

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

MARCELINO ALANIZ, JR., Appellant)

and)

DEPARTMENT OF THE TREASURY,)
IMMIGRATION & NATURALIZATION)
SERVICE, San Antonio, TX, Employer)

**Docket No. 04-160
Issued: March 31, 2004**

Appearances:
Marcelino Alaniz, Jr., pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

COLLEEN DUFFY KIKO, Member
DAVID S. GERSON, Alternate Member
A. PETER KANJORSKI, Alternate Member

JURISDICTION

On October 28, 2003 appellant filed a timely appeal from a merit decision of the Office of Workers' Compensation Programs dated October 16, 2003. Under 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 five percent binaural hearing loss for which he received a schedule award.

FACTUAL HISTORY

On February 8, 2000 appellant, then a 51-year-old supervisory special agent, filed a notice of occupational disease claiming that his permanent hearing loss with tinnitus was caused by factors of his federal employment. The employing establishment noted that his last exposure was on October 14, 1999 when he qualified with a weapon but that he had not lost any work as a result of the exposure. In a report dated December 27, 1999, Dr. Robert Harris stated that

appellant had tinnitus. In a statement of accepted facts, the Office stated that he was exposed to noise during inspections of persons and vehicles at designated traffic check locations from fuel tanker trucks, freight trains, heavy hydraulic machinery, semi-trailers, big rigs and vans and that he continues to be exposed. On March 16, 2000 the Office accepted appellant's claim for tinnitus. On March 20, 2000 the Office referred appellant to Dr. Brian Perry, a Board-certified otolaryngologist, for an evaluation to determine whether he had a work-related hearing loss. The Office attached a statement of accepted facts, an outline for an otologic evaluation and a list of specific questions. In a report dated April 10, 2000, Dr. Perry stated that he had reviewed the results of an audiogram taken on that day that revealed a ratable hearing loss of 1.5 percent in the right and 21 percent in the left for a binaural sensorineural hearing loss of 4.75 percent. Audiometric testing that day revealed the following decibels losses at 500, 1,000, 2,000 and 3,000 cycles per second: 15, 20, 30 and 40 decibels on the right, and 10, 20, 35 and 90 decibels on the left. He further noted that appellant had disabling tinnitus. Dr. Perry added that appellant should undergo tinnitus evaluation and therapy and that he should have a hearing aid evaluation secondary to his hearing loss, as well as to help with his tinnitus.

On October 29, 2002 appellant filed a claim for a schedule award and submitted audiogram test results dated April 10, 2000.

On September 3, 2003 the Office referred Dr. Perry's report to an Office medical adviser. In a report dated September 13, 2003, the Office medical adviser reviewed Dr. Perry's report and determined that appellant had a five percent binaural hearing loss and recommended hearing aids. The maximum medical improvement date was April 10, 2000, the date of appellant's audiogram testing and report by Dr. Perry. By decision dated October 16, 2003, the Office awarded appellant a schedule award of five percent for binaural hearing loss. The period of award ran for 10 weeks from April 10 to June 18, 2000.

LEGAL PRECEDENT

The schedule award provision of the Federal Employees' Compensation Act¹ provides for compensation to employees sustaining impairment from loss or loss of use of, specified members of the body. 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. For consistent results and to ensure equal justice, the Board has authorized the use of a single set of tables so that there may be uniform standards applicable to all claimants. The American Medical Association, *Guides to the Evaluation of Permanent Impairment* has been adopted by the Office as a standard for evaluation of schedule losses and the Board has concurred in such adoption.²

The Office evaluates industrial hearing loss in accordance with the standards contained in the A.M.A., *Guides* (5th ed. 2001).³ Using the frequencies of 500, 1,000, 2,000 and 3,000 cycles

¹ 5 U.S.C. §§ 8101-8193.

² A.M.A., *Guides* (5th ed. 2001).

³ *Id.* at 250.

per second, the losses at each frequency are added up and averaged.⁴ 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.⁵ The remaining amount is multiplied by a factor of 1.5 to arrive at the percentage of monaural hearing loss.⁶ 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.⁷ The Board has concurred in the Office’s adoption of this standard for evaluating hearing loss.⁸

Further, the A.M.A., *Guides* states: “[t]innitus 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.”⁹

