

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

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S.G., Appellant

and

DEPARTMENT OF THE NAVY, MARINE  
CORPS AIR STATION, Miramar, CA, Employer

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**Docket No. 07-30  
Issued: February 26, 2007**

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

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

DAVID S. GERSON, Judge  
MICHAEL E. GROOM, Alternate Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On October 5, 2006 appellant filed a timely appeal from a schedule award decision of the Office of Workers' Compensation Programs dated June 21, 2006. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d), the Board has jurisdiction over the merits of this case.

**ISSUE**

The issue is whether appellant has more than a 13 percent binaural (both ears) hearing loss for which he has received a schedule award.

**FACTUAL HISTORY**

On August 2, 2004 appellant, then a 57-year-old supervisory logistics management specialist, filed a Form CA-2, occupational disease claim, alleging that noise exposure at work caused a bilateral hearing loss. He described his employment history and noise exposure and submitted audiograms taken by the employing establishment dating from November 2, 1965 to November 5, 2003. The November 5, 2003 test results reflected testing at the frequency levels of 500, 1,000, 2,000 and 3,000 cycles per second and revealed the following: right ear 10, 25, 30

and 25 decibels; left ear 10, 15, 30 and 30 decibels, respectively. In a report dated November 6, 2001, Dr. K.D. Yeend, an employing establishment general practitioner, noted a significant threshold shift and recommended additional monitoring and testing. Appellant retired effective August 31, 2004.

By letters dated September 14, 2004, the Office requested that the employing establishment furnish information regarding appellant's noise exposure and informed appellant of the type of evidence needed to support his claim.

On November 17, 2004 the Office referred appellant to Dr. William C. Smith, a Board-certified otolaryngologist, for a second opinion evaluation. In a report dated December 13, 2004, Dr. Smith diagnosed bilateral high frequency sensorineural hearing loss and opined that the condition was due to appellant's employment-related noise exposure. He recommended a hearing aid trial and submitted results of audiometric testing performed by a certified audiologist. The audiogram performed on December 13, 2004 reflected testing at the frequency levels of 500, 1,000, 2,000 and 3,000 cycles per second and revealed the following: right ear 35, 35, 35 and 45 decibels; left ear 20, 25, 35 and 40 decibels, respectively.

On January 22, 2005 an Office medical consultant, Dr. Brian Schindler, a Board-certified otolaryngologist, reviewed the record including Dr. Smith's report. He concurred with Dr. Smith that appellant's hearing loss was caused by employment-related noise exposure. Dr. Schindler found that, as there had been a significant threshold shift in the right ear when comparing Dr. Smith's audiogram with that done one year previously, additional audiometric testing should be done.

The Office referred appellant to Dr. Susan Marena King, also Board-certified in otolaryngology, for an examination.<sup>1</sup> It noted a conflict in the audiometric tests of 2003 and 2004. By report dated September 30, 2005, Dr. King described her examination findings and diagnosed bilateral noise-induced mild to moderate sensorineural hearing loss, consistent with appellant's history of noise exposure, with tinnitus. She opined that it was caused by factors of his federal employment. Dr. King recommended ear protection, dietary restriction and a trial of hearing aids. She submitted results of audiometric testing performed by a certified audiologist on September 30, 2005 which reflected testing at the frequency levels of 500, 1,000, 2,000 and 3,000 cycles per second and revealed the following: right ear 25, 35, 40 and 40 decibels; left ear 25, 30, 40 and 40 decibels, respectively.

In a report dated May 3, 2006, Dr. Schindler noted his review of Dr. King's report and audiometric findings. He authorized hearing aids and applied the Office's standardized procedures to the September 30, 2005 audiogram performed on Dr. King's behalf, finding that the recorded frequency levels at the 500, 1,000, 2,000 and 3,000 cycles per second levels on the right of 25, 35, 40 and 40 respectively totaled a decibel loss of 140. Dr. Schindler then divided this total by 4 which resulted in an average loss of 35 decibels. He then subtracted the fence of 25 decibels to equal 10 decibels which he multiplied by the established factor of 1.5 to result in a

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<sup>1</sup> Dr. Smith and Dr. King were furnished with the medical record, a statement of accepted facts and a set of questions asking that each provide an opinion regarding whether appellant had a hearing loss and, if so, was it employment related.

