support a contrary conclusion, and even where the reviewing authority might have reached a contrary conclusion. *Marriott*, 834 A.2d at 885.

We first address the assignments of error in the appeal filed by Employer. Employer first argues that the ALJ's percentage impairment ratings for Claimant's loss of hearing to each ear are not supported by substantial evidence. Employer argues that the ALJ misinterprets the audiological evaluation by incorrectly equating "hearing level" with "hearing loss" in arriving at a percentage impairment for Claimant's hearing loss. We agree.

In evaluating the competing medical evidence purporting to establish the percentage loss of hearing sustained by Claimant, the ALJ discounts not only Employer's IME, but also Claimant's. With regard to Employer's August 20, 2012 IME, the ALJ found it to be "contradictory and inherently inconsistent" and went on to state:

The physician notes that the previous hearing tests, conducted in December 1999, November 1996, and February 2012, showed a sharp drop in hearing for both ears, at 400 Hz "consistent with noise trauma". However, Employer's IME concludes that the Claimant displayed a loss of hearing in the right ear only.

"Using our test from today, ...calculates a 0% hearing impairment in the right ear and 4% hearing impairment in the left ear. (EE 1 pg. 2)

Furthermore, Employer's IME discounts the work-related impairment, and attributes the current hearing loss to age related hearing degeneration. Employer's IME opined "the 4% hearing loss would disappear because of the additional slight loss of hearing that has occurred over the past 16 years." It is nonsensical that the IME discounts the work-related hearing impairment by opining that some portion of Claimant's hearing impairment may be attributed to age related hearing loss. Instead of adding the 4% permanent partial impairment rating to any supposed age-related hearing loss, Employer's IME inexplicably reduced the rated hearing loss

⁵ "Substantial evidence," as defined by the District of Columbia Court of Appeals, is such evidence as a reasonable person might accept to support a particular conclusion. *Marriott International v. DOES*, 834 A.2d 882 (D.C. 2003).

to 0%. Therefore, considering these inherent inconsistencies in Employer's IME report, the undersigned discounts the evidence, insofar as it does not disprove Claimant's claim.⁶

The ALJ next turns to an assessment of Claimant's March and September 2012 IME reports for Dr. Mark Soltany, an otolaryngologist. The ALJ quotes for Dr. Soltany's March 8, 2012 report where Claimant's hearing loss is determined to be:

In the years that followed [the blast injury], Mr. Leidelmeyer became aware of a hearing loss that has also been associated with the sound blast. The hearing loss pattern was initially found to be an upper and high-frequency loss of approximately forty percent and equal in both ears. Since that time, the hearing loss has progressed further and now is approximately sixty percent loss of hearing in the upper, mid, and high frequencies. CE 1, p. 1.

The ALJ then reasoned

I find that the medical opinion expressed by Claimant's IME to be problematic also. Claimant's March 2012 and August [sic] 2012 IME reports cite to a loss of hearing in each ear for only part of the hearing frequency. The physician opines that the bomb blast affected the Claimant's the [sic] upper, mid, and high frequencies. (CE 1) Claimant's IME's March 2012 IME report only states that Claimant has a 60% hearing loss however, objective tests show that there was a 55% loss to one ear and 60% loss to the other ear. (Fn. Omitted).⁷

After stating that given the conflicting medical opinions that she is allowed to draw reasonable inferences from the medical evidence presented⁸, the ALJ determines

The February 7, 2012 objective audiologic test most accurately rates the hearing loss for each ear. This report, resulting from the most recent audio test, shows that Claimant had a hearing loss (HL) of 55% for the right ear and 60% hearing loss for the left ear. (CE 3) Without sufficient persuasive evidence to the contrary, a preponderance of the evidence supports the Claimant's claim that he is entitled to schedule award benefits.⁹

⁶ COR, pp. 3-4.

⁷ *Id.*, p. 4. The omitted footnote makes note that the February 2012 otolaryngology report, from which the ALJ references as the objective test assigning the percentage hearing loss for each ear, is not referenced in the March 2012 IME report.

