

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

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A.R., Appellant )

and )

**DEPARTMENT OF HOMELAND SECURITY,  
CUSTOMS & BORDER PROTECTION,  
BORDER PATROL/LAREDO SECTOR,  
Laredo, TX, Employer**)

**Docket No. 09-153  
Issued: July 16, 2009**

*Appearances:*

*Appellant, pro se*

*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

ALEC J. KOROMILAS, Chief Judge  
DAVID S. GERSON, Judge  
COLLEEN DUFFY KIKO, Judge

**JURISDICTION**

On October 20, 2008 appellant filed a timely appeal from an August 18, 2008 merit decision of the Office of Workers' Compensation Programs denying his hearing loss claim. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

**ISSUE**

The issue is whether appellant established that he sustained a ratable hearing loss in the performance of duty.

**FACTUAL HISTORY**

On February 26, 2008 appellant, a 41-year-old supervisory border patrol agent, filed an occupational disease claim (Form CA-2) for hearing loss in his left and right ears. He first became aware of his condition and its relation to his employment on February 8, 2008.

Appellant attributed his hearing loss to exposure to gun fire at the Laredo Sector Shooting Range, where he was employed as a firearms instructor. He alleged that, in his capacity as a firearms instructor, he conducted daily shooting qualifications for border patrol agents from the Laredo sector. Appellant reported that, on average, they qualified between 3 and 16 agents per day on a variety of firearms. He alleged that, while attending supervisory leadership training, he attended a class on continuation of pay and work-related injuries where he learned that he might be able to file a workers' compensation claim if he had in fact lost some of his hearing due to exposure to sound of constant gun fire. Appellant also stated that he had never suffered any known hearing problems or loss, but that "it appear[ed] from the audiograms that [he] [had] lost some hearing in [his] left and right ears." Further, he reported that he has regular physicals and there have never been any noted problems with his hearing.

In support of his claim, appellant submitted an audiogram dated February 24, 2005 which reflected testing at 500, 1,000, 2,000 and 3,000 cycles per second (cps) levels and showed the following decibel losses: 20, 15, 10 and 10 in the right ear and 15, 15, 15 and 10 in the left ear. Also submitted was an audiogram dated December 27, 2006 which reflected testing at 500, 1,000, 2,000 and 3,000 cps levels and showed the following decibel losses: 5, 10, 5 and 5 in the right ear and 15, 10, 15 and 0 in the left ear.<sup>1</sup>

Appellant submitted evidence of his employment history, revealing that, prior to being employed by the Federal Government, he worked in a variety of professions, some of which were law enforcement related and some of which were not.

Appellant submitted no additional evidence in support of his claim, and by letter dated March 3, 2008, the Office notified appellant that the evidence of record was insufficient to support his claim. It requested that appellant submit detailed evidence concerning his employment history, his hearing loss and other information concerning his claim.

Responding to the Office's March 13, 2008 letter, appellant submitted a personal statement, dated March 13, 2008. Appellant reported that from December 1984 through November 1986 he was employed as a stacker/stocker at HEB Grocery Store, during which he was exposed to average grocery store noise. From April 1987 through May 1990 he was employed by Hobby Crafts, Etc. in sales. During this experience, appellant's noise exposure consisted of low to moderate traffic store noise produced by people shopping in the store. From September 1990 through December 1992 he was employed as a security guard. Noise exposure during this employment opportunity was produced by passing delivery vehicles and employee vehicles at a checkpoint. From February through August 1993 appellant was employed by Calhoun Electric during which time the only noise exposure he experienced was that produced by a forklift. From August 1993 through December 1995 he was employed by the Bexar County Sheriff's Department as a jailer. During this experience, the noise exposure, other than the voices of inmates, included gun fire from the once-a-year firearm qualifying tests. Finally, from

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<sup>1</sup> The record reflects that the actual values for the decibel losses in the left ear were 15, 10, 15 and -5. However, for purposes of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (5<sup>th</sup> ed.), if the values for a given frequency have a negative value, (e.g., -5 decibels) the level should be taken as 0 decibels. A.M.A., *Guides* 247 (5<sup>th</sup> ed. 2001). Pursuant to the A.M.A *Guides*, then, for purposes of this analysis, the -5 decibel loss value was rounded to zero. See note 11, *infra*.

