U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MICHAEL F. WITKOWICH and DEPARTMENT OF JUSTICE,
U.S. MARSHALS SERVICE, New York, N.Y.

Docket No. 97-436; Submitted on the Record;
Issued October 16, 1998

DECISION and ORDER

Before GEORGE E. RIVERS, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issue is whether appellant has a ratable hearing loss in his right ear causally related to factors of his federal employment.

On May 23, 1994 appellant, a 39-year-old Deputy U.S. Marshall, filed a notice of occupational disease, Form CA-2, alleging that he sustained bilateral hearing loss resulting from a shootout on October 7, 1982. Appellant stated that he was exposed to numerous gunshots and that his hearing had shown some decrease through testing during the years. On the reverse side of the Form CA-2, the employing establishment indicated that appellant had not stopped work.

Accompanying the claim, the employing establishment submitted a report of medical history dated October 21, 1980, two pages of a medical examination report (not dated); and two audiogram results dated February 10, 1993 and March 9, 1994.

Appellant subsequently submitted a report by Dr. Stephen J. Pearlman, an employing establishment referral physician and otolaryngologist. He had an audiogram performed on November 18, 1995. He reported the test demonstrated right-sided mild high frequency sensorineural hearing loss and left-sided severe sensorineural healing loss at 4000 hertz (Hz). Dr. Pearlman further diagnosed that appellant had unilateral failure for a score of 60 decibels in the left ear at 3000 Hz.

At the request of the Office of Workers' Compensation Programs the employing establishment submitted copies of appellant's periodic physical examination reports, which included a March 9, 1994 audiogram. In a March 23, 1994 report, Dr. William E. Wright, an employing establishment physician, stated that appellant had severe bilateral hearing loss, not meeting the employing establishment standards with an "A.M.A., [American Medical Association] disability rating for hearing normal conversation in a quiet room of 25.3 percent."

By letter dated May 20, 1996, the Office referred appellant to Dr. Dev Panigrahi, an otolaryngologist, for a complete audiologic and otologic evaluation and review of medical records.

In his report dated June 4, 1996, Dr. Panigrahi stated that a "complete audiometric evaluation in my office revealed essentially normal hearing between 250 to 2000 in both ears with moderate to severe high frequency sensory neural hearing loss in both ears, left side slightly worse than the right one with 100 percent speech discrimination in both ears." Dr. Panigrahi opined that appellant's hearing loss was due to the October 7, 1982 work incident. The audiogram taken for Dr. Panigrahi did not accompany his report.

The Office also referred appellant to Dr. Larry Shemen, Board-certified in otolaryngologist, for a complete audiologic and otologic evaluation of medical records. He examined appellant on June 10, 1996. Dr. Shemen stated that audiometic testing performed on the same date demonstrated asymmetric sensorineural hearing loss with some combined loss on the left side. He concluded that the hearing loss appears causally related to appellant's participation in the 1982 shootout as described in the report. Dr. Shemen submitted a June 10, 1996 audiogram with his report.

In an August 24, 1996 report, an Office audiologist noted that audiograms from 1993 and 1994 show a significant decrease in both ears; "however, the 1996 (current audiogram) shows recovery to previous levels with normal hearing through 2000 Hz, bilaterally followed by a mild notched high frequency sensorineural hearing loss in the right ear and a severe notched high frequency sensorineural hearing loss in the left ear." The audiologist concluded that the current hearing loss was unratable for the right ear and ratable at 13 percent in the left ear.

In a September 6, 1996 report, an Office medical adviser calculated appellant's percentage of hearing loss as zero percent monaural loss in the right ear, thirteen percent monaural loss in the left ear and two percent binaural loss.

On September 6, 1996 the Office advised that it accepted appellant's claim for noise induced hearing loss. To claim a schedule award, appellant was directed to submit a Form CA-7, which was subsequently filed on September 19, 1996.

Thereafter, the Office issued an award of compensation on October 10, 1996, in which appellant was granted a schedule award for 13 percent hearing loss in the left ear. The Office found that appellant had no ratable hearing loss in his right ear. The period of the award ran from September 10 to July 27, 1996.[1]

Appellant contends on appeal that the Office improperly determined that he does not have a ratable hearing loss in the right ear.

The Board finds that the case is not in posture for decision.

