

On April 15, 2002 appellant, then a 50-year-old supervisory criminal investigator, filed a claim for compensation due to hearing loss and tinnitus as a result of the duties of his federal employment. Specifically, he noted that, throughout his employment with the employing establishment, he has been required to qualify quarterly with various firearms and that, until

recently, the ear protection was either nonexistent or of an inferior quality. Appellant also noted that he was exposed to loud exhaust noise during his previous assignment as a customs inspector.

On June 3, 2002 the Office referred appellant to Dr. Tan D. Nguyen, a Board-certified otolaryngologist, for an examination. In a report dated June 17, 2002, Dr. T.D. Nguyen determined that appellant had an 11.25 percent impairment in his right ear and a nonratable impairment in his left ear.¹ Applying the criteria from the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (5th ed. 2001), he found that appellant had a five percent binaural hearing loss. Dr. T.D. Nguyen then added 1.25 percent for tinnitus that impacted appellant's ability to perform activities of daily living, and concluded that appellant had a 6.25 percent binaural hearing impairment. He also noted that appellant was a borderline hearing aid candidate. Dr. T.D. Nguyen concluded that this hearing loss pattern was consistent with right-side acoustic trauma related to his noise exposure during his federal employment.

On August 5, 2002 the Office referred the report of Dr. T.D. Nguyen to the Office medical adviser who used the audiogram conducted on Dr. T.D. Nguyen's behalf, applied the A.M.A., *Guides*, and determined that appellant had a 3.8 percent monaural hearing loss.² The Office medical adviser also recommended a trial of hearing aids.

By decision dated August 30, 2002, the Office accepted appellant's claim for right sensorineural hearing loss.

On November 19, 2002 appellant filed a claim for a schedule award.

By decision dated August 27, 2004, the Office issued a schedule award for a four percent hearing loss in the right ear.

On September 9, 2004 appellant requested an oral hearing which was held on April 20, 2005. At the hearing, he testified that, since his audiogram by Dr. T.D. Nguyen, his hearing had become worse and he had a severe ringing in his right ear that awoke him at night.

¹ Dr. T.D. Nguyen appears to have made a mathematical error in his calculation of impairment of the right ear. The audiogram performed on behalf of Dr. T.D. Nguyen indicated that appellant had a decibel loss in frequencies of 500, 1,000, 2,000 and 3,000 cycles per second (cps) as reflecting the following decibel losses: 15, 20, 20 and 25 for the left ear and 20, 15, 25 and 50 for the right ear. When calculating appellant's impairment according to the formula set forth in the A.M.A., *Guides*, Dr. T.D. Nguyen correctly calculated that the average hearing loss for the left ear was 20 decibels, from which he subtracted the 25 decibel fence in reaching his conclusion that appellant did not have ratable hearing loss in his left ear. However, when calculating the hearing loss in appellant's right ear, Dr. T.D. Nguyen found that the average hearing loss was 32.5, and used this figure in his calculation. In fact, if one considers the respective hearing losses in appellant's right ear (20 plus 15 plus 25 plus 50) and divide this sum by 4 one will find an average hearing loss of 27.5 decibels.

² Utilizing Dr. T.D. Nguyen's June 17, 2002 audiogram, the Office medical adviser added up the decibel hearing losses in the left ear of 15, 20, 20 and 25 to total 80. He divided this figure by 4 to determine average hearing loss of 20 decibels. When the medical adviser subtracted the fence of 25, he determined that appellant had no ratable hearing loss in his left ear. With regard to the right ear, he added the respective hearing losses of 20, 15, 25 and 50 to total 110. The medical adviser divided this figure by 4 to determine an average decibel loss of 27.5 from which he subtracted the fence of 25, to find a balance of 2.5. He then multiplied this figure by 1.5 to determine that appellant had a 3.8 monaural hearing loss in his right ear, which the Office properly rounded up to 4 percent.

Appellant submitted a November 2, 2004 report wherein Charles Butler, MA, noted that appellant was seen for an audiological examination by Dr. T.D. Nguyen on June 17 and July 8, 2002. Dr. Butler repeated Dr. T.D. Nguyen's findings. He also recommended that appellant avoid noise exposure.

By decision dated October 20, 2005, the hearing representative affirmed the Office's August 27, 2004 decision.

By letter dated November 1, 2005, appellant filed an appeal to this Board and requested oral argument. However, on May 4, 2006 the Office submitted a motion to remand and cancel oral argument wherein the Director stated that, as the Office had accepted that appellant had ratable hearing loss, the case should be remanded to determine whether appellant's tinnitus entitled him to additional impairment for schedule award purposes. In an order dated May 17, 2006, the Board granted remand and cancelled oral argument, which set aside the hearing representative's October 20, 2005 decision.³

In a memorandum to the Office medical adviser dated June 8, 2006, the Office asked that he review Dr. T.D. Nguyen's report and assess the maximum improvement, functional loss of use and percentage of impairment. In a response dated June 30, 2006, the Office medical adviser indicated that the case was not in posture for a determination. He noted that the A.M.A., *Guides* require that for tinnitus to be included in hearing loss, it must impact the ability to perform activities of daily living that Dr. T.D. Nguyen's report did not support this degree of tinnitus and that his calculations were in question. The Office medical adviser also noted that an updated statement of accepted facts with regard to noise exposure on the job was necessary.

