United States Department of Labor
Employees' Compensation Appeals Board

JEFFREY VICKERY, Appellant	)	
and	)	**Docket No. 04-1004**
	)	**Issued: August 18, 2004**
DEPARTMENT OF HOMELAND SECURITY, U.S. CUSTOMS & BORDER PROTECTION, Tomball, TX, Employer	)	

Appearances:
Jeffrey Vickery, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chairman
DAVID S. GERSON, Alternate Member
WILLIE T.C. THOMAS, Alternate Member

JURISDICTION

On March 5, 2004 appellant filed a timely appeal from an Office of Workers' Compensation Programs' schedule award decision dated January 30, 2004. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant has more than a 31 percent binaural loss of hearing for which he received a schedule award.

FACTUAL HISTORY

On January 23, 2003 appellant, then a 44-year-old pilot, filed an occupational disease claim alleging that he sustained hearing loss in both ears due to noise exposure in the course of his federal employment. Appellant did not stop work.

In a statement accompanying his claim, appellant related that he was exposed to noise from airplanes and firearms in the performance of duty.[1] He submitted a medical report dated January 22, 2003 from Dr. David Zarin, a Board-certified otolaryngologist, who noted that he examined appellant on December 16, 2002. Dr. Zarin diagnosed mild to profound sensorineural hearing loss bilaterally and recommended hearing aids. The record contains an audiogram performed on December 16, 2002 in which an audiologist calculated that appellant had a 48 percent hearing impairment.

By letter dated March 14, 2003, the Office referred appellant together with a statement of accepted facts, to a second opinion specialist, Dr. Robert M. Komorn, a Board-certified otolaryngologist, for audiometric testing and an otologic evaluation. Dr. Komorn examined appellant on March 31, 2003 and diagnosed neurosensory hearing loss due to noise exposure during his federal employment. He provided the results of audiometric testing performed on that date. Testing for the right ear at the frequency levels of 500, 1,000, 2,000 and 3,000 cycles per second (cps) revealed decibel losses of 15, 25, 60 and 80 respectively. Testing for the left ear at the frequency levels of 500, 1,000, 2,000 and 3,000 cps revealed decibel losses of 15, 25, 60 and 80 respectively.[2] Dr. Komorn performed calculations with his findings using a form based on the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) (5th ed. 2001). He determined that appellant had a 30.6 percent permanent impairment due to loss of hearing and a 5 percent impairment due to tinnitus, which he added to find a total binaural hearing impairment of 35.6 percent.[3]

On April 17, 2003 an Office medical adviser reviewed Dr. Komorn's report and audiometric test results and concluded that appellant had a 30.6 percent binaural loss of hearing caused or aggravated by his federal employment. He found that appellant had reached maximum medical improvement on March 31, 2003. The Office medical adviser explained that he used Dr. Komorn's March 31, 2003 audiometry because it met the Office's standards, was the most recent and "it is an integral part of the evaluation of [Dr. Komorn]."

On April 24, 2003 the Office accepted appellant's claim for bilateral hearing loss and authorized hearing aids.

Appellant filed a claim for a schedule award on May 16, 2003. In a decision dated January 30, 2004, the Office granted appellant a schedule award for a 31 percent loss of both ears. The period of the award ran for 62 weeks from March 31, 2003, the date of maximum medical improvement, until June 6, 2004. The Office found that the effective date of the pay rate was March 31, 2003.[4]

[1] Appellant also indicated that he had experienced rapid changes in pressurization during the course of his employment.

[2] Appellant's auditory discrimination scores were 76 percent on the right and 72 percent on the left.

[3] Dr. Komorn recommended hearing aids.

[4] The Office obtained pay rate information from the employing establishment for the year prior to March 31, 2003 on December 4, 2003.