⁸ See *George Hyman Construction Co. v. DOES*, 499 A.2d 563, 566 (D.C. 1985).

⁹ *Id.*, p. 5.

It is on the basis of this perceived hearing loss for each ear plus an additional 5% for Claimant's ongoing tinnitus condition that the ALJ orders a schedule award of permanent partial disability of 60% for the right ear and 65% for the left ear.¹⁰

The ALJ found that since the time of the 1996 explosion, Claimant has continued to experience decreased hearing, that medical treatment will improve his hearing, and that this hearing deficit has had an impact on his ability to perform usual work duties. The problem presented is the ALJ's reliance on the February 7, 2012 hearing test is the more persuasive indicator of the percentage impairment for loss of hearing to each ear sustained by Claimant. The ALJ made the following specific finding:

Claimant underwent a hearing test on February 7, 2012 at Otolaryngology [sic] Associates which showed the Claimant to have 55% hearing loss in the right ear and 60% hearing loss in the left ear. (CE 3, Speech audiometry test)¹¹

In finding that objective test more persuasive, the Claimant interprets the abbreviation "HL" to mean "Hearing Loss" and adopted the percentages ostensibly assigned for each ear. Employer contends that the "HL" on the hearing test stands for "Hearing Level" and not hearing loss. We agree.

It is important to first note that the February 7, 2012 hearing test (CE 3) from Otolaryngology Associates, P.C., is a stand-alone exhibit containing only the graphic and numerical test results with no explanatory text. Further, while Claimant's IME physician, Dr. Soltany, is listed on the mast-head, the hearing test was conducted by audiologist Christine Sofie.

A review of CE 3 gives credence to Employer's interpretation that "HL" stands for "Hearing Level" and not "Hearing Loss" as determined by the ALJ. The chart measuring "Frequency in Hertz (Hz)" is labeled on the left axis "Hearing Level in dB [Decibels]". In the chart immediately below where "Speech Audiometry" is measured there is a column delineated "HL" where for the right ear the numerical measure is "55" and for the left ear it is "60".

If these numerical representations are compared to the plotted graph of "Frequency in Hertz" there is a direct correlation between the two, where the "0" represents the right ear and is plotted at "55" for 4000 Hz and above, and the "X" represents the left ear and is plotted at "60". Accordingly, it is a reasonable inference that the "55" and "60" under the column "HL" corresponds to the "Hearing Level" that is plotted on the "Frequency in Hertz" graph. There is nothing on this exhibit that allows for the inference that "HL" stands for "Hearing Loss".

As the ALJ has made a ruling with regard to the level of Claimant's hearing loss that is not supported by a reasonable interpretation of the primary exhibit upon which she found more

¹⁰ The ALJ's assignment of an additional 5% impairment rating for tinnitus suffers from the same lack of explanation and arbitrariness that the Court found fault with in *Jones v. DOES*, 41 A.3d 1219 (D.C. 2012).

¹¹ COR, p. 2.

persuasive and therefore relied, this matter must be returned again to determine the level of Claimant's hearing impairment based on the substantial evidence in the record.¹²

It is undisputed that Claimant has some degree of hearing loss. There is nothing in the record to suggest that the measurement of Claimant's hearing level in decibels equates to the percentage of hearing loss sustained. Given that the ALJ has found both Claimant's and Employer's impairment ratings to be problematic, the ALJ is instructed again to evaluate the evidence in order to arrive at an impairment rating that complies with the test established in *Jones*.

We next turn to Employer's argument that the COR is legally incorrect, *i.e.*, not in accordance with the law, because the ALJ failed to consider Claimant's future wage loss. Employer argues that the record contains no evidence that Claimant's hearing loss has resulted in any loss of wages or possible loss of future wage earning capacity and because the ALJ made no findings on this issue, the schedule award granted for permanent partial disability is not in accordance with the law. We disagree.

A review of the COR shows that the ALJ adopted and incorporated the findings from the January 16, 2012 CO that Claimant's hearing loss has had an impact on his current wage earning capacity and will continue to do so in the future. The ALJ found that Claimant has constant tinnitus in both ears (CO, p. 2), that this causes him to constantly hear a ringing or roaring sound and that "[W]hile working, performing audio checks and setting up audio equipment, Claimant has to compensate for his high hearing loss and he has to take extra care to set the proper sound levels." CO, p. 3 (Internal fn. omitted.)