January 1996 to present day, appellant has been employed as a border patrol agent. From January 2005 through March 2007, he was employed as a firearms instructor with the U.S. Border Patrol Academy and his noise exposure consisted of that produced by gunfire on the range. Appellant reported that his date of last exposure to hazardous noise at the Laredo Range was the last week of March 2007 when his detail as a firearms instructor ended. His date of last exposure for his firearms instructor detail to the U.S. Border Patrol Academy was mid August 2007.

The Office referred appellant, together with a statement of accepted facts, to Dr. Paul W. Loeffler, a Board-certified otolaryngologist, for a second opinion evaluation. By medical report dated July 28, 2008, Dr. Loeffler reported that appellant had normal hearing. He noted that, although he detected one slight drop at 4,000 cps in appellant's right ear, this loss was still within normal limits. Dr. Loeffler diagnosed appellant with tinnitus and reported that there was no sensorineural hearing loss present, as confirmed by an audiogram. An audiogram dated July 28, 2008 reflected testing at frequency levels of 500, 1,000, 2,000 and 3,000 cps and revealed hearing losses in the right ear of 10, 15, 10 and 15 respectively.

Testing for the left ear at frequency levels of 500, 1,000, 2,000 and 3,000 cps revealed hearing losses in the left ear of 10, 10, 5 and 10 respectively.

Dr. Loeffler found no ratable hearing loss but factoring in the presence of tinnitus, added five percent to produce a total value of five percent binaural hearing loss.

By letter dated July 31, 2008, the Office requested the district medical adviser review Dr. Loeffler's report concerning maximum date of improvement and the total percentage of impairment.

By report dated August 7, 2008, the district medical adviser, after reviewing the statement of accepted facts and Dr. Loeffler's July 28, 2008 report, concluded that there was no ratable hearing loss. The district medical adviser noted that appellant's date of maximum improvement was July 28, 2008 and that applying the A.M.A., *Guides*, (5<sup>th</sup> ed.), to Dr. Loeffler's medical report, revealed that appellant had zero percent binaural hearing loss. He did not reference the tinnitus findings by Dr. Loeffler.

By decision dated August 18, 2008, the Office accepted appellant's claim for payment of medical benefits but denied appellant's claim for schedule award benefits because the evidence of record established that appellant sustained no ratable hearing loss attributable to his federal employment.<sup>2</sup>

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<sup>2</sup> The Board notes that appellant submitted additional evidence consisting of a medical note dated July 28, 2008. The Board may not consider evidence for the first time on appeal which was not before the Office at the time it issued the final decision in the case. 20 C.F.R. § 501.2(c). See J.T., 59 ECAB \_\_\_\_ (Docket No. 07-1898, issued January 7, 2008) (holding the Board's jurisdiction is limited to reviewing the evidence that was before the Office at the time of its final decision.) As this medical note was not part of the record considered by the Office, the Board may not consider it for the first time on appeal.

## **LEGAL PRECEDENT**

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.<sup>3</sup> 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 A.M.A., *Guides* (5<sup>th</sup> ed. 2001) as the appropriate standard for evaluating schedule losses.<sup>4</sup> Effective February 1, 2001, schedule awards are determined in accordance with the A.M.A., *Guides* (5<sup>th</sup> ed. 2001).<sup>5</sup>

Using the frequencies of 500, 1,000, 2,000 and 3,000 cps, the losses at each frequency are added up and averaged.<sup>6</sup> 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.<sup>7</sup> The remaining amount is multiplied by a factor of 1.5 to arrive at the percentage of monaural hearing loss.<sup>8</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 and then added to the greater loss and the total is divided by six to arrive at the amount of the binaural hearing loss.<sup>9</sup>

