



## 2011-912

Representative: Anthony Sweet, BPA  
Decision No: 100001565912  
Decision Type: Entitlement Review  
Location of Hearing: Halifax, Nova Scotia  
Date of Decision: 6 January 2011

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### The Entitlement Review Panel decides:

#### HEARING LOSS

Entitlement granted in the amount of one-fifth for service in the Regular Force.  
Subsection 21(2), *Pension Act*

#### Entitlement as previously awarded.

**Before:** John Morrison Presiding Member  
Roger Langille Writing Member

Original signed by:

Signed by: \_\_\_\_\_  
Roger B. Langille

### INTRODUCTION

The Applicant has requested a review of the Minister's decision dated 14 October 2008, which granted one-fifth pension entitlement for hearing loss, claimed pursuant to subsection 21(2) of the *Pension Act*.

### PRELIMINARY MATTERS

As part of the Applicant's case, the Advocate introduced into evidence a letter dated 10 August 2010 from Dr. Ruddy (ER-B1), Otolaryngologist, who offered the opinion that, in essence, the Applicant's hearing at the time of his military discharge may have been worse than indicated in the discharge audiogram, and that his service noise exposure caused post-discharge progression of hearing loss.

During the hearing, the Board inquired of the Advocate as to whether he had any submissions in relation to the Discussion Paper on Hearing Loss prepared for the Board in 2010 by Dr. John Rutka, Professor, Department of Otolaryngology, University of Toronto. The Board indicated it would be taking into consideration Dr. Rutka's paper, which would be regarded as part of the record. At the Advocate's request, the Board provided him an opportunity to make written submissions in relation to that paper. The Board has received and considered those submissions, dated 24 January 2011.

### ISSUE

The issue before the Board is the extent to which the Applicant's hearing loss arose out of, was directly connected with, or aggravated by, his Regular Force service.

## EVIDENCE AND ARGUMENT

### 1. Background

#### a) *Larry W. Nelson v. The Attorney General For Canada*

In 2006, the Federal Court ruled on an application for judicial review of a decision by the Veterans Review and Appeal Board dated 15 November 2004, which refused the Applicant's request for reconsideration of an earlier Veterans Review and Appeal Board decision which denied the Applicant pension disability benefits, under subsection 21(2) of the *Pension Act*.

The Court held that section 3 of the *Pension Act* "means that an applicant would have a disability if his or her ability to hear was lessened or lost."

The Court quoted from the decision of the Board which was the subject of judicial review application:

[36] In its decision, the VRAB stated in part:

. . . While the Board recognizes that some decibel losses were recorded within the Appellant's military service, and while it recognizes that excessive noise exposure within that service was at least a partial cause of those decibel losses and, therefore, of the Appellant's present-day hearing loss disability, it is bound by the legislative authority of the hearing loss policy [Chapter 9 of the *Table of Disabilities*] which states, in part:

If the audiogram on release from service does not meet the requirements for hearing loss disability, any hearing loss demonstrated on subsequent audiograms is not considered due to service-related noise exposure and therefore, pension entitlement is not normally awarded.

Given that situation, the information you offer as new evidence could not, *when taken with other evidence adduced earlier, be expected to affect the result.*

The Court went on to state:

[37] It is obvious from the VRAB's decision that it followed section 9.01 of the Table [of Disabilities] in order to determine whether the applicant had a disability. It did not apply the definition of "disability" contained in section 3 of the *Pension Act*. The VRAB made an error of law in failing to apply the definition of "disability" contained in section 3 of the *Pension Act*.

[*Information added*]

#### b) The Department's response to the *Nelson* decision:

i) Subsequent to the *Nelson* decision, Veterans Affairs Canada (herein the "Department") developed a Hearing Loss Policy Discussion Paper, which states, in part:

##### **Introduction**

This policy position has been developed to address several issues which have arisen in the application of the new Departmental policy on Hearing Loss, which was developed following the Federal Court decision on the *Nelson* case. Two issues have arisen in the application of the new policy to cases in which a previous decision was made, based on the old policy. These issues are (1) Effective Date of pensions, and (2) determining which *Table of Disabilities* applies. A third issue which stems from the introduction of the 2006 edition of the *Table of Disabilities*, and relates to Hearing Loss applications with Tinnitus will also be discussed here.

