United States Department of Labor
Employees' Compensation Appeals Board

STANFORD GORRIN, Appellant **and** **DEPARTMENT OF JUSTICE, U.S. MARSHALS SERVICE, Los Angeles, CA, Employer**	**Docket No. 04-629** **Issued: May 27, 2004**

Appearances:
Stanford Gorrin, 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 January 5, 2004 appellant filed a timely appeal from the Office of Workers' Compensation Programs' merit decisions dated February 11 and December 2, 2003 which denied his claim for a schedule award for a binaural hearing loss. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.[1]

ISSUE

The issue is whether appellant is entitled to a schedule award under the Federal Employees' Compensation Act for a binaural loss of hearing.

FACTUAL HISTORY

On October 13, 2000 appellant, then a 69-year-old retired federal marshal, filed an occupational disease claim alleging that he sustained a bilateral hearing loss and tinnitus causally

[1] 5 U.S.C. §§ 8101-8193.

related to noise exposure during his federal employment. Appellant implicated noise exposure to firearms on various ranges, outdoor and indoor, from 1974 until June 1, 1994 when he retired, and noise in cellblocks and during prisoner airlifts.

Appellant submitted a January 17, 2001 audiometric report from Dr. Brad S. Nitzberg, a Board-certified otolaryngologist, which did not contain the calibration data and did not provide measurement of bilateral hearing thresholds at 3,000 cycles per second (cps). The test did provide tympanogram results and speech reception thresholds which were within normal limits. Appellant also provided a January 22, 2001 audiometric report from Dr. Howard D. Zipper, a Board-certified otolaryngologist, that also did not contain calibration data, but which did provide speech reception thresholds and discrimination scores. Tympanogram results were not provided. Dr. Zipper noted that appellant had the following decibel thresholds at the frequencies 500, 1,000, 2,000, and 3,000 cps: 15, 10, 15 and 25 decibels on the right, and 15, 15, 10 and 30 decibels on the left.

On September 27, 2001 the Office accepted that appellant sustained a bilateral hearing loss. The Office advised that it was unable to determine whether appellant was entitled to a schedule award, because the audiograms of record lacked bilateral hearing threshold measurements at 3,000 cps. The Office referred appellant to his attending physician, Dr. Bruce S. Selden, a Board-certified otolaryngologist, for additional audiometric testing at the frequency of 3,000 cps.

On February 25, 2002 appellant underwent an additional audiogram at Dr. Selden's office testing at all of the accepted frequencies. The following decibel thresholds were measured at the frequencies 500, 1,000, 2,000, and 3,000 cps: 20, 10, 15 and 30 decibels on the right, and 15, 20, 25 and 35 decibels on the left. Speech reception thresholds and discrimination scores were provided.

These audiometric results were referred by the Office to Dr. David N. Schindler, a Board-certified otolaryngologist and medical consultant, for reviewing. By report dated May 3, 2002, Dr. Brian E. Schindler, a Board-certified otolaryngologist in practice with Dr. David Schindler, noted that appellant's testing demonstrated bilateral high frequency sensorineural hearing loss, with good correlation between speech reception thresholds and the pure tone averages. He reviewed the audiometric testing results and calculated that appellant had a zero percent loss in the right ear, a zero percent loss in the left ear and a zero percent binaural loss. He added that he could accept these thresholds as reliable if, when contacting Dr. Selden's office, it was determined that the audiometer had been calibrated within the last year. In a report dated June 21, 2002, Dr. Schindler opined that appellant's tinnitus most likely had been caused by his noise-induced hearing loss. The Office subsequently contacted Dr. Selden's office and determined that the audiometer had been calibrated within the preceding year.

By decision dated February 11, 2003, the Office denied appellant's claim for a schedule award finding that his bilateral hearing loss was not ratable under the Act.

On March 3, 2003 appellant requested an oral hearing before an Office hearing representative. A hearing was held on October 23, 2003 at which appellant testified. By

decision dated December 2, 2003, the hearing representative affirmed the Office's February 11, 2003 decision finding that appellant's binaural loss of hearing was not ratable under the Act.

LEGAL PRECEDENT

The schedule award provision of the Act and its implementing regulation[2] set forth the number of weeks of compensation payable to employees sustaining permanent impairment from loss, or loss of use, of scheduled members or functions of the body. However, the Act does not specify the manner in which the percentage of loss of a member shall be determined. 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. The American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) has been adopted by the implementing regulation as the appropriate standard for evaluating schedule losses.[3]

The Office evaluates industrial hearing loss in accordance with the standards contained in the A.M.A., *Guides.*[4] Using the frequencies of 500, 1,000, 2,000, and 3,000 cps, the losses at each frequency are added and averaged.[5] 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.[6] The remaining amount is multiplied by a factor of 1.5 to arrive at the percentage of monaural hearing loss.[7] 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.[8] The Board has concurred in the Office's adoption of this standard for evaluating hearing loss.[9]

The Office has set forth requirements for the medical evidence to be used in evaluating occupational hearing loss claims. The requirements, as set forth in the Office's Federal (FECA) Procedure Manual, provide that the employee undergo audiological evaluation and otological examination; that the audiological testing precede the otologic examination; that the audiological evaluation and otologic examination be performed by different individuals as a method of evaluating the reliability of the findings; that the clinical audiologist and otolaryngologist be

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[2] *See* 20 C.F.R. § 10.404 (1999).

