

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

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**J.S., Appellant**

**and**

**DEPARTMENT OF THE NAVY,  
MID-ATLANTIC FIRE & EMERGENCY  
SERVICES, Mechanicsburg, PA, Employer**

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**Docket No. 07-1250  
Issued: September 21, 2007**

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

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

MICHAEL E. GROOM, Alternate Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On April 5, 2007 appellant filed a timely appeal from decisions of the Office of Workers' Compensation Programs dated November 28, 2006 and February 27 and March 22, 2007. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d), the Board has jurisdiction over the merits of this case.

**ISSUES**

The issues are: (1) whether appellant has met his burden of proof to establish that he has greater than a two percent hearing loss on the right for which he received a schedule award; and (2) whether the Office used the proper pay rate in calculating appellant's schedule award.

**FACTUAL HISTORY**

On August 19, 2005 appellant, then a 52-year-old lead firefighter, filed a Form CA-2, occupational disease claim, alleging that noise exposure at work caused bilateral hearing loss. He described his employment history and noise exposure and submitted audiograms taken by the employing establishment dating from August 5, 1977 to December 7, 2004. By letters dated

October 18, 2005, the Office requested that the employing establishment furnish information regarding appellant's noise exposure and informed appellant of the type of evidence needed to support his claim. Appellant retired effective January 3, 2006.

On February 16, 2006 the Office referred appellant to Dr. Clifford N. Steinig, a Board-certified osteopath specializing in otolaryngology, for a second opinion evaluation. In a report dated March 6, 2006, Dr. Steinig described the examination and diagnosed bilateral high frequency sensorineural hearing loss, less severe on the left. He opined that the condition was due to employment-related noise exposure and recommended hearing aids. Dr. Steinig submitted results of an audiometric examination performed on March 6, 2006, which reflected testing at the frequency levels of 500, 1,000, 2,000 and 3,000 cycles per second (cps) and revealed the following: right ear 0, 0, 25 and 80 decibels; left ear 0, 0, 25 and 65 decibels, respectively.

In a March 29, 2006 report, an Office medical adviser reviewed Dr. Steinig's report and audiometric findings and advised that maximum medical improvement had been reached on March 6, 2006. He opined that appellant had employment-related binaural hearing loss and checked a box "no," indicating that hearing aids were not authorized. Dr. Steinig applied the Office's standardized procedures to the March 6, 2006 audiogram, finding that the recorded frequency levels at the 500, 1,000, 2,000 and 3,000 cps on the right of 0, 0, 25 and 80 respectively totaled a decibel loss of 105. This total was divided by 4 which resulted in an average loss of 26.25 decibels. The Office medical consultant 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 cps revealed decibel losses of 0, 0, 25 and 65 decibels respectively, for a total of 90 decibels which, when divided by 4, resulted in an average hearing loss of 22.5 decibels. He then subtracted the fence of 25 decibels, for a total of -2.5 decibels, which he multiplied by the established factor of 1.5, finding a 0 percent monaural hearing loss for the left ear.

On March 29, 2006 the Office accepted that appellant sustained a right ear monaural hearing loss. On April 18, 2006 he filed a schedule award claim. By decision dated June 2, 2006, the Office granted him a schedule award for a two percent impairment of his right ear, for a total of 1.04 weeks based on a weekly pay rate of \$366.32, noting that the effective date of pay rate was December 28, 1983.

On June 20, 2006 appellant requested a review of the written record. In a November 28, 2006 decision, an Office hearing representative affirmed that appellant had a two percent impairment of the right ear but remanded the case to the Office to determine the correct rate of pay. The hearing representative noted that the pay rate should have been based on the date of appellant's last exposure.

By decision dated February 27, 2007, the Office granted a schedule award for a two percent hearing loss of the right ear with an effective date of pay of March 6, 2006 or \$853.75 per week. In a March 22, 2007 decision, the Office denied modification of the February 27, 2007 decision.

## LEGAL PRECEDENT -- ISSUE 1

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 Impairment* (hereinafter A.M.A., *Guides*).<sup>4</sup> Using the frequencies of 500, 1,000, 2,000 and 3,000 cps, 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>

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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).

<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).

## ANALYSIS -- ISSUE 1

The Board finds that appellant sustained a binaural hearing loss. Both Dr. Steinig, the second opinion examiner and the Office medical adviser advised that appellant had employment-related binaural hearing loss. Appellant has hearing loss to both ears causally related to factors of his federal employment.<sup>10</sup>