Please note that Hearing Loss, as referenced in this document, refers to hearing loss which is the result of noise exposure experienced during military service.

##### **Hearing**

The human's ability to hear can be measured objectively and represented in an audiogram. This type of report graphs, for an individual, how loud sounds have to be at different frequencies (pitches) before the person can hear them. The scientific community has established a range of what is considered normal hearing. It is possible for a person's hearing ability to decrease but still remain in the normal range. This is what VAC's Hearing Loss policy refers to as a "lesser degree of hearing". When an individual's hearing ability (across the main frequencies that are measured in a standard audiogram) decreases to the point that it is below the range of normal, this is considered a Hearing Loss Disability for VAC disability benefits' purpose.

VAC's hearing Loss policy was recently revised to reflect more clearly the Department's definition of what is considered a Hearing Loss disability. When the policy was revised, a new entitlement consideration was added. Prior to this policy revision, hearing losses within the normal range (a "lesser degree of hearing") during service were not considered for entitlement unless the Hearing Loss disability was established by the time the individual was released from service. Now, with the new policy, these persons with a "lesser degree of hearing" during service may be granted some degree of disability benefit entitlement, even if they didn't have a disability when they left the service. This is, of course, provided that they have a Hearing Loss disability at the time that they apply for disability benefits from VAC.

### **Departmental Reviews**

When VAC reviews previous decisions made with respect to Hearing Loss claims, the new policy is applied, regardless of when the earlier decision was made. This is because the Federal Court decided that the definition of hearing loss that VAC had been using before was not consistent with the definition contained in the authorizing legislation and the new policy corrects this error.

[As transcribed]

ii) The Department also revised its *Entitlement Eligibility Guidelines* pertaining to hearing loss, which currently state, in part:

### **DIAGNOSTIC STANDARD**

For VAC purposes, normal hearing exists where there is decibel loss of 25 dB or less at all frequencies between 250 and 8000 hertz.

For VAC purposes, disabling hearing loss exists when there is a Decibel Sum Hearing Loss (DSHL) 100 dB or greater at frequencies of 500, 1000, 2000 and 3000 Hz in either ear, OR 50 dB or more in both ears at 4000 Hz.

For VAC purposes, a lesser degree of hearing exists when there is decibel loss greater than 25 dB at frequencies between 250 and 8000 hertz, and this loss is not sufficient to meet VAC's definition of disabling hearing loss.

A disabling hearing loss can be considered to be partially caused by service factors, when there is decibel loss greater than 25 dB evident on the discharge audiogram in at least one of the following between 250 and 8000 Hz; AND a disabling hearing loss is established after discharge.

The presence of a hearing loss and the type of hearing loss may be determined from an audiogram. Diagnosis of the type of hearing loss may be made by a clinical/licensed/certified/registered audiologist or a qualified medical practitioner.

The cause of the hearing loss cannot be determined from an audiogram alone. The history from the patient, the physical examination and relevant test results must be considered along with the audiogram findings.

[As transcribed]

The Introduction to the *Entitlement Eligibility Guidelines* states, in part:

## 1.01 PREFACE

Veterans Affairs Canada (VAC) has undertaken a revision of the medical guidelines which have been used as a guide to awards of pension entitlement to eligible persons under the *Pension Act*, R.S.C. 1985, c.P-6, and other legislation.

The purpose of this revision is to compile a current medical and scientific description of injury and disease for which pension application may be made. It is intended that the revision and usage of the guidelines at all times comply with the recognized obligation of the people of Canada and its government to those who have served and their dependants in accordance with s. 2 of the *Pension Act*, and with the rules of evidence including the benefit of doubt provisions pursuant to s. 5 of the *Act*. It is intended that the revision will, as an improvement to the current guidelines, result in an equitable and efficient system of pension entitlement, providing consistency in decision-making and an element of certainty to clients.

The revised entitlement eligibility guidelines are policy statements, intended to assist in the preparation and submission of applications and in adjudication. They are not intended to be a textbook of medicine or of causation. They are not mandatory or binding. They permit the exercise of discretion by the adjudicator where the *Pension Act* is the primary source of law and where this stipulates the construction of the legislative provisions and rules of evidence pursuant to ss. 2 and 5 of the *Act*.