LEGAL PRECEDENT

The schedule award provision of the Federal Employees' Compensation Act,[5] and its implementing federal regulation,[6] set forth the number of weeks of compensation payable to employees sustaining permanent impairment from loss, or loss of use, of scheduled members or functions of the body. 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 for all claimants, the Office has adopted the A.M.A., *Guides* as the uniform standard applicable to all claimants.[7] The Office procedures direct the use of the fifth edition of the A.M.A., *Guides*, issued in 2001, for all decisions made after February 1, 2001.[8]

The Office evaluates industrial hearing loss in accordance with the standards contained in the A.M.A., *Guides*.[9] Under the A.M.A., *Guides*, hearing loss is evaluated by determining decibel loss at the frequency levels of 500, 1,000, 2,000 and 3,000 cps. The losses at each frequency are added up and averaged and a "fence" of 25 decibels is deduced since, as the A.M.A., *Guides* points out, losses below 25 decibels result in no impairment in the ability to hear everyday speech in everyday conditions.[10] The remaining amount is multiplied by a factor of 1.5 to arrive at the percentage of monaural hearing loss.[11] 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.[12] The Board has concurred in the Office's adoption of this standard for evaluating hearing loss.[13]

Regarding tinnitus, the A.M.A., *Guides* provides:

> "Tinnitus in the presence of unilateral or bilateral hearing impairment may impair speech discrimination. Therefore, add up to five percent for tinnitus in the presence of measurable hearing loss if the tinnitus impacts the ability to perform the activities of daily living."[14]

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[5] 5 U.S.C. § 8107.

[6] 20 C.F.R. § 10.404.

[7] 20 C.F.R. § 10.404(a).

[8] *See* FECA Bulletin No. 01-5, issued January 29, 2001.

[9] A.M.A., *Guides* at 250 (5th ed. 2001).

[10] *Id*.

[11] *Id*.

[12] *Id*.

[13] *Donald E. Stockstad*, 53 ECAB ___ (Docket No. 01-1570, issued January 23, 2002); *petition for recon. granted (modifying prior decision*), Docket No. 02-1570 (issued August 13, 2002).

[14] A.M.A., *Guides*, 246.

The A.M.A., *Guides* further states, as follows:

> "Some impairment classes refer to limitations in the ability to perform daily activities. When this information is subjective and possibly misinterpreted, it should not serve as the sole criterion upon which decisions about impairment are made. Rather, obtain objective data about the severity of the findings and the limitations and integrate the findings with the subjective data to estimate the degree of permanent impairment."[15]

In order to establish an employment-related hearing loss, the Office requires the employee to undergo both audiometric and otologic examinations: that the audiometric testing precede the otologic examination; that the audiometric testing be performed by an appropriately certified audiologist; that the otologic examination be performed by an otolaryngologist certified or eligible for certification by the American Academy of Otolaryngology; that the audiometric and otologic examination be performed by different individuals as a method of evaluating the reliability of the findings; that all audiolgical equipment authorized for testing meet the calibration protocol contained in the accreditation manual of the American Speech and Hearing Association; that the audiometric test results include both one conduction and pure tone air conduction thresholds, speech reception thresholds and monaural discrimination scores; and that the otolaryngologist report must include: date and hour of examination, date and hour of the employee's last exposure to loud noise, a rationalized medical opinion regarding the relation of the hearing loss to the employment-related noise exposure and a statement of the reliability of the tests.[16]

ANALYSIS

In support of his claim for an employment-related loss of hearing, appellant submitted an audiogram dated December 16, 2002 and a medical report dated January 22, 2003 from Dr. Zarin. However, this evidence did not meet the Office's criteria to establish an employment-related loss of hearing as the audiogram was not certified by Dr. Zarin as accurate and there is no information regarding whether the audiometric testing met the Office's standards for calibration.[17] The Office referred appellant to Dr. Komorn, a Board-certified otolaryngologist, for a second opinion examination. Dr. Komorn, in a report dated March 31, 2003, found that appellant had a 30.6 percent permanent impairment due to loss of hearing and a 5 percent impairment due to tinnitus, for a total binaural hearing impairment of 35.6 percent. Based on Dr. Komorn's report, the Office accepted appellant's claim for bilateral employment-related hearing loss.

On April 17, 2003 the Office medical adviser reviewed the otologic and audiolgoic testing performed by Dr. Komorn and correctly applied the Office's standardized procedures to

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[15] *Id*.

[16] *Raymond H. VanNett*, 44 ECAB 480, 482-83 (1993). *See also* Federal (FECA) Procedure Manual, Part 3 -- Medical, *Requirements for Medical Reports*, Chapter 3.600.8(a) (September 1994).

