

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: December 20, 2019

CLAIM NO. 201800794 & 201769674

GUBMK

PETITIONER

VS.

APPEAL FROM HON. R. ROLAND CASE,
ADMINISTRATIVE LAW JUDGE

LISA ROLLEY
and HON. R. ROLAND CASE,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION
REVERSING IN PART & REMANDING

* * * * *

BEFORE: ALVEY, Chairman, STIVERS and RECHTER, Members.

STIVERS, Member. On February 18, 2019, GUBMK appealed the December 21, 2018, Opinion, Award, and Order and the January 9, 2019, Order ruling on its petition for reconsideration of Hon. R. Roland Case, Administrative Law Judge ("ALJ").

The sole issue on appeal is whether the ALJ erred in awarding Lisa Rolley ("Rolley") permanent partial disability ("PPD") benefits for her hearing loss claim.

BACKGROUND

On May 17, 2018, Rolley filed a Form 103 (Claim No. 201769674) alleging she sustained work-related hearing loss “[d]ue to loud noises produced by equipment, machinery and the power plant.” The Form 103 alleges Rolley’s last day of exposure occurred on July 22, 2016.

On May 17, 2018, Rolley filed a Form 102 (Claim No. 201800794) alleging she sustained work-related chronic obstructive pulmonary disease. The Form 102 alleges Rolley’s last day of exposure occurred on July 22, 2016. By order dated June 21, 2018, the claims were consolidated.

Rolley was deposed on July 26, 2018. Regarding the prior sudden hearing loss in her left ear, Rolley testified as follows:

Q: And had any doctor ever prescribed any medication for either ear, whether it be drops or pills?

A: I had trouble – prednisone and some kind of antibiotic. When I woke up one day and couldn’t hear, I went to the doctor and that’s what I was prescribed several times.

Q: Would it be that you woke up, had an issue with it, saw the doctor, got medication, and got relief?

A: No, ma’am.

Q: Okay. So you woke up with it and it was from then on?

A: Yes, ma’am, in my left ear.

Q: In your left ear. Do you know when that would have been?

A: About ten years ago. (Emphasis added).

Q: Can you describe for me what happened?

A: I just woke up one morning and I couldn't hear anything and I went to the doctor. He said probably fluid, you know, in my ear, and he gave me some steroids, some type of antibiotics, so I took them. Then he said like hold your nose and blow. That will help, so I done [sic] that. It didn't get any better. I went back to the doctor, more steroids, different type of antibiotics. Took all that. It didn't get any better. That's when I went to Dr. Logan, like a [sic] ear, nose, and throat, because it just kept on and kept on. I couldn't hear anything, and that's when he examined me and done [sic] a hearing [sic] and all this, and I'm completely deaf in the left ear.

Q: Did you ever have any kind of diagnostic test, like a MRI or CT or ultrasound or anything?

A: I had a MRI around the same time of [sic] that, and then I had one probably two or three years ago. At the time I had a – I'm trying to think. It was just a small, I forgot the millimeters at the time, but like a cyst or something, but when the last MRI was done, it's gone.

...

Q: And have you gotten hearing back in the left ear since that happened ten years ago?

A: No, ma'am. (Emphasis added).

Rolley also testified at the October 24, 2018, hearing. She clarified that she worked as a general laborer for GUBMK stating as follows: "Okay, I was a general laborer, and at times, I was a foreman on different jobs, but everything. I worked in the bunker room, shoveled coal, made water, swept shack, run [sic] a concrete saw, jackhammer, anything that needed doing." She testified concerning the problems she currently experiences with her hearing:

A: Now, the left ear, I'm completely deaf. I mean I can't – can't hear anything. In the right one, I mean over the years, the TV has to go louder. I even got a phone that has got a boost or something because I was getting where my regular phone – I mean I couldn't hear or anything. It

has just – it has gotten worse. I mean everything is louder. The radio in the car, everything is louder. And at times, I mean there is ringing. It doesn't – not every day, but there will be ringing and roaring, you know, different sounds.

She also testified concerning the prior loss of hearing in her left ear:

Q: You mentioned about your left ear, you being deaf. Did anything occur for that to happen?

A: No, sir. I just woke up one day and I mean I couldn't hear anything, so I went – a couple of days later when I could, I went to the doctor, and they said it was probably fluid, gave me antibiotic, steroids. I took, you know, the round, whatever, ten days, two weeks. Didn't get any better, and he said like, "Hold your nose and blow," and done [sic] all of that. Went back, gave me different – another antibiotic of a different type, more steroids, and that's when I decided to go to Dr. Logan later because it never got any better. You know, I thought the fluid would clear up, and then that's when he done [sic] the hearing test and all and cannot to this day tell my why.

