

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

H.S., Appellant

and

**DEPARTMENT OF AGRICULTURE, FOREST
SERVICE, STANISLAUS NATIONAL FOREST,
Pinecrest, CA, Employer**

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**Docket No. 07-1176
Issued: September 17, 2007**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On March 28, 2007 appellant filed a timely appeal from the January 11, 2007 merit decision of the Office of Workers' Compensation Programs, which denied his claim for a schedule award. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review the merits of this case.

ISSUE

The issue is whether appellant has a ratable hearing loss entitling him to a schedule award.

FACTUAL HISTORY

On June 6, 2004 appellant, then a 53-year-old district fire prevention officer, filed a claim alleging that he sustained a hearing loss in the performance of duty: "I have been exposed to loud noises throughout my whole firefighting career dating back to 1968." He explained that a

“Pack Test” physical examination at work detected the loss and that further testing confirmed the loss to be noise induced. Appellant did not stop work: “I am still being exposed to loud noises.”

The May 4, 2004 audiogram obtained at work showed hearing thresholds of 25, 25, 20 and 40 decibels on the left and 15, 20, 5 and 10 decibels on the right at 500, 1,000, 2,000 and 3,000 cycles per second. The report noted: “Needs hearing evaluation for high pitches. Referred to Dr. Daniel T. DuBose, a Board-certified otolaryngologist, at Greenley Oaks Ears, Nose, Throat in Sonora, California. An audiogram obtained by the Greenley Oaks Hearing Resource Center on May 27, 2004 showed hearing thresholds of 20, 25, 25 and 50 on the left and 10, 15, 15 and 15 on the right.

The Office referred appellant to Dr. Donald P. Carter, a Board-certified otolaryngologist, for an opinion on causal relationship. Dr. Carter examined appellant on October 18, 2004. He diagnosed bilateral high frequency sensorineural hearing loss secondary to noise exposure, mostly on the job. An audiogram obtained that day showed hearing thresholds of 10, 15, 10 and 10 on the right and 10, 15, 20 and 40 on the left. Reliability was judged to be good.

The Office accepted appellant’s claim for binaural hearing loss. On October 23, 2006 appellant filed a claim for a schedule award.

On December 20, 2006 Dr. Brian E. Schindler, a Board-certified otolaryngologist and Office medical consultant, reviewed appellant’s file. He noted that the earliest audiogram in the file, dating to 2004, showed a bilateral high-frequency hearing loss. Dr. Schindler continued:

“The claimant was most recently examined by Dr. Carter who examined the claimant on October 18, 2004. In his report, he notes the history of noise exposure without any significant past medical history. Physical examination of the ears was normal and audiometric tests were carried out. This audiogram shows that the claimant has a bilateral high frequency sensorineural hearing loss. There is good correlation between the speech reception thresholds and the pure tone averages. It was Dr. Carter’s opinion, and I concur, that the claimant’s hearing loss was causally related to noise exposure. I have calculated a schedule award for the claimant. The claimant is found to have a 0 percent loss in the right ear and a 0 percent loss in the left ear for a 0 percent binaural loss. I believe the audiometer had been calibrated April 1, 2004. If this is correct, I would accept these thresholds as reliable.”

In a decision dated January 11, 2007, the Office denied appellant’s claim for a schedule award. The Office accepted that appellant sustained an occupational bilateral hearing loss but had no ratable impairment.

On appeal, appellant acknowledges that Dr. Carter’s audiogram shows no hearing loss in either ear under the Office’s formula. But he questions why the Office used Dr. Carter’s audiogram when the other audiograms showed a 3.75 and 7.5 percent loss in his left ear.

LEGAL PRECEDENT

Section 8107 of the Federal Employees' Compensation Act authorizes the payment of schedule awards for the loss of use of specified members, organs or functions of the body, including hearing.¹ Such loss of use is known as permanent impairment.

