

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

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**DANIEL E. SHOWN, Appellant** )  
 )  
**and** )  
 )  
**DEPARTMENT OF THE NAVY, PUGET** )  
**SOUND NAVAL SHIPYARD, Bremerton, WA,** )  
**Employer** )  
\_\_\_\_\_ )

**Docket No. 05-610**  
**Issued: June 16, 2005**

*Appearances:*  
*Daniel E. Shown, pro se*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:  
ALEC J. KOROMILAS, Chairman  
DAVID S. GERSON, Alternate Member  
MICHAEL E. GROOM, Alternate Member

**JURISDICTION**

On January 18, 2005 appellant filed a timely appeal from a November 24, 2004 schedule award decision from the Office of Workers' Compensation Programs granting him an award for a four percent binaural hearing loss. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the schedule award decision.

**ISSUE**

The issue is whether appellant is entitled to a schedule award for more than a four percent binaural hearing loss.

**FACTUAL HISTORY**

On July 29, 2003 appellant, then a 56-year-old retired nuclear engineering technician, filed an occupational disease claim alleging that on April 2, 2003 he became aware that he had hearing loss due to noise exposure during the course of his federal employment. He submitted an audiogram dated July 21, 2003 in support of his claim.

Appellant further submitted the results of audiograms obtained by the employing establishment dated December 1969 to February 4, 1993. He related that he retired from the employing establishment on April 2, 1993 and was last exposed to the conditions alleged to have caused his condition in March 1993.

The employing establishment submitted a history of appellant's noise exposure.

The Office referred appellant, together with a statement of accepted facts, for an evaluation to determine whether he had an employment-related loss of hearing. On May 18, 2004 Dr. Gerald G. Randolph, a Board-certified otolaryngologist, evaluated appellant and obtained an audiogram. Dr. Randolph discussed appellant's work history and noted that he had occasional tinnitus which was "not a problem." He opined that appellant's audiogram "reflects hearing loss with an audiometric configuration compatible with hearing loss due to significant past noise exposure." Dr. Randolph reviewed the audiograms obtained from the employing establishment dated December 30, 1969 to February 4, 1993. He noted that appellant had hearing loss present on the December 30, 1969 audiogram and stated:

"The claimant retired April 2, 1993 from the [employing establishment]. Utilizing the same formula on [the] industrial audiogram performed February 4, 1993, we find that [he] has a ratable hearing loss of 5.625 percent in his right ear, 5.625 percent in his left ear, with a binaural hearing loss ratable at 5.63 [percent]. It therefore becomes obvious that the claimant's hearing loss did increase in severity between 1969 and 1993. The claimant's hearing loss is in excess of that which would normally be predicted on the basis of presbycusis.

"Since the claimant's retirement, his hearing has continued to degenerate. Utilizing the same formula on audiogram performed in this office May 18, 2004, [he] currently has a ratable hearing loss of 26.25 percent in his right ear, 28.125 percent in the left ear, with a binaural hearing loss ratable at 26.56 percent. The increase in the claimant's hearing loss since 1994 would not be due to industrial noise exposure at the [employing establishment]."

Dr. Randolph concluded, "[t]he workplace exposure, as described in the material provided, was of sufficient intensity and duration to have aggravated the claimant's hearing loss." He recommended hearing aids.

On July 7, 2004 the Office notified appellant that it had accepted his claim for bilateral neurosensory hearing loss.

On July 27, 2004 an Office medical adviser reviewed Dr. Randolph's report and concluded that appellant was entitled to a schedule award for a four percent binaural loss of hearing based on his February 4, 1993 audiogram.

Appellant filed a claim for a schedule award on October 20, 2004. He submitted an audiogram dated October 20, 2004 performed in conjunction with an examination to determine the best hearing aid system for him.

By decision dated November 24, 2004, the Office granted appellant a schedule award for a four percent binaural loss of hearing. The Office determined that the date of maximum medical improvement was February 4, 2003. The period of the award ran from July 21 to September 14, 2003.