Q: Why you lost the hearing in your left ear?

A: Not why I lost the hearing. I mean it's just like woke up one morning and it was gone.

The record contains the Form 107 University Evaluation report of Dr. Casey Rutledge Roof, Audiologist. Dr. Roof noted, in relevant part, as follows regarding Rolley's medical history:

She [Rolley] reported that about ten years ago, she woke up from sleep and had no hearing acuity in the left ear. She was evaluated initially by her family doctor who gave her oral steroids and antibiotics. She later self-referred to an Ear, Nose, and Throat doctor and stated no other additional treatment was completed. She has not pursued a hearing aid in that ear due to significance of hearing loss and lack of benefit expected with a device.

After performing a physical examination and medical records review, Dr. Roof set forth the following diagnosis:

Objective and behavioral measures are consistent and show permanent, sensorineural hearing loss bilaterally. Based on the reported history of long-term noise exposure, and the overall outcomes of the hearing evaluation, the primary cause of hearing loss in the right ear is due to noise exposure, and the overall outcomes of the hearing evaluation, the primary cause of hearing loss in the right ear is due to noise exposure. It is more likely than not, hearing acuity was affected by excessively loud noise in the left ear and may have contributed to overall hearing difficulties; however, configuration of hearing loss in the left ear does not suggest noise exposure is primary in etiology. Asymmetry is noted.

The primary treatment for her hearing loss is hearing aids or other assistive listening devices for her lifetime, since the hearing loss is permanent. She should pursue a hearing device in the right ear, a Contralateral Routine of Signal system (CROS), or bone anchored hearing aid (BAHA) with a licensed audiologist, pending medical evaluation and management with Ear, Nose, and Throat physician.

Dr. Roof answered “yes” to the following question: “Do you believe the work event as described to you is the cause of impairment found?” He also answered in the affirmative to the following question: “Is any part of the impairment due to a cause other than the work event described above?” When asked to explain the non-work-related cause, he wrote as follows: “Sudden hearing loss in the left ear.” He also answered “yes” and indicated, via an asterisk, “right ear” to two additional questions: “If applicable, do audiograms and other testing establish a hearing loss compatible with that caused by hazardous noise exposure in the workplace?” and “If applicable, within reasonable medical probability, is plaintiff/employee’s hearing loss related to repetitive exposure to hazardous noise over an extended period of employment?” Dr. Roof assessed a 10% whole person impairment rating pursuant to the 5th Edition of the

American Medical Association, Guides to the Evaluation of Permanent Impairment, (“AMA Guides”).¹

GUBMK filed the August 24, 2018, report of Dr. Robert Manning. In his report, Dr. Manning noted, in part, as follows regarding Rolley’s medical history: “She [Rolley] experienced a sudden onset complete loss of hearing in the left ear of unknown etiology approximately 10 to 12 years ago.” Regarding an impairment rating, Dr. Manning opined as follows:

According to the AMA Guidelines for the Evaluation of Permanent Impairment, Lisa Rolley shows a total impairment of 27.6% binaural which equates to a 10% impairment of the Whole Man (or Woman). In order to determine how much of this hearing loss could be caused by long term loud workplace noise exposure, it would be safe to assume that since both ears were exposed equally to workplace noise, both ears would show the same amount of impairment. Therefore, by assigning the same numbers to the left that she demonstrates in the right, she shows a 13.1% binaural impairment which equates to a 5% impairment of the Whole Man.

Dr. Manning’s report then sets forth the following answers to questions posed in a separate correspondence:

1 and 2. The hearing loss that she demonstrates in her left ear is more likely than not related to a medical pathology that occurred 10 to 12 years ago and is not related to workplace noise exposure. The hearing loss that she demonstrates in her right ear more likely than not is related to loud noise exposure over a long period of time. She reports to have worked intermittently since 2004 for GUBMY [sic] as a laborer rotating around the worksite while wearing mandatory hearing protection. Accompanying records indicate that GUBMY [sic] had a hearing conservation program but there are no hearing

¹ This Board can only assume Dr. Roof committed a typographical error when he checked “no” by the inquiry as to whether Rolley had active impairment prior to the work injury.

tests with these records. That is the most efficient way to assign or rule out responsibility for her hearing loss.

3. In my opinion Lisa Rolley reached MMI when she left work for the last time in July, 2016. Noise induced hearing loss does not routinely continue to deteriorate simply because of causation. There may be some medical pathologies which may affect her hearing in the future but they would not be related to the noise exposure.

