

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

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**PRECILIANO S. PEDROZA, Appellant**

**and**

**DEPARTMENT OF THE AIR FORCE,  
KELLY AIR FORCE BASE, TX, Employer**

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**Docket No. 04-406  
Issued: April 7, 2004**

*Appearances:*  
*Preciliano S. Pedroza, pro se*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

ALEC J. KOROMILAS, Chairman  
COLLEEN DUFFY KIKO, Member  
DAVID S. GERSON, Alternate Member

**JURISDICTION**

On December 2, 2003 appellant filed a timely appeal from the Office of Workers' Compensation Programs' decision dated August 7, 2003 which denied his claim for hearing loss. Appellant also appealed an October 16, 2003 decision which denied his request for an oral hearing. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.<sup>1</sup>

**ISSUES**

The issues are: (1) whether appellant has a ratable hearing loss causally related to his federal employment; and (2) whether the Office properly denied appellant's request for a hearing.

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<sup>1</sup> Appellant submitted new medical evidence with his appeal which the Board is precluded from considering for the first time on appeal. 20 C.F.R. § 501.2(c).

## **FACTUAL HISTORY**

On June 18, 2002 appellant, then a 68-year-old retired aircraft engine mechanic, filed an occupational disease claim for bilateral hearing loss. Appellant stated that he became aware of his hearing loss in 1995 and he first realized that it was employment related on March 1, 1997. Appellant was last exposed on July 3, 1999. Accompanying appellant's claim were numerous audiograms covering the period December 4, 1967 to February 19, 2002.

The Office referred appellant to Dr. William C. Smith, a Board-certified otolaryngologist, for otologic examination and evaluation. Dr. Smith performed an otologic evaluation on August 13, 2002 and audiometric testing was conducted on the doctor's behalf on the same date. Testing at the frequency levels of 500, 1,000, 2,000 and 3,000 cycles per second (cps) revealed the following: right ear 10, 10, 10 and 20 decibels; left ear 20, 20, 15 and 25 decibels. Dr. Smith determined that appellant sustained bilateral sensorineural high frequency hearing loss. He indicated that the hearing loss was due to noise exposure encountered in appellant's employment.

On November 23, 2002 an Office medical adviser reviewed Dr. Smith's report and the audiometric test of August 13, 2002. The medical adviser concluded that, in accordance with the American Medical Association, *Guides to the Evaluation of Permanent Impairment*, (5<sup>th</sup> ed. 2001) (A.M.A., *Guides*), that appellant had a zero percent monaural impairment on the right and a zero percent monaural impairment on the left for a zero percent bilateral hearing loss.

By decision dated August 7, 2003, the Office accepted that appellant sustained bilateral sensorineural hearing loss due to workplace exposure to noise. In another decision, also dated August 7, 2003, the Office determined that appellant's employment-related hearing loss was not severe enough to be considered ratable for purposes of a schedule award.

In a letter dated September 6, 2003 and postmarked September 8, 2003 appellant requested an oral hearing. By decision dated October 16, 2003, the Office denied appellant's request for an oral hearing. The Office found that the request was not timely filed. Additionally, the Office informed appellant that his case had been considered in relation to the issue involved, and that the request was further denied for the reason that the issue could be addressed by requesting reconsideration from the district Office and submitting evidence not previously considered.

## **LEGAL PRECEDENT -- ISSUE 1**

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, function and organs of the body.<sup>2</sup> 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.,

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<sup>2</sup> 5 U.S.C. § 8107.