In the COR under review, the ALJ made additional findings that

"...Claimant's decreased hearing condition has continued since the explosion at work in 1996. I find, as a result of the 1996 work injury, Claimant continues to have bilateral tinnitus which causes him to have ringing or constant sounds in his ears. (HT 48) I also find that Claimant's hearing will not improve with addition medical treatment."¹³

The ALJ also found Claimant's credible testimony was supported by his IME's assessment that

"[He] depends on extremely acute hearing as an audio engineer. He requires acute hearing in the upper frequency range on a daily basis. The injury that he has suffered has left him with a significant deficit which will

¹² While being mindful of the percentage impairment requested by Claimant, the ALJ should look first to the medical impairment ratings in evidence. As the D.C. Court of Appeals has held "ALJs have discretion in determining disability percentage ratings and disability awards" without having "to choose a disability percentage rating provided either by the claimant's or the employer's medical examiner." *Negussie v. DOES*, 915 A.2d 391, 398-399 (2007).

¹³ COR, p. 4.

not improve and he must rely on others to perform significant portions of his job and to reassure him that his hearing is accurate during his work.”¹⁴

With the ALJ having made these findings, we find no basis to support Employer’s argument. However, with this matter being remanded for other reasons, we leave it to the ALJ to elaborate further on the potential for possible loss of future wage earning capacity when determining Claimant’s schedule award for loss hearing.

For its final assignment of error, Employer asserts the COR is legally incorrect because it violates the “law of the case” doctrine.¹⁵ Employer argues that the ALJ’s initial finding that Claimant’s evidence only showed a hearing loss for part of the hearing frequency and not across the full spectrum was not reversed or modified by the CRB on remand. It is Employer’s position that when the ALJ on remand concludes that the evidence now supports a percentage impairment to each ear, when initially it did not, that this violates the law of the case doctrine. We disagree.

In the January 16, 2013 CO, the ALJ held:

Despite Claimant’s credible testimony, I find that Claimant’s evidence is deficient in that the medical opinion fails to offer a rating that meets the requirements under the Act. The evidence fails to present a rating for impairment of full hearing spectrum.¹⁶

In its analysis, the CRB reasoned and held:

In his memorandum, the claimant correctly states that the ALJ “did not give us the benefit of her reasoning as to why the medical opinion ‘fails to meet the requirements of the Act’.”

However, by employing the term “full hearing spectrum” (a term not found in the Act and not used by any of the medical experts in any of their reports in this case) and premising the denial of the claim upon the lack of evidence proving a full hearing spectrum loss, the ALJ appeared to acknowledge that the claimant proved some degree of permanent hearing loss but determined the claim must be denied because the claimant failed to adduce enough evidence to ascertain what the overall degree of hearing loss is. The ALJ seems to be saying that the claimant merely adduced evidence of a hearing loss percentage in only part of the audible spectrum, and therefore failed to meet his burden of proof.

¹⁴ *Id.*, p. 4, citing CE 11.

¹⁵ *Employer/Insurer’s Memorandum of Points and Authorities in Support of the Application for Review*, p. 7, citing *Kritsidimas v. Sheskin*, 411 A.2d 370, 371 (D.C. 1980) (once the court has decided a point in a case, that point becomes and remains settled unless or until it is reversed or modified by a higher court).

¹⁶ CO, p. 6.

We do not agree and find the claimant can meet his burden of proof by establishing some degree of permanent hearing loss in part of the audible spectrum.

