

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

A.F., Appellant

and

**DEPARTMENT OF THE TREASURY, U.S.
CUSTOMS SERVICE, Houston, TX, Employer**

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**Docket No. 09-2074
Issued: May 4, 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 11, 2009 appellant filed a timely appeal from a February 12, 2009 schedule award decision of the Office of Workers' Compensation Programs. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review the merits of this case.

ISSUE

The issue is whether appellant has more than a seven percent binaural loss of hearing, for which he received a schedule award.

On appeal, appellant contends that he is entitled to a greater award for increased hearing loss and significant tinnitus.

FACTUAL HISTORY

This is the second time this case has been on appeal to the Board. In a September 16, 2008 decision, the Board set aside the Office's February 22, 2008 decision denying appellant's request for reconsideration of its December 14, 1994 decision as untimely and failing to establish

clear evidence of error. The Board found that the Office had improperly addressed appellant's request for an increased schedule award as a request for reconsideration.¹

On October 5, 1994 the Office accepted appellant's occupational disease claim for bilateral sensorineural hearing loss. By decision dated December 14, 1994, it denied his request for a schedule award on the grounds that his hearing loss was not severe enough to be considered ratable.

On June 22, 2006 appellant asked the Office to reopen his case, asserting that his hearing loss and constant ringing in his ears had progressively worsened. He submitted a February 6, 2008 audiogram from Dr. Charles J. Ballay, II, a Board-certified otolaryngologist, who diagnosed tinnitus and long-standing hearing loss. Appellant also submitted a February 10, 2008 notice of recurrence alleging increased hearing loss and constant ringing in both ears.

In a decision dated February 22, 2008, the Office denied appellant's request for reconsideration as untimely and failing to establish clear evidence of error. In its September 16, 2008 decision, the Board set aside the Office's February 22, 2008 decision and remanded the case for proper consideration of appellant's request for an increased schedule award.

On remand, the Office referred appellant to Dr. William C. Smith, a Board-certified otolaryngologist, for an examination and an opinion as to the extent of his hearing loss secondary to noise exposure during his federal employment. In a report dated October 23, 2008, Dr. Smith noted that a current audiogram showed a worsening of appellant's hearing since 1994. He diagnosed bilateral, high frequency sensorineural hearing loss due to appellant's federal employment. Dr. Smith recommended a trial of hearing aids, as the severe hearing loss affected appellant's daily activities.

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 15, 20, 25 and 55, respectively. Testing for the left ear at frequency levels of 500, 1,000, 2,000 and 3,000 cps revealed decibel losses of 20, 15, 20 and 75, respectively. Dr. Smith applied the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) to the October 23, 2008 audiogram results. When added together, then divided by four, results for the right ear reflected an average loss of 29 decibels ($115/4 = 28.75$). Subtracting the 25 decibel fence and multiplying the remainder (4) by 1.5 reflected a hearing loss of six percent. With regard to the left ear, when added together, then divided by four, results for the right ear reflected an average loss of 33 decibels ($130/4 = 32.5$). Subtracting the 25 decibel fence and multiplying the remainder (8) by 1.5 yielded a 12 percent hearing loss in appellant's left ear. To determine binaural hearing loss, the six percent loss in the right ear was multiplied by five. The product, 30, was then added to the 12 percent hearing loss in the left ear, for a total of 42, which was then divided by 6, for a resulting binaural hearing loss of 7 percent. Dr. Smith indicated that appellant should receive an additional five percent impairment rating for tinnitus, which impacts his ability to perform activities of daily life. He thus concluded that appellant had a 12 percent binaural hearing loss (7 percent + 5 percent for tinnitus). Dr. Smith opined that the date of maximum medical improvement (MMI) was October 23, 2008.

¹ Docket No. 08-1228 (issued September 16, 2008).

In a November 21, 2008 report, the district medical adviser (DMA) opined that appellant had a 6.6 percent binaural hearing loss under the fifth edition of the A.M.A., *Guides*, based on the results of the October 23, 2008 audiogram and Dr. Smith's second opinion report. He calculated the award by adding the losses at the frequencies of 500, 1,000, 2,000 and 3,000 cps and then averaging these losses and deducting the fence of 25 decibels. The remaining amount was multiplied by 1.5 to arrive at the percentage of monaural hearing loss. For decibels in the left ear of 20, 15, 20 and 75, the above formula resulted in 11.25 percent monaural loss, and for decibel levels recorded in the right ear of 15, 20, 25 and 55, the formula resulted in 5.625 percent monaural loss. The binaural loss was determined by calculating the loss in each ear using the formula for monaural loss, the lesser loss, in this case 5.625 was multiplied by five, equaling 28.125, and then added to the greater loss, 11.25, for a sum of 39.375. The total was divided by six to arrive at a binaural hearing loss of 6.5625, rounded up to 6.6 percent. The DMA stated that hearing aids were authorized and that the date of MMI was October 23, 2008.

On December 2, 2008 the Office informed appellant that his claim had been accepted for binaural hearing loss and advised him to submit a CA-7 form requesting a schedule award. On December 2, 2008 appellant requested a schedule award.

By decision dated February 12, 2009, the Office granted appellant a schedule award for a seven percent binaural hearing loss. The award was for the period October 23, 2008 to January 28, 2009. The Office found that the date of MMI was October 23, 2008.

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.² 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* as the appropriate standard for evaluating schedule losses.³ Effective February 1, 2001, schedule awards are determined in accordance with the A.M.A., *Guides* (5th ed. 2001).⁴

Using the frequencies of 500, 1,000, 2,000 and 3,000 cps, the losses at each frequency are added up and averaged.⁵ 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.⁶ The remaining amount is multiplied by a factor of

² 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).

