

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

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N.H., Appellant )

and )

**DEPARTMENT OF AGRICULTURE, FOOD  
SAFETY INSPECTION SERVICE,  
Louisville, KY, Employer** )

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**Docket No. 09-1400  
Issued: March 10, 2010**

*Appearances:*  
*Appellant, pro se*  
*Office of the Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

DAVID S. GERSON, Judge  
COLLEEN DUFFY KIKO, Judge  
MICHAEL E. GROOM, Alternate Judge

**JURISDICTION**

On May 6, 2009 appellant filed a timely appeal from an April 27, 2009 decision of the Office of Workers' Compensation Programs regarding a schedule award. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.2, the Board has jurisdiction over the merits of the claim.

**ISSUE**

The issue is whether appellant has more than a 30 percent binaural hearing loss.

On appeal, appellant asserts that the Office accepted the claim based on evidence not included in the case record. He contends that the Office should have closed the case record upon accepting his claim on October 27, 2004. Appellant claims he is entitled to additional monetary compensation.

**FACTUAL HISTORY**

On February 27, 2004 appellant, then a retired 59-year-old meat and poultry inspector, filed an occupational disease claim for binaural high frequency hearing loss due to exposure to

hazardous noise at work from 1972 to 1986. He noted working in packing houses with high noise levels from pigs and heavy machinery. Appellant noted that the employing establishment did not provide ear protection until a safety intervention in 1986. He retired on February 21, 1989. Appellant first noticed his hearing loss and related it to his federal employment on January 22, 2004. On the reverse of the form, the employing establishment noted that appellant first reported his hearing loss on January 22, 2004.<sup>1</sup>

The Office accepted that appellant was exposed to noise levels at or above 95dB for 20 hours a week from 1972 to 1986. Appellant was terminated effective February 22, 1989. He received total disability compensation for acute post-traumatic stress disorder.<sup>2</sup>

A December 1971 employing establishment pre-hiring screening physical showed no hearing loss. On January 22, 2004 Mike Welsh, a private sector hearing instrument specialist, obtained an audiogram. Testing for the right ear at the frequency levels of 500, 1,000, 2,000 and 3,000 cycles per second (cps) revealed decibel losses of 55, 60, 60 and 55 respectively. Testing for the left ear at the frequency levels of 500, 1,000, 2,000 and 3,000 cps revealed decibel losses of 55, 55, 60 and 60 decibels.

In a June 1, 2004 letter, the Office advised appellant of the evidence needed to establish his claim. It instructed him to submit any audiometric test results prior to the January 22, 2004 audiogram. Appellant responded by June 14, 2004 letter, explaining that he was not part of an audiometric testing program. He stated that his hearing “ha[d] never been that noticeably bad to [him]” until January 2004.

The Office referred appellant to Dr. Burton J. Cohen, a Board-certified otolaryngologist, for examination. In a July 21, 2004 report, Dr. Cohen noted an atypical hearing loss configuration indicative of noise induced hearing loss and some other type of etiology. Audiometric testing performed that day for the right ear at the frequency levels of 500, 1,000, 2,000 and 3,000 cps revealed decibel losses of 55, 50, 50 and 55 respectively. Testing for the left ear at the frequency levels of 500, 1,000, 2,000 and 3,000 cps revealed decibel losses of 60, 55, 60 and 60 decibels. Appellant underwent a distortion product otoacoustic emissions test and an auditory brainstem test on September 16, 2004, which showed normal hearing except at 8,000 cps on the left and from 2,000 to 8,000 cps on the right. In an October 15, 2004 report, Dr. Cohen opined that the objective tests showed essentially normal hearing.

The Office accepted that appellant sustained a bilateral sensorineural hearing loss in the performance of duty. On November 3, 2004 appellant claimed a schedule award.

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<sup>1</sup> The Board notes that appellant’s hearing loss claim is timely under the three-year time limitation at 5 U.S.C. § 8122(d). In an occupational disease claim, the Board has held that the time for filing a claim begins to run when the employee first becomes aware or reasonably should have been aware of a possible relationship between the condition and his employment. This includes cases where a hearing loss becomes apparent more than three years after an employee was last exposed to hazardous noise at work. *William C. Oakley*, 56 ECAB 519 (2005). In this case, appellant stopped work on February 22, 1989 but did not become aware of a hearing loss until a January 22, 2004 audiogram, the first he had undergone.

<sup>2</sup> The Office accepted acute post-traumatic stress disorder under a separate claim. This claim is not before the Board on the present appeal.

