

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

HENRY F. DYER, Appellant

and

**DEPARTMENT OF THE ARMY, FORT
GILLEM, GA, Employer**

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**Docket No. 05-452
Issued: May 13, 2005**

Appearances:
Henry F. Dyer, 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
MICHAEL E. GROOM, Alternate Member

JURISDICTION

On October 21, 2004 appellant filed an appeal before the Board. He did not identify the date of the Office of Workers' Compensation Programs decision on appeal. The record contains a July 22, 2004 final decision on the merits of appellant's claim for an increased schedule award. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits this case.

ISSUES

The issues are: (1) whether the Office's July 22, 2004 letter constituted a final adverse decision; and (2) if so, whether appellant has more than a 53 percent binaural hearing loss, for which he received schedule awards on December 15, 1980 and July 20, 1988.

FACTUAL HISTORY

On March 15, 1979 appellant, then a 55-year-old pipefitter, filed an occupational disease claim for compensation (Form CA-2) alleging that he sustained hearing loss as a result of noise exposure during his federal employment. By decision dated December 15, 1980, the Office issued a schedule award for a 15 percent binaural hearing loss. The period of the award was 30

weeks of compensation commencing October 7, 1980. In a decision dated July 20, 1988, the Office issued a schedule award for an additional 38 percent binaural hearing loss. The period of the award was 76 weeks of compensation commencing November 3, 1987.

On February 18, 2004 the Office received a February 9, 2004 letter from appellant indicating that he was seeking compensation benefits for additional loss of hearing. Appellant indicated that he had been exposed to noise levels for 33 years and his hearing was almost completely gone. In a May 5, 2004 letter, appellant's spouse indicated that he was seeking compensation for his worsening hearing loss. By letter dated June 16, 2004, the Office acknowledged that it would review his file for eligibility for an increased schedule award upon receipt of medical evidence.

Appellant submitted a July 19, 2004 report from Dr. M. Edwin Davis, an otolaryngologist, and an audiogram dated April 14, 2004. Dr. Davis stated that appellant had a monaural hearing loss of 36 percent for the right ear, 31 percent for the left ear, or 32 percent binaural hearing loss. He stated that he believed the hearing loss was due to noise exposure. The audiogram reported hearing levels for the left ear of 30, 45, 65 and 75 decibels at frequencies of 500, 1,000, 2,000 and 4,000 hertz (Hz). For the right ear, the decibel levels were 35, 50, 65 and 80 at those frequencies. The audiogram did not provide results for 3,000 Hz.

By letter dated July 22, 2004, the Office stated that it received a fax transmission from appellant's congressional representative on July 22, 2004 concerning appellant's claim for an additional schedule award.¹ The Office noted that the medical evidence showed a 32 percent binaural hearing loss, but that appellant previously had received schedule awards for a 53 percent binaural hearing loss. The Office stated, "Therefore, there is not an increased hearing impairment documented at this time." No appeal rights were attached to the letter.

LEGAL PRECEDENT -- ISSUE 1

The Board's rules of procedure provide that the Board "has jurisdiction to consider and decide appeals from the final decision of the Office in any case arising under the [Federal Employees' Compensation] Act."² In considering whether a document constitutes a final decision, it is not the form but the "content and the intention" of the Office that is determinative.³

ANALYSIS -- ISSUE 1

The July 22, 2004 letter did not include appeal rights or formally indicate that it represented a final decision of the Office. However, the Office acknowledged that appellant was claiming an increased schedule award, found that the medical evidence did not show an impairment greater than that already received and concluded that no increased hearing loss had been documented.

¹ The evidence of record indicated that on July 22, 2004 the Office received the report of Dr. Davis by fax transmission from the congressional representative's office.

² 20 C.F.R. § 501.2(c).

³ See *Ralph Edmond Zollars*, 5 ECAB 617, 618 (1953) and the cases cited therein.

A claimant may request an increased schedule award at any time and is entitled to a final decision on the claim.⁴ The July 22, 2004 letter made an adverse finding with respect to the claim and there is no indication that the finding was interlocutory or otherwise pending further development. Accordingly, the Board finds that the July 22, 2004 letter constitutes a final decision on the merits of appellant's claim for an additional schedule award for his accepted hearing loss.

LEGAL PRECEDENT -- ISSUE 2

The Office evaluates industrial hearing loss in accordance with the standards contained in the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).⁵ Using the frequencies of 500, 1,000, 2,000 and 3,000 cycles per second, the levels at each frequency are added up and averaged.⁶ 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.⁷ The remaining amount is multiplied by a factor of 1.5 to arrive at the percentage of monaural hearing loss.⁸ 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.⁹ The Board has concurred in the Office's adoption of this standard for evaluating hearing loss.¹⁰

ANALYSIS -- ISSUE 2

The record indicates that appellant had received 106 weeks of compensation, representing a 53 percent binaural hearing loss.¹¹ The July 19, 2004 report from Dr. Davis opined that appellant had a 32 percent binaural hearing loss. Dr. Davis did not explain how he calculated the percentage of hearing loss and the Board notes that the April 14, 2004 audiogram did not provide testing at 3,000 Hz as required for hearing loss evaluations under the A.M.A., *Guides*. This medical evidence is of diminished probative value to the issue presented. There is no probative medical evidence of record showing that appellant has more than a 53 percent binaural hearing loss. Accordingly, the Board finds that the Office properly denied the claim for an increased schedule award.

⁴ See *Paul R. Reedy*, 45 ECAB 488 (1994).

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

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Donald E. Stockstad*, 53 ECAB 301 (2002); petition granted, Docket No. 01-1570 (issued August 13, 2002).

¹¹ 5 U.S.C. § 8107 provides for 200 weeks of compensation for complete loss of hearing in both ears.

CONCLUSION

The Board finds that the July 22, 2004 Office letter constituted a final decision with respect to a claim for an increased schedule award. The Board further finds that the medical evidence does not establish that appellant has more than a 53 percent binaural hearing loss, for which he received schedule awards on December 15, 1980 and July 20, 1988.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated July 22, 2004 is affirmed.

Issued: May 13, 2005
Washington, DC

Alec J. Koromilas
Chairman

Colleen Duffy Kiko
Member

Michael E. Groom
Alternate Member