The schedule award provisions of the Federal Employees' Compensation Act set forth the number of weeks of compensation to be paid for permanent loss of the use of the members listed in

[1] Another award of compensation for a 13 percent left ear hearing loss was issued on October 4, 1996. This award appears to be essentially identical to the one issued on October 10, 1996. However, it is not clear if the October 4, 1996 award was actually "issued" as appellant only appealed the October 10, 1996 decision and it does not appear that the Office intended to pay appellant twice. This decision presumes that only one award was intended by the Office.

the schedule.[2] The Act, however, does not specify the manner, in which the percentage loss of a member shall be determined. The method used in making such determinations is a matter which rests in the sound discretion of the Office.[3] However, as a matter of administrative practice and to insure consistent results to all claimants, the Office has adopted and the Board has approved of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) as the uniform standard applicable to all claimants.[4]

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 Hz. The losses at each frequency are added up and averaged and a "fence" of 25 decibels is deducted 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. The remaining amount is multiplied by 1.5 to arrive at the percentage of monaural hearing loss. 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.[5] The Board has concurred in the Office's use of this new standard for evaluating hearing losses for schedule award purposes.[6]

In determining the percentage of appellant's hearing loss, the Office medical adviser applied the Office's standardized procedures to the audiogram obtained for Dr. Shemen on June 10, 1996. Testing for the left ear at 500, 1,000, 2,000 and 3,000 Hz revealed hearing threshold levels of 25, 20, 25 and 65 decibels respectively. These losses total 135 decibels for an average level of 33.75 decibels. Reducing this average by 25 decibels (as discussed earlier) leaves a balance of 8.75 decibels, which when multiplied by 1.5 yields a compensable hearing loss of 13 percent, which the Office awarded.

Testing for the right ear at 500, 1,000, 2,000 and 3,000 Hz revealed hearing threshold levels of 20, 15, 20 and 30 decibels respectively. These losses total 85 decibels for an average of 21.25 decibels. Reducing this average by 25 decibels (as discussed earlier) leaves a balance of 0 decibels, meaning that no impairment is presumed to exist in appellant's ability to hear, with his right ear, everyday sounds under everyday listening conditions.

The Office appears to have relied solely on the June 10, 1996 audiometric findings in calculating the schedule award. The record, however, does not contain the results of the June 4, 1996 audiogram taken for Dr. Panigrahi.[7] As this audiogram was administered at the request of the Office

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[2] 5 U.S.C. § 8107.

[3] *Daniel C. Goings*, 37 ECAB 781 (1986); *Richard Beggs*, 28 ECAB 387 (1977).

[4] *Henry L. King* 25 ECAB 39, at 44 (1973); *August M. Buffa*, 12 ECAB 324, at 325 (1961).

[5] *See* A.M.A., *Guides* 224 (4th ed. 1993); FECA Program Memorandum No. 272 (issued February 24, 1986).

[6] *Daniel C. Goings*, *supra* note 3.

[7] Appellant submitted a copy of this audiogram on appeal. The Board, however, may only consider evidence that was in the case record that was before the Office at the time of its October 10, 1996 decision; *see* 20 C.F.R. § 501.2(c). The record does not indicate why the Office chose to refer appellant to both Drs. Panigrahi and Shemen.

it would likely be relevant to a full and fair adjudication of the claim. As the record is incomplete without the June 10, 1996 audiogram, the case must be remanded to the Office to obtain that evidence.[8]

In cases where there are several audiograms of record, all made within approximately two years of each other and submitted by more than one specialist, the Board has held that the Office must have all of such audiograms evaluated to determine the percentage loss of hearing shown by each. The Office should not arbitrarily select one audiogram without explanation, even though the one selected is the most recent of record.[9] Consequently, after obtaining the audiogram taken for Dr. Panigrahi and following other necessary development, the Office should consider all appropriate audiograms of record to determine which one most accurately reflects appellant's hearing loss. Thereafter, the Office shall issue a *de novo* decision.

Accordingly, the October 10, 1996 decision of the Office of Workers' Compensation Programs is set aside and the case remanded for further action consistent with this decision of the Board.

Dated, Washington, D.C.
October 16, 1998

George E. Rivers
Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member

[8] *See Edward Schoening*, 41 ECAB 277, 282 (1989) (where the Board found that once the Office has begun investigating a claim, it must pursue the evidence as far as reasonably possible); *see also Michael Gallo*, 29 ECAB 159 (1978); *William N. Saathoff*, 8 ECAB 769 (1956) (where the Board found that once the Office proceeds to develop the evidence, it must do so in a fair and impartial manner).

[9] *See Harry Frank*, 33 ECAB 261, 263 (1981).