On December 1, 2004 Office referred appellant to Dr. Amulakh M. Patel, a Board-certified otolaryngologist.<sup>3</sup> In a December 16, 2004 report, Dr. Patel provided a history of occupational noise exposure. Audiometric testing performed that day for the right ear at the frequency levels of 500, 1,000, 2,000 and 3,000 cps revealed decibel losses of 35, 35, 35 and 35 respectively. Testing for the left ear at the frequency levels of 500, 1,000, 2,000 and 3,000 cps revealed decibel losses of 40, 40, 50 and 50 decibels.

In a June 2, 2005 report, Mr. Welsh stated that January 22, 2004 audiometry showed a bilateral hearing loss with an average decibel loss of 58.3 on the right and 56.6 on the left. He recommended hearing aids. On June 9, 2005 the Office approved the purchase of two digital hearing aids.

An Office medical adviser reviewed the medical evidence and recommended a current second opinion.<sup>4</sup> On March 27, 2007 the Office obtained a second opinion from Dr. William R. Pugh, a Board-certified otolaryngologist. Audiometric testing performed that day for the right ear at the frequency levels of 500, 1,000, 2,000 and 3,000 cps revealed decibel losses of 45, 45, 45 and 40 respectively. Testing for the left ear at the frequency levels of 500, 1,000, 2,000 and 3,000 cps revealed decibel losses of 50, 50, 55 and 50 decibels. Dr. Pugh diagnosed a moderate bilateral sensorineural hearing loss related to occupational noise exposure.

The Office referred the medical evidence to an Office medical adviser for calculation of a schedule award according to the fifth edition of the American Medical Associations, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*). In a November 26, 2008 report, the Office medical adviser totaled the decibel losses for the right ear at the frequency levels of 500, 1,000, 2,000 and 3,000 cps of 45, 45, 45 and 40 to equal 175. She then divided this total by 4 to obtain the average hearing loss at those cycles of 43.75 decibels. The average of 43.75 decibels was then reduced by the 25 decibel “fence” to equal 18.75. Multiplying the balance of 18.75 by 1.5 resulted in a 28.125 percent monaural hearing loss for the right ear. The medical adviser then totaled the 50, 50, 55 and 50 decibel losses in the left ear at the frequency levels of 500, 1,000, 2,000 and 3,000 cps to equal 205. She then divided this total by 4 to obtain the average hearing loss at those cycles of 51.25 decibels. The average of 51.25 decibels was then reduced by 25 decibels to equal a balance of 26.25 decibels. Multiplying the balance of 26.25 decibels by 1.5 resulted in a 39.375 percent monaural hearing loss for the left ear. The Office medical adviser then multiplied 28.125, the lesser monaural loss, by 5, for a result of 140.625. She then added the greater monaural loss of 39.372, to equal 179.997. She then divided the result of

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<sup>3</sup> The Office selected Dr. Patel as impartial medical examination to resolve conflict between Dr. Cohen and Mr. Welsh. It referred to Mr. Welsh, a licensed hearing instrument specialist, as a medical physician. As Mr. Welsh was not a physician, there was no conflict of medical evidence. 5 U.S.C. § 8123(d). A conflict of medical evidence can occur only between two medical professionals classified as physicians under the Federal Employees’ Compensation Act. 5 U.S.C. § 8103; *James P. Roberts*, 31 ECAB 1010 (1980). Therefore, Dr. Patel cannot be an impartial medical specialist. His opinion therefore functions as a second opinion. The Board notes that the Office’s characterization of Dr. Patel as an impartial medical specialist is harmless, nondispositive error.

<sup>4</sup> Appellant refused to attend a second opinion examination scheduled in September 2005, alleging the referral was part of a conspiracy against him. The Office advised appellant by September 21, 2005 letter that it could not develop the schedule award claim until he agreed to further testing. In an August 30, 2006 letter, appellant agreed to cooperate.

179.997 by 6, to equal a 30 percent binaural sensorineural hearing loss. The medical adviser authorized bilateral hearing aids.

By decision dated April 27, 2009, the Office granted appellant a schedule award for a 30 percent binaural hearing loss. It found that the Office medical adviser properly applied the A.M.A., *Guides* to Dr. Pugh's findings. The period of the award ran for 60 weeks.

