

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of RONALD G. RISNER and DEPARTMENT OF JUSTICE,  
FEDERAL BUREAU OF INVESTIGATION, Miami, FL

*Docket No. 99-772; Submitted on the Record;  
Issued August 8, 2000*

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DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,  
A. PETER KANJORSKI

The issue is whether appellant has more than a 36 percent monaural left ear hearing loss for which he received a schedule award.

On August 27, 1997 appellant, then a 54-year-old special agent, filed an occupational disease claim (Form CA-2) alleging that he sustained hearing loss related to factors of his federal employment. On the claim form, appellant asserted that, during his approximately 25 years of employment with the employing establishment, he was routinely exposed to "extremely loud" firearms and explosive devices. He also asserted that, during the early 1970s, little or no ear protection was available. Appellant further stated that he first became aware of his hearing loss and realized that it was caused or aggravated by his federal employment on May 20, 1978. Appellant explained that he did not file a notice or claim for compensation within 30 days of relating his hearing loss to factors of his federal employment because he was able to perform his normal duties. On the reverse side of the claim form, appellant's supervisor noted that appellant first reported his condition in 1995. Appellant did not stop work.

In support of his claim, appellant submitted a narrative statement asserting that he was exposed to specific work-related incidents involving firing loud weapons and explosive devices. Appellant also submitted an employment history identifying his exposures to loud noises. He noted that in 1966 he sustained an ear infection unrelated to factors of his federal employment, as well as a 1977 ear drum injury related to his federal employment. Further, appellant submitted audiology reports and audiometric results dated January 19, 1989 to December 10, 1993. Additionally, appellant submitted annual physical examination reports, dated October 29, 1970 to August 14, 1996, by various physicians. All reports showed a normal clinical evaluation with the exception of abnormal identifying body marks, scars or tattoos. Appellant also submitted audiograms dated December 20, 1994 and February 7, 1985. Further, appellant submitted his application for employment with the employment establishment dated October 15, 1970. Additionally, appellant submitted reports by the employing establishment regarding ear protection and firearms noise level exposure. Appellant also submitted information regarding

special agent physical requirements, physical program and a special agent position description. Finally, appellant submitted statements from the employing establishment concerning his work history and exposure to the noise of firearms.

By letter dated October 20, 1997, the Office of Workers' Compensation Programs requested additional information from the employing establishment regarding appellant's exposure to noise and his pay rate on the date of his last exposure to hazardous noise.

In response to the Office's request, the employing establishment submitted duplicate copies of previously submitted evidence, including appellant's work history and exposure to the noise of firearms.

The Office referred appellant to Dr. Robert H. Maliner, a Board-certified otolaryngologist. By letter dated February 9, 1998, the Office provided instructions and statement of accepted facts to Dr. Maliner. In its statement of accepted facts, the Office noted appellant's work history and specific instances of exposure to loud noises. In his report dated February 17, 1998, Dr. Maliner found the following decibel losses at the 500, 1,000, 2,000 and 3,000 Hertz (Hz) frequency levels: 5, 10, 10 and 45 of the right ear and 35, 45, 55 and 60 of the left ear. He also found that appellant's workplace exposure was of sufficient intensity and duration to have caused hearing loss. Dr. Maliner diagnosed left muted-type deafness with mild-to-moderate bilateral high-frequency nerve deafness due to noise exposure encountered during appellant's federal employment. He stated that the change in audiograms and appellant's history of noise exposure was the basis for his opinion that appellant's hearing loss was related to his federal employment. Dr. Maliner recommended a hearing aid and left middle ear surgery.

The Office referred Dr. Maliner's report, along with appellant's case record, to an Office district medical adviser for review. In his report dated March 31 1998, the Office medical adviser diagnosed bilateral sensorineural hearing loss with a conductive component of the left ear. Dr. Maliner found the following decibel losses at the 500, 1,000, 2,000 and 3,000 Hz frequency levels: 5, 10, 10 and 45 of the right ear; and 35, 45, 55 and 60 of the left ear. By applying the current Office standards for determining hearing loss, he found that appellant sustained no right ear hearing loss and a 36 percent monaural loss of the left ear. The Office medical adviser authorized a trial hearing aid for appellant.

By letter dated April 1, 1998, the Office granted appellant a schedule award for a 36 percent bilateral noise-induced hearing loss and authorized appellant to purchase hearing aids.

On April 16, 1998 the Office granted appellant a schedule award for a 36 percent permanent hearing loss of the left ear for 18.72 weeks at the rate of \$1,318.95 weekly or 75 percent of his weekly pay rate of \$1,758.60. The period of the award commenced February 17, 1998 and ran to March 28, 1998.

By letter dated May 13, 1998, appellant requested a review of the written record asserting that he sustained a bilateral hearing loss of approximately 50 percent.

To support his claim, appellant submitted a report and audiogram, dated May 6, 1998, by Dr. Craig S. Shapiro, an osteopath. In his report, Dr. Shapiro diagnosed sensorineural hearing

loss and recommended hearing aids. The audiogram showed the following decibel losses at the 500, 1,000 and 2,000 Hz frequency levels: 40, 30 and 35 of the right ear; and 55, 60 and 55 of the left ear. Frequency levels at 250, 4,000 and 5,000 Hz were also recorded.

