

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

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**D.S., Appellant**

**and**

**DEPARTMENT OF THE NAVY, REGIONAL  
FIRE-RESCUE, NORTHWEST DISTRICT,  
Chesapeake, VA, Employer**

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**Docket No. 07-282  
Issued: April 23, 2007**

*Appearances:*  
*Appellant, pro se*  
*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 November 13, 2006 appellant filed a timely appeal from a schedule award decision of the Office of Workers' Compensation Programs dated October 24, 2006. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

**ISSUE**

The issue is whether appellant has greater than a five percent hearing loss of both ears for which he has received a schedule award. On appeal, appellant contends that the pay rate used for schedule award compensation purposes was incorrect.

**FACTUAL HISTORY**

On January 27, 2004 appellant, then a 54-year-old retired supervisory firefighter, filed a Form CA-2, occupational disease claim, alleging that factors of his federal employment caused hearing difficulty and tinnitus. In an attached statement, he described his employment history noting that he began civilian employment with the employing establishment in 1975 and became

a firefighter in 1977. Appellant submitted a Notice of Personnel Action, Form 50, noting that he retired effective February 23, 2002 with a total pay rate of \$42,416.00. He also submitted employing establishment audiograms dating from July 12, 1974 to June 5, 2001 and additional material regarding his employment.

On March 16, 2004 the Office referred appellant to Dr. Alan S. Keyes, a Board-certified otolaryngologist, for an impairment evaluation. Dr. Keyes was provided with a statement of accepted facts and a set of questions. In a report of May 18, 2004, Dr. Keyes diagnosed bilateral noise-induced sensorineural hearing loss and tinnitus which he advised was due to appellant's employment-related noise exposure. He recommended hearing aids and submitted results of audiometric testing performed by a certified audiologist. The audiogram, performed on April 22, 2004, reflected testing at the frequency levels of 500, 1,000, 2,000 and 3,000 cycles per second and revealed the following: right ear -- 20, 20, 25 and 40 decibels; left ear -- 20, 10, 20 and 35 decibels, respectively. Dr. Keys concluded that appellant had a 1.56 percent binaural hearing loss and an additional 5 percent for tinnitus which impacted his ability to perform activities of daily living, to total a 6.56 percent binaural impairment.

On May 21, 2005 appellant filed a schedule award claim. On April 11, 2006 the Office accepted that he sustained employment-related bilateral noise-induced hearing loss. In a report dated April 23, 2006, an Office medical adviser advised that maximum medical improvement had been reached on April 22, 2004 and diagnosed bilateral high frequency sensorineural hearing loss. He authorized a hearing aid for appellant's right ear and concluded that he had a 0.3125 binaural impairment. In a September 20, 2006 report, the Office medical adviser stated that an additional five percent impairment was appropriate for appellant's diagnosed tinnitus. In a September 30, 2006 report, he advised that appellant had a 5.3125 percent binaural impairment.

By decision dated October 24, 2006, the Office granted appellant a schedule award for a five percent impairment to both ears, for 10 weeks of compensation to run from April 22 to June 30, 2004, based on a weekly pay rate of \$815.69.

### **LEGAL PRECEDENT**

Section 8107 of the Federal Employees' Compensation Act<sup>1</sup> specifies the number of weeks of compensation to be paid for permanent loss of use of specified members, functions and organs of the body.<sup>2</sup> The Act does not, however, specify the manner by which the percentage loss of a member, function or organ shall be determined. The method used in making such a determination is a matter which rests in the sound discretion of the Office. 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.<sup>3</sup> The Office evaluates industrial hearing loss in accordance with the standards contained in the American Medical Association, *Guides to the Evaluation of Permanent*

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<sup>1</sup> 5 U.S.C. §§ 8101-8193.

<sup>2</sup> *Id.* at § 8107(c).

<sup>3</sup> *Renee M. Straubinger*, 51 ECAB 667 (2000).

*Impairment* (hereinafter A.M.A., *Guides*).<sup>4</sup> Using the frequencies of 500, 1,000, 2,000 and 3,000 cycles per second, the losses at each frequency are added and averaged.<sup>5</sup> The “fence” of 25 decibels is then 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.<sup>6</sup> The remaining amount is multiplied by a factor of 1.5 to arrive at the percentage of monaural hearing loss.<sup>7</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>8</sup> The Board has concurred in the Office’s adoption of this standard for evaluating hearing loss.<sup>9</sup>

The A.M.A., *Guides* allow for compensation of 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.<sup>10</sup>

### ANALYSIS

The Board finds that the record establishes that appellant has no more than a five percent bilateral hearing loss. The Board notes that the employing establishment’s audiograms dating from July 12, 1974 to June 5, 2001 do not comport with the appropriate standards because there is no evidence that appellant underwent examination by an otolaryngologist, that the audiometric testing was performed by a certified audiologist or that all the equipment used for testing met the required standards.<sup>11</sup>

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<sup>4</sup> A.M.A., *Guides* (5<sup>th</sup> ed. 2001); *Joseph Lawrence, Jr.*, 53 ECAB 331 (2002).

<sup>5</sup> A.M.A., *Guides* at 250.

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

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Horace L. Fuller*, 53 ECAB 775 (2002).

<sup>10</sup> *Leslie M. Mahin*, 55 ECAB 311 (2004).

