

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

R.M., Appellant

and

**DEPARTMENT OF THE NAVY, NAVAL AIR
STATION, Grove, PA, Employer**

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Docket No. 09-537

Issued: September 21, 2009

Appearances:

Thomas R. Uliase, Esq., for the appellant

Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge

COLLEEN DUFFY KIKO, Judge

JAMES A. HAYNES, Alternate Judge

JURISDICTION

On December 18, 2008 appellant filed a timely appeal from the Office of Workers' Compensation Programs' merit decision dated August 13, 2008 which denied modification of a February 7, 2008 decision which granted him a schedule award for 12 percent bilateral hearing loss. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the schedule award in this case.

ISSUE

The issue is whether appellant has more than 12 percent bilateral hearing loss for which he received a schedule award.

FACTUAL HISTORY

In January 2004 appellant, then a 52-year-old boiler plant operator, filed a claim for compensation benefits alleging that he developed hearing loss due to his federal employment.

He became aware of his hearing loss on August 13, 1998 and was exposed to noise at his federal employment until his retirement on April 3, 2006.¹

The employing establishment submitted employing establishment audiograms dated April 30, 1981 to May 15, 1998 which revealed progressive bilateral high frequency hearing loss. Also submitted was an industrial hygiene survey dated January 1984 and October 4, 2002.

Appellant submitted an employment history with a job description for a boiler plant operator/mechanic. In accompanying statements, he noted working from April 1970 to February 1972 as an airman in fire rescue and minor aircraft maintenance; from February 1972 to 1974 in assembly line manufacturing, installing tail lights and pop-riveted sheet metal parts; from June 1975 to October 1975 as an auto equipment serviceman with the employing establishment; from October 1975 to July 1977 as a general helper in the boiler house, and in July 1977 as a boiler plant operator where he operated high pressure steam boilers and dismantled the main boilers for maintenance. Appellant was exposed to noise from compressor, pumps, boilers and generators and was provided with hearing protection.

An April 20, 2004 statement of accepted facts set forth appellant's noise exposure history prior to and during his employment with the employing establishment.

The employing establishment submitted employer medical records which noted that appellant participated in an occupational health and hearing conservation program from April 17, 1985 through May 15, 1998 and was tested annually. The records revealed that appellant sustained bilateral mild hearing loss and was issued foam earplugs.

By letter dated March 4, 2004, the Office referred appellant and the statement of accepted facts to Dr. Emil P. Liebman, a Board-certified otolaryngologist, for an otologic examination and an audiological evaluation. Dr. Liebman performed an otologic evaluation of appellant on May 18, 2004 and audiometric testing was conducted on his behalf on the same date. Testing at the frequency levels of 500, 1,000, 2,000 and 3,000 cycles per second (cps) revealed the following: right ear 0, 20, 35 and 45 decibels; left ear 0, 15, 35 and 45 decibels. Dr. Liebman determined that appellant sustained bilateral symmetrical high frequency sensorineural hearing loss which was at least in part due to the noise exposure encountered in appellant's employment.

On July 19, 2004 an Office medical adviser reviewed Dr. Liebman's report and the audiometric test of May 18, 2004. The medical adviser concluded that, in accordance with the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*,² (A.M.A., *Guides*), appellant had zero percent bilateral sensorineural hearing loss for a zero percent impairment for bilateral hearing loss. The medical adviser determined that appellant's hearing loss was not severe enough to be ratable for a schedule award after applying

¹ In his Form CA-2, appellant also alleged that he developed asbestosis as a result of his work duties. In a letter dated March 10, 2004, the Office requested that appellant file a separate occupational disease claim for the alleged work-related asbestosis.

² A.M.A., *Guides* (5th ed. 2001).

the Office's current standards for evaluating hearing loss to the results of the May 18, 2004 audiology test.

On July 22, 2004 the Office accepted appellant's claim for bilateral hearing loss. In a July 22, 2004 decision, it found that the hearing loss was not severe enough to be considered ratable for purposes of a schedule award.

On August 16, 2004 appellant requested an oral hearing which was held on May 24, 2005. He submitted employing establishment audiograms from June 25, 1985 to July 16, 1998 which showed progressive bilateral hearing loss. Also submitted was an audiogram dated November 29, 2004 performed by Deborah Turofski, an audiologist, who diagnosed mild to moderate, high frequency sensorineural hearing loss bilaterally and recommended hearing aids in both ears. Ms. Turofski determined that appellant sustained a 5.93 percent binaural hearing loss.

In an August 17, 2005 decision, the hearing representative vacated the July 22, 2004 Office decision and remanded the case for further medical development.

