

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

J.H., Appellant

and

**DEPARTMENT OF THE NAVY, PEARL
HARBOR SHIP YARD, Pearl Harbor, HI,
Employer**

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**Docket No. 09-2357
Issued: July 7, 2010**

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 September 23, 2009 appellant filed a timely appeal from an August 5, 2009 merit decision of the Office of Workers' Compensation Programs denying a schedule award for a loss of hearing. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.

ISSUES

The issues are: (1) whether appellant has a ratable hearing loss entitling him to a schedule award; and (2) whether the Office properly exercised its discretion in denying hearing aids.

On appeal, appellant contends that he sustained greater hearing loss than found on audiometric testing performed by a physician and that he should be referred for another hearing test.

FACTUAL HISTORY

On December 23, 2008 appellant, then a 60-year-old ship tank tester, filed an occupational disease claim (Form CA-2) alleging that he sustained a hearing loss caused by working near noisy cranes and other heavy machinery, as well as working inside a submarine. He submitted audiograms dated November 13, 1985 through December 15, 2008 and a record of audiograms dating back to January 30, 1981.

The Office referred appellant to Dr. Meredith Pang, a Board-certified otolaryngologist, for a second opinion evaluation of his hearing loss. In a March 23, 2009 report, Dr. Pang discussed the results of a March 23, 2009 audiogram, which revealed bilateral mild high frequency sensorineural hearing loss. Speech reception thresholds, which reflect understanding of conversational speech, were within the normal range at 5 decibels (dB) on the right and 5 dB on the left. Speech discrimination scores, reflecting word understanding at higher frequencies, were within the normal range at 100 percent on the right and 98 percent on the left. Dr. Pang stated that the audiometric test results were not completely reliable and she suspected appellant's hearing might be slightly better based on the differences in the pure tone averages and speech reception thresholds. She advised that, using the frequencies at 500, 1000, 2000 and 3000 hertz (Hz), appellant had a hearing loss of zero percent on the left, right and bilaterally. An audiogram dated March 23, 2009, with an attached calibration certificate, showed hearing levels of 20, 15, 10 and 10 dB on the right and 15, 25, 5 and 5 dB on the left at 500, 1000, 2000 and 3000 Hz, respectively.¹

On April 27, 2009 the Office requested that Dr. Pang provide a report clarifying the reliability of the audiogram.

In a May 18, 2009 report, Dr. Pang found that appellant's workplace noise exposure was sufficient in intensity and duration to have caused his hearing loss. Although the March 23, 2009 audiometric tests were not completely reliable, as she suspected that his hearing might be slightly better than the results, the audiograms were performed within the American National Standards Institute's standards and she believed them to be accurate. Dr. Pang advised that appellant did not require hearing amplification.

By decision dated June 3, 2009, the Office accepted appellant's claim for bilateral hearing loss.

It forwarded Dr. Pang's report and the March 23, 2009 audiogram to Dr. Brian Schindler, a Board-certified otolaryngologist, for an impairment rating in accordance with the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).² In a June 27, 2009 report, Dr. Schindler found that appellant did not sustain

¹ Dr. Pang indicated that the test was repeated as appellant was initially only providing half-word responses during the speech reception threshold test and that there were inconsistencies between the pure tone averages and speech reception thresholds. She stated that the reliability was improved on reinstruction, however, the results appeared to be slightly elevated compared to the speech reception threshold.

² (6th ed. 2009).

a ratable hearing loss. Using the March 23, 2009 audiogram, he added up and averaged appellant's hearing levels at 500, 1000, 2000 and 3000 Hz in the right ear, which were 20, 15, 10 and 10 dB, respectively, to find an average of 13.75. Dr. Schindler subtracted out the 25-decibel fence to find a balance of zero, which he multiplied by 1.5 to find that appellant did not sustain a ratable monaural loss on the right. He added and averaged appellant's hearing levels at 500, 1000, 2000 and 3000 Hz on the left, which were 15, 25, 5 and 5 dB, to find an average of 12.5. Dr. Schindler subtracted out the 25-decibel fence and multiplied the zero balance by 1.5 to find that appellant did not have a ratable monaural loss on the left. He advised that appellant did not sustain a ratable binaural loss and that hearing aids were not authorized.

By decision dated August 5, 2009, the Office denied appellant's claim for a schedule award as the reports from Dr. Pang and Dr. Schindler did not establish a ratable hearing loss under the A.M.A., *Guides*. It also found that he did not require hearing aids.

LEGAL PRECEDENT -- ISSUE 1

Section 8107 of the Federal Employees' Compensation Act³ authorizes the payment of schedule awards for the loss of use of specified members, organs or functions of the body, including hearing.⁴ The Act, however, does not specify how the percentage of loss shall be determined. The method used to make such a determination is a matter that rests in the sound discretion of the Office.⁵ 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.⁶

The Office evaluates industrial hearing loss in accordance with the standards set forth in the specified edition of the A.M.A., *Guides*.⁷ Using the frequencies of 500, 1000, 2000 and 3000 Hz, the losses at each frequency are added up and averaged. Then, a "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 sounds under everyday listening conditions. 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, then added to the greater loss and the total is

³ 5 U.S.C. §§ 8101-8193.

⁴ 5 U.S.C. § 8107(c)(13) (which provides 52 weeks of compensation for complete loss of hearing in one ear and 200 weeks of compensation for complete loss of hearing in both ears).