Tinnitus in the presence of unilateral or bilateral hearing impairment may impair speech discrimination. Therefore, the A.M.A., *Guides* allow up to five percent additional for tinnitus in the presence of measurable hearing loss if the tinnitus impacts the ability to perform activities of daily living.<sup>10</sup>

## **ANALYSIS**

The Office medical adviser applied the Office's standardized procedures to the February 28, 2008 audiogram obtained by Dr. Loeffler. According to the Office's standardized procedures, testing at frequency levels of 500, 1,000, 2,000 and 3,000 cps revealed hearing losses in the right ear of 10, 15, 10 and 15 respectively. These totaled 50 decibels which, when divided

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<sup>3</sup> 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).

<sup>4</sup> 20 C.F.R. § 10.404 (2006).

<sup>5</sup> Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 (June 2003).

<sup>6</sup> A.M.A., *Guides* 250 (5<sup>th</sup> ed. 2001).

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

by 4, produced an average hearing loss of 12.5 decibels. The average of 12.5 decibels when reduced by 25 decibels (the first 25 decibels are discounted as discussed above), equals 0 and which, when multiplied by the established factor of 1.5 produced a 0 percent hearing loss in the right ear.

Testing for the left ear at frequency levels of 500, 1,000, 2,000 and 3,000 cps revealed hearing losses in the left ear of 10, 10, 5 and 10 respectively. These totaled 35 decibels which when divided by 4, produced an average hearing loss of 8.75 decibels. The average hearing loss of 8.75 decibels, when reduced by 25 decibels (the first 25 decibels are discounted as discussed above), equals 0 which, when multiplied by the established factor of 1.5 produced a 0 percent hearing loss in the left ear.

The district medical adviser then calculated appellant's binaural hearing loss. The zero percent hearing loss for the right ear, when multiplied by five, yielded a product of zero. The zero percent loss was then added to the zero percent hearing loss for the left ear to obtain a total of zero. The zero percent loss was then divided by six, in order to calculate a binaural hearing loss of zero percent.

The Board finds that there was no ratable hearing loss attributable to his federal employment.<sup>11</sup> Dr. Loeffler improperly factored in tinnitus, by adding an additional five percent, to arrive at a five percent binaural hearing loss.<sup>12</sup> The Board has held, however, that a claimant is not entitled to a schedule award for tinnitus if there is no ratable hearing loss under the standards set forth in the A.M.A., *Guides*.<sup>13</sup> As appellant has no ratable hearing loss Dr. Loeffler's calculation was incorrect and appellant is not entitled to an award for his bilateral tinnitus.

Therefore, the Office properly denied appellant's schedule award claim based upon the medical evidence in the record.

### **CONCLUSION**

Appellant has not established that he sustained a ratable hearing loss in the performance of duty.

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<sup>11</sup> As a preliminary matter, the Board notes that if an audiogram is prepared by an audiologist it must be certified by a physician as being accurate before it can be used to determine the percentage of hearing loss. *Joshua A. Holmes*, 42 ECAB 231, 236 (1990). Neither of the audiograms appellant submitted were certified by a physician as being accurate and therefore they are of little probative value.

<sup>12</sup> Tinnitus in the presence of unilateral or bilateral hearing impairment may impair speech discrimination. Therefore, the A.M.A., *Guides* allow up to five percent additional for tinnitus in the presence of measurable hearing loss if the tinnitus impacts the ability to perform activities of daily living. A.M.A., *Guides* 246.

<sup>13</sup> See *Juan A. Trevino*, 54 ECAB 356, 358 (2003).

**ORDER**

**IT IS HEREBY ORDERED THAT** the August 18, 2008 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 16, 2009  
Washington, DC

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

David S. Gerson, Judge  
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board