### **LEGAL PRECEDENT**

The schedule award provision of the Act<sup>5</sup> provides for compensation to employees sustaining permanent loss or loss of use, of specified members of the body. The Act, however, does not specify the manner in which the percentage loss of a member shall be determined. The method used in making such determination is a matter which rests in the sound discretion of the Office. For consistent results and to ensure equal justice, the Board has authorized 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 Office for evaluating schedule losses and the Board has concurred in such adoption.<sup>6</sup>

The Office evaluates industrial hearing loss in accordance with the standards contained in the A.M.A., *Guides*.<sup>7</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>8</sup> The remaining amount is multiplied by a factor of 1.5 to arrive at the percentage of monaural hearing loss.<sup>9</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, then added to the greater loss and the total is divided by six to arrive at the amount of the binaural hearing loss.<sup>10</sup> The Board has concurred in the Office's adoption of this standard for evaluating hearing loss.<sup>11</sup>

### **ANALYSIS**

The Office accepted that appellant sustained a binaural sensorineural hearing loss due to hazardous noise exposure at work. To determine appellant's entitlement to a schedule award, it obtained a second opinion report and audiometric test results from Dr. Pugh, a Board-certified otolaryngologist.

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<sup>5</sup> 5 U.S.C. §§ 8101-8193.

<sup>6</sup> See 20 C.F.R. § 10.404; *Bernard A. Babcock, Jr.*, 52 ECAB 143 (2000).

<sup>7</sup> A.M.A., *Guides* 250.

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

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

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

<sup>11</sup> *Reynaldo R. Lichtenberger*, 52 ECAB 462 (2001).

The Office medical adviser properly applied the Office's standardized procedures to the March 27, 2007 audiogram obtained by Dr. Pugh. Testing for the left ear at the frequencies of 500, 1,000, 2,000 and 3,000 cps revealed decibel losses of 50, 50, 55 and 50 dBA (decibels), respectively. These decibel losses were totaled at 205 and divided by 4 to obtain the average hearing loss per cycle of 51.25. The average of 51.25 was then reduced by the 25 decibel fence to equal 26.25 decibels for the right ear.<sup>12</sup> Following the same mathematical procedure, the medical adviser totaled the 45, 45, 45 and 40 decibel losses in the right ear at the frequency levels of 500, 1,000, 2,000 and 3,000 cps to equal 175. She divided the total by 4 to obtain the average hearing loss at those cycles of 43.75 decibels, reduced by 25 decibels to equal 18.75.

The binaural hearing loss is determined by calculating the loss in each ear using the formula for monaural loss; the lesser loss, in this case 28.125 is multiplied by five, equaling 140.625 then added to the greater loss of 39.372 for a sum of 179.997 and the total is divided by six to arrive at the amount of the binaural hearing loss of 29.999, rounded up to 30 percent.<sup>13</sup>

The Board finds that the Office medical adviser applied the proper standards to the findings in the March 27, 2007 report of Dr. Pugh and accompanying audiogram performed on his behalf. The result is a 30 percent binaural hearing loss. The Board further finds that the medical adviser properly relied upon the March 27, 2007 audiogram as it was part of Dr. Pugh's evaluation and met all the Office's standards.<sup>14</sup> Therefore, the Office properly found that appellant had a 30 percent binaural hearing loss due to hazardous noise exposures at work.

On appeal, appellant asserts that the Office accepted the claim based on evidence not included in the record. However, he did not identify what evidence he believed was not of record. Appellant also asserted that the Office should have closed his case at the time his claim was accepted on October 27, 2004. However, he filed a claim for a schedule award on November 3, 2004, after the Office had accepted the claim. To develop appellant's schedule award claim, the Office developed the medical evidence. He contended that he was entitled to additional monetary compensation. However, the terms of the Act specify the number of weeks of compensation payable under a schedule award for bilateral hearing loss. For total loss of hearing of both ears, section 8107(13)(B) provides for 200 weeks of compensation. As appellant was found to have a 30 percent binaural loss, he is entitled to a proportionate amount or 30 percent of 200 weeks which is 60 weeks, the period of the award he received. Moreover, factors such as appellant's employability or limitations on daily activities do not go into the calculation of the amount payable under a schedule award.<sup>15</sup>

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<sup>12</sup> The decibel fence is subtracted as it has been shown that the ability to hear everyday sounds under everyday listening conditions is not impaired when the average of the designated hearing levels is 25 decibels or less. See A.M.A., *Guides* 250.

<sup>13</sup> The policy of the Office is to round the calculated percentage of impairment to the nearest decimal point. Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.3.b (June 2003).

<sup>14</sup> See Federal (FECA) Procedure Manual, *supra* note 13, *Requirement for Medical Reports*, Chapter 3.600.8(a) (September 1994).

<sup>15</sup> See *Kimberly M. Held*, 56 ECAB 670 (2005).

**CONCLUSION**

The Board finds that appellant has no more than a 30 percent binaural hearing loss, for which he received a schedule award.

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated April 27, 2009 is affirmed.

Issued: March 10, 2010  
Washington, DC

David S. Gerson, Judge  
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge  
Employees' Compensation Appeals Board