

FACTUAL HISTORY

On October 22, 2003 appellant, then a 40-year-old retired electronics mechanic, filed an occupational disease claim for hearing loss caused by noise exposure in the course of his federal employment. The Office accepted the claim for bilateral sensorineural hearing loss and bilateral subjective tinnitus on July 7, 2004.

On March 1, 2006 appellant filed a Form CA-7 claim for compensation for a schedule award. In response, the Office referred appellant to Dr. Henry Bikhazi, a Board-certified otolaryngologist, for a second opinion examination. On April 4, 2006 an audiometric evaluation was performed. The audiogram reflected testing at frequency levels including those of 500, 1,000, 2,000 and 3,000 cycles per second (cps) and revealed decibel losses on the left of 10, 10, 20 and 50 respectively and on the right of 10, 10, 10 and 40. Dr. Bikhazi opined, in his April 4, 2006 report, that appellant had bilateral high frequency noise-induced sensorineural hearing loss.

Appellant's file was sent to the district medical adviser to determine if appellant's accepted hearing loss was sufficient to warrant a schedule award. In a report dated June 27, 2006, Dr. David Schindler, a Board-certified otolaryngologist, found that, based on the April 4, 2006 audiogram, appellant did not have a ratable hearing loss and that appellant did not report tinnitus at the last examination. In a decision dated July 31, 2006, the Office denied appellant's claim for a schedule award. The Office explained that appellant's accepted hearing loss was not severe enough to be considered ratable.

On August 31, 2006 appellant requested an oral hearing. By decision dated October 18, 2006, the Office denied appellant's request for an oral hearing on the grounds that appellant was not entitled to a hearing as a matter of right as the request was made after 30 days.

LEGAL PRECEDENT -- ISSUE 1

Section 8107 of the Federal Employees' Compensation Act sets forth the number of weeks of compensation to be paid for the permanent loss of use of specified members, functions and organs of the body.² The Act, however, does not specify the manner by which the percentage loss of a member, function or organ shall be determined. To ensure consistent results and equal justice under the law, good administrative practice requires the use of uniform standards applicable to all claimants. The implementing regulations have adopted the American Medical Association, *Guides to the Evaluation of Permanent Impairment* as the appropriate standard for evaluating schedule losses.³ Effective February 1, 2001, schedule awards are determined in accordance with the A.M.A., *Guides* (5th ed. 2001).⁴

² The Act provides that, for complete, or 100 percent loss of hearing in one ear, an employee shall receive 52 weeks' compensation. For complete loss of hearing of both ears, an employee shall receive 200 weeks' compensation. 5 U.S.C. § 8107(c)(13) (2000).

³ 20 C.F.R. § 10.404 (2006).

⁴ Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 (June 2003).

Using the frequencies of 500, 1,000, 2,000 and 3,000 cps, the losses at each frequency are added up and averaged.⁵ 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.⁶ The remaining amount is multiplied by a factor of 1.5 to arrive at the percentage of monaural hearing loss.⁷ 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, and then added to the greater loss and the total is divided by six to arrive at the amount of the binaural hearing loss.⁸

ANALYSIS -- ISSUE 1

In reviewing appellant’s April 4, 2006 audiogram, the frequency levels recorded at 500, 1,000, 2,000 and 3,000 cps for the right ear reveal decibel losses of 10, 10, 10 and 40, respectively, for a total of 70 decibels. This figure when divided by 4 results in an average hearing loss of 17.5 decibels. The average loss of 17.5 when reduced by 25 decibels represents no ratable monaural hearing loss for the right ear. Testing for the left ear at the frequency levels of 500, 1,000, 2,000 and 3,000 cps revealed decibel losses of 10, 10, 20 and 50 decibels respectively, for a total of 90 decibels. This figure when divided by 4 results in an average hearing loss of 22.5 decibels. The average loss of 22.5 when reduced by 25 decibels represents no ratable monaural hearing loss for the left ear. Accordingly, appellant’s most recent audiogram does not establish a ratable hearing loss for either ear.

Regarding appellant’s argument that he is entitled to an award for tinnitus, the A.M.A. *Guides* states:

“*Tinnitus* in the presence of unilateral or bilateral hearing impairment may impair speech discrimination. Therefore, add 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.”⁹

As appellant’s hearing loss is not ratable, he is not entitled to an additional award for tinnitus.¹⁰

LEGAL PRECEDENT -- ISSUE 2

A claimant dissatisfied with a decision of the Office shall be afforded an opportunity for an oral hearing or, in lieu thereof, a review of the written record. A request for either an oral

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

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ *Id.* at 246.

¹⁰ *Juan A. Trevino*, 54 ECAB 358 (2003).

hearing or a review of the written record must be submitted in writing, within 30 days of the date of the decision for which a hearing is sought.¹¹ If the request is not made within 30 days or if it is made after a reconsideration request, a claimant is not entitled to a hearing or a review of the written record as a matter of right.¹² The Board has held that the Office, in its broad discretionary authority in the administration of the Act,¹³ has the power to hold hearings in certain circumstances where no legal provision was made for such hearings and that the Office must exercise this discretionary authority in deciding whether to grant a hearing.¹⁴ The Office's procedures, which require the Office to exercise its discretion to grant or deny a hearing when the request is untimely or made after reconsideration, are a proper interpretation of the Act and Board precedent.¹⁵

ANALYSIS -- ISSUE 2

The Board finds that appellant did not timely request a hearing. In its October 17, 2006 decision, denying appellant's request for a hearing, the Office stated correctly that, as the decision was issued July 31, 2006 and appellant's request was postmarked August 31, 2006,¹⁶ his request for a hearing was untimely as it was not made within 30 days. The 30-day period in which appellant could request a hearing as a matter of right commenced August 1, 2006.¹⁷ The 30th day fell on Wednesday, August 30, 2006. In computing a time period, the date of the event from which the designated period of time begins to run shall not be included, while the last day of the period shall be included, unless it is a Saturday, a Sunday, or a legal holiday.¹⁸ Appellant's request for a hearing was postmarked on August 31, 2006 and not within the 30-day period. Therefore, appellant was not entitled to a hearing before an Office hearing representative as a matter of right. The Board finds the request for a hearing was not timely filed.

CONCLUSION

The Board finds that appellant does not have a ratable hearing loss and that the Office properly denied his request for a hearing as untimely filed.

¹¹ 20 C.F.R. § 10.616(a) (2004).

¹² *Claudio Vazquez*, 52 ECAB 496 (2001).

¹³ 5 U.S.C. §§ 8101-8193.

¹⁴ *Marilyn F. Wilson*, 52 ECAB 347 (2001).

¹⁵ *Claudio Vazquez*, *supra* note 12.

¹⁶ Under the Office's procedures, the timeliness of a request for a hearing is determined on the basis of the postmark of the envelope, which contains the letter requesting a hearing. *See* 20 C.F.R. § 10.616(a) (2004); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Hearings and Reviews of the Written Record*, Chapter 2.1601.4(a) (December 1995).

¹⁷ *See Angel M. Lebron, Jr.*, 51 ECAB 488 (2000) (the date of the event from which the designated period of time begins to run shall not be included when computing the time period).

¹⁸ *See Marguerite J. Dvorak*, 33 ECAB 1682 (1982). *See also* FECA Program Memorandum No. 250 (January 29, 1979).

ORDER

IT IS HEREBY ORDERED THAT the October 18 and July 31, 2006 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: June 7, 2007
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

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