By decision dated September 9, 1998, the Office found that appellant sustained a 36 percent monaural left ear hearing loss. The hearing representative noted that Dr. Maliner and the audiologist who performed appellant's audiometric testing, certified that the audiologic examination was conducted according to the Office's guidelines and produced accurate results. The hearing representative also noted that the Office medical adviser applied the Office's standardized procedures to the findings and found results consistent with Dr. Maliner's findings. The hearing representative further noted that Dr. Shapiro's audiogram showed "a significantly higher degree of hearing loss [than Dr. Maliner's report], especially in the right ear." However, the hearing representative gave greater weight to the opinions of Dr. Maliner and the Office medical adviser because Dr. Shapiro's audiogram contained no information regarding whether or not the testing was performed according to the Office's regulations.

On appeal, appellant asserts that his hearing loss is in excess of 36 percent in accordance with Dr. Shapiro's report.

The Board finds that appellant has no more than a 36 percent monaural left ear hearing loss for which he received a schedule award.

The Federal Employees' Compensation Act schedule award provisions set forth the number of weeks' compensation to be paid for permanent loss of use of the members of the body that are listed in the schedule.<sup>1</sup> 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.<sup>2</sup> 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."<sup>3</sup>

The Office evaluates industrial hearing loss in accordance with the standards contained in the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4<sup>th</sup> ed. rev., 1995).<sup>4</sup> 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.<sup>5</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>6</sup> The remaining amount is

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<sup>1</sup> 5 U.S.C. § 8107.

<sup>2</sup> *Richard Larry Enders*, 48 ECAB 184 (1996); *Danniel C. Goings*, 37 ECAB 781, 783 (1986).

<sup>3</sup> See *Richard Larry Enders*, *supra* note 2 at 186.

<sup>4</sup> *George L. Cooper*, 40 ECAB 296, 302 (1988).

<sup>5</sup> A.M.A., *Guides* 224 (4<sup>th</sup> ed. rev., 1995).

<sup>6</sup> *Id.*

multiplied by a factor of 1.5 to arrive at the percentage of monaural hearing loss.<sup>7</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 5, then added to the greater loss and the total is divided by 6 to arrive at the amount of the binaural hearing loss.<sup>8</sup> The Board has concurred in the Office's adoption of this standard for evaluating hearing loss.<sup>9</sup>

In the present case, an Office medical adviser applied the Office's standardized procedures to the audiogram performed for Dr. Maliner. Both ears were tested for decibel loss at the 500, 1,000, 2,000 and 3,000 frequency levels. Testing for the right ear revealed decibel losses of 5, 10, 10 and 45, respectively. These decibel losses were totaled at 70 and divided by 4 to obtain a 17.5 average decibel hearing loss. The 17.5 decibel average was reduced by 25 decibels, as discussed above, which resulted in a 0 percent monaural loss for the right ear. Testing for the left ear revealed decibel losses of 35, 45, 55 and 60, respectively. These decibel losses were totaled at 195 and divided by 4 to obtain a 48.75 average decibel hearing loss. The 48.75 average decibel loss was then reduced by 25 decibels, as discussed above, to equal 23.75 which was multiplied by 1.5 to compute a 35.63 percent hearing loss for the left ear. The Office medical adviser rounded appellant's left ear hearing loss to 36 percent.<sup>10</sup> Pursuant to the Office's standardized procedures, the Office district medical adviser determined that appellant had a nonratable hearing loss in his right ear and a 36 percent monaural left ear hearing loss. Those findings were consistent with Dr. Maliner's report.

Dr. Shapiro's report, which diagnosed a sensorineural hearing loss, is of diminished probative value because the accompanying audiogram did not show testing at the 3,000 Hz frequency level. According to the Office's standardized procedures for determining hearing loss, audiograms must include testing at the 500, 1,000, 2,000 and 3,000 Hz frequency levels.<sup>11</sup> In addition, no information was provided regarding the calibration of the testing equipment or the validity of the test results as required by the Office's procedures.<sup>12</sup> Therefore, Dr. Maliner's report is the weight of the medical evidence.

Under the Act's schedule award provisions, an employee shall receive 52 weeks' compensation for a total, or 100 percent, hearing loss in one ear.<sup>13</sup> Accordingly, the amount payable for a 36 percent monaural left ear hearing loss would be 36 percent of 52 weeks or 18.72

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<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Donald A. Larson*, 41 ECAB 947, 951 (1990).

<sup>10</sup> *See* FECA Program Memorandum No. 49 (issued May 1, 1967).

<sup>11</sup> *Daniel C. Goings*, 37 ECAB 781, 784 (1986); Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.0700.4(b)(2)(a) (October 1990).

<sup>12</sup> *George L. Cooper*, *supra* note 4; Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.0700.4(b) Exhibit 3 (October 1990).

<sup>13</sup> 5 U.S.C. § 8107(c)(13)(a).

weeks of compensation, which is the amount appellant was awarded. Under the schedule award provisions, he is entitled to no more.<sup>14</sup>

The decisions of the Office of Workers' Compensation Programs dated September 9 and May 13, 1998 are affirmed.

Dated, Washington, D.C.  
August 8, 2000

Michael J. Walsh  
Chairman

David S. Gerson  
Member

A. Peter Kanjorski  
Alternate Member

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<sup>14</sup> The schedule award commences on the date of maximum medical improvement or the point at which the injury has stabilized and will not improve further; *see Marie J. Born*, 27 ECAB 623 (1976). That determination is based on the medical evidence and is usually the date of the medical examination, which determined the extent of the hearing loss; *see James L. Thomas*, 31 ECAB 1088 (1980). In this case, the date was February 17, 1988, the date of the audiologic examination conducted by Dr. Maliner, the results of which were used as the basis of the schedule award.