

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of STEVEN A. BARTON and DEPARTMENT OF THE TREASURY,
INTERNAL REVENUE SERVICE, Olympia Fields, IL

*Docket No. 02-977; Submitted on the Record;
Issued April 29, 2003*

DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON,
MICHAEL E. GROOM

The issue is whether appellant is entitled to a schedule award for his employment-related bilateral hearing loss and tinnitus.

On April 21, 2000 appellant, then a 53-year-old criminal investigator, filed an occupational disease claim, alleging that his hearing loss and tinnitus were employment related. In support of his claim, he submitted an accompanying statement in which he described the employment noise hazards that he believed caused his condition and a medical report from Dr. James E. Rejowski, a Board-certified otolaryngologist.

By letter dated May 12, 2000, the Office of Workers' Compensation Programs informed appellant of the evidence needed to support his claim. Appellant submitted an audiogram dated December 30, 1999. Appellant retired from the employing establishment on June 2, 2000. On July 28, 2000 the Office referred appellant, together with the medical record and a statement of accepted facts, to Dr. Jack D. Clemis, a Board-certified otolaryngologist, for evaluation including an audiogram.

Dr. Clemis submitted a report detailing his examination on August 16, 2000, with an accompanying audiogram made that day.¹ The audiogram reflected testing at the frequency levels of 500, 1,000, 2,000 and 3,000 cycles per second which revealed the following: right ear 5, 10, 15 and 20 decibels; left ear 10, 10, 10 and 15 decibels. Dr. Clemis diagnosed mild high-frequency hearing loss and tinnitus which he opined were employment related.

On September 26, 2000 the Office accepted that appellant sustained employment-related bilateral tinnitus and bilateral noise-induced hearing loss. On October 6, 2000 appellant filed a

¹ The record also contains a certification of calibration of the audiometry equipment and of the audiologist, Elizabeth A. Mandell.

schedule award claim. The record was referred to an Office medical adviser to determine if appellant was eligible for a schedule award.

By decision dated January 5, 2001, the Office found that appellant was not entitled to a schedule award as his hearing loss was not ratable. On January 29, 2001 appellant requested a hearing. In a November 3, 2001 decision, an Office hearing representative affirmed the January 5, 2001 decision. The instant appeal follows.

The Board finds that appellant has not established a ratable hearing loss.

The Federal Employees' Compensation Act² schedule award provisions set forth the number of weeks of compensation to be paid for permanent loss of use of the members of the body that are listed in the schedule.³ Where the loss of use is less than 100 percent the amount of compensation is paid in proportion to the percentage loss of use.⁴ 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.⁵ 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."⁶

The Office evaluates industrial hearing loss in accordance with the standards contained in the American Medical Association, *Guides to the Evaluation of Permanent Impairment*.⁷ 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.⁸ The "fence" of 25 decibels is then 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.⁹ The remaining amount is multiplied by a factor of 1.5 to arrive at the percentage of monaural hearing loss.¹⁰ The binaural loss is determined by calculating the loss in each ear using the formula for monaural loss; the lesser loss is multiplied

² 5 U.S.C. §§ 8101-8193.

³ 5 U.S.C. § 8107.

⁴ *Id.* at § 8107(c)(19).

⁵ *Andrew Aaron, Jr.*, 48 ECAB 141 (1996).

⁶ *Id.*

⁷ A.M.A., *Guides* at 250 (5th ed. 2001).

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

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.¹¹

In reviewing appellant's August 16, 2000 audiogram, the frequency levels recorded at 500, 1,000, 2,000 and 3,000 cycles per second for the right ear revealed decibel losses of 5, 10, 15 and 20, respectively, for a total of 50 decibels. When divided by 4, the result is an average hearing loss of 12.5 decibels, which is less than the fence of 25 decibels. Appellant thus does not demonstrate a ratable hearing loss in the right ear. 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 10, 10, 10 and 15 respectively, for a total of 45 decibels. Utilizing the above-noted formula, the audiogram does not demonstrate a ratable hearing loss in the left ear over the 25 decibel fence.¹²

On appeal appellant contends that the A.M.A., *Guides* is "not the most reliable/comprehensive" method of evaluating hearing loss claims and that, when considering the schedule award claim, the Office did not consider how the disability affected appellant's personal life. In *Harry D. Butler*,¹³ the Board addressed a similar contention and reviewed the discretionary authority of the Director in providing a uniform method for evaluating the nature and extent of permanent impairment.¹⁴ Moreover, it is well established that factors such as employability or limitations on lifestyle activities do not bear on the calculation of a schedule award.¹⁵

Appellant further contends that appellant is entitled to compensation for his employment-related tinnitus. In his initial claim form, appellant described his tinnitus as ringing in the ears. At the hearing appellant requested that the report of Thomas Thunder, an audiologist, who performed a tinnitus evaluation,¹⁶ be considered as medical evidence. He further testified that the tinnitus affected his hearing and ability to sleep.

The Board notes, however, that an audiologist is not included among the list of healthcare professionals recognized as a "physician" under 5 U.S.C. § 8101(2).¹⁷ The Board has held that an audiogram prepared by an audiologist must be certified by a physician as being accurate

¹¹ *Id.*

¹² The Board notes that, likewise, the December 30, 1999 audiogram did not demonstrate a ratable hearing loss. Moreover, there is no evidence of record to indicate that the December 30, 1999 audiogram fulfilled the procedural requirements described in *supra* note 8.

¹³ 43 ECAB 859 (1992).

¹⁴ *Id.* at 863-71.

¹⁵ See *James A. Castagno*, 53 ECAB ____ (Docket No. 02-975, issued September 19, 2002); *Smith Littlefield*, 30 ECAB 814 (1979).

¹⁶ By report dated June 22, 2001, Mr. Thunder evaluated "pitch matching," "loudness matching," "minimum masking level," and "loudness discomfort levels."

¹⁷ *Leon Thomas*, 52 ECAB ____ (Docket No. 00-671, issued January 4, 2001).

before it can be used to determine the percentage loss of hearing.¹⁸ Such was not the case with Mr. Thunder's report.

Regarding tinnitus, the A.M.A., *Guides* states:

“*Tinnitus* in the presence of unilateral or bilateral hearing impairment may impair speech discrimination. Therefore, add up to 5 percent for tinnitus in the presence of measurable hearing loss if the tinnitus impacts the ability to perform activities of daily living.”¹⁹

The Board has interpreted this section of the A.M.A., *Guides* to require a ratable hearing loss,²⁰ therefore, finds that as appellant's hearing loss is not ratable in the instant case, a threshold element for entitlement to an award due to tinnitus, appellant is not entitled to a schedule award for his tinnitus. If at some later date a medical examination indicates that appellant's condition has worsened, a claim for an amended schedule award can be made to cover any additional impairment.²¹

The decision of the Office of Workers' Compensation Programs finalized on November 11, 2001 is hereby affirmed.

Dated, Washington, DC
April 29, 2003

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member

¹⁸ See *James A. England*, 47 ECAB 115 (1995).

¹⁹ A.M.A., *Guides*, *supra* note 7 at 246.

²⁰ *Juan A. Trevino*, 54 ECAB ____ (Docket No. 02-1602, issued January 17, 2003).

²¹ *Andrew Aaron*, 48 ECAB 141 (1996).