

**United States Department of Labor
Employees' Compensation Appeals Board**

A.C., Appellant)

and)

**DEPARTMENT OF THE ARMY, ALABAMA)
ARMY NATIONAL GUARD, Birmingham, AL,)
Employer)**

**Docket No. 07-1636
Issued: December 10, 2007**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On May 30, 2007 appellant filed a timely appeal from the April 11, 2007 merit decision of the Office of Workers' Compensation Programs, finding that he did not sustain a ratable binaural (both ears) hearing loss entitling him to a schedule award and denying authorization for hearing aids. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether appellant has established that he sustained a ratable binaural (both ears) hearing loss entitling him to a schedule award; and (2) whether the Office properly denied authorization for hearing aids.

FACTUAL HISTORY

On August 24, 2004 appellant, then a 54-year-old information technology specialist, filed a claim for an occupational disease. On September 27, 1997 he first became aware of his

hearing loss and realized that this condition was caused by his federal employment. Appellant was exposed to loud jet engine noise from commercial and military aircraft taking off and landing. He was last exposed to the alleged employment factor on September 27, 1997.

By decision dated February 2, 2005, the Office denied appellant's claim on the grounds that it was not timely filed pursuant to 5 U.S.C. § 8122. By letter dated February 5, 2005, he requested an oral hearing before an Office hearing representative.

In an October 5, 2005 decision, a hearing representative set aside the February 2, 2005 decision and remanded the case to the Office. He found that appellant's occupational disease claim was timely filed as appellant first realized that his hearing loss was caused by his federal employment on April 23, 2004. At the hearing appellant testified that he mistakenly indicated on his claim form that September 27, 1997 was the date that he realized his hearing loss was caused by his employment.

On November 2, 2005 an Office medical adviser reviewed appellant's case record. He found that an April 10, 1989 audiogram was virtually normal while a September 17, 1991 audiogram revealed mild high frequency hearing loss. The Office medical adviser opined that the change, though not striking, was probably significant.

By letter dated November 10, 2005, the Office referred appellant, together with the case record, a statement of accepted facts and a list of questions to be addressed to, Dr. Robert J. Sciacca, a Board-certified otolaryngologist, for a second opinion medical examination. At the time of appellant's scheduled examination, Dr. Sciacca was not available due to emergency surgery. Instead, he was evaluated by Dr. John C. Davis, a Board-certified otolaryngologist.

In a November 23, 2005 medical report, Dr. Davis stated that the April 10, 1989 audiogram revealed that appellant already had mild hearing loss in the right ear and normal hearing in the left ear. On examination, he reported a decrease in high frequency hearing in both ears that was somewhat more excessive than the presbycusis noted above. Dr. Davis opined that workplace exposure had some effect on appellant's hearing but he could not comment as to the extent of this effect. He diagnosed moderate high frequency sensorineural bilateral hearing loss and found that appellant's hearing loss was caused by his workplace noise exposure. Dr. Davis indicated that appellant was exposed to noise 40 hours per week for over 8 years with no ear protection. He recommended a hearing aid evaluation if appellant so desired. Dr. Davis also recommended that appellant see a physician if he noticed any change in his hearing. A November 23, 2005 audiogram performed by an audiologist whose signature is illegible, accompanied Dr. Davis's report. Testing of the right ear at frequency levels of 500, 1,000, 2,000 and 3,000 Hertz (Hz) revealed decibel losses of 10, 20, 15 and 50, respectively and in the left ear decibel losses of 20, 15, 5 and 45, respectively.

On December 12, 2005 Dr. A.E. Anderson, Jr., an Office medical adviser, reviewed Dr. Davis's November 23, 2005 report and audiogram results to find that appellant reached maximum medical improvement on November 23, 2005. He diagnosed binaural sensorineural hearing loss. Dr. Anderson determined that appellant had a zero percent binaural hearing loss for schedule award purposes. He checked the block marked no in response to the questions as to

whether a hearing aid was authorized and whether an examination by a specialist was recommended.