As the guidelines are intended to provide guidance as opposed to direction on the issue of entitlement, they are maintained separate and apart from the legislated *Table of Disabilities*.

## 1.02 ACKNOWLEDGEMENT

The VAC Entitlement Eligibility Guidelines are based on evidence from credible and peer-reviewed medical research and literature (most of which have been listed in the reference portion of the guidelines). Comprehensive adjudicative guidelines from various disability compensation bodies in Canada, United States and Australia were also reviewed and utilized in the development of the VAC guidelines. A major source of the review with respect to the medical-scientific research on causation and aggravation was from the Australian Department of Veterans Affairs.

Also reviewed and of equal importance were medical texts, journals and other sources of information deemed reliable and reflective of accepted medical theory and practice at the time of writing of the guidelines.

[As transcribed]

One such text is titled *Noise and Military Service*, published by the Institute of Medicine of the National Academies, 2006, Washington, DC: The National Academies Press. In its findings, in Chapter 2, the Institute reported the following:

*. . . FINDING: The evidence from laboratory studies in humans and animals is sufficient to conclude that the most pronounced effects of a given noise exposure on pure-tone thresholds are measurable immediately following the exposure, with the length of recovery, whether partial or complete, related to the level, duration, and type of noise exposure. Most recovery to stable hearing thresholds occurs within 30 days.*

*FINDING: There is not sufficient evidence from longitudinal studies in laboratory animals or humans to determine whether permanent noise-induced hearing loss can develop much later in one's lifetime, long after the cessation of that noise exposure. Although the definitive studies to address this issue have not been performed, based on the anatomical and physiological data available on the recovery process following noise exposure, it is unlikely that such delayed effects occur.*

[As transcribed]

iii) Also prepared to assist the Department in adjudicating hearing loss claims is a document titled "**HEARING LOSS - ENTITLEMENT POLICY DIRECTIVE**", which states, in part:

## **Amendment: 2007-12**

### **A. LEGISLATIVE AUTHORITY**

Sections 21(1) and 21(2) of the *Pension Act* and Section 45 of the *Canadian Forces Members and Veterans Reestablishment and Compensation Act* (hereafter NVC) give Veterans Affairs Canada (VAC) the authority to pay, respectively, Disability Pensions and Disability Awards. Full or partial entitlement may be awarded based on the extent to which the injury, disease or the aggravation thereof, as the case may be, is deemed to be related to service. Entitlement decisions are based on the above-noted authorities, the provisions of this policy, and the guidance provided in the Entitlement Eligibility Guidelines.

### **B. POLICY**

#### **1. Purpose**

The policy is intended to provide direction on rendering decisions regarding disability pension/award entitlement with respect to hearing loss claims.

#### **2. Determination of Hearing Loss**

Subsections 3(1) of the *Pension Act* and 2(1) of the NVC define disability as follows:

*“disability” means the loss or lessening of the power to will and to do any normal mental or physical act.*

In interpreting and applying subsections 3(1) of the *Pension Act* and 2(1) of the NVC, it must be recognized that some “mental or physical acts” such as “hearing” have a range of what is considered “normal”.

##### **Normal hearing**

As based on widely accepted standards, the range of normal hearing is considered to be between 0 and 25 decibels (dB) at all frequencies between 250 and 8000 hertz<sup>1</sup>.

##### **Disabling hearing loss**

For VAC disability benefits purposes, a disabling hearing loss exists when there is a Decibel Sum Hearing Loss<sup>2</sup> of 100 dB or greater at frequencies of 500, 1000, 2000, and 3000 hertz<sup>3</sup> in either ear; or, 50 dB or more in both ears at 4000 hertz<sup>4</sup>.

Where this policy refers to a “disabling hearing loss” it should be taken to mean that the above criteria have been met.

##### **Lesser degree of hearing**

For VAC purposes, a lesser degree of hearing is represented by decibel loss greater than 25 dB at frequencies between 250 and 8000 hertz, but not sufficient to meet the above definition of a disabling hearing loss (i.e., this is when audiometric readings fall between the definitions of “normal hearing” and “disabling hearing loss” as noted above).

#### **3. Factors to be considered - Entitlement**

The *Pension Act* and NVC provide the authority to grant full or partial entitlement for hearing loss.