*Guides* as the appropriate standard for evaluating schedule losses.<sup>3</sup> Effective February 1, 2001, schedule awards are determined in accordance with the A.M.A., *Guides* (5<sup>th</sup> ed. 2001).<sup>4</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>5</sup> 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.<sup>6</sup> The remaining amount is multiplied by a factor of 1.5 to arrive at the percentage of monaural hearing loss.<sup>7</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>8</sup> The Board has concurred in the Office’s adoption of this standard for evaluating hearing loss.<sup>9</sup>

### ANALYSIS -- ISSUE 1

In reviewing appellant’s most recent August 13, 2002 audiogram, the frequency levels recorded at 500, 1,000, 2,000 and 3,000 cps for the right ear reveal decibel losses of 10, 10, 10 and 20, respectively, for a total of 50 decibels. This figure when divided by 4 results in an average hearing loss of 12.5 decibels. The average loss of 12.5 is reduced by 25 decibels to equal –12.5, which results in a 0 percent monaural hearing loss for the right ear. Testing for the left ear at the frequency levels of 500, 1,000, 2,000 and 3,000 cps revealed decibel losses of 20, 20, 15 and 25 decibels respectively, for a total of 80 decibels. Utilizing the above-noted formula results in a zero percent monaural hearing loss for the left ear. Accordingly, pursuant to the Office’s standardized procedures, the Office’s medical adviser determined that appellant had a nonratable hearing loss in both ears.

The Board finds that the Office medical adviser applied the proper standards to the findings as stated in Dr. Smith’s report and the accompanying August 13, 2002 audiogram performed on his behalf. This resulted in a calculation of a nonratable hearing loss as set forth above. Consequently, the Office properly determined that appellant was not entitled to a schedule award.

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<sup>3</sup> 20 C.F.R. § 10.404 (1999).

<sup>4</sup> FECA Bulletin No. 01-05 (issued January 29, 2001); Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 (June 2003).

<sup>5</sup> A.M.A., *Guides* at 250 (5<sup>th</sup> ed. 2001).

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

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

<sup>9</sup> *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).

## LEGAL PRECEDENT -- ISSUE 2

Any claimant dissatisfied with a decision of the Office shall be afforded an opportunity for an oral hearing or, in lieu thereof, a review of the written record. A request for either an oral hearing or a review of the written record must be submitted, in writing, within 30 days of the date of the decision for which a hearing is sought. A claimant is not entitled to a hearing or a review of the written record if the request is not made within 30 days of the date of the decision for which a hearing is sought.<sup>10</sup> However, the Office has discretion to grant or deny a request that was made after this 30-day period.<sup>11</sup> In such a case, the Office will determine whether a discretionary hearing should be granted and, if not, will so advise the claimant with reasons.<sup>12</sup>

## ANALYSIS -- ISSUE 2

In the present case, appellant's request for an oral hearing was postmarked September 8, 2003, which is more than 30 days after the Office's August 7, 2003 schedule award.<sup>13</sup> As such, appellant is not entitled to a hearing as a matter of right. Moreover, the Office considered whether to grant a discretionary review, and correctly advised appellant that the issue of the extent of appellant's permanent hearing loss could equally well be addressed by requesting reconsideration. Accordingly, the Board finds that the Office properly exercised its discretion in denying appellant's untimely request for an oral hearing.<sup>14</sup>

## CONCLUSION

The Board finds that the Office properly denied appellant's claim for a schedule award for hearing loss. The Board further finds that the Office properly denied appellant's request for an oral hearing as untimely.

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<sup>10</sup> 20 C.F.R. § 10.616(a) (1999).

<sup>11</sup> *Herbert C. Holley*, 33 ECAB 140 (1981).

<sup>12</sup> *Rudolph Bermann*, 26 ECAB 354 (1975).

<sup>13</sup> Although appellant's request for a hearing was dated September 6, 2003, in this instance the September 8, 2003 postmark is dispositive for purposes of determining the timeliness of her request. 20 C.F.R. § 10.616(a) (1999).

<sup>14</sup> *E.g., Jeff Micono*, 39 ECAB 617 (1988).

**ORDER**

**IT IS HEREBY ORDERED THAT** the October 16 and August 7, 2003 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: April 7, 2004  
Washington, DC

Alec J. Koromilas  
Chairman

Colleen Duffy Kiko  
Member

David S. Gerson  
Alternate Member