



## **FACTUAL HISTORY**

On November 25, 2002 appellant, then a 52-year-old retired special agent,<sup>2</sup> filed an occupational disease claim for a hearing loss caused by exposure to firearms noise in the course of his federal employment. He stated that hearing protection was not provided by the employing establishment until 1990 and then consisted only of “flimsy” headsets. Appellant stated that when he began working at Treasury he was issued sophisticated hearing protection which included expandable plugs for inner ear protection. He alleged that he had a progressive hearing loss while working at the employing establishment from 1987 to 2001.

On May 6, 2003 the Office referred appellant to Dr. Mark J. Maslan, an otolaryngologist. In a May 31, 2003 report, which included a May 20, 2003 audiogram, he diagnosed a slight high frequency sensorineural hearing loss in appellant’s left ear and essentially normal hearing in the right ear. Dr. Maslan stated, “I doubt that noise has played a significant role in his hearing loss at this time.” He opined that appellant’s hearing loss was not related to his federal employment. Dr. Maslan provided the results of audiometric testing that revealed losses of decibels of 20, 20, 10 and 20 in the right ear and 15, 20, 35 and 75 decibels in the left ear for the frequency levels of 500, 1,000, 2,000 and 3,000 cycles per second (cps).

By decision dated July 15, 2003, the Office denied appellant’s claim on the grounds that the weight of the medical evidence did not establish that his hearing loss was causally related to factors of his federal employment.

In an August 15, 2003 report, Dr. Jay A. Dunfield, a Board-certified otolaryngologist, opined that appellant had a work-related noise-induced hearing loss, worse in the left ear. He provided the results of audiometric testing that revealed losses of 10, 15, 15 and 15 decibels in the right ear and 10, 25, 30 and 70 decibels in the left ear for the frequency levels of 500, 1,000, 2,000 and 3,000 cps. Dr. Dunfield stated that appellant provided a history of noise exposure from using firearms during the past 20 years and indicated that hearing protection was not provided until 1990. He noted that he had reviewed audiograms dated 1986 to 2003 which revealed a left-sided high frequency sensorineural hearing loss of moderate severity that had worsened over the past 17 years but had been relatively stable the past 4 or 5 years.<sup>3</sup> Dr. Dunfield opined that appellant’s hearing loss was causally related, at least in part, to his exposure to concussive noise from firearms.

Appellant requested an oral hearing that was held on March 25, 2004. He testified that the hearing protection provided by the employing establishment was not adequate and consisted of headgear that had a minimal effect on noise reduction and makeshift ear protection such as cigarette filters and shell casings. Appellant noted that he had no significant loss in his hearing since retirement from the employing establishment and he used adequate hearing protection while working for Treasury.

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<sup>2</sup> Appellant retired from the employing establishment effective January 2, 2001. He then worked for Treasury as a firearms and driving instructor from March 24, 2002 to January 3, 2003.

<sup>3</sup> The record contains copies of audiograms dated April 16, 1986 to July 20, 2004.

By decision dated May 21, 2004, an Office hearing representative found a conflict in the medical evidence between Drs. Dunfield and Maslan on the issue of causal relationship and remanded the case for referral to an impartial medical specialist.

On June 28, 2004 the Office referred appellant to Dr. Matthew E. Beuerlein, a Board-certified otolaryngologist, together with a statement of accepted facts and copies of medical records, for an examination and evaluation of the nature and extent of his hearing loss.<sup>4</sup>

In a report dated July 20, 2004, Dr. Beuerlein found that appellant had a high frequency sensorineural hearing loss, "more dominant on the left side," which was consistent with noise exposure and a right-handed shooter. He stated that appellant was not required to wear hearing protection during most of the time that he was exposed to firearms noise and was told to use shell casings or cigarette butts or "stick his finger in his ear." Dr. Beuerlein provided the results of audiometric testing that revealed losses of decibels of 25, 20, 20 and 30 in the right ear and 20, 25, 45 and 80 decibels in the left ear for the frequency levels of 500, 1,000, 2,000 and 3,000 cps. He stated:

"My impression at this time is that [appellant] has a classic high frequency sensorineural hearing loss more dominant on the left side, which is consistent with noise exposure and a right-handed shooter. Having experience with hand guns, noise exposure and shooting myself, I am personally familiar with the increased exposure of the left ear in a right-handed shooter.... I have recommended continued noise protection in the future.... Furthermore, I have recommended hearing aid amplification for his left ear only. It is a very reasonable conclusion that firearm exposure over time is related to his asymmetric hearing loss that now requires amplification on the left side."

