

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

CONRADO JORGE VILLARREAL, Appellant)

and)

DEPARTMENT OF THE TREASURY,)
U.S. Marshals Service, Corpus Christi, TX,)
Employer)

Docket No. 03-2292
Issued: January 5, 2004

Appearance:
Conrado Jorge Villarreal, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

DAVID S. GERSON, Alternate Member
WILLIE T.C. THOMAS, Alternate Member
MICHAEL E. GROOM, Alternate Member

JURISDICTION

On September 15, 2003 appellant filed a timely appeal from a merit decision of the Office of Workers' Compensation Programs dated August 25, 2003 which affirmed a schedule award. Under 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant sustained more than a seven percent binaural hearing loss for which he had received a schedule award.

FACTUAL HISTORY

On August 7, 2001 appellant, then a 55-year-old deputy marshal, filed a notice of occupational disease alleging that his hearing loss was caused by conditions of his federal employment. He noted that, since 1986, he was exposed to noise from firearm qualifications, airlift tasks, cell block and jail activities and the operation of prison vans.

Appellant stated that he was unable to hear loud noises, his ear drums were damaged and he experienced pain due to large build up of ear wax. The employing establishment advised that he first reported his condition in 1986 and that his exposure was continuous and ongoing. Appellant did not stop work as a result of his hearing loss.

On January 31, 2002 the Office accepted appellant's acoustic ear trauma, which was later expanded to bilateral acoustic trauma (explosive). On February 7, 2002 he filed a claim for a schedule award.

In a report dated February 11, 2002, Dr. William P. Sage, a Board-certified otolaryngologist, stated that appellant had sustained a significant hearing loss, probably due in great part to his noise exposure. He recommended bilateral digital hearing aids. Results from an audiometric test taken that day and an attending physician's report were attached.

On March 18, 2002 an Office medical adviser noted that Dr. Sage's report was deficient because it did not include the date and type of calibration of the audiometer, the license and certification numbers of the audiologist and verification signatures by the physician and audiologist.

In response, Dr. Sage resubmitted his February 11 and 12, 2002 reports, completed an Office form regarding audiometric testing and submitted certifications regarding the audiologist.

By letter dated April 23, 2002, the Office authorized hearing aids and associated services. On April 25, 2002 the Office requested Dr. Sage to provide additional information regarding his report.

On June 27, 2002 the Office referred appellant, his medical records, a statement of accepted facts and a list of specific questions to Dr. Michael Jaindl, a Board-certified otolaryngologist, for a second opinion evaluation. In a report dated July 29, 2002, he stated that he had reviewed the results of an audiogram obtained that day and advised that appellant had a 31.5 percent right ear hearing loss and a 1.5 percent left ear hearing loss which resulted in a 26.5 percent binaural hearing loss. Dr. Jaindl noted that appellant had tinnitus, which impacted his ability to perform activities of daily living and, therefore, added 5 percent to the hearing loss for a total impairment rating of a 31.5 percent binaural hearing loss. The date of maximum medical improvement was listed as July 29, 2002. Audiometric testing that day revealed the following decibels losses at 500, 1,000, 2,000 and 3,000 cycles per second: 30, 10, 60 and 85 decibels on the right and 15, 5, 15 and 70 decibels on the left. In a report dated July 29, 2002, a clinical audiologist noted that the audiometric equipment had been calibrated on January 21, 2002 and that, appellant had been free from significant noise exposure for more than 16 hours.

On September 11, 2002 the Office referred the medical record to an Office medical adviser for review. In reports dated October 15 and 23, 2002, the Office medical adviser found that appellant had a seven percent binaural hearing loss and recommended hearing aids.

On January 3, 2003 the Office awarded appellant a seven percent schedule award for binaural hearing loss. The award was for 14 weeks and ran from July 29 to November 3, 2002.

On January 4, 2003 appellant requested an oral hearing and submitted additional evidence including audiogram test results from December 1982 to October 2000. A hearing was held on May 15, 2003.

On August 25, 2003 the Office hearing representative issued a decision affirming the Office's January 3, 2003 decision.

