

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JEROME M. TOMCZYK and DEPARTMENT OF DEFENSE, DEFENSE
LOGISTICS AGENCY, DEFENSE DISTRIBUTION DEPOT, Tobyhanna, PA

*Docket No. 02-1359; Submitted on the Record;
Issued January 7, 2003*

DECISION and ORDER

Before DAVID S. GERSON, MICHAEL E. GROOM,
A. PETER KANJORSKI

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

On November 18, 1999 appellant, then a 58-year-old support power system assembler, filed an occupational disease claim for hearing loss caused by noise exposure in the course of his federal employment. The Office of Workers' Compensation Programs accepted the claim for bilateral hearing loss. Appellant had retired from employment on September 30, 1999.

On February 16, 2000 the Office referred appellant to Dr. Thomas F. Kozlek, a Board-certified otolaryngologist, for audiometric testing and otologic evaluation. Dr. Kozlek submitted a report detailing his examination on March 2, 2000 with an accompanying audiogram made on the same day. An audiogram performed March 2, 2000, reflected testing at the frequency levels of 500, 1,000, 2,000 and 3,000 cycles per second, which revealed the following: right ear decibels 10, 15, 35 and 45; left ear 15, 20, 40 and 50 decibels. Dr. Kozlek opined that the audiogram demonstrated a bilateral high frequency moderate sensorineural hearing loss, which was caused by noise exposure during his federal employment.

An Office medical adviser reviewed Dr. Kozlek's report and audiometric test results and concluded that appellant had a binaural sensorineural hearing loss of two percent and that appellant's date of maximum medical improvement was March 2, 2000. On May 24, 2001 the Office granted a schedule award for two percent binaural loss of hearing. The period of the award ran for four weeks, from March 2 to 29, 2000.

On June 2, 2001 appellant requested a review of the written record by the Branch of Hearings and Review of the Office. In a decision dated October 2, 2001, an Office hearing representative modified the May 24, 2001 schedule award to reflect that appellant sustained a three percent binaural sensorineural hearing loss. On October 16, 2001 the Office awarded appellant an additional one percent. The instant appeal follows.

The Board finds that appellant has no more than a three percent binaural sensorineural hearing loss, for which he received schedule awards.

The Federal Employees' Compensation Act schedule award provisions set forth the number of weeks of compensation to be paid for permanent loss of use of the members of the body that are listed in the schedule.¹ Where the loss of use is less than 100 percent the amount of compensation is paid in proportion to the percentage loss of use.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 a determination is a matter which rests in the sound discretion of the Office.³ However, as a matter of administrative practice, the Board has stated: "For consistent results and to ensure equal justice under the law to all claimants, good administrative practice necessitates the use of a single set of tables so that there may be uniform standards applicable to all claimants."⁴

The Office evaluates industrial hearing loss in accordance with the standards contained in the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).⁵ Using the frequencies of 500, 1,000, 2,000 and 3,000 cycles per second, 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

In reviewing appellant's March 2, 2000 audiogram, the frequency levels recorded at 500, 1,000, 2,000 and 3,000 hertz (Hz) for the left ear reveal decibel losses of 15, 20, 40 and 50, respectively, for a total of 125 decibels. When divided by 4, the result is an average hearing loss of 31.25 decibels. The average loss of 31.25 is reduced by 25 decibels to equal 6.25, which

¹ 5 U.S.C. § 8107.

² *Id.* at § 8107(c)(19).

³ *Andrew Arron, Jr.*, 48 ECAB 141 (1996).

⁴ *Id.*

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

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Donald E. Stockstad*, 53 ECAB ____ (Docket No. 01-1570, issued January 23, 2002).

when multiplied by the established factor of 1.5, results in a 9.375 percent monaural hearing loss for the left ear. Testing for the right ear at the frequency levels of 500, 1,000, 2,000 and 3,000 Hz revealed decibel losses of 10, 15, 35 and 45 respectively, for a total of 105 decibels. Utilizing the same above-noted formula results in a 1.875 percent monaural hearing loss for the right ear. The 1.875 percent hearing loss for the right ear (the ear with the lesser loss), when multiplied by 5, yields a product of 9.375. The 9.375 is then added to the 9.375 percent hearing loss for the left ear (the ear with the greater loss) to obtain a total of 18.75. The 18.75 is then divided by 6, in order to calculate a binaural loss of hearing of 3.125 percent. Consequently, the evidence of record does not establish that appellant has greater than a three percent binaural loss of hearing.

A schedule award under the Act is paid for permanent impairment involving the loss or loss of use of certain members of the body. The schedule award provides for the payment of compensation for a specific number of weeks as prescribed in the statute.¹¹ With respect to the schedule awards for hearing impairments, the pertinent provision of the Act provides that for a total, or 100 percent loss of hearing in both ears, an employee shall receive 200 weeks of compensation.¹² In the instant case, appellant does not have a total, or 100 percent binaural hearing loss, but rather a 3 percent binaural hearing loss. As such, he is entitled to 3 percent of the 200 weeks of compensation, which is 6 weeks. The Office, therefore, properly determined the number of weeks of compensation for which appellant is entitled under the schedule award.

Lastly, the Board notes that, on appeal, appellant is requesting that he be furnished with hearing aids. With respect to reimbursement for medical services and appliances, section 8103(a) of the Act states, in pertinent part, 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 disability or aid in lessening the amount of the monthly compensation.” The medical evidence of record does not contain an opinion that advises the necessity for hearing aids. Appellant, however, submitted evidence with his appeal to be Board. The Board cannot consider this evidence as its review of the case is limited to the evidence of record, which was before the Office at the time of its final decision.¹³ Appellant, however, retains the right to submit this evidence to the Office and request reconsideration regarding his entitlement to an increased schedule award¹⁴ and regarding whether the Office should furnish him with hearing aids.¹⁵

¹¹ *Supra* note 1.

¹² 5 U.S.C. § 8107(c)(13)(b).

¹³ 20 C.F.R. § 501.2(c).

¹⁴ If at some later date a medical examination indicates that appellant’s condition has worsened, a claim for an amended schedule award can be made to cover any additional impairment. *Andrew Aaron, Jr., supra* note 3.

¹⁵ The Board further notes that Dr. Kozlek diagnosed tinnitus but no vertigo. While the A.M.A., *Guides* allows for an award for tinnitus under disturbances of vestibular function, in the instant case there are no objective findings of disequilibrium or evidence that appellant could not perform his usual activities of daily living to establish that the tinnitus caused disturbances of vestibular function; *see Richard Larry Enders*, 48 ECAB 184 (1996).

The April 27, 2001 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC
January 7, 2003

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member