³ 20 C.F.R. § 10.404.

⁴ Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 (June 2003).

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

⁶ *Id.*

1.5 to arrive at the percentage of monaural hearing loss.⁷ 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.⁸

Proceedings under the Act are not adversarial in nature, and the Office is not a disinterested arbiter. While appellant has the burden to establish entitlement to compensation, the Office shares responsibility in the development of the evidence.⁹ Once the Office has begun an investigation of a claim, it must pursue the evidence as far as reasonably possible¹⁰ and develop the medical evidence in a proper manner.¹¹

ANALYSIS

The Board finds that this case is not in posture for a decision. The case will be remanded to the Office for clarification from the DMA or and further development of the medical evidence as necessary to determine appellant's entitlement to a schedule award.

In its September 16, 2008 decision, the Board remanded the case to the Office for consideration of appellant's request for a schedule award. On remand, the Office referred appellant to Dr. Smith for an opinion as to whether he had a permanent hearing loss and, if so, to what degree. Dr. Smith diagnosed bilateral, high frequency sensorineural hearing loss due to appellant's federal employment and recommended a trial of hearing aids. He applied the fifth edition of the A.M.A., *Guides* to the October 23, 2008 audiogram results. Dr. Smith calculated appellant's schedule award by adding the losses at the frequencies of 500, 1,000, 2,000 and 3,000 cps and then averaging these losses and deducting the fence of 25 decibels. The remaining amount was multiplied by 1.5 to arrive at the percentage of monaural hearing loss. Pursuant to this formula, Dr. Smith concluded that appellant had a 6 percent monaural hearing loss in the right ear, and a 12 percent loss in the left ear. The binaural loss was determined by adding the product of the lesser loss, 6, times 5 ($5 \times 6 = 30$) to the greater loss, 12. The total, 42, was divided by 6 to arrive at a binaural hearing loss of 7 percent. Dr. Smith opined that appellant should receive an additional five percent impairment rating for tinnitus, which impacts his ability to perform activities of daily life. He thus concluded that appellant had a 12 percent binaural hearing loss (7 percent + 5 percent for tinnitus).

The Office properly routed Dr. Smith's report to the DMA, who opined that appellant had a 6.6 percent binaural hearing loss under the 5th edition of the A.M.A., *Guides*, based on the results of the October 23, 2008 audiogram and Dr. Smith's second opinion report. Its February 12, 2009 decision was based largely on the DMA's recommendation. The DMA's

⁷ *Id.*

⁸ *Id.*

⁹ *John J. Carlone*, 41 ECAB 354, 359-60 (1989).

¹⁰ *Edward Schoening*, 41 ECAB 277, 282 (1989).

¹¹ *Melvin James*, 55 ECAB 406 (2004).

report, however, is incomplete and insufficiently rationalized to provide a basis for a schedule award.

The Board notes that the DMA's calculations and application of the A.M.A., *Guides* produced results essentially consistent with Dr. Smith's rating with regard to monaural and binaural hearing loss.¹² Applying the A.M.A., *Guides* to Dr. Smith's results, he concluded that appellant had an 11.25 percent monaural loss in the left ear and a 5.625 percent monaural loss in the right ear. The DMA then determined that the binaural loss was 6.6 percent by applying the appropriate formula. He stated that hearing aids were authorized and that the date of MMI was October 23, 2008. The DMA did not, however, explain why he did not provide an award for tinnitus, as recommended by Dr. Smith. The A.M.A., *Guides* allows for compensation of up to five percent for tinnitus in the presence of measurable hearing loss if the tinnitus impacts the ability to perform activities of daily living.¹³ In this case, Dr. Smith stated that appellant's tinnitus does impact his ability to perform activities of daily living. Office procedures provide that, after obtaining all necessary medical evidence, the file should be routed to the Office medical adviser for an opinion concerning the nature and percentage of impairment in accordance with the A.M.A., *Guides*, with the Office medical adviser providing rationale for the percentage of impairment specified.¹⁴ The DMA failed to provide such rationale. As such, the Board cannot make a proper determination as to the extent of appellant's permanent impairment.

Proceedings under the Act are not adversarial in nature, nor is the Office a disinterested arbiter.¹⁵ While the claimant has the responsibility to establish entitlement to compensation, the Office shares responsibility in the development of the evidence. It has the obligation to see that justice is done.¹⁶ Accordingly, once the Office undertakes to develop the medical evidence further, it has the responsibility to do so in the proper manner.¹⁷ The case will be remanded to the Office for clarification by the DMA and further development of the medical evidence, as necessary.

CONCLUSION

The Board finds that this case is not in posture for decision.

¹² The Board notes that, while the DMA's calculations were not rounded, as were those of Dr. Smith, the effect of rounding did not substantively affect the recommended schedule award. The DMA concluded that appellant had a 6.6 percent binaural hearing loss, which was rounded up by the Office to 7 percent.

¹³ See A.M.A., *Guides* 246; *S.G.*, 58 ECAB 383 (2007); *Leslie M. Mahin*, 55 ECAB 311 (2004).

¹⁴ See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6(d) (August 2002).

¹⁵ *Vanessa Young*, 55 ECAB 575 (2004).

¹⁶ *Richard E. Simpson*, 55 ECAB 490 (2004).

¹⁷ *Melvin James*, 55 ECAB 406 (2004).

ORDER

IT IS HEREBY ORDERED THAT the February 12, 2009 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further development of the medical evidence and a *de novo* decision.

Issued: May 4, 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