On September 15, 2006 the Office prepared a new statement of accepted facts which noted that appellant was exposed to noise through exposure to firearms during quarterly weapons qualification. It noted that appellant was still exposed to the noise hazard.

On September 26, 2006 the Office referred appellant to Dr. Gregory S. Rowin, an osteopathic otolaryngologist, for a hearing examination. In a report dated October 10, 2006, Dr. Rowin noted that an audiogram conducted on that date on his behalf showed that appellant had a 1.25 percent binaural hearing loss.⁴ He then added a 5 percent impairment for tinnitus which impacted the ability to perform activities of daily living and determined that appellant had a 6.25 percent binaural hearing impairment. On October 27, 2006 the Office requested that Dr. Rowin address how appellant's tinnitus has affected his activities of daily living.

³ Docket No. 06-215 (issued May 17, 2006).

⁴ Dr. Rowin found hearing loss at the frequencies of 500, 1,000, 2,000 and 3,000 cps as follows: in the right ear 20, 20, 25 and 55 decibels, respectively and in the left ear 20, 15, 20 and 25 decibels, respectively. He then calculated the hearing loss in appellant's right ear by taking the average hearing loss of 30 and subtracting the fence of 25 which equaled 5 which he multiplied by 1.5 to determine that appellant had a 7.5 percent monaural hearing loss in his right ear. Dr. Rowin then took the average loss in the left ear of 20 decibels and subtracted the fence of 25 decibels and determined that appellant had a 0 percent monaural hearing loss in his left ear. He then calculated appellant's binaural hearing loss by multiply 5 times the loss in the better ear (0 percent) and adding the loss in the weaker ear (7.5) and dividing this figure by 6 to determine that appellant had a 1.25 percent binaural hearing loss.

When Dr. Rowin did not provide an immediate response to the Office's query, the Office referred appellant to Dr. Chi D. Nguyen, a Board-certified otolaryngologist, for another second opinion. In a report dated January 9, 2007, Dr. C. Nguyen concluded that appellant had a 2.25 percent binaural hearing impairment.⁵ He then added 5 percent to this figure for tinnitus which impacted the ability to perform activities of daily living and concluded that appellant had a 7.25 percent binaural hearing impairment. Dr. C. Nguyen recommended hearing aids.

On June 13, 2007 the Office referred appellant to Dr. Paul W. Loeffler, a Board-certified otolaryngologist, for another second opinion. Dr. Loeffler determined that appellant had a 2.83 percent hearing impairment due to hearing loss⁶ for which he added 0 for tinnitus that impacts the ability to perform activities of daily living to yield a total binaural hearing impairment of 2.813. He listed his diagnoses as tinnitus and bilateral sensorineural hearing loss. In a June 28, 2007 report, Dr. Loeffler indicated that appellant had profound tinnitus with asymmetric sensorineural hearing loss and recommended a magnetic resonance imaging (MRI) scan. In a July 23, 2007 addendum, he stated that he had sent appellant for an MRI scan which was normal for a patient with severe tinnitus, and high frequency sensorineural hearing loss that is asymmetric.

In an October 22, 2007 decision, the Office determined that appellant was entitled to a 5.63 percent binaural hearing loss. It reached this conclusion by adding a 0 percent hearing loss in the left ear to 3.8 percent hearing loss in the right ear and divided by 6 to equal a .63 percent binaural hearing loss to which it added 5 percent for tinnitus to conclude that appellant had a 5.63 percent binaural hearing loss. The Office noted that for a 5.63 percent binaural hearing loss appellant would be paid for 78.82 days of compensation (or 11.26 weeks). It noted that appellant was previously paid for a four percent monaural hearing loss in the right ear which meant that appellant was paid for 14.56 days of compensation, or 2.08 weeks. The Office concluded that appellant was entitled to 65 additional days of payment.

