

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

G.M., Appellant

and

**DEPARTMENT OF THE NAVY, NAVAL
INSTALLATIONS, Pearl Harbor, HI, Employer**

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**Docket No. 11-1295
Issued: January 25, 2012**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On May 7, 2011 appellant filed a timely appeal from a February 2, 2011 decision of the Office of Workers' Compensation Programs (OWCP) denying a schedule award for an employment-related hearing loss and hearing aids. Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.

ISSUES

The issues are: (1) whether appellant met his burden of proof to establish that he sustained a ratable hearing loss entitling him to a schedule award; and (2) whether he is entitled to hearing aids.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On January 20, 2010 appellant, then a 57-year-old firefighter, filed an occupational disease claim (Form CA-2) alleging that he developed progressive hearing loss and ringing in both ears as a result of employment-related noise exposure. He reported that he rode in open fire trucks with loud diesel engines, jake brakes, aircrafts, air horns, pump noise and alarm bells. Appellant first became aware of his condition on December 4, 2003 and reported it to his supervisor on January 15, 2010.

By letter dated January 29, 2010, OWCP requested additional factual information from both appellant and the employing establishment. Appellant was requested to provide information regarding his employment history, when he related his hearing loss to conditions of employment and all nonoccupational exposure to noise. OWCP also requested that he provide medical documentation pertaining to any prior treatment he received for ear or hearing problems. It requested that the employer provide noise survey reports for each site where appellant worked, the sources and period of noise exposure for each location and whether he wore ear protection.

In an undated narrative statement, appellant provided a job summary history which spanned from July 1971 to February 2010. He worked as a fireman for the Department of Navy from December 1985 to February 2010. Appellant reported that he had no history of hearing loss except when working at the fire department and noted his last date of exposure as January 31, 2010. He stated that he had no hobbies which exposed him to loud noise and that he had never filed a claim for hearing loss. There was no specific date when appellant recognized his hearing loss and it had been progressive since his employment with the fire department. He submitted a history of audiograms dated November 25, 1985 to January 22, 2010.

On February 12, 2010 appellant filed a claim for compensation (Form CA-7) for a schedule award.

On April 27, 2010 OWCP referred appellant to Dr. Meredith Pang, a Board-certified otolaryngologist, for a second opinion evaluation. It prepared a statement of accepted facts addressing his federal work history from 1976 to 2010. OWCP did not provide noise exposure data on appellant's positions. It reported that he worked as a firefighter at the Department of the Navy Pearl Harbor Naval Shipyard from December 1985 to January 2010. Appellant would ride in open cab fire trucks with loud diesel engines, jake brakes, and around aircraft, air horns, pump noise and alarm bells. Hearing protection was utilized when possible.

On May 13, 2010 appellant was examined by Dr. Pang, who noted progressive hearing loss throughout the years.² His May 13, 2010 audiogram revealed bilateral mild low and also left mild and right mild-to-moderate high-frequency sensorineural hearing loss. The audiogram revealed the following decibels losses at 500, 1,000, 2,000 and 3,000 cycles per second: 15, 15, 25 and 40 for the right ear and 10, 10, 25 and 45 for the left ear. Speech reception thresholds were 20 decibels on the left and right, while speech discrimination scores were 100 percent on

² Dr. Pang noted that there were no noise survey reports submitted and the statement of accepted facts was silent as to whether appellant was exposed to occupational noise levels above 85 decibels while at the Department of Navy. She accepted appellant's history of noise exposure as factual.

the right and 92 percent on the left. Dr. Pang opined that appellant's federal workplace noise exposure was sufficient in intensity and duration to have aggravated or caused his hearing loss. She stated that the hearing loss was stable and ratable in that it would not improve and recommended that he avoid noises and fully protect himself when exposed. Dr. Pang also noted that appellant was a candidate for hearing amplification.

On August 15, 2010 Dr. David N. Schindler, an OWCP medical consultant and Board-certified otolaryngologist, reviewed Dr. Pang's May 13, 2010 report. He agreed that appellant's bilateral high-frequency neurosensory hearing loss was due to occupational noise exposure. Dr. Schindler applied the audiometric data to OWCP's standard for evaluating hearing loss and determined that appellant had a zero percent monaural hearing loss in the left ear and a zero percent monaural hearing loss in the right ear. He concluded that, in accordance with the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*), appellant had no ratable hearing loss and noted that his tinnitus did not warrant a schedule award in the absence of a ratable hearing loss. Dr. Schindler further opined that hearing aids should not be authorized.

