

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

L.K., Appellant

and

**DEPARTMENT OF JUSTICE, FEDERAL
BUREAU OF INVESTIGATION, Akron, OH,
Employer**

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**Docket No. 08-256
Issued: December 2, 2008**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On November 2, 2007 appellant filed a timely appeal from the May 30 and September 20, 2007 merit decisions of the Office of Workers' Compensation Programs concerning his schedule award claim. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d), the Board has jurisdiction over the merits of the schedule award.

ISSUE

The issue is whether appellant has more than a nine percent impairment of the left ear.

FACTUAL HISTORY

On January 4, 2005 appellant, then a 55-year-old retired supervisory special agent, filed an occupational disease claim alleging that his left ear hearing loss and ringing in both ears were caused by noise from firing weapons during his federal employment. He retired from federal employment December 31, 2004. Appellant submitted personnel information and copies of hearing tests performed at the employing establishment. Medical reports and medical forms from Dr. Mark May, an otolaryngologist, found that appellant had left ear sensorineural hearing

loss that was an occupational hazard for a right-hand shooter and law enforcement officer. Copies of audiometric testing results and fitness-for-duty evaluations were also received.

A statement of accepted facts dated September 27, 2005 noted that appellant worked as a Special Agent from December 7, 1975 through December 31, 2004 and exposed to firearm noise from training school and periods of firearms qualification.

On November 2, 2005 the Office referred appellant for an audiologic and otologic evaluation with Dr. Peter F. Agnello, Board-certified in otolaryngology. An audiogram was completed on December 5, 2005, which reflected testing at frequency levels including those of 500, 1,000, 2,000 and 3,000 cycles per second (cps). Dr. Agnello's associate, Dr. Arnold Goodman, a Board-certified otolaryngologist, examined appellant on December 5, 2005. He noted that appellant had a long-standing history of left ear hearing loss and had worked as a firearms instructor. Appellant was a right-hand shooter with significant hearing loss noted in his left ear since 1996. At the time the asymmetric sensorineural hearing loss was noted, he also had ongoing persistent tinnitus. Dr. Goodman reviewed appellant's medical records and presented findings on examination. He opined that appellant had left ear asymmetric sensorineural hearing loss, which was long-standing and somewhat progressive. Dr. Goodman opined that appellant's hearing loss was compatible with and likely related to noise exposure from his history as a firearms instructor.

On December 12, 2005 the Office accepted appellant's claim for left ear sensorineural hearing loss due to noise exposure.

On January 25, 2005 an Office medical adviser reviewed the medical evidence of record. The December 5, 2005 audiogram, which reflected testing at frequency levels including those of 500, 1,000, 2,000 and 3,000 cps, revealed decibel losses on the left of 25, 25, 40 and 35, respectively and on the right of 15, 20, 15 and 20. Based on the December 5, 2005 audiogram, the Office medical adviser found that appellant had zero percent hearing loss in the right ear and nine percent hearing loss in the left ear. He opined that appellant reached maximum medical improvement on January 25, 2005 and monaural hearing loss was caused or aggravated by his federal employment. The Office medical adviser further advised that hearing aids should not be authorized.

On May 21, 2006 appellant requested a schedule award. By decision dated May 11, 2006, the Office granted him a schedule award for a nine percent permanent impairment of the left ear. The period of the award ran for 4.68 weeks from December 5, 2005 to January 6, 2006.

On May 22, 2006 appellant disagreed with the Office's decision and requested an oral hearing which was held on April 11, 2007. He contended that his hearing loss was greater than that awarded, his tinnitus condition was not considered in the degree schedule award and the Office did not authorize.

Following the hearing, the Office received a May 3, 2007 letter from appellant indicating that he underwent another hearing test and examination with Dr. Goodman on May 1, 2007. Appellant advised that Dr. Goodman's report was forthcoming. No additional medical evidence was received.

By decision dated May 30, 2007, an Office hearing representative affirmed the May 11, 2006 schedule award. The hearing representative found there was no evidence to support that appellant had greater impairment than that awarded for the left ear and there was no medical evidence to establish that his hearing loss required hearing aids.

On June 29, 2007 appellant requested reconsideration. He argued that the Office should pay for his present and future costs to maintain his hearing and life style through the use of hearing aids.

In a May 2, 2007 report, Dr. Goodman noted that appellant complained of a worsening hearing loss in his left ear. He performed an otological evaluation and obtained audiometric testing and a tympanogram. Dr. Goodman stated that the repeat audiogram showed significant worsening in the low frequencies from 250 to 2,000 hertz from the previous audiogram, but with good speech discrimination. He opined that appellant had asymmetric sensorineural hearing loss with worsening in the left ear. Dr. Goodman opined that this was “likely secondary to his history of noise exposure from shooting firearms. Remote possibility of acoustic neuroma ... although this was very unlikely given the time course.” He recommended that a magnetic resonance imaging (MRI) scan be obtained to rule out any acoustic neuroma. Dr. Goodman advised that, if the MRI scan was negative, he would recommend a hearing aid for appellant’s left ear.