On July 30, 2004 the Office accepted appellant's claim for hearing loss in his left ear.

In reports dated July 30 and August 15, 2004, Dr. Daniel D. Zimmerman, an Office district medical director, stated that the July 20, 2004 audiogram obtained for Dr. Beuerlein could not be used for purposes of determining a schedule award because the Office protocol for hearing loss testing was not followed. He noted that the test results did not indicate when appellant was last exposed to noise prior to the testing or when the audiometer had last been calibrated. Using audiometric test results obtained on May 20, 2003 for Dr. Maslan, he determined that appellant had a 16.875 hearing loss in the left ear, rounded to 17 percent.<sup>5</sup> Dr. Zimmerman did not calculate appellant's hearing loss in his right ear, stating that the Office had not accepted the right ear hearing loss as causally related to his federal employment.

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<sup>4</sup> The statement of accepted facts dated June 14, 2004 noted that, as a special agent for the employing establishment from 1987 to 2001, appellant engaged in firearms training on a quarterly basis on indoor firing ranges. It indicated that in his job as a firearms instructor for Treasury from March to November 2002, he was exposed to firearms noise.

<sup>5</sup> Dr. Zimmerman stated that Dr. Maslan's May 20, 2003 audiogram was obtained in accordance with Office protocol for hearing loss assessments but the August 15, 2003 audiogram obtained for Dr. Dunfield did not conform to Office protocols. He stated that the August 15, 2003 audiogram results obtained for Dr. Dunfield were less favorable for appellant than the May 20, 2003 results.

On August 20, 2004 appellant filed a claim for a schedule award for hearing loss.<sup>6</sup>

In a November 8, 2004 report, Dr. Zimmerman determined that appellant had a 13 percent hearing loss in the left ear and no ratable hearing loss in his right ear based on an August 4, 2000 audiogram in the case record, which was the audiogram closest in time to his January 2001 resignation from the employing establishment.<sup>7</sup> He stated that appellant's contention that his hearing loss was caused while he was at the employing establishment from August 1987 to January 2001 was not correct according to the medical evidence. Dr. Zimmerman stated that the statement of accepted facts indicated that he had intense noise exposure from March through November 2002 while working for Treasury.<sup>8</sup> He noted that Dr. Maslan's May 20, 2003 audiogram complied with all the testing parameters required for schedule awards and was the most favorable for appellant as it revealed a 17 percent hearing loss in the left ear. Dr. Zimmerman noted that the May 20, 2003 audiogram represented appellant's cumulative noise exposure from 1987 to 2001 with the employing establishment and his intense noise exposure with Treasury from March through November 2002.

By decision dated November 22, 2004, the Office granted appellant a schedule award for 8.84 weeks for the period May 20 to July 20, 2003 based on a 17 percent hearing loss in his left ear.

### **LEGAL PRECEDENT**

The schedule award provision of the Federal Employees' Compensation Act<sup>9</sup> and its implementing regulation<sup>10</sup> sets 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 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. The American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) has been adopted by the implementing regulation as the appropriate standard for evaluating losses.<sup>11</sup>

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<sup>6</sup> Appellant indicated on appeal that he filed a schedule award claim for hearing loss on November 21, 2002. However, there is no November 21, 2002 schedule award claim form of record.

<sup>7</sup> An audiogram dated August 4, 2000 revealed decibel losses of 10, 15, 15 and 20 in the right ear and 25, 20, 20 and 70 decibels in the left ear for the frequency levels of 500, 1,000, 2,000 and 3,000 cps.

<sup>8</sup> The statement of accepted facts dated September 28, 2004 stated that appellant engaged in firearms training on a quarterly basis on indoor firing ranges. For the first four months that he worked for Treasury, he was exposed to noise on outside firing ranges where he fired approximately two million rounds each month.