### **LEGAL PRECEDENT**

The schedule award provision of the Federal Employees' Compensation Act<sup>1</sup> provides for compensation to employees sustaining permanent 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 results in the sound discretion of the Office. For consistent results and to insure 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*, (5<sup>th</sup> ed. 2001) (A.M.A., *Guides*), has been adopted by the Office for evaluating schedule losses and the Board has concurred in such adoption.<sup>2</sup>

The Office evaluates industrial hearing loss in accordance with the standards contained in the A.M.A., *Guides*.<sup>3</sup> 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.<sup>4</sup> The remaining amount is multiplied by a factor of 1.5 to arrive at the percentage of monaural hearing loss.<sup>5</sup> 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.<sup>6</sup> The Board has concurred in the Office's adoption of this standard for evaluating hearing loss.<sup>7</sup>

In order to establish a work-related loss of hearing, the Office requires that the employee undergo both audiometric and otologic examination; that the audiometric testing precede the otologic examination; that the audiometric testing be performed by an appropriately certified audiologist; that the otologic examination be performed by an otolaryngologist certified or eligible for certification by the American Academy of Otolaryngology and that the audiometric and otologic examination be performed by different individuals as a method of evaluating the reliability of the findings. Office procedures require that all audiological equipment authorized for testing meet the calibration protocol contained in the accreditation manual of the American Speech and Hearing Association and that audiometric test results include both bone conduction

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<sup>1</sup> 5 U.S.C. §§ 8101-8193.

<sup>2</sup> See 20 C.F.R. § 10.404; *Bernard A. Babcock, Jr.*, 52 ECAB 143 (2000).

<sup>3</sup> A.M.A., *Guides* at 250.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Reynaldo R. Lichtenberger*, 52 ECAB 462 (2001).

and pure tone air conduction thresholds, speech reception thresholds and monaural discrimination scores. The otolaryngologist's report must include: date and hour of examination, date and hour of employee's last exposure to loud noise, a rationalized medical opinion regarding the relation of the hearing loss to the employment-related noise exposure and a statement of the reliability of the tests.<sup>8</sup>

The Office procedure manual provides:

"Noise-induced hearing loss does not typically progress after exposure to noise ceases. A claim with an audiogram showing less than a 25 decibel loss soon after exposure ceases and a second audiogram showing a ratable loss may be denied if the DMA [district medical adviser] provides a well-rationalized opinion."<sup>9</sup>

Proceedings under the Act are not adversarial in nature and the Office is not a disinterested arbiter. While the claimant has the burden to establish entitlement to compensation, the Office shares responsibility to see that justice is done.<sup>10</sup> Once the Office undertakes to develop the medical evidence further, it has the responsibility to do so in a proper manner.<sup>11</sup>

### ANALYSIS

Appellant alleged that he sustained hearing loss due to factors of his federal employment. The Office referred appellant to Dr. Randolph for a second opinion evaluation. In a report dated May 18, 2004, Dr. Randolph reviewed appellant's work history and the results of audiograms obtained by the employing establishment from 1969 to 1993. He determined that appellant's hearing loss increased between 1969 and the date of his retirement in 1993 and further increased between 1993 and the date of his examination in May 2004. Dr. Randolph concluded that appellant had a 5.63 percent binaural hearing loss prior to his April 2, 1993 retirement based on the results of a February 4, 1993 audiogram. He further found that appellant had a 26.56 percent hearing loss based on the audiogram performed in his office on May 18, 2004. Dr. Randolph stated, "The increase in the claimant's hearing loss since 1993 would not be due to industrial noise exposure at the [employing establishment]."

The Office medical adviser did not calculate appellant's schedule award based on the audiogram dated May 18, 2004, which was performed on behalf of Dr. Randolph. Rather, the Office medical adviser applied the Office's standardized procedures to the results of an earlier audiogram dated February 4, 1993 taken by the employing establishment a few months prior to appellant's retirement on April 2, 1993.

