

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

DAVID E. McPHERSON, Appellant

and

**DEPARTMENT OF THE AIR FORCE,
WRIGHT-PATTERSON AIR FORCE BASE,
Dayton, OH, Employer**

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**Docket No. 04-1387
Issued: September 15, 2004**

Appearances:
David E. McPherson, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chairman
COLLEEN DUFFY KIKO, Member
DAVID S. GERSON, Alternate Member

JURISDICTION

On May 3, 2004 appellant filed a timely appeal from a merit decision of the Office of Workers' Compensation Programs dated April 6, 2004 finding that he had a two percent hearing loss of the left ear for which he received a schedule award. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the schedule award issue.

ISSUE

The issue is whether appellant has more than a two percent impairment hearing loss of the left ear for which he had received a schedule award.

FACTUAL HISTORY

On July 3, 2003 appellant, then a 55-year-old boiler plant worker, filed a claim alleging that he sustained binaural hearing loss while in the performance of duty. On September 3, 2003 the Office referred appellant, a statement of accepted facts and medical records to Dr. David T. Ryu, a Board-certified otolaryngologist, for a second opinion evaluation. In a report dated September 26, 2003, Dr. Ryu stated that appellant had work-related bilateral sensorineural

hearing loss and tinnitus, and supported his opinion based on an audiogram evaluation dated September 17, 2003. The record includes an October 22, 2002 report from Dr. Robert Goldenberg, appellant's attending Board-certified otolaryngologist, in which he stated that appellant "has a progressive loss of hearing ... and has had tinnitus present which is not necessarily lateralized or localized to either ear." In a follow-up report dated December 3, 2002, Dr. Goldenberg stated that appellant's inner ear function studies revealed a central nervous system pathology but no indication of a peripheral labyrinthine disorder, noting further that appellant was in no acute distress and was capable of working at full capacity with no restrictions.

In a decision dated October 6, 2003, the Office accepted appellant's claim for a bilateral sensorineural hearing loss. On December 18, 2003 appellant filed a claim for a schedule award. On February 21, 2004 the Office medical adviser reviewed appellant's medical record and recommended a 1.9 percent monaural left ear hearing loss and a 5 percent impairment for tinnitus. The Office on April 6, 2004 awarded appellant a schedule award for a 2 percent hearing loss of the left ear for a period of 7.28 days from September 17 to 24, 2003.

LEGAL PRECEDENT

Section 8107 of the Federal Employees' Compensation Act sets forth the number of weeks of compensation to be paid for the permanent loss of use of specified members, functions and organs of the body.¹ The Act, however, does not specify the manner by which the percentage loss of a member, function or organ shall be determined. To ensure consistent results and equal justice under the law, good administrative practice requires the use of uniform standards applicable to all claimants. The implementing regulations have adopted the American Medical Association, *Guides to the Evaluation of Permanent Impairment* as the appropriate standard for evaluating schedule losses.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 hertz (Hz), the losses at each frequency are added up and averaged.³ 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.⁴ The remaining amount is multiplied by a factor of 1.5 to arrive at the percentage of monaural hearing loss.⁵ 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

¹ 5 U.S.C. § 8107.

² 20 C.F.R. § 10.404 (1999).

³ A.M.A., *Guides* 250 (5th ed. 2001).

⁴ *Id.*

⁵ *Id.*

arrive at the amount of the binaural hearing loss.⁶ The Board has concurred in the Office's adoption of this standard for evaluating hearing loss.⁷

Regarding the finding that appellant sustained tinnitus, the A.M.A., *Guides* states that “[t]innitus 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.”⁸

ANALYSIS

In reviewing appellant's September 17, 2003 audiogram, the frequency levels recorded at 500, 1,000, 2,000 and 3,000 Hz revealed decibel losses of 15, 15, 10 and 35, respectively, for a total of 75 decibels. This figure, when divided by 4, results in an average hearing loss of 18.75 decibels. The average of 18.75 decibels was then reduced by 25 decibels, which resulted in a 0 percent monaural hearing loss of the right ear. Testing for the left ear at the frequency levels of 500, 1,000, 2,000 and 3,000 Hz revealed decibel losses of 10, 15, 30 and 50, respectively, for a total loss of 105 decibels which, when divided by 4, results in an average 26.25 decibels. When reduced by the 25 decibel fence, this results in 1.25 which is then multiplied by the factor of 1.5 which results in a 1.875 percent monaural hearing loss, rounded up to 2 percent, of the left ear. Accordingly, the medical adviser properly relied on the Office's standardized procedures in determining that appellant had a 2 percent left ear hearing loss and a nonratable right ear hearing loss.

The record also includes reports from Dr. Goldenberg and the Office medical adviser which diagnose tinnitus. The Office medical adviser recommended an additional five percent impairment rating based on appellant's ten-year tinnitus condition.⁹ However, none of the reports established that his tinnitus impacted on his daily living. In an October 22, 2001 report, Dr. Goldenberg stated that appellant had tinnitus but did not attribute an impact of daily living to this condition. Indeed, in a follow-up report on December 3, 2002, the doctor noted that appellant's imbalance was probably caused by a central nervous system pathology and noted that he was working at “full capacity.” Further, Dr. Ryu, the second opinion physician, merely marked a form report with an “x” indicating the presence of tinnitus. Neither these reports nor the report of the Office medical adviser established that appellant was entitled to an additional schedule award due to tinnitus.

⁶ *Id.*

⁷ *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).

⁸ A.M.A., *Guides* at 246 (5th ed. 2001); *Juan Trevino*, 54 ECAB ____ (Docket No. 02-1602, issued January 17, 2003).

⁹ *Id.*

CONCLUSION

Appellant failed to establish that he has more than a two percent permanent hearing loss in the left ear.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated April 6, 2004 is affirmed.

Issued: September 15, 2004
Washington, DC

Alec J. Koromilas
Chairman

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member