⁵ An audiogram conducted on Dr. C. Nguyen's behalf on January 9, 2007 showed hearing loss at 500, 1,000, 2,000 and 3,000 cps as follows: right ear 30, 25, 20 and 60, respectively and left ear 30, 25, 20 and 25 respectively. In making his mathematical calculations, Dr. C. Nguyen accidentally switched calculations for the right and left ears. The audiogram was interpreted as showing decibel hearing loss at 500, 1,000, 2,000 and 3,000 cps as follows: right ear 30, 25, 20 and 60 decibels, respectively and for the left ear at 30, 25, 20 and 25 decibels, respectively. Dr. C. Nguyen then determined that the average hearing loss in the right ear was 25 decibels from which he subtracted the 25 decibel fence to determine that appellant had a 0 percent monaural impairment in his right ear. He then determined that the average hearing loss in appellant's left ear was 34 decibels, from which he subtracted the 25 decibel fence which yielded 9 which he multiplied by 1.5 to determine that appellant had a 13.5 percent monaural impairment in his left ear. To calculate binaural hearing loss, Dr. C. Nguyen multiplied the hearing loss in the better ear (0 percent) by 5 and added the hearing loss in the poorer ear (13.5) and divided this figure by 6 to conclude that appellant had a 2.25 percent binaural hearing loss.

⁶ The audiogram conducted on Dr. Loeffler's behalf showed hearing loss at 500, 1,000, 2,000 and 3,000 cps 30, 30, 30 and 55 decibels for the right ear and 25, 25, 25 and 25 decibels for the left ear. Dr. Loeffler took the average hearing loss in the right ear of 36.25 and subtracted the 25 decibel fence and multiplied it by 1.5 to yield at 16.875 percent monaural impairment in the right ear. He then found the average decibel hearing loss in the left ear to be 25 from which he subtracted 25 to result in a 0 percent monaural hearing impairment in the left ear. Dr. Loeffler multiplied the hearing loss in the better ear of 0 percent by 5 and added this to 16.875 percent hearing loss in the poorer ear and divided the sum by 6 to yield a 2.183 percent binaural hearing loss.

LEGAL PRECEDENT

The schedule award provision of the Federal Employees' Compensation Act⁷ and its implementing regulation⁸ set 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 A.M.A., *Guides* has been adopted by the implementing regulation as the appropriate standard for evaluating schedule losses.⁹

The Office evaluates industrial hearing loss in accordance with the standards contained in the A.M.A., *Guides*.¹⁰ Using the frequencies of 500, 1,000, 2,000 and 3,000 cps, the losses at each frequency are added up and averaged.¹¹ 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.¹² The remaining amount is multiplied by a factor of 1.5 to arrive at the percentage of monaural hearing loss.¹³ 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.¹⁴ The Board has concurred in the Office's adoption of this standard for evaluating hearing loss.¹⁵

ANALYSIS

The Board finds that this case is not in posture for decision.

The Office's calculations with regard to hearing loss are questionable. In determining that appellant had a 5.63 percent binaural hearing loss, the Office indicated that this figure was obtained by adding .63 for binaural hearing loss to 5 percent for tinnitus which affected appellant's everyday activities. However, the Board finds that the Office improperly found appellant's binaural hearing loss was .63 percent. In finding that appellant had a .63 percent binaural hearing loss, the Office utilized hearing loss findings from the Office medical adviser's

⁷ 5 U.S.C. § 8107.

⁸ 20 C.F.R. § 10.404 (2002).

⁹ *Id.*

¹⁰ A.M.A., *Guides* 250 (5th ed. 2001).

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

August 24, 2002 opinion which relied on an audiogram conducted by Dr. T.D. Nguyen on June 17, 2002. At that time, the Office medical adviser found a 3.8 percent monaural hearing loss to the right ear, which the Office, in its October 22, 2007 decision indicated amounted to a .63 percent binaural hearing loss. In light of the fact that appellant continued to be exposed to noise from quarterly firearms qualifications as part of his employment and the fact that appellant testified that his hearing had deteriorated since the 2002 audiogram, the Office erred in making its hearing loss calculations based on an audiogram that was over 5 years old. In fact, subsequent audiograms conducted on behalf of the Office showed greater hearing losses. Dr. Rowin interpreted an audiogram conducted on his behalf on October 10, 2006 as showing a 1.25 percent binaural hearing loss and a 7.5 percent monaural hearing loss in the right ear. Dr. C. Nguyen noted that a January 9, 2007 report on his behalf showed a 2.25 percent binaural hearing loss. Finally, Dr. Loeffler found a 2.813 percent binaural hearing loss based on a June 28, 2007 audiogram. Accordingly, the decision of October 22, 2007 was in error as it utilized an audiogram for hearing loss that was over five years old despite the fact that appellant continued to be exposed to noise at work and greater hearing loss was subsequently noted.

Accordingly, the Board finds that this case must be remanded to the Office to refer to an Office medical adviser to reevaluate appellant's hearing loss based on current hearing loss data and tinnitus. After any further necessary development, the Office should issue a *de novo* decision.

CONCLUSION

The Board finds that this case is not in posture for decision.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated October 22, 2007 is vacated and the case remanded for further consideration consistent with this opinion.

Issued: August 6, 2008
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