

In a report dated July 24, 2006, Dr. Salim A. Matar, a Board-certified otolaryngologist and Office referral physician, diagnosed employment-related bilateral sensorineural hearing loss. He rated appellant's binaural impairment at 47.8 percent.

Dr. Ira D. Rothfeld, a Board-certified otolaryngologist, reviewed appellant's case record at the Office's request. In a report dated September 10, 2006, he found that appellant had a 40.63 percent binaural hearing loss based on the July 24, 2006 audiogram administered in conjunction with Dr. Matar's examination.

Appellant filed a claim for a schedule award on October 11, 2006 and the Office commenced payment on the award in May 2007 without having issued a formal decision.

In July 2007 the Office received a May 16, 2007 audiogram.

In a decision dated March 21, 2008, the Office granted appellant a schedule award for 41 percent binaural hearing loss. The award covered a period of 82 weeks from July 24, 2006 through February 17, 2008.¹

On April 26, 2008 appellant requested an oral hearing. By decision dated May 27, 2008, the Branch of Hearings & Review denied appellant's hearing request because it was untimely. Appellant was advised that he could pursue the issue by requesting reconsideration before the district Office.

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

Utilizing the claimant's recorded frequencies at 500, 1,000, 2,000 and 3,000 cycles per second, the losses at each frequency are added and then averaged.⁵ From this average loss a

¹ By the time the Office issued a decision, all payments under the schedule award had been disbursed.

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) (2006).

³ 20 C.F.R. § 10.404 (2008).

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

⁵ A.M.A., *Guides* 250.

“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 remainder is then 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. Then the lesser of the two monaural values is multiplied by five. The resulting value is then added to the greater monaural loss and the total is divided by six to arrive at the binaural hearing loss.⁸

ANALYSIS -- ISSUE 1

Appellant argues that he has a 47.8 percent hearing loss as indicated by Dr. Matar in a July 24, 2006 report. Dr. Matar based his binaural impairment rating on Table 11-2, A.M.A., *Guides* 248-49. Although the A.M.A., *Guides* include Table 11-2 as an alternative method for calculating binaural hearing impairment, the Office has not endorsed this particular method.⁹ The appropriate formula for determining hearing impairment under the Act is as noted above. But while Dr. Rothfeld applied the correct formula for determining binaural hearing loss, the data he used was not entirely consistent with the July 24, 2006 audiogram results.

In reviewing appellant’s July 24, 2006 audiogram, the frequency levels recorded at 500, 1,000, 2,000 and 3,000 hertz for the right ear reveal decibel losses of 40, 50, 60 and 65, respectively, for a total of 215 decibels.¹⁰ This amount when divided by four results in an average hearing loss of 53.75 decibels. The average loss of 53.75 is reduced by 25 decibels to 28.75, which when multiplied by 1.5 represents a 43.1 percent 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 hertz revealed decibel losses of 40, 65, 65 and 75 decibels respectively, for a total of 245 decibels.¹¹ Utilizing the above-noted formula ($245 \div 4 = 61.25 - 25 = 36.25 \times 1.5 = 54.4$) results in a 54.4 percent monaural hearing loss for the left ear. Based on the 43.1 percent loss in the right ear and the 54.4 percent loss in the left, appellant has a 44.98 percent binaural loss ($43.1 \times 5 = 215.5 + 54.4 = 269.9 \div 6 = 44.98$), which is rounded to 45 percent.¹² Appellant also submitted a May 16, 2007 audiogram. Assuming the equipment was properly calibrated and the results are accurate, this latest study is consistent with a binaural hearing loss of 45 percent.

The Board finds that appellant has a 45 percent binaural hearing loss. The Office has awarded 41 percent impairment. Therefore, appellant is entitled to an additional four percent.

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ Dr. Rothfeld found a total loss of 205 decibels (35, 50, 55 and 65) with respect to appellant’s right ear.

¹¹ According to Dr. Rothfeld, appellant’s left ear showed a total loss of 225 decibels (40, 50, 65 and 70).

¹² Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.4b(2)(b) (March 2005).

The March 21, 2008 decision is modified to reflect appellant's entitlement to a schedule award for 45 percent binaural hearing loss.

LEGAL PRECEDENT -- ISSUE 2

Any 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.¹³ A request for either an oral 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.¹⁴ If the request is not made within 30 days, a claimant is not entitled to a hearing or a review of the written record as a matter of right. Office regulations further provide that the "claimant must not have previously submitted a reconsideration request (whether or not it was granted) on the same decision."¹⁵ Although a claimant may not be entitled to a hearing as a matter of right, the Office has discretionary authority with respect to granting a hearing and the Office must exercise such discretion.¹⁶

ANALYSIS -- ISSUE 2

Appellant's request for an oral hearing was dated and postmarked April 26, 2008, which is more than 30 days after the Office issued its March 21, 2008 schedule award decision. The regulations clearly specify that "[t]he hearing request must be sent within 30 days (as determined by postmark or other carrier's date marking) of the date of the decision for which a hearing is sought."¹⁷ Appellant's request was, therefore, untimely and as such, he was not entitled to an oral hearing as a matter of right. In its May 27, 2008 decision, the Branch of Hearings & Review also denied appellant's request on the grounds that the pertinent issue could be addressed by requesting reconsideration and submitting additional evidence to the district Office. This is considered a proper exercise of the hearing representative's discretionary authority.¹⁸ Moreover, there is no evidence indicating that the Branch of Hearings & Review otherwise abused its discretion in denying appellant's request. Accordingly, the Board finds that the Branch of Hearings & Review properly exercised its discretion in denying appellant's request for an oral hearing.

CONCLUSION

Appellant has 45 percent binaural hearing loss. The Board further finds that the Branch of Hearings & Review properly denied appellant's April 26, 2008 hearing request.

¹³ 20 C.F.R. § 10.615.

¹⁴ 20 C.F.R. § 10.616(a).

¹⁵ *Id.*

¹⁶ See *Herbert C. Holley*, 33 ECAB 140 (1981).

¹⁷ 20 C.F.R. § 10.616(a).

¹⁸ *Mary B. Moss*, 40 ECAB 640, 647 (1989).

ORDER

IT IS HEREBY ORDERED THAT the May 27, 2008 decision is affirmed and the March 21, 2008 schedule award decision is affirmed, as modified.

Issued: February 18, 2009
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