[3] *Id.*

[4] *See* A.M.A., *Guides* at 250 (5th ed. 2001).

[5] *Id.*

[6] *Id.*

[7] *Id.*

[8] *Id.*

[9] *Donald E. Stockstad,* 53 ECAB ___ (Docket No. 01-1570, issued January 23, 2002), *petition for recon. granted (modifying prior decision)* Docket No. 01-1570 (issued August 13, 2002).

certified; that all audiological equipment authorized for testing meet the calibration protocol contained in the accreditation manual of the American Speech and Hearing Association that the audiometric test results include both bone conduction and pure-tone air conduction thresholds; speech reception thresholds and monaural discrimination scores; and that the otolaryngologist's report include the date and hour of examination; date and hour of the employee's last exposure to loud noise; a rationalized medical opinion regarding the relationship of the hearing loss to employment-related noise exposure; and a statement on the reliability of the tests conducted.[10]

The Act provides for the payment of a schedule award for permanent loss of hearing and the Board has held that a schedule award is payable for tinnitus to the extent that such condition has caused or contributed to a permanent and ratable loss of hearing.[11] The A.M.A., *Guides* allows for an award for tinnitus "in the presence of measurable hearing loss if the tinnitus impacts the ability to perform activities of daily living."[12]

ANALYSIS

Dr. Schindler applied the Office's standardized procedures to the audiogram obtained by Dr. Selden on February 25, 2002. Testing for the right ear at frequencies of 500, 1,000, 2,000, and 3,000 cps revealed losses of 20, 10, 15 and 30 decibels, respectively. These losses were totaled at 75 decibels and divided by 4 to arrive at an average hearing loss of 18.75 decibels. The average loss was reduced by 25 decibels (the first 25 decibels are discounted, as discussed above) to equal 0 decibels, which was multiplied by 1.5 to arrive at a 0 percent hearing loss for the right ear. Testing for the left ear at frequencies of 500, 1,000, 2,000, and 3,000 cps revealed losses of 15, 20, 25 and 35 decibels, respectively. These losses were totaled at 95 decibels and divided by 4 to arrive at an average hearing loss of 23.75 decibels. The average loss was reduced by 25 decibels (the first 25 decibels are discounted, as discussed above) to equal 0 decibels, which was multiplied by 1.5 to arrive at a 0 percent hearing loss for the left ear.

Dr. Schindler applied the Office's standardized procedures to correctly calculate appellant's binaural hearing loss at zero percent. Although appellant has sustained a binaural hearing loss, the extent of the loss is not enough to impair his ability to hear everyday sounds under everyday conditions or to entitle him to a schedule award.

Appellant testified that his hearing loss and tinnitus was disabling, but he failed to submit sufficient medical evidence to support that his hearing loss is any greater than that determined, or that tinnitus contributed to any ratable loss of hearing. The audiogram results from Dr. Zipper were resubmitted. However, the audiometric test results obtained by Dr. Zipper and Dr. Nitzberg did not conform to the Office's standards and failed to include hearing loss thresholds at 3,000 cps.

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

[11] *Charles Joseph Kellerman*, 32 ECAB 333 (1980); *John T. Bradley*, 25 ECAB 348 (1974); *see Juan A. Trevino*, 54 ECAB ____ (Docket No. 02-1602, issued January 17, 2003).

[12] American Medical Association, *Guides to the Evaluation of Permanent Impairment* (5th ed. 2001), Chapter 11.2a at 246.

Consequently, the medical evidence appellant submitted to support is insufficient to establish his claim.

Further appellant submitted a USA Today article on tinnitus, which has no probative value in this case.[13]

CONCLUSION

The audiometric testing results submitted by appellant do not demonstrate a ratable loss of hearing, and he has not presented any evidence that the tinnitus, which, in the presence of a measurable hearing loss, impacts his ability to perform activities of daily living. He has not established entitlement to a schedule award for binaural hearing loss or for tinnitus.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated February 11 and December 2, 2003 be and are affirmed.

Issued: May 27, 2004
Washington, DC

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

[13] *See Ronald M. Cokes,* 46 ECAB 967 (1995); *Ruby I. Fish*, 46 ECAB 276 (1994) (textual evidence or excerpts from publications have little probative value is establishing the level of appellant's binaural loss of hearing as they are of general application, and are not determinative of appellant's specific hearing loss related to tinnitus in this case).