

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

W.P., Appellant

and

**DEPARTMENT OF THE AIR FORCE,
940TH AIR REFUELING,
BEALE AIR FORCE BASE, CA, Employer**

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**Docket No. 09-2094
Issued: April 22, 2010**

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 August 17, 2009 appellant filed a timely appeal from an August 5, 2009 merit decision of the Office of Workers' Compensation Programs affirming a December 22, 2008 merit decision granting him a schedule award. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3 the Board has jurisdiction over the merits of his claim.

ISSUE

The issue is whether appellant established that he sustained a four percent hearing loss entitling him to a schedule award as well as additional compensation for tinnitus.

FACTUAL HISTORY

On August 20, 2008 appellant, a 61-year-old aircraft mechanic, filed an occupational disease claim (Form CA-2) for bilateral hearing loss and ringing in his ears that he attributes to

working around jet aircraft for 30 years. He first became aware of his hearing loss and that it was caused by his federal employment on August 31, 1981.¹

Appellant submitted results from historical audiograms.

On August 17, 2008 appellant filed a schedule award claim (Form CA-7).

Appellant submitted an undated note documenting his employment history and information concerning hearing protection studies and devices.

The Office referred appellant, together with a statement of accepted facts for evaluation by Dr. David Kiener, a Board-certified otolaryngologist. By report dated November 4, 2008, Dr. Kiener reviewed appellant's medical history, presented findings on examination and diagnosed mild to moderate neurosensory hearing loss. He opined that appellant's hearing loss was caused by employment-related noise exposure. On December 10, 2008 the district medical adviser reviewed the audiogram, dated October 27, 2008 included in Dr. Kiener's report which reflected testing at frequency levels of 500, 1,000, 2,000 and 3,000 cycles per second (cps) and revealed hearing losses in appellant's right ear of 10, 15, 30 and 55 decibels respectively and 10, 10, 30, and 60 decibels on the left. The district medical adviser diagnosed binaural sensorineural hearing loss and authorized hearing aids.

By decision dated December 22, 2008, the Office accepted appellant's condition for sensorineural hearing loss and granted him a schedule award for four percent binaural hearing loss.

On January 15, 2009 appellant requested an oral hearing. He later elected a review of the written record in lieu of an oral hearing.²

Appellant submitted an undated statement documenting his employment history and results from additional audiograms, four of which concerned hearing tests conducted during the 1960's, 1970's and the early 1980's. He also submitted an audiogram dated October 27, 2008.

By decision dated August 5, 2009, the Office affirmed its December 22, 2008 decision, finding the evidence of record did not demonstrate that appellant sustained greater than a four percent hearing loss and did not support an additional award for tinnitus.

¹ Appellant submitted additional evidence on appeal. 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.)

² A hearing was scheduled for May 15, 2009 but the record reflects that appellant did not attend. Explaining that he had difficulty connecting to the conference call and after he made repeated unsuccessful attempts to participate in another telephonic hearing, the Office offered him the option of scheduling another oral hearing or pursuing review of the written record. Appellant elected review of the written record.

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

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

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 loss for tinnitus in the presence of measurable hearing loss if the tinnitus impacts the ability to perform activities of daily living.¹⁰

³ 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).

⁴ 20 C.F.R. § 10.404 (2006).

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

⁶ A.M.A., *Guides* 250 (5th ed. 2001).

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

ANALYSIS

On appeal appellant argues he is entitled to additional compensation, including compensation for tinnitus. The Board has carefully reviewed the evidence of record¹¹ and finds while he has established he sustained a four percent hearing loss, the record lacks any medical opinion evidence directly addressing the impact of tinnitus on his daily activities.¹² Accordingly, appellant is not entitled to a schedule award for tinnitus.

The Office medical adviser applied the Office's standardized procedures to the October 27, 2008 audiogram obtained by Dr. Kiener. 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, 30 and 55 respectively. These totaled 110 decibels which, when divided by 4, produced an average hearing loss of 27.50. The average of 27.50 decibels when reduced by 25 decibels (the first 25 decibels are discounted as discussed above), equals 2.50 and which, when multiplied by the established factor of 1.5 produced a 3.75 percent hearing loss in appellant's 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, 30 and 60 respectively. These totaled 110 which when divided by 4, produced an average hearing loss of 27.50 decibels. The average hearing loss of 27.50 decibels, when reduced by 25 decibels (the first 25 decibels are discounted as discussed above), equals 2.5 which, when multiplied by the established factor of 1.5 produced a 3.75 percent hearing loss in appellant's left ear.

The district medical adviser then proceeded to calculate appellant's binaural hearing loss. The 3.75 percent hearing loss on the left, when multiplied by 5, yielded a product of 18.75 percent. The 18.75 percent loss was then added to the 3.75 percent loss in appellant's right ear to obtain a total of 22.50 percent which, when divided by 6 yields a 3.75 percent binaural hearing impairment. The Office rounded this 3.75 percent loss to 4 for purposes of his schedule award.

While appellant submitted additional audiograms, many of these predate the date when he became aware of his condition, August 31, 1981. Furthermore, these other audiograms do not constitute competent medical evidence. The Board has held 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.¹³ Accordingly these additional audiograms do not establish that appellant is entitled to additional compensation for his established hearing loss.

On appeal appellant argues he is entitled to compensation for tinnitus, ringing in his ears. Neither Dr. Kiener nor the district medical adviser diagnosed tinnitus or directly addressed the

¹¹ Appellant submitted a November 4, 2008 decision of an administrative law judge in a Department of Veterans Affairs decision denying his right ear hearing loss claim and granting his tinnitus claim for 10 percent impairment. While this decision was favorable to appellant it is not binding on the Board. *See generally Jimmy L. Day*, 48 ECAB 654 (1997).

¹² *See Juan A. Trevino*, 54 ECAB 356, 358 (2003).

¹³ *Joshua A. Holmes*, 42 ECAB 231, 236 (1990).

impact of tinnitus on appellant's daily activities in their reports.¹⁴ Accordingly, appellant is not entitled to a schedule award for tinnitus.

While appellant established he sustained a four percent hearing loss, the evidence of record does not establish he is entitled to a schedule award for tinnitus.

CONCLUSION

The Board finds appellant established that he sustained a four percent hearing loss but has not established he is entitled to a schedule award for tinnitus.

ORDER

IT IS HEREBY ORDERED THAT the August 5, 2005 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 22, 2010
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

¹⁴ *Id.*