There are a number of factors that can contribute to hearing loss; for example, trauma, noise, age (presbycusis), diseases, infections, blockages in the ear and usage of certain drugs.

These and other causes of hearing loss may be encountered before, during and after military service, so some or all hearing loss may be due to service factors, to other causes unrelated to military service or to a combination of factors. These factors need to be considered when making a determination as to whether partial entitlement should be considered.

#### 4. **Audiometric examinations**

Audiometry is the accepted international standard for assessing hearing and determining whether hearing loss exists. In most cases, audiograms will be available from enrolment, during service and at discharge from service. These audiograms may assist in determining whether a disabling hearing loss or a lesser degree of hearing was present at the end of military service. In rare cases, audiograms may not be available or no longer exist. In such circumstances, other credible information, such as statements from the service period and/or clinical assessments, along with current medical opinion, may be used to substantiate that a long standing service-related hearing loss existed. This approach could apply to cases such as:

- a. where client is deceased and no audiograms can be obtained, but the client wore hearing aids and a physician provides an opinion that the client had long standing hearing loss.
- b. where client was exposed to service-related noise, never had audiograms performed while in service, or had audiograms performed following service that were subsequently destroyed, and current audiogram reveals a noise-induced disabling hearing loss.

Non-audiometric information can and should be considered, however it cannot override evidence clearly established through audiograms.

#### 5. **Full Entitlement for Hearing Loss**

Where it can be reasonably determined that a service-related disabling hearing loss was documented by the time of release and is reasonably found to be the only factor contributing to the disabling hearing loss, then full entitlement to disability benefits may be awarded.

#### 6. **Partial Entitlement for Hearing Loss**

Partial entitlement may be awarded in proportion to the causative role of military service factors which are determined to have contributed to the disabling hearing loss.

For the purposes of awarding partial entitlement when based on audiometric evidence, a lesser degree of hearing, i.e., a decibel loss greater than 25 dB at any of the frequencies between 250 and 8000 hertz, must be evident on the discharge audiogram in either ear. The Veteran must also have subsequently established a disabling hearing loss. In addition, the current audiogram must reveal the same or greater decibel losses at the affected frequencies noted on the discharge audiogram in order to establish a permanent loss.

iv) The Department has also prepared a 36 page document titled "Hearing Loss Claims Adjudication Approach Re: Hearing Loss Policy", dated 11 December 2007, intended to assist Departmental Adjudicators. It contains the following chart:

<p style="text-align: center;"><b>Partial Entitlement Chart for Hearing Loss</b> <b>Converts % of service related loss to fifths</b></p>
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Amount of Decibel loss at the frequency level with the highest loss	Category of loss	Partial Entitlement (fifth)
30	mild	1/5
35	mild	1/5
40	mild	1/5
45	moderate	2/5
50	moderate	2/5
55	moderate	2/5
60	moderate	2/5
65	severe	3/5
70	severe	3/5
75	severe	3/5
80	severe	3/5
85	severe	3/5
90	severe	3/5
95	profound	4/5
100	profound	4/5
110	profound	4/5

## Summary

As noted above, prior to the Nelson decision and the subsequent revision of the Department's *Entitlement Eligibility Guidelines* on hearing loss and relevant policies, hearing losses which represented a "lesser degree of hearing" but nonetheless fell within the normal range, were not considered eligible for entitlement unless the hearing loss disability was established by the time the individual was released from service.

However, now, with the new policy, those persons with a lesser degree of hearing during service will be granted some degree of disability benefit entitlement, even if they did not have a disability when they left the service.

Pursuant to the Hearing Loss Entitlement Eligibility Guidelines, the Policy Directive and the Adjudication Approach, when the Minister considers, for instance, a Regular Force claim, partial entitlement will be awarded if:

- the current audiogram shows a "disabling hearing loss"; **and**
- there is evidence of service-related noise exposure; **and**
- the discharge audiogram (if available; otherwise the earliest post-discharge audiogram) shows a "lesser degree of hearing" that is "consistent with noise exposure"; **and**
- the current audiogram reveals the same or greater decibel losses at the affected frequencies noted on the discharge audiogram, so as to establish that the loss is permanent.