The Act, however, does not specify how the percentage loss shall be determined. The method used to make such a determination is a matter that rests in the sound discretion of the Office.² 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.³

The Office evaluates the degree of permanent impairment according to the standards set forth in the specified edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*.⁴ Using the frequencies of 500, 1,000, 2,000 and 3,000 cycles per second, the losses at each frequency are added up and averaged. Then, a "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 sounds under everyday listening conditions. The remaining amount is multiplied by a factor of 1.5 to arrive at the percentage of monaural hearing loss. 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.⁵ The Board has concurred in the Office's adoption of this standard for evaluating hearing loss.⁶

ANALYSIS

The May 4, 2004 audiogram obtained at work showed hearing thresholds of 25, 25, 20 and 40 decibels on the left, for a total of 110 and an average of 27.5. Subtracting the fence of 25 decibels leaves 2.5, which multiplied by 1.5 reveals a 3.75 percent hearing loss in the left ear, or 4 percent when rounded. The May 27, 2004 audiogram obtained for Dr. DuBose showed hearing thresholds of 20, 25, 25 and 50 on the left, for a total of 120 and an average of 30. Subtracting the fence of 25 decibels leaves 5, which when multiplied by 1.5 reveals a 7.5 percent hearing loss in the left ear or 8 percent when rounded. The October 18, 2004 audiogram obtained for

¹ 5 U.S.C. § 8107(c)(13) (which provides 52 weeks' compensation for complete loss of hearing in one ear and 200 weeks' compensation for complete loss of hearing in both ears); *see id.* at § 8107(c)(19) (compensation for partial loss is proportionate).

² *Daniel C. Goings*, 37 ECAB 781 (1986); *Richard Beggs*, 28 ECAB 387 (1977).

³ *Henry L. King*, 25 ECAB 39, 44 (1973); *August M. Buffa*, 12 ECAB 324, 325 (1961).

⁴ 20 C.F.R. § 10.404 (1999). Effective February 1, 2001, the Office began using the A.M.A., *Guides* (5th ed. 2001).

⁵ A.M.A., *Guides* 250.

⁶ *Donald E. Stockstad*, 53 ECAB 301 (2002), *petition for recon. granted (modifying prior decision)*, Docket No. 01-1570 (issued August 13, 2002).

Dr. Carter showed hearing thresholds of 10, 15, 10 and 10 on the left, for a total of 45 and an average of 11.25. As this falls below the fence of 25 decibels, Dr. Carter's audiogram shows no ratable hearing loss in the left ear.

The Board has held:

“When several audiograms are in the case record, as here, and all are made within approximately two years of each other and are submitted by more than one specialist, the Office should have all of such audiograms evaluated to determine the percentage loss of hearing shown by each. In making a determination of the percentage loss of hearing for a schedule award, the Office should give an explanation as to why it selected one audiogram over the others. It should not arbitrarily select one audiogram without explanation, even though the one selected is the most recent, in those instances where other specialists have submitted current audiograms.

“If the Office determines that there is a conflict regarding the percentage loss of hearing, it may give rationale for selecting one report over the others, or in the alternative it may have another evaluation made of appellant's hearing in order to resolve the conflict.”⁷

The medical record contains three audiograms obtained within several months of each other. Dr. Schindler, the reviewing Office consultant, did not address the May 2004 audiograms to determine the percentage hearing loss shown and he did not explain why he selected Dr. Carter's audiogram over the others.

Moreover, the Office based its decision on an audiogram that was, at the time of Dr. Schindler's review, over two years old. Appellant, in the meantime, did not stop work. He continued to be exposed to loud noises in the course of his federal employment. Thus, when he filed his claim for a schedule award on October 23, 2006, the Office should have obtained a current audiometric evaluation to reflect the current extent of his work-related hearing loss. The Board will set aside the Office's January 11, 2007 decision denying appellant's claim for a schedule award and will remand the case for further medical development and an appropriate final decision.

CONCLUSION

The Board finds that this case is not in posture for decision. In a case of continuing exposure, the Office denied appellant's claim for a schedule award without the benefit of a current audiogram. Further development of the medical evidence is therefore warranted.

⁷ E.g., *John C. Messick*, 25 ECAB 333 (1974).

ORDER

IT IS HEREBY ORDERED THAT the January 11, 2007 decision of the Office of Workers' Compensation Programs is set aside and the case remanded for further action consistent with this opinion.

Issued: September 17, 2007
Washington, DC

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

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

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