

claimed an increase in his hearing loss following a physical examination on September 11, 2005. He explained his occupational noise exposure in an attached statement.

In an October 7, 2005 statement of accepted facts, the Office indicated that appellant was currently exposed to noise at work and had no history of ear problems other than the ones related to his employment. The Office referred him to Dr. Robert Sciacca, a Board-certified otolaryngologist, for a second opinion examination on October 27, 2005. In his report, Dr. Sciacca diagnosed hearing loss in both the right and left ears. He noted a clear drop bilaterally at 4,000 hertz (Hz) which was typical of hearing loss due to noise exposure. The audiometric testing revealed a decibel loss of 35, 35, 25 and 25 in the right ear and 50, 35, 20 and 25 in the left ear for frequency levels of 500, 1,000, 2,000 and 3,000 cycles per second (cps).

On May 10, 2006 the district medical adviser reviewed Dr. Sciacca's audiogram and calculated appellant's bilateral hearing loss to be eight percent. The district medical adviser opined that appellant's hearing loss had improved as his impairment was 15 percent in 2001 which contrasted presently to 8 percent.

On July 27, 2006 the Office denied appellant's claim for an increased schedule award finding that he did not establish any additional loss of hearing. On August 21, 2006 the Office reissued the decision, as material was omitted in the July 27, 2006 decision.

On August 15, 2006 appellant requested a review of the written record and submitted copies of documents from his previous claim.

In a December 4, 2006 decision, the Office denied appellant's request for a schedule award finding that the medical evidence did not establish that he sustained a bilateral hearing loss in excess of the 15 percent for which compensation was previously awarded. It noted that the district medical adviser properly calculated an eight percent binaural hearing loss.

On January 17, 2007 appellant requested reconsideration. He submitted a January 9, 2007 audiometric report from Dr. James McQueen, a Board-certified otolaryngologist, who found a bilateral conductive hearing loss in both ears with a sensorineural component at 4,000 Hz in the left ear. Dr. McQueen stated that the conductive component was not due to noise exposure but the sensorineural component was consistent with noise exposure. He diagnosed conductive hearing loss in the right ear and mixed loss in the left ear. Dr. McQueen's report included the audiometric test results which revealed a decibel loss of 50, 45, 35 and 30 in the right ear and 50, 45, 35 and 35 in the left ear for frequency levels of 500, 1,000, 2,000 and 3,000 cps.

The Office forwarded Dr. McQueen's report to a district medical adviser to review. In a January 31, 2007 memorandum, the medical adviser noted the absence of an audiogram and tympanogram in the record which would be needed to proceed with adjudication. He also noted that Dr. McQueen felt that the right ear hearing loss was not work related.

On April 4, 2007 the Office denied modification of the December 4, 2006 decision on the grounds that the medical evidence submitted was insufficient as it did not contain an audiogram or tympanogram.

In a May 9, 2007 letter, appellant requested reconsideration and resubmitted copies of medical reports arguing that the report from Dr. McQueen demonstrated an increase in hearing loss greater than the 15 percent impairment previously granted. A January 9, 2007 audiogram and tympanogram were submitted.

In a June 25, 2007 memorandum, the Office requested that the district medical adviser review the medical record. On June 27, 2007 the district medical adviser used Dr. McQueen's audiometric findings to calculate appellant's hearing loss. He stated that the conductive hearing loss in the right ear was not work related and calculated the loss to be zero. Hearing loss for the left side was calculated and resulted in a 24 percent monaural hearing impairment.

In a September 17, 2007 decision, the Office denied modification of the April 4, 2007 decision. It found that appellant was previously paid a schedule award for 15 percent binaural hearing loss for which he was paid a total of 30 weeks compensation from April 2 through October 28, 2001.² The Office noted that a 24 percent impairment of the left ear represented 12.48 weeks. It concluded that appellant was not entitled to an additional schedule award greater than the one previously paid.

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.³ 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 American Medical Association, *Guides to the Evaluation of Permanent Impairment* as the appropriate standard for evaluating schedule losses.⁴ Effective February 1, 2001, schedule awards are determined in accordance with the A.M.A., *Guides* (5th ed. 2001).⁵

Using the frequencies of 500, 1,000, 2,000 and 3,000 cps, the losses at each frequency are added up and averaged.⁶ 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.⁷ The remaining amount is multiplied by a factor of

² File No. 06-2027259.

³ 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).

⁴ 20 C.F.R. § 10.404 (2006).

⁵ Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 (June 2003).

⁶ A.M.A., *Guides* 250 (5th ed. 2001).

⁷ *Id.*

1.5 to arrive at the percentage of monaural hearing loss.⁸ 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.⁹

ANALYSIS

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

The Office accepted appellant's claim for bilateral hearing loss and granted a schedule award based on this injury. Once the Office accepted that appellant's hearing loss was work related it could not deny an impairment rating based on the grounds that it was not employment related, unless it rescinded acceptance of the right ear hearing impairment. In effect the attempted Office to rescind its acceptance of appellant's bilateral hearing loss when it subsequently concluded that appellant was only entitled to an award for monaural left ear impairment because the right ear impairment was not work related.

The Board has long held that the power to annul an award is not an arbitrary one and that an award for compensation can only be set aside in the manner provided by the compensation statute. It is well established that, once the Office accepts a claim, it has the burden of justifying termination or modification of compensation. This holds true where the Office decides it erroneously accepted the claim. To support rescission of acceptance of a claim, the Office must show that it based its decision on new evidence, legal argument and or rationale. In establishing that its prior acceptance was erroneous, the Office is required to provide a clear explanation for its rationale for rescission.¹⁰

On remand the Office should obtain a supplemental report from Dr. McQueen which addresses appellant's current binaural hearing loss. The only issue to be determined is whether appellant's hearing loss is greater than the previously awarded schedule award for a 15 percent impairment.

CONCLUSION

The Board finds that the case is not in posture for a decision and should be set aside and remanded for further development.

⁸ *Id.*

⁹ *Id.*

¹⁰ *Doris J. Wright*, 49 ECAB 230 (1997).

ORDER

IT IS HEREBY ORDERED THAT the September 17, 2007 decision of the Office of Workers' Compensation Programs is set aside and remanded.

Issued: July 21, 2008
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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