By decision dated February 2, 2011, OWCP accepted appellant's claim for bilateral hearing loss and denied his schedule award claim finding that his hearing loss was not severe enough to be considered ratable. It further found that he would not benefit from hearing aids.

LEGAL PRECEDENT -- ISSUE 1

The schedule award provision of FECA³ and its implementing regulations 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. FECA, however, does not specify the manner in which the percentage loss of a member shall be determined. The method used in making such determination is a matter which rests in the sound discretion of OWCP. For consistent results and to ensure equal justice, the Board has authorized the use of a single set of tables so that there may be uniform standards applicable to all claimants. The A.M.A., *Guides* (6th ed. 2009), has been adopted by OWCP for evaluating schedule losses and the Board has concurred in such adoption.⁴

OWCP evaluates industrial hearing loss in accordance with the standards contained in the A.M.A., *Guides*. Using the frequencies of 500, 1,000, 2,000 and 3,000 cycles per second, the losses at each frequency are added up and averaged. 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.⁵ The remaining amount is multiplied by a factor of 1.5 to arrive at the percentage of monaural hearing loss. 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

³ 5 U.S.C. §§ 8101-8193.

⁴ See *R.D.*, 59 ECAB 127 (2007); *Bernard Babcock, Jr.*, 52 ECAB 143 (2000).

⁵ See A.M.A., *Guides* 250.

arrive at the amount of the binaural hearing loss. The Board has concurred in OWCP's adoption of this standard for evaluating hearing loss.⁶

Regarding tinnitus, the A.M.A., *Guides* provide that tinnitus is not a disease but rather a symptom that may be the result of disease or injury.⁷ The A.M.A., *Guides* state that, if tinnitus interferes with activities of daily living (ADLs), including sleep, reading (and other tasks requiring concentration), enjoyment of quiet recreation and emotional well-being, up to five percent may be added to a measurable binaural hearing impairment.⁸

ANALYSIS -- ISSUE 1

Appellant filed a claim for bilateral hearing loss and was referred to Dr. Pang for a second opinion examination. After reviewing the statement of accepted facts and medical file, conducting a thorough physical evaluation and obtaining an audiogram on May 13, 2010, Dr. Pang diagnosed bilateral high-frequency neurosensory hearing loss due to occupational noise exposure. OWCP's medical adviser concurred with this finding and further concluded that appellant had no ratable hearing loss to warrant a schedule award or hearing aids. By decision dated February 2, 2011, OWCP accepted his claim for bilateral hearing loss, but denied a schedule award and authorization for hearing aids.

The Board finds that OWCP properly denied appellant's schedule award claim. According to the audiometry obtained on May 13, 2010, appellant's hearing thresholds were 15, 15, 25 and 40 on the right and 10, 10, 25 and 45 on the left. These total 95 and 90 decibels, respectively, for averages of 23.75 and 22.5 decibels. Because these averages are below the fence of 25 decibels, he is deemed to have no impairment in his ability to hear everyday sounds under everyday listening conditions.⁹ This does not mean that appellant has no hearing loss. It means that the extent or degree of loss is not sufficient to show a practical impairment in hearing according to the A.M.A., *Guides*. The A.M.A., *Guides* set a threshold for impairment and appellant's occupational hearing loss did not cross that threshold. Thus, appellant's hearing loss was not ratable. For this reason, the Board finds that OWCP properly denied a schedule award for his nonratable hearing loss.

The Board further finds that OWCP properly denied a schedule award for tinnitus.¹⁰ FECA does not list tinnitus in the schedule of eligible members, organs or functions of the body. Therefore, no claimant may directly receive a schedule award for tinnitus. Hearing loss is a covered function of the body, so if tinnitus contributes to a ratable loss of hearing, a claimant's schedule award will reflect that contribution. The A.M.A., *Guides* provide that, if tinnitus

⁶ See *E.S.*, 59 ECAB 249 (2007); *Donald Stockstad*, 53 ECAB 301 (2002), *petition for recon., granted (modifying prior decision)*, Docket No. 01-1570 (issued August 13, 2002).