On September 13, 2005 an Office medical adviser reviewed the November 29, 2004 audiometric test and noted that the audiogram met the Office's procedural requirements. The medical adviser concluded that, in accordance with the A.M.A., *Guides*, appellant had 2.19 percent binaural hearing loss. He noted that appellant reached maximum medical improvement on November 29, 2004.

On November 8, 2005 the Office advised appellant that, after further development by the Office, the Office medical adviser determined that he sustained ratable hearing loss causally related to his federal employment. It advised appellant to file a Form CA-7, claim for a schedule award. On February 13, 2006 appellant filed a claim for a schedule award.

On October 26, 2007 appellant's claim was referred to the medical adviser. After reviewing the November 29, 2004 audiogram as well as the other audiograms in the record, the medical adviser concluded that the audiogram validity requirements were not satisfied. He recommended referring appellant to a second opinion physician for otologic examination and an audiological evaluation.

By letter dated December 13, 2007, the Office referred appellant and the statement of accepted facts to Dr. Edward Kampsen, a Board-certified otolaryngologist, for an otologic examination and an audiological evaluation. Dr. Kampsen performed an otologic evaluation of appellant on January 4, 2008 and audiometric testing was conducted on his behalf on the same date. Testing at the frequency levels of 500, 1,000, 2,000 and 3,000 cps revealed the following: right ear 20, 30, 45, and 50 decibels; left ear 10, 25, 45 and 50 decibels. Dr. Kampsen determined that appellant sustained noise-induced hearing loss which was at least in part due to the noise exposure encountered in appellant's employment. He recommended bilateral hearing aids.

On January 30, 2008 an Office medical adviser reviewed Dr. Kampsen's report and the audiometric test of January 4, 2008. He concluded that, in accordance with the A.M.A., *Guides*, appellant had 12 percent bilateral sensorineural hearing loss. The medical adviser noted that the

condition found on examination on January 4, 2008 was aggravated by conditions of federal employment and diagnosed bilateral sensorineural hearing loss, consistent in part with hearing loss due to noise exposure. Dr. Kampsen also recommended authorizing bilateral hearing aids.

In a decision dated February 7, 2008, the Office granted appellant a schedule award for a 12 percent bilateral hearing loss. It noted that hearing aids were authorized. The period of the award was from January 4 to June 19, 2008.

On February 13, 2008 appellant requested reconsideration. Appellant, through his attorney, asserted that the calculation of the medical adviser was incorrect and appellant was entitled to a schedule award of 15.94 percent binaural hearing loss.

On February 22, 2008 the Office requested that the medical adviser review the schedule award calculation based on the January 4, 2008 audiogram submitted by appellant's counsel and explain the discrepancy in the impairment determination. In a February 25, 2008 report, the medical adviser reviewed the schedule award calculation and noted that pursuant to page 250 of the A.M.A., *Guides* appellant was entitled to a 12 percent impairment for binaural hearing loss. The medical adviser noted that appellant's counsel reversed the order of the data in the standard formula calculating hearing impairment.

In a March 4, 2008 decision, the Office denied appellant's reconsideration request on the grounds that his letter neither raised substantive legal questions nor included new and relevant evidence and was therefore insufficient to warrant review of the prior decision.

On May 30, 2008 appellant requested reconsideration. He submitted an audiogram from Contemporary Hearing dated April 28, 2008 performed by Blair Post, an audiologist. In a June 25, 2008 letter, the audiologist provided a copy of the calibration of the audiometer used in appellant's hearing test.

On August 11, 2008 an Office medical adviser stated that the audiometric test of April 28, 2008 would compute to a slightly higher bilateral hearing loss than the 12 percent previously granted. However, he opined that it was not a basis for evaluating appellant's hearing loss as it did not conform to the Office's criteria for a valid audiogram which included the completion of a Form CA-1332.³

In a decision dated August 13, 2008, the Office denied modification of the prior decision.

LEGAL PRECEDENT

The schedule award provision of the Federal Employees' Compensation Act⁴ and its implementing regulations⁵ set forth the number of weeks of compensation payable to employees

³ A CA-1332 form is the Office's "Outline for Otologic Evaluation." The form sets forth lists information to be completed in a hearing loss evaluation and contains signature blocks for both the audiologist and the reviewing physician.

⁴ 5 U.S.C. § 8107.

⁵ 20 C.F.R. § 10.404 (1999).

