U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of RODOLFO VELA and DEPARTMENT OF JUSTICE
Border Patrol, Laredo, TX

Docket No. 02-618; Submitted on the Record;
Issued August 14, 2002

DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issue is whether appellant had more than a 19 percent bilateral hearing loss.

The Board finds appellant has not met his burden of proof to establish more than a 19 percent hearing loss.

On December 23, 1999 appellant, then a 53-year-old border patrol agent, filed a notice of occupational disease and claim for compensation (Form CA-2) alleging that continued exposure to loud noises from firearms and assorted other sources caused hearing loss and constant ringing in his ears.

In support of his claim, appellant submitted an audiogram from when he started with the employing establishment in 1997 that showed normal hearing levels and a February 16, 2000 audiogram that showed bilateral hearing loss.

In a May 1, 2000 letter, the Office of Workers' Compensation Programs referred appellant to Dr. Charles A. Syms for a second opinion.

In a June 23, 2000 report, Dr. Syms diagnosed: (1) sensorineural hearing loss, noise (2) sensorineural hearing loss, mixed AD. (3) endolymphatic hydrops (4) vertigo, peripheral, aural (5) tinnitus and (6) dizziness. He found monaural in the right ear at 78 percent, in the left 48 percent and binaural 53 percent.

In a December 13, 2000 memorandum, the Office referred appellant's medical results to the Office medical adviser.

In a December 29, 2000 report, the Office medical adviser calculate a 19 percent binaural hearing loss based on the fourth edition of the American Medical Association, *Guides to the*

Evaluation of Permanent Impairment, based on the following calculations:[1] Left ear: 500 Hertz (Hz) equals 15; 1,000 Hz equals 15; 2,000 Hz equals 40; and 3,000 Hz equals 70 totaling 140, divided by 4 equals 35. Less fence is 25 -- balance equals 10 times 1.5 equals 15. Right ear: 500 Hz equal 45; 1,000 Hz equals 50; 2,000 Hz equals 45 and 3,000 Hz equals 60, totaling 200, divided by 4 equals 50. Less fence is 25 -- balance equals 25 times 1.5 equals 37.5.

He found maximum medical improvement as May 25, 2000 the date of the audiogram.

In a January 9, 2001 decision, the Office accepted appellant's claim for binaural hearing loss.

In a March 16, 2001 letter, the Office awarded appellant a schedule award based on the 19 percent binaural hearing loss.

The Board finds appellant has not established that he sustained greater than a 19 percent binaural hearing loss.

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 members of the body that are listed in the schedule.[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 insure 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 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

[1] The Board notes the Office used the 4th ed. of the *Guides* when it should have used the 5th ed. but finds this a harmless error because there is no difference in how hearing loss is calculated between the two editions.

[2] 5 U.S.C. § 8107.

[3] *Danniel C. Goings*, 37 ECAB 781, 783 (1986); *Richard Beggs*, 28 ECAB 387, 390-91 (1977).

[4] *Henry L. King*, 25 ECAB 39, 44 (1973); *August M. Buffa*, 12 ECAB 324-25 (1961).

[5] *George L. Cooper*, 40 ECAB 296, 302 (1988).

[6] A.M.A., *Guides*, 224-25 (4th ed. 1993).

[7] *Id*.

[8] *Id*.

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]

On December 29, 2000 the Office medical adviser reviewed the otologic and audiologic testing performed on appellant by Dr. Syms, a Board-certified otolaryngologist, on May 25, 2000 and applied the Office's standardized procedures to this evaluation. Testing for the left ear at the frequency levels of 500, 1,000, 2,000 and 3,000 cycles per second revealed decibel losses of 15, 15, 45 and 60 respectively. These decibel losses were totaled at 140 decibels and were divided by 4 to obtain the average hearing loss of 35 decibels. This average loss was then reduced by 25 decibels (25 decibels being discounted as discussed above) to equal 10 which was multiplied by the established factor of 1.5 to compute a 15 percent hearing loss in the left ear. Testing for the right ear at the frequency levels of 500, 1,000, 2,000 and 3,000 cycles per second revealed decibel losses of 45, 50, 45 and 60 respectively. These decibel losses were totaled at 200 decibels and were divided by 4 to obtain the average hearing loss of 50 decibels. This average was then reduced by 25 decibels (25 decibels being discounted as discussed above) to equal 25 which was multiplied by the established factor of 1.5 to compute a 37.5 percent hearing loss in the right ear. To compute the binaural hearing loss, the lesser loss in the left ear, 15 percent, was multiplied by the established factor of 5, added to the 37.5 percent loss in the right ear and this sum was divided by the established factor of 6 to calculate a 19 percent binaural hearing loss.

On appeal, appellant contends that the schedule award he received was not adequate compensation for his binaural hearing loss. The schedule award provision of the Act provides for compensation to employees sustaining permanent impairment from loss of use of specified members of the body.[11] The Act establishes a maximum of 200 weeks of compensation as the award for total binaural hearing loss.[12] A partial loss of hearing is compensated at a proportionate rate,[13] so appellant's award of compensation for a 19 percent binaural hearing loss entitled appellant to 19 percent of 200 weeks of compensation, or 38 weeks of compensation. The record indicates that appellant has already received this amount of compensation. Because appellant has been fully compensated for the 19 percent binaural hearing loss and his condition has not worsened since that time under the Office's standards for evaluating hearing loss, he is not entitled to any additional compensation.

[9] *Id*.

[10] *Donald A. Larson*, 41 ECAB 947, 951 (1990).

[11] 5 U.S.C. § 8107(c) and implementing regulations at 20 C.F.R. § 10.304.

[12] 5 U.S.C. § 8107(c)(13)(B).

[13] 5 U.S.C. § 8107(c)(19).

The decision of the Office of Workers' Compensation Programs dated March 16, 2001 is hereby affirmed.

Dated, Washington, DC
August 14, 2002

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member