By decision dated January 18, 2006, the Office accepted appellant's claim for binaural hearing loss due to his employment-related noise exposure. It, however, found that he was not entitled to a schedule award as he did not sustain a ratable hearing loss based on the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) (5th ed. 2001). The Office also found that the weight of the medical evidence established that appellant would not benefit from hearing aids and, therefore, denied his claim for additional medical benefits. In a letter dated January 25, 2006, appellant requested an oral hearing before a hearing representative.

By decision dated March 26, 2007, a hearing representative affirmed in part the January 18, 2006 decision. The evidence of record established that appellant did not have any ratable hearing loss. The hearing representative, however, remanded the case to the Office because the Office medical adviser failed to provide medical rationale explaining why appellant did not require hearing aids despite Dr. Davis's opinion that he could be evaluated for such devices. The hearing representative also instructed the Office to ask the medical adviser to comment on appellant's hearing testimony that hearing aids could help his tinnitus-related hearing problems.

On April 6, 2007 Dr. Anderson stated that appellant did not require hearing aids because his nonratable bilateral hearing loss and normal speech reception threshold (SRT) of 20 decibels bilaterally, implied a normal ability to recognize speech as a meaningful symbol. He stated that the discrimination scores and his ability to discriminate various speech at 500 Hz, were excellent on the left and good on the right. Regarding tinnitus, Dr. Anderson opined that there was no indication in Dr. Davis's November 23, 2005 examination that tinnitus impacted appellant's ability to perform activities of daily living. He noted that the term "tinnitus" did not appear anywhere in the November 23, 2005 report.

By decision dated April 11, 2007, the Office denied authorization for hearing aids based on Dr. Anderson's April 6, 2007 opinion.

LEGAL PRECEDENT -- ISSUE 1

The schedule award provision of the Federal Employees' Compensation Act¹ and its implementing regulations² set forth the number of weeks of compensation to be paid for permanent loss, or loss of use of the members of the body listed in the schedule. Where the loss of use is less than 100 percent, the amount of compensation is paid in proportion to the percentage of loss of use.³ However, neither the Act nor the regulations specify the manner in which the percentage of impairment shall be determined. For consistent results and to ensure

¹ 5 U.S.C. §§ 8101-8193; *see* 5 U.S.C. § 8107(c).

² 20 C.F.R. § 10.404.

³ 5 U.S.C. § 8107(c)(19).

equal justice for all claimants, the Office adopted the A.M.A., *Guides* as a standard for determining the percentage of impairment and the Board has concurred in such adoption.⁴

The Office evaluates industrial hearing loss in accordance with the standards contained in the A.M.A., *Guides*.⁵ Using the frequencies of 500, 1,000, 2,000 and 3,000 Hz the losses at each frequency are added up and averaged.⁶ Then, the fence of 25 decibels is deducted because, as the A.M.A., *Guides* points out, losses below 25 decibels result in no impairment in the ability to hear everyday speech under everyday conditions.⁷ The remaining amount is multiplied by a factor of 1.5 to arrive at the percentage of monaural hearing loss.⁸ 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.⁹ The Board has concurred in the Office's adoption of this standard for evaluating hearing loss.¹⁰

The A.M.A., *Guides* provides that 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 activities of daily living."¹¹

ANALYSIS -- ISSUE 1

In response to the Office's referral of appellant for a current evaluation as to the nature and extent of any employment-related hearing loss, Dr. Davis, the second opinion specialist, found that appellant sustained bilateral sensorineural hearing loss related to noise exposure in the course of his federal employment. Dr. Anderson, the Office medical adviser, applied the Office's standardized procedures to the November 23, 2005 audiogram obtained by Dr. Davis. Testing of the right ear at frequency levels of 500, 1,000, 2,000 and 3,000 Hz revealed decibel losses of 10, 20, 15 and 50, respectively for a total of 95 decibels. When divided by 4, the result is an average hearing loss of 23.75 decibels. The average loss of 23.75 decibels is reduced by 25 decibels to equal 0, which, when multiplied by the established factor of 1.5, results in a 0 percent hearing loss for the right ear. Testing of the left ear at the same frequency levels revealed decibel losses of 20, 15, 5 and 45, respectively for a total of 85 decibels. When divided by 4, the result is an average hearing loss of 21.25 decibels. The average loss of 21.25 decibels is reduced

⁴ *Supra* note 2; *Donald E. Stockstad*, 53 ECAB 301 (2002), *petition for recon. granted (modifying prior decision)* Docket 01-1570 (issued August 13, 2002).