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 regulations as the appropriate standard for evaluating schedule losses.⁶

The Office evaluates industrial hearing loss in accordance with the standards contained in the A.M.A., *Guides*.⁷ Using the frequencies of 500, 1,000, 2,000 and 3,000 cps, the losses at each frequency are added up and averaged.⁸ 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.⁹ The remaining amount is multiplied by a factor of 1.5 to arrive at the percentage of monaural hearing loss.¹⁰ 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.¹¹ The Board has concurred in the Office’s adoption of this standard for evaluating hearing loss.¹²

ANALYSIS

The Office properly referred appellant to Dr. Kampsen regarding his hearing loss. An Office medical adviser reviewed Dr. Kampsen’s findings and concluded that appellant’s hearing loss was aggravated by his employment. He applied the Office’s standardized procedures to the January 4, 2008 audiogram performed for Dr. Kampsen. Testing for the right ear at the frequency levels of 500, 1,000, 2,000 and 3,000 cps revealed decibels losses of 20, 30, 45 and 50, respectively. These decibels were totaled at 145 and were divided by 4 to obtain an average hearing loss at those cycles of 36.25 decibels. The average of 36.25 decibels was then reduced by 25 decibels (the first 25 decibels were discounted as discussed above) to equal 11.25, which was multiplied by the established factor of 1.5 to compute a 16.8 percent monaural loss of hearing for the right ear. Testing for the left ear at the frequency levels of 500, 1,000, 2,000 and 3,000 cps revealed decibels losses of 10, 25, 45 and 50 respectively. These decibels were totaled at 130 and were divided by 4 to obtain the average hearing loss at those cycles of 32.5 decibels. The average of 32.5 decibels was then reduced by 25 decibels (the first 25 decibels were discounted as discussed above) to 7.5, which was multiplied by the established factor of 1.5 to compute an 11.25 percent hearing monaural loss for the left ear. The lesser loss of 11.25 is

⁶ *Id.* See also *Jacqueline S. Harris*, 54 ECAB 139 (2002).

⁷ A.M.A., *Guides* at 250 (5th ed. 2001).

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Donald E. Stockstad*, 53 ECAB 301 (2002), *petition for recon. granted (modifying prior decision)*, Docket No. 01-1570 (issued August 13, 2002).

multiplied by 5, then added to the greater loss of 16.88 and the total is divided by 6 to arrive at the amount of the binaural hearing loss of 12.19 or 12 percent.

Appellant submitted an audiogram dated April 28, 2008, performed by an audiologist, who noted testing for the right ear at the frequency levels of 500, 1,000, 2,000 and 3,000 cps revealed decibels losses of 20, 30, 50 and 50 respectively and for the left ear revealed decibels losses of 25, 35, 45 and 50. In correspondence dated June 5, 2008, the audiologist provided a copy of the calibration of the audiometer used in appellant's hearing test. However, the April 28, 2008 audiogram was not signed by a physician and the Board has held the audiograms that have not been certified as accurate by a physician of record are not a proper basis for calculating a schedule award.¹³

The Board finds that the Office medical adviser applied the proper standards to the January 4, 2008 audiogram and found that appellant has 12 percent binaural hearing loss. Under the Office's standardized procedures, there is no basis on which to find more than 12 percent binaural hearing loss for which appellant has received a schedule award.

On appeal appellant through his attorney asserted that there was a conflict in opinion with regard to the audiogram results. Appellant specifically noted that the January 4, 2008 audiogram performed on behalf of the second opinion physician, yielded 15.94 percent impairment and an April 28, 2008 audiogram by Contemporary Hearing yielded 19.06 percent impairment which were greater than the 12 percent binaural hearing loss calculated by the medical adviser. The Board notes that the medical adviser properly calculated a 12 percent binaural hearing loss by multiplying the lesser loss of 11.25 by 5, then added to the greater loss of 16.88 and the total is divided by 6 to arrive at the amount of the binaural hearing loss of 12.19 or 12 percent. Appellant's counsel seemingly reversed the order of the data in the standard formula and multiplied the greater loss of 16.88 by 5, then added that figure to the lesser loss of 11.25, therefore arriving at an incorrect rating. The Board further notes that the April 28, 2008 audiogram was not certified as accurate by a physician and therefore not a proper basis for calculating a schedule award.¹⁴ Furthermore, as the April 28, 2008 audiogram was not certified by a physician, there is no statutory basis for finding a conflict in the medical evidence.¹⁵

CONCLUSION

The Board finds that the Office properly determined that appellant sustained 12 percent binaural hearing loss.

¹³ See *Joshua A. Holmes*, 42 ECAB 231 (1990).

¹⁴ *Id.* (the Office does not have to review every uncertified audiogram which has not been prepared in connection with an examination by a medical specialist; it is appellant's burden of proof to submit a properly certified audiogram by a medical specialist).

¹⁵ 5 U.S.C. § 8123(a) provides for a conflict in the medical evidence when there is a disagreement between the physician of the employee and the physician making the examination for the United States.

ORDER

IT IS HEREBY ORDERED THAT the August 13, March 4 and February 7, 2008 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: September 21, 2009
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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