[17] *See* Federal (FECA) Procedure Manual, Part 3 -- Medical, *Requirements for Medical Reports*, Chapter 3.600.8(a) (September 1994); *see also James England*, 47 ECAB 115 (1995).

this evaluation. The Office medical adviser explained that he used Dr. Komorn's March 31, 2003 audiogram because it met the Office's standards and was the most recent. He thus gave sufficient rationale to support his conclusions that the audiogram of Dr. Komorn would most accurately depict appellant's hearing.[18] Applying the Office's standardized procedures, the Office medical adviser found that the frequency levels of 500, 1,000, 2,000 and 3,000 cps for the right ear revealed decibel losses of 15, 25, 60 and 80, respectively, for a total of 180 decibels. When divided by 4, the result was an average hearing loss of 45 decibels. The average loss of 45 decibels was reduced by 25 decibels to equal 20, which when multiplied by the established factor of 1.5, resulted in a 30 percent monaural hearing loss for the right ear. Testing for the left ear at the frequency levels of 500, 1,000, 2,000 and 3,000 cps revealed decibel losses of 15, 25, 65 and 85, respectively, for a total of 190 decibels. When divided by 4, the result was an average hearing loss of 47.5 decibels. The average loss of 47.5 decibels was reduced by 25 decibels to equal 22.5, which when multiplied by the established factor of 1.5, resulted in a 33.75 percent monaural hearing loss for the left ear. The 30 percent hearing loss for the right ear, when multiplied by 5, yielded a product of 150. The Office medical adviser added the 150 to the 33.75 percent hearing loss for the left ear to obtain a total of 183.75. The 183.75 was then divided by 6, for a total binaural loss of hearing of 30.6 percent. The policy of the Office is to round the calculated percentage of impairment to the nearest whole point.[19] Consequently, the Office medical adviser properly determined that appellant had a 31 percent binaural loss of hearing.

Dr. Komorn, the Office referral physician, found that appellant had an additional 5 percent binaural impairment due to tinnitus for a total impairment of 36 percent. As discussed above, the A.M.A., *Guides* provides that tinnitus in the presence of unilateral or bilateral hearing impairment may impair speech discrimination and thus an additional five percent may be awarded for hearing loss with tinnitus that "impacts the ability to perform the activities of daily living."[20] However, in this case, Dr. Komorn did not diagnose tinnitus or address how tinnitus affected appellant's ability to perform his usual activities. He further did not indicate that appellant experienced any complaints or current symptoms of tinnitus. As Dr. Komorn did not report any subjective or objective findings of tinnitus or otherwise explain his finding that appellant was entitled to an additional five percent impairment rating from tinnitus, the Board cannot find that he followed the procedures set forth in the fifth edition of the A.M.A., *Guides*. The Office, therefore, properly excluded this aspect from the impairment rating when calculating appellant's entitlement to a schedule award.

Under the Act, the maximum award for binaural hearing loss is 200 weeks of compensation.[21] Since the binaural hearing loss in this case is 31 percent, appellant is entitled to 31 percent of 200 weeks or 62 weeks of compensation. Appellant's schedule award ran from March 31, 2003 to June 6, 2004, which equates to 62 weeks of compensation. The Office,

[18] *See Marco A. Padilla*, 51 ECAB 202 (1999); *Stacey L. Walker*, 48 ECAB 353 (1997).

[19] Federal (FECA) Procedure Manual, Part 2 -- Medical, *Schedule Awards*, Chapter 3.700.3(b) (June 2003).

[20] A.M.A., *Guides*, 246.

[21] 5 U.S.C. § 8107(c)(13)(b).

therefore, properly determined the number of weeks of compensation to which appellant is entitled under the Act.[22]

CONCLUSION

The Board finds that appellant has no more than a 31 percent binaural hearing loss for which he received a schedule award.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated January 30, 2004 is affirmed.

Issued: August 18, 2004
Washington, DC

Alec J. Koromilas
Chairman

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

[22] Subsequent to the Office's January 30, 2004 decision, appellant submitted additional evidence to the Office. The Board has no jurisdiction to review evidence for the first time on appeal which was not before the Office at the time it issued its final decision. *See* 20 C.F.R. § 501.2(c).