⁵ A.M.A., *Guides* 250.

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *See Donald E. Stockstad*, *supra* note 4.

¹¹ A.M.A., *Guides* 246.

by 25 decibels to equal 0, which, when multiplied by the established factor of 1.5, results in a 0 percent hearing loss for the left ear.

The Board finds that Dr. Anderson properly applied the Office's standards to the findings stated in Dr. Davis's November 23, 2005 report and accompanying audiogram. This resulted in a nonratable hearing loss, which is not compensable for schedule award purposes. Further, Dr. Anderson stated that Dr. Davis neither diagnosed appellant as having tinnitus nor indicated that this condition impacted his ability to perform activities of daily living.¹² Because an additional amount for tinnitus is warranted only in the presence of unilateral or bilateral impairment, *i.e.*, a measurable hearing loss, the Board finds that appellant is not entitled to a schedule award based solely on his tinnitus.¹³

LEGAL PRECEDENT -- ISSUE 2

Section 8103(a) of the Act provides that the United States shall furnish to an employee who is injured while in the performance of duty, the services, appliances and supplies prescribed or recommended by a qualified physician, which the Secretary of Labor considers likely to cure, give relief, reduce the degree or the period of any disability or aid in lessening the amount of any monthly compensation.¹⁴ The Office must therefore exercise discretion in determining whether the particular service, appliance or supply is likely to affect the purposes specified in the Act.¹⁵

ANALYSIS -- ISSUE 2

Dr. Davis recommended a hearing aid evaluation if appellant so desired. The Board finds, however, that the record does not support that hearing aids are necessary. After having reviewed Dr. Davis's findings and accompanying audiogram, Dr. Anderson checked the block marked no in response to the question as to whether a hearing aid was authorized. He explained that appellant did not require hearing aids because his nonratable bilateral hearing loss and normal SRT of 20 decibels bilaterally, implied a normal ability to recognize speech as a meaningful symbol. Dr. Anderson further explained that the discrimination scores and appellant's ability to discriminate various speech at 500 Hz were excellent on the left and good on the right. Moreover, as stated, he indicated that appellant was not diagnosed as having tinnitus and this condition was not found to have impacted his ability to perform activities of daily living. The Board finds that Dr. Anderson provided a rationalized explanation for why

¹² *Id.* at 250; *see also S.G.*, 58 ECAB ____ (Docket No. 07-30, issued February 26, 2007).

¹³ *Id.*

¹⁴ 5 U.S.C. § 8103(a).

¹⁵ *Marjorie S. Geer*, 39 ECAB 1099 (1988) (the Office has broad discretionary authority in the administration of the Act and must exercise that discretion to achieve the objectives of section 8103).

hearing aids are not necessary.¹⁶ Therefore, the Board finds that, under these circumstances, the Office acted within its discretion under section 8103(a) to deny authorization for hearing aids.¹⁷

CONCLUSION

The Board finds that appellant has failed to establish that he sustained a ratable bilateral hearing loss entitling him to a schedule award. The Board further finds that the Office properly denied authorization for hearing aids.

ORDER

IT IS HEREBY ORDERED THAT the April 11, 2007 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: December 10, 2007
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board

¹⁶ *Cathy B. Millin*, 51 ECAB 331 (2000).

¹⁷ By letter dated August 4, 2006 and on appeal, appellant requested reimbursement of travel expenses related to his attendance at Office hearings and second opinion medical examinations in light of the Office's January 17, 2006 authorization for 148 units of ground mileage. The Board's jurisdiction is limited to review of final decisions of the Office on appeal. *See* 20 C.F.R. § 501.2(c). As the Office has not issued a decision on the payment of travel-related expenses for appellant's attendance at hearings and medical examinations, the Board has no jurisdiction to issue a decision on this issue.