

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ALAN S. URKOV and DEPARTMENT OF THE ARMY,
FORT HUACHUA FIRE DEPARTMENT, Fort Huachua, AZ

*Docket No. 03-1540; Submitted on the Record;
Issued September 3, 2003*

DECISION and ORDER

Before WILLIE T.C. THOMAS, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issue is whether appellant has sustained a compensable loss of hearing causally related to factors of his federal employment.

Appellant, a 52-year-old lead firefighter, filed a notice of occupational disease alleging that he had developed a loss of hearing due to factors of his federal employment. In support of the claim, appellant submitted audiometric results from the employing establishment's hearing conservation program dated January 15 and February 6, 2002.

The Office of Workers' Compensation Programs referred appellant for a second opinion evaluation with Dr. Eugene Falk, a Board-certified otolaryngologist, on July 1, 2002. In a report dated August 14, 2002, Dr. Falk found that appellant had an employment-related high frequency loss of hearing. The Office medical adviser reviewed this report on October 18, 2002 and found that there was an unexplained significant threshold shift, which required further clarification.

The Office referred appellant for an impartial medical examination on November 14, 2002 to resolve the existing conflict of medical opinion evidence regarding the degree of his loss of hearing. In a report dated November 25, 2002, Dr. Walter J. Jasin, a Board-certified otolaryngologist, agreed that appellant had an employment-related loss of hearing and provided an audiogram.

By decision dated May 12, 2003, the Office accepted that appellant had sustained a loss of hearing due to factors of his federal employment. However, the Office found that appellant was not entitled to a schedule award as his hearing loss was not ratable under the acceptable standards.

The Board finds that appellant has not established that he sustained a compensable loss of hearing causally related to factors of his federal employment.

The schedule award provisions of the Federal Employees' Compensation Act¹ and its implementing federal regulation² set forth the number of weeks of compensation payable to employees 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 loss shall be determined. For consistent results and to ensure equal justice under the law to all claimants, good administrative practice requires the use of a single set of tables so that there may be uniform standards applicable to all claimants.

The Office evaluates industrial hearing loss in accordance with the standards contained in the American Medical Association, *Guides to the Evaluation of Permanent Impairment*, (A.M.A., *Guides*) using the frequencies of 500, 1,000, 2,000 and 3,000 cycles per second.³ The losses at each frequency are added and averaged.⁴ 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 speech under everyday conditions.⁵ The remaining amount is multiplied by a factor of 1.5 to arrive at the percentage of monaural hearing loss.⁶ 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 loss.⁷ The Board has concurred in the Office's adoption of this standard for evaluating hearing losses for schedule award purposes.⁸

Appellant submitted audiometric results from the employing establishment's hearing conservation program dated January 15, 2002, which demonstrated at the frequencies of 500, 1,000, 2,000 and 3,000 cycles per second loss in the left ear -- losses of 0, 0, 20 and 45 respectively and in the right ear -- losses of 5, 10, 20 and 30 respectively. Audiometric results, also from the hearing conservation program, dated February 6, 2002, demonstrated at the frequencies of 500, 1,000, 2,000 and 3,000 cycles per second loss in the left ear -- losses of 20, 15, 30 and 60 respectively and in the right ear -- losses of 5, 10, 20 and 35 respectively.

The Office referred appellant for a second opinion evaluation with Dr. Falk, a Board-certified otolaryngologist. The audiogram accompanying this report demonstrated at the frequencies of 500, 1,000, 2,000 and 3,000 cycles per second loss in the left ear -- losses of 15, 20, 25 and 45 respectively and in the right ear -- losses of 20, 20, 30 and 40 respectively. Due to the discrepancies between the audiometric results from the employing establishment's hearing

¹ 5 U.S.C. §§ 8101-8193, § 8107.

² 20 C.F.R. § 10.404.

³ A.M.A., *Guides* at 250 (5th ed. 2001).

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ *Donald E. Stockstad*, 53 ECAB ____ (Docket No. 01-1570, issued January 23, 2002), *petition for recon. granted (modifying prior decision)*, Docket No. 01-1570 (issued August 13, 2002).

conservation program as submitted by appellant and those of Dr. Falk, the Office medical adviser found that there was a conflict of medical opinion evidence. To resolve this conflict, the Office referred appellant to Dr. Jasin, a Board-certified otolaryngologist.

Section 8123(a) of the Act⁹ provides, “If there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination.” The Board finds that, although there was a discrepancy between the threshold shifts provided by the audiometric results of the employing establishment and Dr. Falk’s audiogram, this was not sufficient to arise to a conflict in medical opinion. In this regard, the audiometric results were provided by the employing establishment’s hearing conservation program, which is a program within an agency of the Federal Government. Moreover, Dr. Falk was a second opinion specialist selected by the Office which renders him a physician of the Federal Government. As a conflict may only exist between appellant’s physician and that of the United States, no classic conflict was created.¹⁰ Therefore, the Office improperly referred to Dr. Jasin, as an impartial medical specialist as he was actually a second opinion specialist, which is also known as referral physicians, who was selected by the Office to investigate the medical condition of appellant in order to make a determination as to whether compensation benefits should be granted, awarded or terminated.¹¹

The Office properly considered the medical evidence submitted in support of appellant’s claim and applied the A.M.A., *Guides*. A medical report was submitted from Dr. Jasin which conforms to applicable criteria and thus constitutes the weight of the medical evidence. The losses at the frequencies of 500, 1,000, 2,000 and 3,000 cycles per second were added and averaged and the “fence” of 25 decibels was deducted.¹² The remaining amount was multiplied by 1.5 to arrive at the percentage of monaural hearing loss. For levels recorded in the left ear of 15, 15, 20 and 50, the above formula derives 0 percent monaural loss and for levels recorded in the right ear of 15, 15, 20 and 35, the above formula derives 0 percent monaural loss. As appellant does not have a ratable loss of hearing in accordance with the above formula, he is not entitled to a schedule award for his loss of hearing at this time.

⁹ 5 U.S.C. §§ 8101-8193, 8123(a).

¹⁰ See *Rosa Whitfield Swain*, 38 ECAB 368, 372 (1987); see also *Albert J. Scione*, 36 ECAB 717, 719 (1985).

¹¹ *Anthony La-Grutta*, 37 ECAB, 602 (1986).

¹² The A.M.A., *Guides* points out that the loss below an average of 25 decibels is deducted as it does not result in impairment in the ability to hear everyday sounds under everyday listening conditions.

The decision of the Office of Workers' Compensation Programs dated May 12, 2003 is hereby affirmed.

Dated, Washington, DC
September 3, 2003

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member