The Board further finds that the evidence of record does not establish that appellant is entitled to a schedule award greater than the two percent awarded for his right ear. The March 6, 2006 audiogram, the only study that complied with Office certification procedures,<sup>11</sup> demonstrated record values at the frequency levels of 500, 1,000, 2,000 and 3,000 cps of 0, 0, 25 and 80 decibels on the right for a total of 105 decibels. This total, when divided by 4, results in an average hearing loss of 26.25 decibels. The average of 26.25 decibels, when reduced by 25 decibels to equal 1.25 decibels, which when multiplied by the established factor of 1.5, results in a 1.875 percent monaural hearing loss on the right. The frequency levels on the left at 500, 1,000, 2,000 and 3,000 cps revealed decibel losses of 0, 0, 25 and 65, for a total of 90 decibels. This total, when divided by 4, results in an average hearing loss of 22.5 decibels, which when reduced by the 25 decibel fence, results in a 0 percent monaural hearing loss of the left ear. The Board thus finds that the March 6, 2006 audiogram demonstrated a 1.875 hearing loss which, when rounded up, yielded a two percent hearing loss on the right. The audiogram also demonstrated that appellant's hearing loss on the left of zero percent was not ratable.<sup>12</sup> The

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<sup>10</sup> To establish that an injury was sustained in the performance of duty in an occupational disease claim, a claimant must submit the following: (1) medical evidence establishing the presence or existence of the disease or condition for which compensation is claimed; (2) a factual statement identifying employment factors alleged to have caused or contributed to the presence or occurrence of the disease or condition; and (3) medical evidence establishing that the diagnosed condition is causally related to the employment factors identified by the claimant. The medical opinion must be one of reasonable medical certainty and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant. *Solomon Polen*, 51 ECAB 341 (2000).

<sup>11</sup> Office procedures set forth requirements for the type of medical evidence used in evaluating hearing loss. These include 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 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. Federal (FECA) Procedure Manual, Part 3 -- Medical, *Requirement for Medical Records*, Chapter 3.600.8(a) (September 1995); see *Vernon Brown*, 54 ECAB 376 (2003). The record does not indicate that the employing establishment audiograms dating from August 1977 to December 2004 were reviewed by a physician. They, therefore, are insufficient to establish entitlement to an additional schedule award.

<sup>12</sup> The Board, however, has long recognized that, if a claimant's employment-related hearing loss worsens in the future, he or she may apply for a schedule award for any ratable impairment. See *Robert E. Cullison*, 55 ECAB 570 (2004).

Office, therefore, properly found that he was entitled to a schedule award for a two percent hearing loss on the right.<sup>13</sup>

### **LEGAL PRECEDENT -- ISSUE 2**

Section 8107 of the Act provides that compensation for a schedule award shall be based on the employee's "monthly pay."<sup>14</sup> For all claims under the Act, compensation is to be based on the pay rate as determined under section 8101(4) which defines "monthly pay" as:

"The monthly pay at the time of injury, or the monthly pay at the time disability begins, or the monthly pay at the time compensable disability recurs, if the recurrence begins more than six months after the injured employee resumes regular full-time employment with the United States, whichever is greater...."<sup>15</sup>

In applying section 8101(4), the statute requires the Office to determine monthly pay by determining the date of the greater pay rate, based on the date of injury, date of disability or the date of recurrent disability. The Board has held that rate of pay for schedule award purposes is the highest rate which satisfies the terms of section 8101(4).

### **ANALYSIS -- ISSUE 2**

In all situations, including those involving a schedule award, compensation is to be based on the pay rate either at the time of injury, the rate at the time disability for work begins or the rate at the time of recurrence of disability of the type described in section 8101(4) of the Act, whichever is greater.<sup>16</sup> 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 the employment factors causing the injury.<sup>17</sup> In this case, in determining the amount of compensation payable under the schedule award, the Office properly used the pay rate of \$853.75 per week, which was the rate in effect on January 3, 2006, the date appellant retired, which was the date of last exposure. This was the highest rate which satisfies the terms of section 8101(4).

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<sup>13</sup> The Board notes that the Office has not rendered a final decision with regard to whether hearing aids should be authorized. The Board's jurisdiction to consider and decide appeals from final decisions of the Office extends only to those final decisions issued within one year prior to the filing of the appeal. 20 C.F.R. § 501.2(c); *see Karen L. Yaeger*, 54 ECAB 323 (2003). This issue is, therefore, in an interlocutory posture. As such, the Board has no jurisdiction to consider this issue on appeal. *Eugene Van Dyk*, 53 ECAB 706 (2002).

<sup>14</sup> 5 U.S.C. § 8107.

<sup>15</sup> 5 U.S.C. § 8101(4).

<sup>16</sup> *Id.*; *see Charles P. Mulholland*, 48 ECAB 604 (1997).

<sup>17</sup> *Sherron A. Roberts*, 47 ECAB 617 (1996).

**CONCLUSION**

The Board finds that appellant has established that he sustained an employment-related binaural hearing loss but that he did not meet his burden of proof to establish that he is entitled to a schedule award for his employment-related hearing loss greater than the two percent awarded for his right ear. The Board also finds that the Office used the proper pay rate for compensation purposes in its February 27, 2007 decision.

**ORDER**

**IT IS HEREBY ORDERED THAT** the decisions of the Office of Workers' Compensation Programs dated March 22 and February 27, 2007 and November 28, 2006 be affirmed, as modified.

Issued: September 21, 2007  
Washington, DC

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

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