

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

N.M., Appellant)

and)

**DEPARTMENT OF THE NAVY, PUGET
SOUND NAVAL SHIPYARD, Bremerton, WA,
Employer**)

**Docket No. 06-1964
Issued: December 12, 2006**

Appearances:

*John Eiler Goodwin, Esq., for the appellant
Office of Solicitor, for the Director*

Case Submitted on the Record

DECISION AND ORDER

Before:

DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On August 22, 2006 appellant filed a timely appeal from a September 13, 2005 decision of the Office of Workers' Compensation Programs granting a schedule award for hearing loss. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(3), the Board has jurisdiction over the merits of the claim.

ISSUE

The issue is whether appellant has established that he sustained greater than an 11 percent binaural hearing loss in the performance of duty, for which he received a schedule award. On appeal, appellant contends that the Office improperly required him to elect between receiving compensation benefits and benefits from the Department of Veterans Affairs.

FACTUAL HISTORY

On November 8, 2004 appellant, then a 57-year-old insulator, filed an occupational disease claim for binaural high frequency hearing loss due to hazardous noise exposure at work

on or before May 25, 1995. The employing establishment confirmed that, from 1989 to January 2005, appellant had occupational noise exposure greater than 84 dBA (decibels) for at least 30 days a year. Annual employing establishment audiograms from 1989 to 2001 showed an increasing binaural high frequency hearing loss. Appellant noted that he received benefits from the Department of Veterans Affairs for tinnitus sustained during service in the United States Navy from July 1966 to February 1989. He retired from the employing establishment on April 1, 2005.

On May 24, 2005 the Office referred appellant to Dr. Gerald G. Randolph, a Board-certified otolaryngologist, for a second opinion evaluation. A statement of accepted facts and the medical record were provided for the physician's review. In a June 14, 2005 report, Joy Nilsson, an audiologist, noted audiometric findings. Testing for the right ear at the frequency levels of 500, 1,000, 2,000 and 3,000 cycles per second (cps) revealed decibel losses of 25, 15, 20 and 65 respectively. Testing for the left ear at the frequency levels of 500, 1,000, 2,000 and 3,000 cps revealed decibel losses of 20, 15, 40 and 80 respectively. Dr. Randolph reviewed these findings and opined that these losses equaled a 9.37 percent hearing loss in the right ear and a 20.62 percent loss of hearing in the left ear. He calculated a binaural hearing loss of 11.25 percent. Dr. Randolph submitted a June 14, 2005 report finding a bilateral high frequency sensorineural hearing loss consistent with appellant's history of occupational noise exposure. He found that appellant had tinnitus that interfered "somewhat with the aspects of normal daily living during the day.... [Appellant] did receive compensation for tinnitus at the time he left the United States Navy. He also received hearing aids at that time." Dr. Randolph rated appellant's tinnitus at "no greater than two percent."

On June 27, 2005 the Office referred Dr. Randolph's report and audiometric findings to an Office medical adviser for calculation of impairment according to the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*). In a June 29, 2005 report, the Office medical adviser totaled the decibel losses for the right ear at the frequency levels of 500, 1,000, 2,000 and 3,000 cps of 25, 15, 20 and 65 to equal 125. He then divided this total by 4 to obtain the average hearing loss at those cycles of 31.25 decibels. The average of 31.25 decibels was then reduced by the 25 decibel "fence" to equal 6.25, which was multiplied by the established factor of 1.5 to compute a 9.38 percent loss of hearing for the right ear. The medical adviser then totaled the 20, 15, 40 and 80 decibel losses in the left ear at the frequency levels of 500, 1,000, 2,000 and 3,000 cps to equal 155. He then divided this total by 4 to obtain the average hearing loss at those cycles of 38.75 decibels. The average of 38.75 decibels was then reduced by 25 decibels to equal 13.75 which was multiplied by the established factor of 1.5 to compute a 20.63 percent loss of hearing for the left ear. The Office medical adviser then computed the binaural hearing loss by multiplying the lesser loss, 9.38 by 5, added this to the greater loss of 20.63, and divided this figure by 6 to arrive at an 11.30 percent binaural hearing loss, rounded down to equal an 11 percent binaural hearing loss. He recommended binaural hearing aids.¹

¹ In a July 13, 2005 report, Sinda Steedley, an audiologist, recommended binaural digital hearing aids. On August 8, 2005 the Office approved the purchase of binaural hearing aids.