## 2. The Evidence in this Case

The Applicant was born in 1937. His military service is as follows:

Regular Force - 2 September 1954 to 23 October 1975

The Minister's decision dated 14 October 2008 (in which he was granted one-fifth pension entitlement) was a review of his earlier decision dated 25 September 2006, in which pension entitlement was denied. In the more recent decision (granting entitlement), the Minister wrote in part:

The Department has determined that there was an error in fact or law in the previous decision. This was related to the criteria the Department used to establish the presence of a hearing loss disability under the *1995 Table of Disabilities*. In addition, new evidence has been submitted; an audiogram, dated 27 February 2008.

The evidence establishes that you were previously denied entitlement for hearing loss because your audiogram did not meet the criteria to establish a hearing loss disability. A revised hearing loss policy, implemented in 2007, indicates that there is a range of hearing including normal hearing, lesser degree of hearing and disabling hearing loss.

This new policy provides for partial entitlement for hearing loss; that is, the Department may now award benefits for the extent of loss that is related to military service.

The Hearing Loss Entitlement Eligibility Guideline indicates;

-a lesser degree of hearing is represented by decibel loss greater than 25 decibels at frequencies between 250 and 8000, but there is no disabling hearing loss.

-a disabling hearing loss is represented by a Decibel Sum Hearing Loss (DSHL) of 100 or greater at frequencies of 500,1000, 2000 and 3000 in either ear, or 50 decibels or more in both ears at 4000.

This information is usually recorded on an audiogram.

The evidence establishes that you were exposed to noise during your military service as an Avionics Technician. A service discharge audiogram, dated 25 August 1975, shows a decibel loss at the 6000 Hz frequency, a frequency that is typically affected by noise exposure.

This change in your hearing at service discharge represents a lesser degree of hearing, but not a disabling hearing loss.

Your current audiogram dated 27 February 2008 reveals the first evidence of a disabling hearing loss. This audiogram also shows that the frequencies that were affected during your military service are still affected today.

The Department recognizes that you were exposed to noise during your military service. However, as you did not have disabling hearing loss at the time of your service release, the Department cannot consider full entitlement for this condition. The Department can award entitlement for only the mild category of loss that developed during your military service.

[As transcribed]

The service discharge audiogram dated 25 August 1975 showed the following readings:

	250	500	1000	2000	3000	4000	6000
Right		0	5	0	5	10	20
Left		0	0	10	5	10	30

The Applicant relates his hearing loss to noise exposure during his military service. In the Minister's decision of 14 October 2008, the Department accepted that the Applicant was exposed to noise during his military service. This is no longer in issue.

The Applicant stated he did not undergo a formal hearing test at the time of his discharge. He said that, instead, during the course of his examination by an intern, the latter asked, "Can you hear everything I'm saying?" The Applicant responded he could, and then the intern "filled out a piece of paper and put it aside."



The Applicant also indicated he may have undergone a hearing test during service, but he was not certain. He thought the test may have been conducted while he was in Germany. Initially, the Applicant was adamant he did not undergo any other hearing test while in the military. However, when prompted by the Board regarding the various reports of hearing tests in the documentary evidence before it, the Applicant thought that perhaps he could remember one of them.

The evidence before the Board includes, in addition to the 1975 discharge audiogram referred to above:

1. an audiogram dated 17 December 1962;
2. an audiogram pertaining to the Applicant dated 19 October 1964;
3. an audiogram dated 4 August 1966, showing 15 dB at 6000 Hz in the left ear, and 5 dB at 6000 Hz in the right ear;
4. an audiogram dated 31 March 2006 showing hearing loss of as much as 80 dB at 5000 Hz in the right ear and 90 dB at 5000 Hz in the left ear.

As noted earlier, the Advocate entered into evidence a letter dated 10 August 2010 from Dr. Ruddy, Otolaryngologist, who offered the opinion (in part) that "there is a reasonable chance... that [the Applicant's] hearing may have been worse than appreciated at discharge", and "it is medically "possible" for noise induced hearing loss to continue once noise ceases."

While allowing for a presbycusis element in the Applicant's hearing loss, Dr. Ruddy concluded as follows:

. . . Overall opinion is that the Applicant is more likely than not to have experienced military noise damage with subsequent progression of the noise injury, combined with vascular disease that may also be noise related as a cause for his current disability despite his military discharge screening audiogram.