⁷ See A.M.A., *Guides* 249.

⁸ *Id.* See also *Robert E. Cullison*, 55 ECAB 570 (2004); *R.H.*, Docket No. 10-2139 (issued July 13, 2011).

⁹ See *L.F.*, Docket No. 10-2115 (issued June 3, 2011).

¹⁰ *Id.*

interferes with ADLs, up to five percent may be added to a measurable binaural hearing impairment.¹¹ The Board has repeatedly held, however, that there is no basis for paying a schedule award for a condition such as tinnitus unless the evidence establishes that the condition caused or contributed to a ratable hearing loss.¹² Although appellant submitted medical evidence that provided a firm diagnosis of tinnitus, as his hearing loss is not ratable, the Board will affirm OWCP's February 2, 2011 decision finding that he was not entitled to a schedule award.

Appellant may request a schedule award or increased schedule award based on evidence of a new exposure or medical evidence showing progression of an employment-related condition resulting in permanent impairment or increased impairment.

LEGAL PRECEDENT -- ISSUE 2

Section 8103(a) of FECA provides that the United States shall furnish to an employee who is injured while in the performance of duty the services, appliances and supplies prescribed or recommended by a qualified physician, which the Secretary of Labor considers likely to cure, give relief, reduces the degree or the period of any disability or aid in lessening the amount of any monthly compensation.¹³ OWCP must therefore exercise discretion in determining whether the particular service, appliance or supply is likely to affect the purposes specified in FECA.¹⁴

Following medical evaluation of a claim, if the hearing loss is determined to be nonratable for schedule award purposes, other benefits such as hearing aids may still be payable if any employment-related hearing loss exists.¹⁵

ANALYSIS -- ISSUE 2

The Board finds that the case is not in posture for decision on whether appellant is entitled to hearing aids. The Board has held that, following medical evaluation of a claim, if the hearing loss is determined to be nonratable for schedule award purposes, other benefits such as a hearing aid may still be provided if any causally-related hearing loss exists.¹⁶ Dr. Pang's report indicated that the noise at appellant's workplace was sufficient to cause his hearing loss and she recommended hearing amplification. Dr. Schindler, an OWCP medical adviser, noted that hearing aids should not be authorized but did not provide any explanation for this disagreement

¹¹ See A.M.A., *Guides* 249. See also *supra* note 8.

¹² See *Richard Larry Enders*, 48 ECAB 184 (1996).

¹³ See *Joshua A. Holmes*, 42 ECAB 231, 236.

¹⁴ 5 U.S.C. § 8103.

¹⁵ See *F.D.*, Docket No. 10-1175 (issued January 4, 2011), Federal (FECA) Procedure Manual, Part 3 -- Medical, *Medical Services and Supplies*, Chapter 3.4003(d)(2) (October 1990).

¹⁶ See Federal (FECA) Procedure Manual, *id.*; *Raymond VanNett*, 44 ECAB 480 (1993).

with Dr. Pang. OWCP's decision provided no findings as to denial of hearing aids. Therefore, the record is unclear why it declined to authorize hearing aids.¹⁷

The Board notes that proceedings under FECA are not adversarial in nature. OWCP shares in the responsibility to develop the evidence and has an obligation to see that justice is done.¹⁸ Accordingly, the case will be remanded to OWCP for further adjudication on the question of whether appellant is entitled to hearing aids. Following this and such other development as is deemed necessary, OWCP shall issue an appropriate merit decision regarding his entitlement to hearing aids.

CONCLUSION

The Board finds that appellant does not have a ratable hearing loss for schedule award purposes. The Board also finds that the case must be remanded to OWCP for further development on the question of whether hearing aids should be authorized.

¹⁷ *J.B.*, 60 ECAB 1735 (2009).

¹⁸ *Lyle Dayberry*, 49 ECAB 369, 372 (1998). *See also VanNett* at 483, *supra* note 16 (where OWCP began to develop appellant's hearing loss claim but did not complete such development, the case was remanded for further evidentiary development).

ORDER

IT IS HEREBY ORDERED THAT the February 2, 2011 decision of the Office of Workers' Compensation Programs is affirmed, in part and set aside and remanded in part.

Issued: January 25, 2012
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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