⁵ *Daniel C. Goings*, 37 ECAB 781 (1986); *Richard Beggs*, 28 ECAB 387 (1977).

⁶ *Henry L. King*, 25 ECAB 39 (1973); *August M. Buffa*, 12 ECAB 324 (1961).

⁷ 20 C.F.R. § 10.404. Effective May 1, 2009, the Office began using the A.M.A., *Guides* (6th ed. 2009).

⁸ A.M.A., *Guides* 249-51.

divided by six to arrive at the amount of the binaural hearing loss.⁹ The Board has concurred in the Office's adoption of this standard for evaluating hearing loss.¹⁰

ANALYSIS -- ISSUE 1

The Office accepted that appellant sustained bilateral hearing loss due to noise exposure from his federal employment. The issue is whether he sustained a ratable impairment in accordance with the A.M.A., *Guides*, entitling him to a schedule award.

The Office referred appellant to Dr. Pang, a Board-certified otolaryngologist, for a second opinion evaluation of his hearing loss. Dr. Pang provided a March 23, 2009 audiogram, with a recent calibration certificate, showing hearing levels of 20, 15, 10 and 10 dB on the right and 15, 25, 5 and 5 dB on the left at 500, 1000, 2000 and 3000 Hz, respectively.

The Office properly forwarded Dr. Pang's report and the March 23, 2009 audiogram to Dr. Schindler, an Office medical consultant, for a determination of permanent impairment in accordance with the sixth edition of the A.M.A., *Guides*.¹¹ In a June 27, 2009 report, Dr. Schindler averaged appellant's hearing levels of 20, 15, 10 and 10 dB on the right and 15, 25, 5 and 5 dB on the left at 500, 1000, 2000 and 3000 Hz, respectively, to find an average of 13.75 on the right and 12.5 on the left. He subtracted out a 25-decibel fence, to find a balance of zero on both the right and left. Multiplying the zero balance by 1.5, he determined that appellant did not sustain a ratable monaural loss on the right or left.¹² Dr. Schindler further found that appellant did not sustain a binaural loss.¹³ The Board finds that he properly applied the A.M.A., *Guides* to the March 23, 2009 audiogram to determine that appellant did not sustain a ratable hearing loss for schedule award purposes.¹⁴

On appeal, appellant contends that he sustained a hearing loss beyond that found by the single audiometric test performed for Dr. Pang and that he should be referred for another hearing test. The Board finds that the Office properly used the audiometric test performed on March 23, 2009 for determining appellant's impairment and eligibility for a schedule award. It was the only test of record performed within the past two years that was certified by a physician.¹⁵ It is

⁹ *Id.* at 250-51.

¹⁰ *Donald E. Stockstad*, 53 ECAB 301 (2002), *petition for recon., granted (modifying prior decision)*, Docket No. 01-1570 (issued August 13, 2002).

¹¹ See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Award and Permanent Disability Claims*, Chapter 2.808.6(d) (August 2002); *Frantz Ghassan*, 57 ECAB 349 (2006).

¹² *Supra* note 8.

¹³ *Id.*

¹⁴ See *S.G.*, 58 ECAB 383 (2007).

¹⁵ See *H.S.*, 58 ECAB 690 (2007); *John C. Messick*, 25 ECAB 333 (1974).

appellant's burden to submit a properly certified audiogram for review if he objects to the audiogram selected by the Office for determining the degree of hearing loss.¹⁶

LEGAL PRECEDENT -- ISSUE 2

Section 8103(a) of the Act provides that the United States shall furnish to an employee who is injured while in the performance of duty, the services, appliances and supplies prescribed or recommended by a qualified physician, which the Secretary of Labor considers likely to cure, give relief, reduces the degree or the period of any disability or aid in lessening the amount of any monthly compensation.¹⁷ The Office must therefore exercise discretion in determining whether the particular service, appliance or supply is likely to affect the purposes specified in the Act.¹⁸

ANALYSIS -- ISSUE 2

The Board further finds that the medical evidence of record supports that appellant is not entitled to hearing aids. There is no medical evidence from a physician recommending that appellant be provided with hearing aids or any other medical treatment for his employment-related hearing loss. Both Dr. Pang and Dr. Schindler found that appellant did not require hearing aids. The Board finds that under these circumstances the Office did not abuse its discretion under section 8103(a) by denying authorization for hearing aids.¹⁹

CONCLUSION

The Board finds that appellant has not established a ratable hearing loss entitling him to a schedule award. The Board also finds that the Office did not abuse its discretion in denying authorization for hearing aids.

¹⁶ See *Joshua A. Holmes*, 42 ECAB 231 (1990).

¹⁷ 5 U.S.C. § 8103(a).

¹⁸ The Office has broad discretionary authority in the administration of the Act and must exercise its discretion to achieve the objectives of section 8103. *Marjorie S. Greer*, 39 ECAB 1099 (1988).

¹⁹ This does not preclude appellant from seeking authorization for hearing aids or other appropriate medical treatment. See Federal (FECA) Procedure Manual, Part 3 -- Medical, *Medical Services and Supplies*, Chapter 3.400.3(d)(2) (October 1990); *Raymond VanNett*, 44 ECAB 480 (1993).

ORDER

IT IS HEREBY ORDERED THAT the August 5, 2009 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 7, 2010
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