In his lengthy and very detailed paper (referred to in the Preliminary Matter section above), Dr. Rutka listed a number of basic facts concerning noise induced hearing loss, which he said "tend to reflect what is agreed upon by the majority of scientists and physicians who deal with noise induced hearing loss." One such statement is the following:

Once the exposure to noise is discontinued, there is no substantial further worsening of hearing as a result of noise unless other causes occur.

In relation to the question of whether previous noise induced hearing loss accelerates the onset of presbycusis, Dr. Rutka wrote:

This is question that continues to intrigue auditory research scientists. As previously noted, the effects of noise exposure and aging on hearing when not combined are reasonably well understood. When the two processes are combined, the resultant pathology and its effects upon aging are not as well understood.

It is likely that the two effects are not additive (Corso's theorem) but from a practical point of view this is how they are usually viewed with regards to compensation claims (Dobie's theorem).

*[As transcribed]*

The Advocate requested that, based on noise exposure during the Applicant's military service, together with the Applicant's testimony and the letter from Dr. Ruddy, the Board attribute a greater degree of the Applicant's hearing loss to his military service, and increase the level of disability pension entitlement accordingly.

## ANALYSIS/REASONS

When determining pension entitlement, the Board liberally construes the governing legislation.

Further, in weighing the evidence in this matter, the Board has applied the provisions of section 5 of the *Pension Act* and section 39 of the *Veterans Review and Appeal Board Act* which require that claimants benefit from every reasonable inference, that the case be established by credible evidence, and that claimants be provided with the benefit of the doubt as to whether they have established a case.

The Board has considered the submissions of the Advocate representing the Applicant, the Applicant's testimony before the Review Panel, as well as the documentary evidence before the Board.

The Board has determined the Applicant has not established entitlement to an increased level of disability pension.

Bearing in mind that any doubt in weighing the evidence must be resolved in the Applicant's favour, the Board finds the evidence does not establish that there should be an increase in the Applicant's level of pension entitlement for disability arising from hearing loss.

The Department properly applied the Department's new *Hearing Loss and Tinnitus Guidelines*. The discharge audiogram reveals, at that time, only a 'mild' lesser degree of hearing within the meaning of the Department's *Hearing Loss Guidelines*.

While the Guidelines are neither mandatory nor binding, they are based on evidence from credible peer-reviewed medical research and literature, as well as comprehensive adjudicative guidelines from various disability compensation bodies in Canada, the United States, and Australia.

Applying the Guidelines achieves a significant measure of consistency in the adjudication of disability award claims under the *Pension Act* across the country. The opposite is also the case - disregarding the guidelines would undoubtedly lead to inconsistency.

The Board finds that the Canadian Forces was using medically-accepted testing procedures at the time in question, and that the August 1975 audiogram pertaining to the Applicant was performed on equipment and with personnel appropriate for the task. The Board considers this audiogram reflective of the state of the Applicant's hearing at that time.

With regard to the Applicant's oral evidence that he did not undergo a formal hearing test at the time of his discharge, given that the Applicant had obvious difficulty remembering any of the various hearing tests which are documented in the evidence, the Board cannot attach any significant weight to that testimony.

As to whether the Applicant's hearing continued to deteriorate after discharge as a result of his noise exposure during service, the Board does not find the opinion of Dr. Ruddy to be as persuasive as that of Dr. Rutka, the latter of which, in its entirety, represents a thorough analysis of hearing loss, including noise induced hearing loss, and is supported by an extensive bibliography.

Further, the determination that service-related noise exposure does not cause additional hearing loss after discharge from the military is consistent with the findings of the Institute of Medicine of the National Academies, noted above.

While Dr. Ruddy asserts that "the consensus in the literature is now more towards continuing effects rather than merely assuming cessation at the end of exposure", this opinion is at odds with the consensus referred to by Dr. Rutka. Although Dr. Ruddy cites a few references, they are not sufficient to establish that the consensus is not as indicated by Dr. Rutka and the Institute of Medicine.

With respect to the submission that the audiogram conducted at the time of the Applicant's release from the military is not reliable, the Board does not find Dr. Ruddy's letter to be persuasive. Dr.

Ruddy does not provide any objective evidence that the audiometric testing conducted that date was below standard, inaccurate or deficient in any way.

Further, although Dr. Ruddy lists "cueing" amongst the possible reasons why the audiogram may be unreliable, he does not explain why cueing would apply to some frequencies and not others.