On July 11, 2007 an Office medical adviser reviewed the May 2, 2007 report from Dr. Goodman. He noted that the May 11, 2006 hearing evaluation and testing was performed and submitted under the strict conditions of Office protocol and judged to be a valid study. The Office medical adviser noted that the hearing thresholds in the May 2, 2007 audiogram were substantially worse than those in the May 11, 2006 evaluation. He stated that this much deterioration in just a year was “highly suspect” as appellant retired on December 31, 2004 and noise-induced hearing loss did not usually progress after removal from noise, in referencing a scientific survey.

By decision dated September 20, 2007, the Office denied modification of its May 30, 2007 decision.

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.¹ 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

¹ 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).

standard for evaluating schedule losses.² Effective February 1, 2001, schedule awards are determined in accordance with the A.M.A., *Guides* (5th ed. 2001).³

Using the frequencies of 500, 1,000, 2,000 and 3,000 cps, the losses at each frequency are added up and averaged.⁴ 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.⁵ The remaining amount is multiplied by a factor of 1.5 to arrive at the percentage of monaural hearing loss.⁶ 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.⁷

Office procedures provide that, after obtaining all necessary medical evidence, the file should be routed to the Office medical adviser for an opinion concerning the nature and percentage of impairment in accordance with the A.M.A., *Guides*, with the Office medical adviser providing rationale for the percentage of impairment specified.⁸

ANALYSIS -- ISSUE 1

The Office medical adviser applied the Office's standard procedures to the May 11, 2006 audiogram performed for Dr. Goodman. It tested decibel losses at the 500, 1,000, 2,000 and 3,000 cps levels and recorded decibel losses of 25, 25, 40, 35 respectively for the left ear. The total decibel loss in the left ear is 125. When divided by 4, the result is an average hearing loss of 31.25 decibels. The average loss of 31.25 decibels is reduced by a fence of 25 decibels to equal 6.25 which when multiplied by the established factor of 1.5, results in 9.375 percent impairment for the left ear.

Testing for the right ear at frequencies of 500, 1,000, 2,000 and 3,000 cps revealed decibel losses of 15, 20, 15, 20 respectively, for a total decibel loss of 70 decibels. When divided by 4, the result is an average hearing loss of 17.5 decibels. The average loss of 17.5 decibels is reduced by the fence of 25 decibels to equal 0 which when multiplied by the established factor of 1.5, resulted in no impairment for the right ear.

² 20 C.F.R. § 10.404 (2006).

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

⁴ A.M.A., *Guides* at 250 (5th ed. 2001).

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6(d) (August 2002).

The Board finds that the Office medical adviser applied the proper standards to the May 11, 2006 audiogram. Based on this evaluation, the Office granted a schedule award for nine percent impairment of the left ear.

Appellant submitted Dr. Goodman's May 2, 2007 report and audiogram in support of an increased schedule award. Dr. Goodman noted a worsening of appellant's asymmetric sensorineural hearing loss in the left ear "likely" secondary to his history of noise exposure from shooting firearms or a "remote possibility" of an acoustic neuroma. The Board finds that Dr. Goodman's opinion is equivocal on the worsening of appellant's hearing loss. The Board has held that medical opinions which are speculative or equivocal in character are of diminished probative value.⁹ An Office medical adviser reviewed Dr. Goodman's report and opined that the worsening noted in the study could not be attributed to appellant's federal employment as he had retired December 31, 2004 and that hearing loss typically did not progress after removal from noise. As Dr. Goodman did not support his conclusion that the worsening of appellant's hearing loss was due to his exposure to federal work factors, his opinion is of diminished probative value. The Board finds that the medical evidence is insufficient to establish that appellant sustained more than nine percent impairment to his left ear as a result of federal employment factors.

On appeal, appellant asserts that the Office should pay for hearing aids. The Board notes that in his May 2, 2007 report, Dr. Goodman advised that a hearing aid would be contingent on the results of an MRI scan. There is no MRI scan of record or other medical evidence explaining why he needs hearing aids for treatment of his hearing loss. The Office's medical adviser opined that hearing aids should not be authorized. The Board finds that appellant has not submitted evidence to establish his need for hearing aids.

CONCLUSION

The Board finds that appellant has no more than nine percent permanent impairment of the left ear. The Board further finds that appellant has not established entitlement to hearing aids.

⁹ *L.R. (E.R.)*, 58 ECAB ____ (Docket No. 06-1942, issued February 20, 2007).

ORDER

IT IS HEREBY ORDERED THAT the September 20 and May 30, 2007 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: December 2, 2008
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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