In a June 27, 2005 letter, the Office advised appellant that he was required to elect “between the entitlement to a schedule award for tinnitus under [the Act] and the entire amount of the [Department of Veterans Affairs] award, which is for tinnitus.” On June 30, 2005 appellant elected to receive benefits from the Department of Veterans Affairs for tinnitus, effective May 25, 1995.

On July 5, 2005 the Office accepted that appellant sustained a bilateral hearing loss and tinnitus. Appellant claimed a schedule award on July 26, 2005.

By decision dated September 13, 2005, the Office granted appellant a schedule award for an 11 percent binaural hearing loss. The period of the award ran from June 14 to September 3, 2005.

LEGAL PRECEDENT

The schedule award provision of the Federal Employees’ Compensation Act² 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 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 A.M.A., *Guides* (5th ed. 2001), has been adopted by the Office for evaluating schedule losses and the Board has concurred in such adoption.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 up and averaged.⁵ The remaining amount is multiplied by a factor of 1.5 to arrive at the percentage of monaural hearing loss.⁶ 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.⁷ The Board has concurred in the Office’s adoption of this standard for evaluating hearing loss.⁸

² 5 U.S.C. §§ 8101-8193.

³ See 20 C.F.R. § 10.404; *Bernard A. Babcock, Jr.*, 52 ECAB 143 (2000).

⁴ A.M.A., *Guides* 250.

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ *Reynaldo R. Lichtenberger*, 52 ECAB 462 (2001).

ANALYSIS

The Office accepted that appellant sustained a binaural high frequency sensorineural hearing loss due to hazardous noise exposure at work. To determine appellant's entitlement to a schedule award, the Office obtained a second opinion report and audiometric test results from Dr. Randolph, a Board-certified otolaryngologist. The Board finds that Dr. Randolph used the appropriate portions of the A.M.A., *Guides* and accurately calculated an 11 percent binaural hearing loss. He also noted an additional impairment for tinnitus "no greater than two percent." An Office medical adviser concurred with Dr. Randolph's calculation of an 11 percent binaural hearing loss but did not provide any additional impairment for tinnitus. Based on the Office medical adviser's interpretation of Dr. Randolph's findings, the Office granted appellant a schedule award for an 11 percent binaural hearing loss. The Board finds that the Office properly found that appellant had an 11 percent binaural hearing loss due to hazardous noise exposures at work.

On appeal, appellant's counsel contends that appellant was entitled to a two percent schedule award for tinnitus in addition to his Department of Veterans Affairs benefits for tinnitus sustained in military service prior to 1989. He asserted that the Office should not have made appellant elect between the two types of benefits. The Board finds that appellant is not entitled to dual benefits. Section 8116 of the Act prevents payment of dual benefits where the Office has found that a disability was sustained in civilian federal employment and the Department of Veterans Affairs has held that the same disability was caused by military service. In such cases, the claimant must elect between the two.⁹ Appellant also asserts that the Office's procedure manual provides that the Office is not required to reduce a schedule award if the Department of Veterans Affairs "made an award for an earlier injury to the same member." However, the procedure manual clearly states that in such circumstance the word "injury" means an "earlier injury received while in [f]ederal civilian employment."¹⁰ In this case, the evidence demonstrates that appellant sustained tinnitus while in military service, prior to his federal civilian employment. Therefore, appellant is not entitled to receive a schedule award for tinnitus.

CONCLUSION

The Board finds that appellant has not established that he sustained greater than an 11 percent binaural hearing loss in the performance of duty, for which he received a schedule award.

⁹ 5 U.S.C. §§ 8116(a) and (b); *Allen W. Hermes*, 42 ECAB 435 (1992); *Adeline N. Etzel (Bernard E. Etzel)*, 21 ECAB 151 (1969).

¹⁰ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Dual Benefits*, Chapter 2.1000.8b(2)(a) (February 1995).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated September 13, 2005 is affirmed.

Issued: December 12, 2006
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board