<sup>9</sup> 5 U.S.C. § 8107.

<sup>10</sup> 20 C.F.R. § 10.404.

<sup>11</sup> *Id.*

The Office evaluates industrial hearing loss in accordance with the standards contained in the A.M.A., *Guides*.<sup>12</sup> Using the frequencies of 500, 1,000, 2,000 and 3,000 cps, the losses at each frequency are added up and averaged.<sup>13</sup> 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.<sup>14</sup> The remaining amount is multiplied by a factor of 1.5 to arrive at the percentage of monaural hearing loss.<sup>15</sup> 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.<sup>16</sup> The Board has concurred in the Office’s adoption of this standard for evaluating hearing loss.<sup>17</sup>

Section 8123(a) of the Act provides that if there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination.<sup>18</sup> Where a case is referred to an impartial medical specialist for the purpose of resolving a conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual and medical background, must be given special weight.<sup>19</sup>

### ANALYSIS

The Office properly determined that there was a conflict in the medical opinion evidence between Dr. Dunfield and Dr. Maslan as to whether appellant’s hearing loss was causally related to factors of his federal employment. Dr. Maslan, an otolaryngologist and Office referral physician, opined that appellant’s hearing loss was not causally related to his federal employment. Dr. Dunfield, an attending otolaryngologist, stated that appellant’s hearing loss was caused, at least in part, by his noise exposure during his long career at the employing establishment.

Due to the conflict in the medical opinion evidence between Dr. Maslan and Dr. Dunfield, the Office properly referred appellant to Dr. Beuerlein, a Board-certified otolaryngologist, for an independent medical examination. Dr. Beuerlein found that appellant had a high frequency sensorineural hearing loss, more dominant on the left side, which was

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<sup>12</sup> A.M.A., *Guides* at 250 (5<sup>th</sup> ed. 2001).

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Donald E. Stockstad*, 53 ECAB 301 (2002); *petition for recon. granted (modifying prior decision)*, Docket No. 01-1570 (issued August 13, 2002).

<sup>18</sup> 5 U.S.C. § 8123(a); *see also Raymond A. Fondots*, 53 ECAB 637 (2002); *Rita Lusignan (Henry Lusignan)*, 45 ECAB 207 (1993).

<sup>19</sup> *See Roger Dingess*, 47 ECAB 123 (1995); *Glenn C. Chasteen*, 42 ECAB 493 (1991).

consistent with noise exposure “over time” and a right-handed shooter. He noted that appellant was not required to wear hearing protection during most of the time that he was exposed to firearms noise. Dr. Beuerlein provided the results of audiometric testing that revealed decibel losses of 25, 20, 20 and 30 in the right ear and 20, 25, 45 and 80 decibels in the left ear for the frequency levels of 500, 1,000, 2,000 and 3,000 cps.

The Board finds that the report of Dr. Beuerlein is not sufficient to resolve the conflict in the medical opinion evidence and requires clarification. As noted by Dr. Zimmerman, the audiometric testing performed for Dr. Beuerlein was not done in accordance with Office procedures for determining hearing loss schedule awards.

When the Office obtains an opinion from an impartial medical specialist for the purpose of resolving a conflict in the medical evidence and the specialist’s opinion requires clarification or elaboration, the Office must secure a supplemental report from the specialist to correct the defect in his original report.<sup>20</sup>

### **CONCLUSION**

The Board finds that this case is not in posture for a decision. On remand, the Office should request a supplemental report from Dr. Beuerlein to include audiometric test results that conform to Office procedures for determining a hearing loss schedule award. After such further development as it deems necessary, the Office shall issue a *de novo* decision.

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<sup>20</sup> Nancy Lackner (*Jack D. Lackner*), 40 ECAB 232 (1988); Ramon K. Ferrin, Jr., 39 ECAB 736 (1988).

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs' dated November 22, 2004 is set aside and the case is remanded for further development consistent with this decision.

Issued: July 22, 2005  
Washington, DC

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

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge  
Employees' Compensation Appeals Board