LEGAL PRECEDENT

The schedule award provisions of the Federal Employees' Compensation Act¹ provide for compensation to employees sustaining impairment from loss or loss of use of, specified members of the body. 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 determination is a matter which rests in the sound discretion of the Office. For consistent results and to ensure equal justice, the Board has authorized 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* has been adopted by the Office as a standard for evaluation of schedule losses and the Board has concurred in such adoption.²

The Office evaluates industrial hearing loss in accordance with the standards contained in the A.M.A., *Guides*. 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. 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. The remaining amount is multiplied by a factor of 1.5 to arrive at the percentage of monaural hearing loss. 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. The Board has concurred in the Office's adoption of this standard for evaluating hearing loss.³

ANALYSIS

The Office medical adviser properly applied the Office's standardized procedures to the July 29, 2002 audiogram performed for Dr. Jaindl. Testing for the right ear revealed decibel losses of 30, 10, 60 and 85 respectively. These decibel losses were

¹ 5 U.S.C. §§ 8101-8193.

² *Bernard A. Babcock, Jr.*, 52 ECAB 143 (2000).

³ *Reynaldo R. Lichtenberger*, 52 ECAB 462 (2001).

totaled at 185 and divided by 4 to obtain the average hearing loss at those cycles of 46.25. The average of 46.25 decibels was then reduced by 25 decibels, (the first 25 decibels were discounted as discussed above) to equal 21.25 decibels for the right ear. The 21.25 was multiplied by 1.5 resulting in a 31.875 loss. The 31.875 loss was properly rounded up to a 32 percent monaural (right ear) loss. Testing for the left ear at frequency levels of 500, 1,000, 2,000 and 3, 000 cycles per second revealed decibel losses of 15, 5, 15 and 70 decibels respectively. These decibel losses were totaled at 105 decibels and divided by 4 to obtain the average hearing loss at those cycles of 26.25 decibels. The average of 26.25 decibels was then reduced by 25 decibels to equal 1.25 decibels for the left ear. The 1.25 was multiplied by 1.5 resulting in a 1.9 loss. To determine binaural hearing loss, the lesser loss, 1.9, is multiplied by 5 and then added to the greater loss, 31.9. This result is divided by 6 for a binaural hearing loss estimate of 7 percent.

The medical evidence reveals that, after applying the relevant standards of the A.M.A., *Guides* and rounding to whole figures, appellant has a 32 percent monaural hearing loss in his right ear, a 1 percent monaural hearing loss in his right ear and a 7 percent binaural hearing loss.

The schedule award provisions of the Act specifies the number of weeks of compensation to be awarded for loss of hearing. For total loss of hearing in one ear, the Act provides for 52 weeks of compensation, for total loss of hearing in both ears, the Act provides for 200 weeks of compensation. Any loss less than a total loss is compensated at a proportionate rate, so a 7 percent binaural hearing loss equals 14 weeks of compensation or 7 percent of 200 weeks.⁴

The Board notes, however, that FECA Program Memorandum No. 181 (issued November 26, 1974) provides:

“On occasion, the allowances for loss of hearing in each ear, if computed separately, may be greater than the combined value of bilateral hearing loss.”

In such cases, the employee should be given the benefit of the more favorable allowance, as prescribed in the awards for hands and feet in FECA Program Memorandum No. 134. The claimant should be compensated in accordance with the scheduled allowances for the sum of loss of hearing in each ear.⁵

Further, regarding tinnitus, the A.M.A., *Guides* provides:

“Tinnitus in the presence of unilateral or bilateral hearing impairment may impair speech discrimination. Therefore, add up to five percent for tinnitus in the presence of measurable hearing loss if the tinnitus impacts the ability to perform activities of daily living.”⁶

⁴ 5 U.S.C. § 8107(c)(13), (c)(19).

⁵ *Jeffrey J. Stickney*, 51 ECAB 616 (2000).

⁶ A.M.A., *Guides* at 246.

In the present case, the Office medical adviser did not apply FECA Program Memorandum No. 181 to the audiometric results reported by Dr. Jaindl, nor did he consider his tinnitus finding. For this reason, the case will be remanded to the Office to recalculate the schedule award for appellant's hearing loss.

CONCLUSION

The Board will set aside the decisions to remand the case to the Office for further development in conformance with this decision.

ORDER

IT IS HEREBY ORDERED THAT the August 25 and January 3, 2003 decisions of the Office of Workers' Compensation Programs be, and hereby are, set aside and the case remanded for further action in accordance with this decision.

Issued: January 5, 2004
Washington, DC

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member