* * *

Having proven some degree of hearing loss, the ALJ should consider the evidence that is before her and evaluate which of the medical opinions is superior, i.e., which preponderates. If the ALJ deems a rating submitted by the Claimant to lack detail to the degree that she finds persuasive, the record contains counter evidence against which the evidence can be weighed.¹⁷

The CRB called into question the ALJ's use of the term "full hearing spectrum" and premising her denial of the claim on a lack of full hearing spectrum loss when there was evidence of the degree of permanent hearing loss across part of the hearing spectrum. To the extent the initial CO found no hearing loss across the full hearing spectrum, it also found there was permanent hearing loss across part of the hearing spectrum, and while the ALJ denied the claim predicated on no full hearing spectrum loss, the CO order was returned to determine the impairment percentage for the permanent loss across part of the hearing spectrum. Thus, to the extent the ALJ now assigns a percentage loss for the permanent loss across part of the audible spectrum, it does not constitute a violation of the law of the case as the evidence is used in accordance the CRB's directive to rate the level of hearing loss as previously proven.

In his Application for Review, Claimant takes no issue with the ALJ's percentage awards for permanent partial disability to the right and left ears. Rather, Claimant asserts the ALJ erred in finding that the ratings for hearing loss related to each ear separately with a footnote to § 32-1508(3)(M), which resulted in the insurance company paying him compensation of 52 weeks for each ear (104 weeks total), as opposed to 200 weeks compensation for loss of hearing of both ears.¹⁸ Claimant proffers that the insurance company used the lesser total of weeks to compensate him in an amount less than what he was entitled to under the statutorily required 200 weeks. We agree this issue must be returned for further evaluation.

In the COR, the ALJ stated:

¹⁷ DRO, p. 7.

¹⁸ Section 32-1508(3)(M) of the Act states in pertinent part:

(3) In case of disability partial in character but permanent in quality, the compensation shall be 66 2/3 of the employee's average weekly wages ... and shall be paid to the employee, as follows:

(M) Compensation for loss of hearing of 1 ear, 52 weeks. Compensation for loss of hearing of both ears, 200 weeks ...;

Although the Claimant argued that the hearing rates warrant the 200 week award under the Act, I find the hearing loss ratings relate to each ear separately. (CE 3) (fn. Omitted).¹⁹

In rebuffing Claimant's argument the hearing loss is binaural, or both ears, and entitled to 200 weeks of compensation under the schedule, the ALJ gives no explanation for her finding that each ear is to be compensated separately at 54 weeks. Ostensibly, the ALJ has taken this position because she has rated each ear separately. If that is the case, we point the ALJ to the following further qualification under § 32-1508 (3)(S) and (U), which state:

(S) Compensation for permanent partial loss or loss of use of a member may be for proportionate loss or loss of use of the member. Benefits for partial loss of vision in 1 or both eyes, or partial loss of hearing in 1 or both ears shall be for a period proportionate to the period benefits are payable for total bilateral loss of vision or total binaural loss of hearing as such partial loss bears to total loss;

* * *

(U) In any case in which there shall be a loss of, or loss of use of, more than 1 member or parts of more than 1 member set forth in subparagraphs (A) to (S) of this paragraph, not amounting to permanent total disability, the award of compensation shall be for the loss of, or loss of use of, each member or part thereof, which awards shall run consecutively, except that where 1 injury affects only 2 or more digits of the same hand or foot, subparagraph (Q) of this paragraph shall apply;

As the ALJ has provided no explanation for her ruling treating each ear separately for purposes of weeks of compensation paid under the statute as oppose to compensation to be paid for loss of hearing of both ears, the ruling is not in accordance with the law and must be returned for further consideration.

¹⁹ COR, p. 5.

CONCLUSION AND ORDER

Because there is no evidence in the record that the measurement of Claimant's hearing level in decibels equates to the percentage of hearing loss sustained, the ALJ's permanent partial schedule awards for the right and left ears are not supported by substantial evidence in the record and are VACATED. The ALJ made findings on Claimant's loss of wages/possible loss of future wage earning capacity that are supported by substantial evidence in the record. The ALJ's ruling treating each ear separately for purposes of weeks of compensation paid is not in accordance with the law and VACATED. The October 31, 2013 Compensation Order on Remand is REMANDED for further consideration consistent with the above discussion.

FOR THE COMPENSATION REVIEW BOARD:


HENRY W. MCCOY
Administrative Appeals Judge

April 29, 2014
DATE