4. According to the AMA Guidelines Lisa Rolley has a 10% impairment of the Whole Man. This lady will have significant problems locating sound which may affect her safety. She will have problems communicating with co-workers particularly if she is required to wear hearing protection.

5. The right ear demonstrates a classic noise induced hearing loss but the total loss of hearing in the left ear is more likely than not related to medical pathologies. Assuming that both ears would have been exposed to the same levels of noise in the workplace and therefore would have had the same amount of damage from loud noise exposure, the AMA Whole Man impairment would be 5%.

6 and 7. Physical restrictions should take into account that she has no localization abilities so she cannot tell where a sound is coming from. This could compromise her safety. If she is to work in a noisy environment, she will be required to wear hearing protection which will make it even more difficult to communicate with supervisors and co-workers.

8. I would recommend that she recheck hearing annually until it can be determined that there is no progression of this pathology. I would also suggest that she consider the use of amplification to improve her ability to communicate as well as to provide some masking for the tinnitus she is experiencing.

The October 24, 2018, Benefit Review Conference Order and Memorandum lists the following contested issues: work-related injury, occupational disease, due and timely notice, average weekly wage, physical capacity to return to the

type of work performed at time of injury, exclusion for pre-existing impairment, permanent income benefits per KRS 342.730 including multipliers, statute of limitations, injurious exposure, and KRS 342.7305.

In his decision, the ALJ set forth the following findings of fact and conclusions of law regarding Rolley's hearing loss claim:

KRS 342.7305(2) provides that income benefits payable for occupational hearing loss shall be as provided in KRS 342.730, except income benefits shall not be payable for the binaural hearing impairment converted to impairment of the whole person results in an impairment of less than 8%. No impairment percentage of tinnitus shall be considered in determining impairment to the whole person. However, the plaintiff will be entitled to reasonable and necessary medical expenses related to the treatment of his occupational hearing loss. Dr. Roof opined the primary cause of the plaintiff's hearing loss in the right ear was due to noise exposure and assessed a 10% impairment to the whole person. Dr. Manning indicated that "both ears would have been exposed to the same levels of noise in the workplace and therefore would have had the same amount of damage from loud noise exposure, the AMA Whole Man Impairment would be 5%."

The ALJ has reviewed the report of Dr. Ruth and the deposition of Dr. Manning. Although the plaintiff clearly has a 10% impairment it appears only 5% is related to occupational hearing loss. The remaining 5% is not work related. However, since the total impairment is 10% and exceeds 8% the plaintiff will be entitled to an award based on the 5% impairment.

GUBMK's petition for reconsideration asserted the same argument it now sets forth on appeal. By order dated January 9, 2019, the ALJ overruled the petition.

On February 18, 2019, GUBMK appealed to this Board, asserting the ALJ erred by awarding PPD benefits for Rolley's hearing loss. GUBMK argues since

the ALJ determined only 5% of Rolley's 10% impairment due to hearing loss is work-related, she is not entitled to income benefits. GUBMK requests this Board to reverse and remand the claim to the ALJ for instructions to dismiss Rolley's hearing loss claim.

By order dated April 1, 2019, this Board placed the claim in abeyance pending a final resolution of the appeal in Napier v. Enterprise Mining Co. (at that time, 2014-CA-001473-WC). In Napier v. Enterprise Mining Co., 2018-SC-000217-WC, the Kentucky Supreme Court upheld the constitutionality of KRS 342.7305(2). Napier's appeal was consolidated with Teco/Perry County Coal v. Feltner, 582 S.W.3d 42 (Ky. 2019).²

By order dated October 30, 2019, this Board removed the claim from abeyance.

ANALYSIS

We reverse the ALJ's award of PPD benefits for Rolley's occupational hearing loss.

KRS 342.7305(2) states as follows:

Income benefits payable for occupational hearing loss shall be as provided in KRS 342.730, except income benefits shall not be payable where the binaural hearing impairment converted to impairment of the whole person results in impairment of less than eight percent (8%). No impairment percentage for tinnitus shall be considered in determining impairment to the whole person. (emphasis added).

² Feltner was consolidated with McCoy-Elkhorn Coal Co. v. Robbie Hatfield and Enterprise Mining Company v. Herman Napier.

The AMA Guides provide the following guidance to physicians calculating hearing loss impairment:

In the calculation of a hearing impairment rating, no correction for prebycusis should be made because: (1) the method below calculates the degree of hearing and assigns a rating, regardless of cause (eg, age, injury, or noise exposure); (2) age correction would result in a reduced binaural impairment score that would thus underestimate the true magnitude of the hearing impairment; and (3) estimation of the relative contributions of various causes of binaural hearing impairment is a clinical process (apportionment or allocation) that is separate from the calculation of binaural hearing impairment.