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<sup>8</sup> See Federal (FECA) Procedure Manual, Part 3 -- Medical, *Requirements for Medical Reports*, Chapter 3.600.8(a) (September 1996); see also *Luis M. Villanueva*, 54 ECAB \_\_\_\_ (Docket No. 03-977, issued July 1, 2003).

<sup>9</sup> Federal (FECA) Procedure Manual, Part 3 -- Medical, *Special Determinations*, Chapter 3.700.4(b)(3) (March 2001).

<sup>10</sup> *Jimmy A. Hammons*, 51 ECAB 219 (1999).

<sup>11</sup> *Melvin James*, 55 ECAB \_\_\_\_ (Docket No. 03-2140, issued March 25, 2004).

Although the Office medical adviser may review any audiogram of record in determining which one most accurately reflects appellant's employment-related hearing loss, the Office should not arbitrarily select one audiogram without explanation.<sup>12</sup> Board precedent contemplates that the Office will give rationale for selecting one audiogram over another.<sup>13</sup> Office procedures further contemplate that, while noise-induced hearing loss does not typically progress after exposure to noise ceases, the Office medical adviser must provide a well-rationalized opinion for selecting one audiogram over another in a situation where a nonratable hearing loss is shown on an audiogram soon after noise exposure ceases while a second audiogram shows a ratable loss.<sup>14</sup>

In this case, the Office medical adviser did not provide any explanation for selecting the results of the February 1993 audiogram, taken prior to appellant's retirement, over the more recent audiograms of record. Additionally, the Office referral physician, Dr. Randolph, also failed to provide adequate medical rationale explaining why appellant's increase in hearing loss subsequent to his retirement was not caused or aggravated by his employment. The Office medical adviser did not explain why the results of the employing establishment's February 1993 audiogram were reliable enough to accurately reflect appellant's employment-related hearing loss.<sup>15</sup>

Proceedings under the Act are not adversarial in nature, nor is the Office a disinterested arbiter.<sup>16</sup> While the claimant has the responsibility to establish entitlement to compensation, the Office shares responsibility in the development of the evidence. It has the obligation to see that justice is done.<sup>17</sup> Accordingly, once the Office undertakes to develop the medical evidence further, it has the responsibility to do so in the proper manner.<sup>18</sup>

Consequently, the case must be remanded for the Office to obtain a reasoned medical opinion regarding whether appellant's increased hearing loss after his retirement was employment related and which audiogram most accurately reflects appellant's employment-related hearing loss. Following this and such other development as deemed necessary, the Office shall issue a *de novo* decision.

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<sup>12</sup> See *Joshua A. Holmes*, 42 ECAB 321 (1990).

<sup>13</sup> See *Cecil E. Odell*, 41 ECAB 503 (1990).

<sup>14</sup> Federal (FECA) Procedure Manual, Part 3 -- Medical, *Special Determinations*, Chapter 3.700.4(b)(3) (March 2001). While appellant had a ratable hearing loss on his February 4, 1993 audiogram, obtained two months prior to the date his noise exposure ceased, the Office must still provide rationale for selecting one audiogram over another according to Board case law. See *Cecil E. Odell*, *supra* note 13.

<sup>15</sup> See *supra* note 9.

<sup>16</sup> *Vanessa Young*, 55 ECAB \_\_\_ (Docket No. 04-562, issued June 22, 2004).

<sup>17</sup> *Richard E. Simpson*, 55 ECAB \_\_\_ (Docket No. 04-14, issued May 3, 2004).

<sup>18</sup> *Melvin James*, *supra* note 11.

**CONCLUSION**

The Board finds that the case is not in posture for decision as the case must be remanded to the Office for further development on the extent of appellant's employment-related hearing loss.

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated November 24, 2004 is set aside and the case is remanded for further proceedings consistent with this opinion of the Board.

Issued: June 16, 2005  
Washington, DC

Alec J. Koromilas  
Chairman

David S. Gerson  
Alternate Member

Michael E. Groom  
Alternate Member