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

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| **MAXIMO M. CUELLAR, Appellant** | ) | |
| | ) | **Docket No. 06-162** |
| **and** | ) | **Issued: February 14, 2006** |
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| **DEPARTMENT OF THE NAVY, NAVAL AVIATION DEPOT, Cherry Point, NC, Employer** | ) | |

*Appearances:*
*Maximo M. Cuellar, 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
MICHAEL E. GROOM, Alternate Judge

### ***JURISDICTION***

On November 1, 2005 appellant filed a timely appeal from the October 3, 2005 merit decision of the Office of Workers' Compensation Programs which found that he did not sustain a ratable hearing loss entitling him to a schedule award and denied 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 schedule award case.

### ***ISSUES***

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

### ***FACTUAL HISTORY***

On March 3, 2005 appellant, then a 50-year-old supervisory machinist, filed an occupational disease claim alleging that on that date he first realized that his hearing loss was

caused by his federal employment. He was exposed to noise for 30 years as a machinist. Appellant indicated that the high pitch and volume of noise were constant in the machine shop. He submitted a March 27, 2005 memorandum which provided a history of his military and federal employment and described his exposure to noise while working during this period. Appellant stated that he did not have any hearing problems prior to joining the military and his hobbies did not involve exposure to loud noise. He was still exposed to loud noise at the employing establishment and that this was the first time he had filed a claim for hearing loss. Appellant first noticed his hearing problems about six months prior when he experienced loud ringing noise in his ears at night while sleeping. He was last exposed to noise at the employing establishment on March 28, 2005. Appellant submitted employing establishment audiogram results covering the period December 6, 1978 through December 1, 2003.

By letter dated August 8, 2005, the Office referred appellant, together with the case record, a statement of accepted facts and a list of questions, to Dr. Charles B. Beasley, a Board-certified otolaryngologist, for a second opinion medical examination.

In a September 7, 2005 report, Dr. Beasley stated that appellant's hearing at the beginning of his federal employment on December 6, 1978 was normal. Based on a comparison to present audiometric findings, he found that appellant showed a sensorineural loss that was in excess of what would be normally predicted on the basis of presbycusis. Dr. Beasley noted a 25 to 35 decibel loss at 500 to 6,000 hertz (Hz) bilaterally. Dr. Beasley opined that appellant's workplace noise exposure was sufficient as to intensity and duration to have caused his hearing loss. He provided findings on physical examination and diagnosed bilateral sensorineural hearing loss. Dr. Beasley found that appellant's condition was due, in part, to noise exposure during his federal employment based on characteristic audiograms. He recommended noise protection, annual hearing examinations and a hearing aid evaluation. A September 7, 2005 audiogram performed by Dr. James Dooling, an audiologist, accompanied Dr. Beasley's report. Testing of the right ear at frequency levels of 500, 1,000, 2,000 and 3,000 Hz revealed decibel losses of 25, 25, 15 and 25, respectively and in the left ear decibel losses of 20, 20, 20 and 30, respectively.

By letter dated September 14, 2005, the Office accepted appellant's claim for bilateral noise-induced hearing loss. On September 21, 2005 he filed a claim for a schedule award.

On September 30, 2005 an Office medical adviser reviewed Dr. Beasley's September 7, 2005 report and audiogram results to find that appellant reached maximum medical improvement on September 7, 2005. He determined that appellant had a nonratable hearing loss for schedule award purposes. The Office medical adviser checked the block marked no in response to the question as to whether a hearing aid was authorized.

By decision dated October 3, 2005, the Office denied appellant's claim for 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* (5th ed. 2001) (A.M.A., *Guides*). The Office also found that the weight of the medical evidence established that he would not benefit from hearing aids and, therefore, denied his claim for additional medical benefits.

## ***LEGAL PRECEDENT -- ISSUE 1***

The schedule award provision of the Federal Employees' Compensation Act[1] and its implementing regulation[2] sets 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 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]

## ***ANALYSIS -- ISSUE 1***

Dr. Beasley, the second opinion specialist, examined appellant and submitted a report on September 7, 2005 finding that he sustained bilateral sensorineural hearing loss related to noise exposure in the course of his federal employment. The Office medical adviser applied the Office's standardized procedures to the September 7, 2005 audiogram obtained by Dr. Beasley. Testing of the right ear at frequency levels of 500, 1,000, 2,000 and 3,000 Hz revealed decibel

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

[2] 20 C.F.R. § 10.404.

[3] U.S.C. § 8107(c)(19).

[4] 20 C.F.R. § 10.404 (1999); *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.

losses of 25, 25, 15 and 25, respectively for a total of 90 decibels. When divided by 4, the result is an average hearing loss of 22.5 decibels. The average loss of 22.5 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 above-noted frequency levels, revealed decibel losses of 20, 20, 20 and 30, respectively, for a total of 90 decibels. When divided by 4, the result is an average hearing loss of 22.5 decibels. The average loss of 22.5 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 left ear.

The Board finds that the Office medical adviser properly applied the Office's standards to the findings stated in Dr. Beasley's September 7, 2005 report and accompanying audiogram. This resulted in a nonratable hearing loss in the right and left ears, which is not compensable for schedule award purposes.

## ***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.[11] The Office must, therefore, exercise discretion in determining whether the particular service, appliance or supply is likely to effect the purposes specified in the Act.[12]

## ***ANALYSIS -- ISSUE 2***

Appellant submitted no prescription or recommendation for hearing aids by a qualified physician. Dr. Beasely recommended only an evaluation for hearing aids. Further, the Office medical adviser checked the block marked no in response to the question as to whether a hearing aid was authorized. Therefore, the Board finds that the Office did not abuse its discretion under section 8103(a), by denying authorization for hearing aids. Should the need for such medical care arise in the future, appellant may file an appropriate claim at that time.

## ***CONCLUSION***

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

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[11] 5 U.S.C. § 8103(a).

[12] *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).

## ***ORDER***

**IT IS HEREBY ORDERED THAT** the October 3, 2005 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: February 14, 2006
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

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