15 percent monaural hearing loss for the right ear. Dr. Schindler then followed the same procedure on the left, noting that testing for the left ear at the frequencies of 500, 1,000, 2,000 and 3,000 cycles per second revealed decibel losses of 25, 30, 40 and 40 decibels respectively, for a total of 135 decibels which, when divided by 4, resulted in an average hearing loss of 33.75 decibels. He then subtracted the fence of 25 decibels, for a total of 18.75 decibels which he multiplied by the established factor of 1.5, finding a 13.1 percent monaural hearing loss for the left ear. Dr. Schindler then multiplied the 13.1 percent monaural hearing loss for the left ear, as it was the lesser loss, which yielded a product of 65.5. The 65.5 was then added to the 15 percent hearing loss for the right ear, to obtain a total of 80.5 which was divided by 6 in order to calculate a binaural hearing loss of 13 percent.

By decisions dated June 21, 2006, the Office accepted that appellant sustained employment-related bilateral sensorineural hearing loss. It granted him a schedule award for a 13 percent binaural hearing loss.

### **LEGAL PRECEDENT**

Section 8107 of the Federal Employees' Compensation Act<sup>2</sup> specifies the number of weeks of compensation to be paid for permanent loss of use of specified members, functions and organs of the body.<sup>3</sup> The Act does not, however, specify the manner by which the percentage loss of a member, function or organ shall be determined. The method used in making such a determination is a matter which rests in the sound discretion of the Office. 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.<sup>4</sup> The Office evaluates industrial hearing loss in accordance with the standards contained in the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (hereinafter A.M.A., *Guides*).<sup>5</sup> Using the frequencies of 500, 1,000, 2,000 and 3,000 cycles per second, the losses at each frequency are added and averaged.<sup>6</sup> The "fence" of 25 decibels is then 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>7</sup> The remaining amount is multiplied by a factor of 1.5 to arrive at the percentage of monaural hearing loss.<sup>8</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

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<sup>2</sup> 5 U.S.C. §§ 8101-8193.

<sup>3</sup> *Id.* at § 8107(c).

<sup>4</sup> *Renee M. Straubinger*, 51 ECAB 667 (2000).

<sup>5</sup> A.M.A., *Guides* (5<sup>th</sup> ed. 2001); *Joseph Lawrence, Jr.*, 53 ECAB 331 (2002).

<sup>6</sup> *Id.* at 250.

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

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

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

### ANALYSIS

In November 2004, the Office referred appellant to Dr. Smith for a second opinion evaluation. Due to discrepancies between his audiometric findings and those of an employing establishment audiogram dated November 2003, Dr. Schindler recommended further audiometric testing. The Office found that a conflict in medical evidence was created between the November 5, 2003 audiogram submitted by the employing establishment and the December 13, 2004 audiogram submitted by Dr. Smith. Section 8123(a) of the Act provides that, 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.<sup>11</sup> The Board notes that, although there was a discrepancy between the threshold shifts provided by the audiometric results of the 2003 employing establishment audiogram and Dr. Smith's 2004 audiogram, this was not sufficient to create a conflict in medical opinion. Dr. Smith was a second opinion specialist selected by the Office which renders him a physician of the Federal Government, and the employing establishment is a federal agency. As a conflict may only exist between a physician for an employee and that of the United States, no conflict in medical opinion was created. Therefore, the Office improperly identified Dr. King as an impartial medical specialist.

The Board, however, finds that the Office properly considered the medical evidence submitted in support of appellant's claim and applied the A.M.A., *Guides*. When several audiograms are in the case record and all are made within approximately two years of one another and are submitted by more than one physician, the Office should give an explanation for selecting one audiogram over the others.<sup>12</sup> In this case, the Office medical consultant explained that because there had been a significant threshold shift between the November 2003 and December 2004 audiograms, further testing was needed, and the Office referred appellant to Dr. King.