Additionally, Dr. Ruddy's reasoning is, in some respects, circular and speculative. The doctor postulates that the discharge audiogram was inaccurate and, to support this conclusion, he says he would expect an individual with the Applicant's service-related noise exposure to have worse hearing than that shown in pooled survey results of male workers not exposed to industrial noise. He then goes on to say (completing the circular reasoning) that given his conclusion the discharge audiogram may have been inaccurate, the Applicant's "hearing may have been worse than appreciated at discharge."

Circular reasoning does not constitute credible medical evidence: *Elliot v. Canada (Attorney General)*, 2003 FCA 298, (2003), 242 F.T.R. 320

Further, in his own analysis, Dr. Ruddy acknowledges that while it may be surprising that the Applicant should have the hearing results presented in the discharge audiogram, it is not impossible.

That the results of the audiogram are unusual does not render it unreliable. This Board has reviewed thousands of audiograms conducted by the military using the same methods and equipment and which produced results of a wide variety typical of both the general population and the military population.

Additionally, Dr. Ruddy acknowledged (albeit parenthetically), that making comparisons between pooled results of hearing tests and individual data is discouraged. Yet, Dr. Ruddy went on to do just that.

There is good reason why making comparisons between pooled results of hearing tests and individual data is discouraged. By definition, pooled results represent an average, median and mean. While such a pool also includes results on either end of the spectrum (indeed all along the spectrum), those individual results are not shown. Any particular individual, for instance the Applicant, could fall anywhere within that broad spectrum.

In the end, a comparison between the Applicant's hearing test results and those of the pool establishes only that the Applicant's test results did not fall within the median or average. It does not establish that the Applicant's discharge audiogram was inaccurate.

The doctor's argument in this regard is, in the final analysis, specious, and ultimately serves only to undermine the objectivity and of the credibility of the remainder of his report.

Finally, that the discharge audiogram in 1975 revealed a mild (as contrasted with moderate, severe or profound) degree of hearing impairment is not inconsistent with the fact that it was not until some 30 years later, when he was almost 69 years of age, that he was found to have disabling hearing loss.

## **DECISION**

The Minister's decision dated 14 October 2008 granting one-fifth pension entitlement is affirmed.

## **APPEAL RIGHTS**

If you are dissatisfied with this decision, you may appeal it to an Appeal Panel of the Veterans Review and Appeal Board, which may affirm, vary or reverse the decision.

In pursuing this right of appeal, you may be represented, free of charge, by the Bureau of Pensions Advocates or a service bureau of a veterans' organization or at your expense by any other representative.

## **Applicable Statutes:**

*Pension Act*, [R.S.C. 1970, c. P-7, s. 1; R.S.C. 1985, c. P-6, s. 1.]

Section 2  
Subsection 21(2)  
Section 39

*Veterans Review and Appeal Board Act*, [S.C. 1987, c. 25, s. 1; R.S.C. 1985, c. 20 (3rd Supp.), s. 1; S.C. 1994-95, c. 18, s. 1; SI/95-108.]

Section 3  
Section 25  
Section 39

**Exhibits:**

ER-B1: Medical Report from Dr. J. Ruddy dated 10 August 2010 (8 pages); and

ER-B2: Copy of correspondence from the Bureau of Pensions Advocates to Dr. Ruddy (with attachments) dated 21 May 2010 (9 pages).

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1. Institute of Medicine of the National Academies. 2006. *Noise and Military Service - Implications for Hearing Loss and Tinnitus*. Washington, DC: The National Academies press; *Disease -a- month Journal* Vol. 46 number 4 (April 2000) Selected topics related to occupational exposures.
  2. The 1995 edition of the Table of Disabilities references Pure Tone Average (PTA). For the purposes of this policy, Decibel Sum Hearing Loss (DSHL) equates to the terminology of Pure Tone Average.
  3. This criteria is based on the American Medical Association: *Guides to the Evaluation of Permanent Impairment* (fourth edition) 1993.
  4. The additional criteria of 50 dB at the 4000 Hz frequency further extends the definition of a disabling hearing loss. The 4000 Hz frequency was adopted by Veterans Affairs in 1992 to take into account high tone hearing impacts.

Date Modified: 2012-03-08