<sup>11</sup> The Office has delineated requirements for the type of medical evidence used in evaluating hearing loss. The requirements, as set forth in the Office’s Procedure Manual, are, *inter alia*, 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; that the audiometric and otologic examination be performed by different individuals as a method of evaluating the reliability of the findings; that all audiological equipment authorized for testing meet the calibration protocol contained in the accreditation manual of the American Speech and Hearing Association; that the audiometric test results include both bone conduction and pure tone air conduction thresholds, speech reception thresholds and monaural discrimination scores; and that 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. See Federal (FECA) Procedure Manual, Part 3 -- Requirements for Medical Reports, *Special Conditions*, Chapter 3.600.8(a) (September 1995); *Raymond Van Nett*, 44 ECAB 480 (1993).

The Office referred appellant for a second opinion evaluation with Dr. Keyes. The Board finds that the audiometric results submitted by Dr. Keyes conform to applicable criteria and thus, constitutes the weight of the medical evidence. The Board, however, notes that Dr. Keyes erred in concluding that appellant had a 6.56 percent impairment. In making this determination, Dr. Keyes did not follow the proper procedure which is outlined in the A.M.A., *Guides* because he multiplied the greater loss of 1.875 by 5 rather than the lesser loss of 0.<sup>12</sup> The Office medical adviser reviewed Dr. Keyes' report and audiometric findings and properly applied the Office's standardized procedures in determining that appellant had a five percent impairment to both ears.<sup>13</sup> He advised that maximum medical improvement was reached on April 22, 2004 and applied the Office's standardized procedures to the April 22, 2004 audiogram performed on Dr. Keyes behalf finding that the recorded frequency levels at the 500, 1,000, 2,000 and 3,000 hertz levels on the right of 20, 20, 25 and 40 respectively totaled a decibel loss of 105. He then divided this total by 4 which resulted in an average loss of 26.25 decibels. The Office medical adviser then subtracted the fence of 25 decibels to equal 1.25 decibels which he multiplied by the established factor of 1.5 to result in a 1.875 percent monaural hearing loss for the right ear. He then followed the same procedure on the left, noting that testing for the left ear at the frequencies of 500, 1,000, 2,000 and 3,000 hertz revealed decibel losses of 25, 15, 10 and 25 decibels respectively, for a total of 75 decibels which, when divided by 4, resulted in an average hearing loss of 18.75 decibels. He then subtracted the fence of 25 decibels, for a total of 0 which when multiplied by the established factor of 1.5, equaled a 0 percent monaural hearing loss for the left ear. The Office medical adviser then multiplied the zero percent monaural hearing loss for the left ear, as it was the lesser loss by five which yielded a product of zero. He then added the 0 to the 1.875 percent hearing loss for the right ear, to obtain a total of 1.875 which was divided by 6 in order to calculate a binaural hearing loss of 0.3125. The Office medical adviser then added the 5 percent binaural impairment for tinnitus, to equal a total binaural impairment of 5.3125 which, when appropriately rounded down,<sup>14</sup> equaled a 5 percent binaural hearing loss. The record establishes that appellant has no more than a five percent binaural hearing impairment.<sup>15</sup>

On appeal, appellant contends that the pay rate used for schedule award compensation purposes was incorrect. The Board has held that where an injury is sustained over a period of time, as in this case, the date of injury is the date of last exposure to those employment factors causing the injury.<sup>16</sup> In determining appellant's schedule award pay rate, the Office utilized the pay rate effective February 23, 2002, the date he retired or \$815.69 per week. As provided on the Form 50 found in the record, this was the date of appellant's last exposure and the pay rate provided on the Form 50 was \$42,416.00 annually or \$815.69 per week. There is nothing in the record to indicate that appellant was entitled to additional pay. The Board, therefore, finds that

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<sup>12</sup> A.M.A., *Guides*, *supra* note 4 at 250.

<sup>13</sup> *Id.*

<sup>14</sup> Section 2.5d of the A.M.A., *Guides* provides that the impairment rating should be rounded to the nearest whole number. A.M.A., *Guides*, *supra* note 4 at 20; *see Carl J. Cleary*, 57 ECAB \_\_\_\_ (2006).

<sup>15</sup> The Board notes that, if appellant's employment-related hearing loss worsens in the future, he may apply for an additional schedule award for any increased permanent impairment. *Robert E. Cullison*, 55 ECAB 570 (2004).

<sup>16</sup> *Barbara A. Dunnivant*, 48 ECAB 517 (1997).

the Office properly calculated the October 24, 2006 schedule award based on appellant's pay rate on the date he retired.<sup>17</sup>

**CONCLUSION**

The Board finds that appellant did not meet his burden of proof to establish that he has greater than a five percent binaural hearing loss.

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated October 24, 2006 be affirmed.

Issued: April 23, 2007  
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

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<sup>17</sup> *Id.* Appellant also questioned the 3/4 compensation rate. The basic rate of compensation paid under the Act is 66 2/3 percent of the injured employee's monthly pay. Where the employee has one or more dependents, as in this case, as defined in the Act, the employee is entitled to have his or her basic compensation augmented at the rate of 8 1/3 percent for a total of 75 percent of monthly pay. 5 U.S.C. § 8110(b). The number of weeks of compensation for a schedule award is determined by the compensation schedule found in section 8107(c) of the Act. 5 U.S.C. § 8107(c); *Dennis R. Stark*, 57 ECAB \_\_\_\_ (Docket No. 05-1826, issued January 10, 2006).