Hearing impairment is measured by evaluating hearing in each ear separately and both ears together, based on audiometric measurements. Hearing impairment is reported in each ear separately and both ears together. (Emphasis added).

In Feltner, the Supreme Court was tasked with determining whether the 8% threshold as set forth in KRS 342.7305(2) is violative of a claimant's equal protection guarantees, and the Supreme Court ultimately held it was not. In so determining, the Supreme Court stated, in pertinent part, as follows:

Some states, including South Dakota, use deductions based on age to set off potential age-related hearing loss from claims. KRS 342.7305 instead follows the *Guides'* approach for not subtracting age-related hearing loss from an impairment rating and thus sets a threshold of 8%. Although this may not be a perfect solution, it adheres to the principle that workers' compensation claimants receive PPD income benefits when their injury is work-related. An 8% threshold all but guarantees that hearing-loss claimants who meet the threshold have work-related, not just age-related, hearing loss. As the United States Supreme Court opined, "[t]he 'task of classifying persons for ... benefits ... inevitably requires that some persons who have an almost equally strong claim to favored treatment be placed on different sides of the line,'

v. Diaz, 426 U.S. 67, 83-84, 96 S. Ct. 1883, 1893, 48 L. Ed. 2d 478 (1976), and the fact the line might have been drawn differently at some points is a matter for legislative, rather than judicial, consideration.” *Fritz*, 449 U.S. at 179, 101 S. Ct. at 461.

The facts in the case *sub judice* are unique and unlike anything seen in the three consolidated cases resolved by Feltner, as the pattern of Rolley’s hearing loss is distinctly divided between the *complete hearing loss* of unknown origin in her left ear occurring at least ten years prior to any impairment rating assessed in this claim and the occupational hearing loss in her right ear. As noted by both Drs. Roof and Manning, and as testified to in detail by Rolley, she awoke one morning approximately ten years prior to the date of her deposition (i.e. July 2018) with a loss of all hearing in her left ear. After several rounds of antibiotics and steroids, she never regained hearing in that ear nor has she ever learned of the cause.

In the case *sub judice*, the ALJ ultimately concluded that, while Rolley has a 10% whole person impairment rating due to hearing loss, only 5% is attributable to the occupational hearing loss in her right ear. Indeed, the record reveals Dr. Roof assessed a 10% whole person impairment rating, and opined that her employment is the cause of her impairment. However, he also opined that part of the 10% impairment rating is attributable to the non-work-related hearing loss in Rolley’s left ear without specifying exactly how much would be attributed to the left. However, Dr. Manning assessed a 10% whole person impairment rating, and, of that, *specifically assigned 5% to Rolley’s right ear*. Regarding Rolley’s left ear, he opined “the total loss of hearing in the left ear is more likely than not related to medical pathologies.”

The rationale of the Supreme Court in Feltner hinges on the notion that any impairment rating assessed for occupational hearing loss inherently includes non-work-related causes such as age-related hearing loss. As the Supreme Court stated, it would not only be an impossible task to monitor age-related hearing degradation over time, requiring “every potential employee in the Commonwealth...to undergo baseline hearing tests at various ages throughout their life to determine the true extent of their age-related vs. occupational hearing loss,” but this would also ultimately contradict Chapter 11 of the AMA Guides which mandates that hearing loss impairment ratings be calculated without regard to cause.

In the case *sub judice*, the Court’s rationale is certainly applicable, but only to Rolley’s right ear. Under the facts in this claim, the hearing loss in Rolley’s left ear is wholly separate and distinct from any impairment rating assessed for Rolley’s occupational hearing loss, as Rolley was rendered completely deaf in her left ear *for causes unknown* ten years prior to the impairment ratings assessed in this claim. As the ALJ ultimately determined the impairment rating for Rolley’s occupational hearing loss in her right ear is 5%, falling below the 8% threshold set forth in KRS 342.7305(2), Rolley is not entitled to an award of income benefits.

Accordingly, the ALJ’s award of PPD benefits for Rolley’s occupational hearing loss claim, as set forth in the December 21, 2018, Opinion, Award, and Order and the January 9, 2019, Order, is **REVERSED**. The award of medical benefits remains unaffected. This claim is **REMANDED** for entry of an amended award for the occupational hearing loss in accordance with the views expressed herein.

ALL CONCUR.

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