The medical report submitted by Dr. King conforms to applicable criteria and thus constitutes the weight of the medical evidence. The Office medical consultant, Dr. Schindler, reviewed Dr. King's report and audiometric findings and properly applied the Office's standardized procedures in finding that appellant had a 13 percent binaural hearing loss impairment.<sup>13</sup> In a report dated May 3, 2006, he noted his review of Dr. King's report and audiometric findings. Dr. Schindler authorized hearing aids and applied the Office's standardized procedures to the September 30, 2005 audiogram performed on Dr. King's behalf

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

<sup>10</sup> *Horace L. Fuller*, 53 ECAB 775 (2002).

<sup>11</sup> 5 U.S.C. § 8123(a).

<sup>12</sup> *Paul M. Sawko*, 50 ECAB 365 (1999).

<sup>13</sup> A.M.A., *Guides*, *supra* note 5 at 250.

which recorded frequency levels at the 500, 1,000, 2,000 and 3,000 cycles per second levels and revealed decibel losses of 25, 35, 40 and 40 respectively in the right ear for a total decibel loss of 140 on the right. He then followed established procedures and divided this total by 4 which resulted in an average loss of 35 decibels and subtracted the fence of 25 decibels to equal 10 decibels. Dr. Schindler then multiplied this by the established factor of 1.5 to result in a 15 percent monaural hearing loss for the right ear. He then properly followed the same procedure on the left, noting that the test results for the left ear at the frequencies of 500, 1,000, 2,000 and 3,000 cycles per second revealed decibel losses of 25, 30, 40 and 40 decibels respectively, for a total of 135 decibels. Dr. Schindler divided this by 4, for an average hearing loss of 33.75 decibels, subtracted the fence of 25 decibels to equal 8.75 decibels, and multiplied this by the established factor of 1.5, for a 13.1 percent monaural hearing loss for the left ear. He then multiplied the 13.1 percent monaural hearing loss for the left ear by 5, as it was the lesser loss, to find a product of 65.5. As the procedures provide, Dr. Schindler then added the 65.5 to the 15 percent hearing loss for the right ear, to obtain a total of 80.5 which was divided by 6 in order to calculate a binaural hearing loss of 13 percent.<sup>14</sup> The record therefore establishes that appellant is entitled to a schedule award for a 13 percent binaural hearing loss.

The Board also notes that Dr. King diagnosed tinnitus. 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.<sup>15</sup> There is no evidence of record, however, that demonstrates that appellant's tinnitus impacts his ability to perform the activities of daily living. He, therefore, has not established that he is entitled to an additional schedule award for this condition.

The Board thus finds that appellant is not entitled to an additional schedule award for his accepted hearing loss condition.

### CONCLUSION

The Board finds that appellant did not meet his burden of proof to establish that he is entitled to a schedule award for his employment-related hearing loss greater than the 13 percent awarded.

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<sup>14</sup> Dr. Schindler rounded the 13.41 percent down to 13 percent. Office procedures provide that in computing binaural hearing loss percentages should not be rounded until the final percent for award purposes is obtained and fractions should be rounded down from .49 or up from .50. Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.4.b(2)(b) (March 2005). It is also well established that, if calculations based on the monaural loss for each ear would result in greater compensation than calculations for binaural loss, then the monaural hearing loss calculations should be used. *Reynaldo R. Lichtenberger*, 52 ECAB 462 (2001). In this case, appellant's compensation is greater under the procedures used for calculating binaural loss.

<sup>15</sup> A.M.A., *Guides*, *supra* note 5 at 246; see *Leslie M. Mahin*, 55 ECAB 311 (2004).

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated June 21, 2006 be affirmed, as modified.

Issued: February 26, 2007  
Washington, DC

David S. Gerson, Judge  
Employees' Compensation Appeals Board

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

James A. Haynes, Alternate Judge  
Employees' Compensation Appeals Board