

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

JOHN T. COUNIHAN, Appellant

and

**DEPARTMENT OF JUSTICE, DRUG
ENFORCEMENT ADMINISTRATION,
Washington, DC, Employer**

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**Docket No. 06-659
Issued: July 18, 2006**

Appearances:

*Thomas C. Robbins, pro se
Office of Solicitor, for the Director*

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On January 27, 2006 appellant filed a timely appeal from the Office of Workers' Compensation Programs' decisions dated April 4, 2005, granting a schedule award, July 27, 2005 decision, denying his request for a review of the written record and October 21, 2005 decision, denying his request for reconsideration. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the claim.

ISSUES

The issues are: (1) whether appellant has more than a four percent loss of hearing of the left ear; (2) whether the Office properly denied his request for a review of the written record; and (3) whether the Office properly denied appellant's request for reconsideration.

FACTUAL HISTORY

On July 12, 2004 appellant, then a 57-year-old supervisory criminal investigator, filed an occupational disease claim alleging that he sustained bilateral hearing loss causally related to firearms noise exposure at work. On March 4, 2005 he filed a claim for a schedule award.

The record contains a copy of audiometric test results performed for the employing establishment on May 17, 2004. The audiometric test results were not signed by an otolaryngologist and results of an otologic examination were not provided.

By decision dated September 28, 2004, the Office denied appellant's hearing loss claim. He requested reconsideration.

The Office referred appellant to Dr. Lester F. Shapiro, a Board-certified otolaryngologist, for an examination on January 4, 2005. In a January 6, 2005 report, he provided an impression of essentially normal hearing in the right ear for low-to-mid frequencies, with mild-to-moderate high frequency hearing loss, causally related to appellant's federal employment. The left ear showed work-related moderate sensorineural hearing loss in both mid and high frequencies. An audiogram performed on January 4, 2005 revealed the results of testing at the frequency levels of 500, 1,000, 2,000 and 3,000 cycles per second (cps); right ear decibels of 10, 5, 30 and 30; and left ear decibels of 20, 40, 40 and 35.

On January 27, 2005 an Office medical adviser reviewed the results of the audiometric testing performed on January 4, 2005 for Dr. Shapiro and applied the Office's standardized procedures. He totaled the decibels of 10, 5, 30 and 30 in the right ear for the frequency levels of 500, 1,000, 2,000 and 3,000 cps at 75 decibels and divided by 4 to obtain the average hearing loss of 18.75 decibels. This average was then reduced by 25 decibels to equal 0 decibels which was multiplied by the established factor of 1.5 to compute a 0 percent impairment of the right ear. The Office medical adviser totaled the losses of 20, 40, 40 and 35 in the left ear at 135 decibels and divided by 4 to obtain the average hearing loss of 33.75 decibels. This average was then reduced by 25 decibels to equal 8.75 which was multiplied by the established factor of 1.5 to compute a 13.125 percent impairment of the left ear. However, the medical adviser stated that, based on a note from an audiologist, appellant had a left ear hearing loss of 3.75 percent, according to a May 17, 2004 audiometric test.¹

On February 14, 2005 the Office accepted binaural hearing loss as causally related to appellant's employment.

By decision dated April 4, 2005, the Office granted appellant a schedule award for 2.08 weeks for a four percent loss of hearing of the left ear.

¹ Accompanying the rating by the Office medical adviser was a note from an audiologist who stated that the January 4, 2005 audiometric results were inconsistent and recommended that the May 17, 2004 audiometric test results be used for determining appellant's hearing loss impairment in the left ear. She found that appellant had a 3.75 percent left ear hearing loss.

By decision dated July 27, 2005, the Office denied appellant's request for a review of the written record. By decision dated October 21, 2005, the Office denied appellant's request for reconsideration.

LEGAL PRECEDENT -- ISSUE 1

The schedule award provisions of the Federal Employees' Compensation Act² and its implementing regulation³ sets 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 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 losses.⁴

The Office evaluates industrial hearing loss in accordance with the standards contained in the A.M.A, *Guides*.⁵ Using the frequencies of 500, 1,000, 2,000 and 3,000 cps, the losses 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

² 5 U.S.C. § 8107.

³ 20 C.F.R. § 10.404.

⁴ *Id.*

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

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

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

ANALYSIS -- ISSUE 1

The Office medical adviser reviewed the results of the audiometric testing performed on January 4, 2005 for Dr. Shapiro and correctly applied the Office's standardized procedures. He totaled the decibels of 10, 5, 30 and 30 in appellant's right ear for the frequency levels of 500, 1,000, 2,000 and 3,000 cps at 75 decibels and divided by 4 to obtain the average hearing loss of 18.75 decibels. This average was then reduced by 25 decibels to equal 0 decibels which was multiplied by the established factor of 1.5 to compute a 0 percent impairment of the right ear. The Office medical adviser totaled the losses of 20, 40, 40 and 35 in the left ear at 135 decibels and divided by 4 to obtain the average hearing loss of 33.75 decibels. This average was then reduced by 25 decibels to equal 1.25 decibels which was multiplied by the established factor of 1.5 to compute a 13.125 percent impairment of the left ear, rounded to 13 percent.

The Board finds that appellant has a 13 percent loss of hearing of the left ear and no ratable impairment of the right ear. The Office medical adviser correctly followed Office procedures in determining that appellant had no ratable impairment of his right ear. However, the Office erred in using the May 17, 2004 audiometric test results in determining appellant's left ear impairment. The May 17, 2004 test results were not reviewed by a physician and results of an otologic evaluation were not provided.¹¹ The Board has held that unsigned medical reports are of no probative value.¹² Due to these deficiencies, the May 17, 2004 test results cannot be used in determining appellant's left ear hearing loss. The Board finds that the Office medical adviser's calculation of a 13.125 percent impairment in appellant's left ear, based on the January 4, 2005 test results obtained for Dr. Shapiro, was correctly based on Office standardized procedures for determining hearing loss impairment.

CONCLUSION

The Board finds that appellant has a 13 percent loss of hearing of the left ear. On remand, the Office should calculate the additional compensation owed to appellant based on a 13 percent loss of hearing of the left ear.¹³

¹¹ See *Luis M. Villanueva*, 54 ECAB 666 (2003) (the Board requires both audiometric and otologic examinations for a determination of hearing loss impairment and the otologic evaluation must be performed by a certified otolaryngologist).

¹² See *Vicky C. Randall*, 51 ECAB 357 (2000); *Merton J. Sills*, 39 ECAB 572 (1988).

¹³ In light of the Board's resolution of the first issue, the second and third issues are moot.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated October 21, July 27 and April 4, 2005 are set aside and the case is remanded for further action consistent with this opinion.

Issued: July 18, 2006
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

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