ANALYSIS

In determining that appellant had a five percent binaural hearing loss, the Office medical adviser reported that testing for the right ear revealed decibel losses of 15, 20, 30 and 40 respectively. These losses were totaled at 105 decibels and divided by 4 to obtain the average hearing loss at those cycles of 26.25. The average of 26.25 decibels was then reduced by 25 decibels (the first 25 decibels were discounted as discussed above) to equal 1.25 decibels for the right ear. The 1.25 was multiplied by 1.5 resulting in a 1.9 loss. Testing for the left ear at frequency levels of 500, 1,000, 2,000 and 3, 000 cycles per second revealed losses of 10, 20, 35 and 90 decibels respectively. These losses were totaled at 155 decibels and divided by 4 to obtain the average hearing loss at those cycles of 38.75 decibels. The average of 38.75 decibels was then reduced by 25 decibels to equal 13.75 decibels for the left ear. The 13.75 was multiplied by 1.5 resulting in a 20.6 loss. To determine binaural hearing loss, the lesser loss, 1.9, was multiplied by 5 and then added to the greater loss, 20.6. This result was divided by six for a binaural hearing loss estimate of five percent.

The medical evidence reveals that, after applying the relevant standards of the A.M.A., *Guides* and rounding to whole figures, appellant thus has a 1.9 percent monaural hearing loss in his right ear and a 20.6 percent monaural hearing loss in his left ear equating to a five percent binaural hearing loss.

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ *Donald E. Stockstad*, 53 ECAB ____ (Docket No. 01-1570, issued January 23, 2002); *petition for recon. granted (modifying prior decision)*, Docket No. 01-1570 (issued August 13, 2002).

⁹ A.M.A., *Guides* at 246.

The schedule award provision of the Act specifies the number of weeks of compensation to be awarded for loss of hearing. For total loss of hearing in one ear, the Act provides for 52 weeks of compensation, for total loss of hearing in both ears, the Act provides for 200 weeks of compensation. Any loss less than a total loss is compensated at a proportionate rate.¹⁰

The Board notes, however, that FECA Program Memorandum No. 181 (issued November 26, 1974) provides:

“On occasion, the allowances for loss of hearing in each ear, if computed separately, may be greater than the combined value of bilateral hearing loss. In such cases, the employee should be given the benefit of the more favorable allowance and should be compensated in accordance with the scheduled allowances for the sum of loss of hearing in each ear.”¹¹

In the present case, the Office medical adviser did not apply the FECA Program Memorandum No. 181 to the audiometric results found by Dr. Perry. Audiometric testing revealed that appellant had a 20.6 percent hearing loss on the left and a 1.5 percent loss on the right.

Calculated separately appellant’s schedule award using the monaural hearing loss figures would equal 12 weeks of compensation: the 20.6 percent hearing loss multiplied by 52 weeks equals 10.7, rounded to 11 weeks. The 1.9 percent hearing loss on the right multiplied by 52 weeks equals .98, rounded to 1. When combined these monaural losses equal 12 as opposed to 10 weeks of compensation for a five percent binaural hearing loss.

Further, Dr. Perry advised that appellant had disabling tinnitus. The Office had previously accepted appellant’s claim for work-related tinnitus but did not evaluate whether this condition warranted an additional schedule award. Regarding the finding that appellant sustained tinnitus, the A.M.A., *Guides* states that “[t]innitus 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.”¹² Thus, although Dr. Perry’s opinion is not sufficiently rationalized¹³ to carry appellant’s burden of proof in establishing a disability for tinnitus, it stands uncontroverted in the record and is, therefore, sufficient to require further development of the case by the Office.¹⁴

¹⁰ 5 U.S.C. § 8107(c)(13), (c)(19).

¹¹ *Jeffrey J. Stickney*, 51 ECAB 616 (2000).

¹² A.M.A., *Guides* at 246.

¹³ *Annie L. Billingsley*, 50 ECAB 210 (1998) (where the Board found that a medical opinion not fortified by medical rationale is of little probative value).

¹⁴ *Felix Flecha*, 52 ECAB 268 (2001).

CONCLUSION

The Board finds that the Office medical adviser applied the proper standards to the findings stated in Dr. Perry's report. Thus the Board will affirm the decision as modified, to find appellant has a 1.9 percent right ear hearing loss and a 20.6 percent left ear hearing loss entitling him to 12 weeks of compensation. The Board notes that hearing aids were authorized. However, the Office failed to evaluate whether appellant's work-related tinnitus caused a disability and if so whether this disability warranted a schedule award. The case will therefore be remanded to the Office to determine if appellant's tinnitus caused a disability warranting an additional schedule award.

ORDER

IT IS HEREBY ORDERED THAT the October 16, 2003 decision of the Office of Workers' Compensation Programs be, and is hereby affirmed as modified with respect to appellant's binaural hearing loss and remanded to the Office for proceedings consistent with this opinion regarding his tinnitus.

Issued: March 31, 2004
Washington, DC

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

A. Peter Kanjorski
Alternate Member