

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

W.Z., Appellant

and

**DEPARTMENT OF THE NAVY, NAVAL AIR
SYSTEMS COMMAND-STATIONS,
Coronado, CA, Employer**

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**Docket No. 11-1371
Issued: January 6, 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 17, 2011 appellant filed a timely appeal from an April 12, 2011 schedule award decision of the Office of Workers' Compensation Programs (OWCP). 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 schedule award issue.

ISSUE

The issue is whether appellant sustained more than three percent binaural hearing loss for which he received a schedule award.

FACTUAL HISTORY

On January 5, 2010 appellant, then a 55-year-old sheet metal mechanic, filed an occupational disease claim alleging that he sustained bilateral hearing loss and tinnitus due to

¹ 5 U.S.C. § 8101 *et seq.*

exposure to hazardous noise during his federal employment. He submitted employing establishment audiograms and medical reports reflecting diagnoses of bilateral hearing loss and tinnitus.²

Following development of the evidence regarding appellant's history of employment-related noise exposure, OWCP referred him to Dr. Theodore Mazer, a Board-certified otolaryngologist, for an otologic examination and an audiological evaluation. In a report dated May 21, 2010, Dr. Mazer provided the results of audiometric testing performed on that date. Testing at the frequency levels of 500, 1,000, 2,000 and 3,000 cycles per second revealed the following: right ear 20, 30, 25 and 30 decibels; left ear 25, 25, 30 and 45 decibels. Pure tone hearing levels were within normal limits at 15 decibels on each ear. Speech discrimination was 100 percent in both ears at normal presentation. Middle ear impedance and reflexes were within normal limits. Dr. Mazer concluded that appellant's hearing loss was related to work-related noise exposures, as the pattern of current loss was not inconsistent with noise exposure and there was no other evident cause. He stated, however, that appellant's subjective complaints of hearing loss and tinnitus were out of proportion to the objective findings. Based on the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) Dr. Mazer calculated a 1.9 percent impairment on the right and a 9.4 percent impairment on the left, for a 3.1 percent binaural impairment. He indicated that appellant's description of his tinnitus constituted an annoyance not affecting activities of daily living or sleep and therefore did not constitute any additional impairment under the A.M.A., *Guides*.

In a decision dated July 1, 2010, OWCP accepted appellant's claim for bilateral hearing loss.

On July 7, 2010 appellant requested a schedule award. He submitted a June 21, 2010 report from Dr. Nick Nurani, Board-certified in family medicine, who diagnosed bilateral hearing loss. In a July 30, 2010 report, Dr. Thieuha Tuan Hoang, a treating physician, diagnosed noise-induced bilateral hearing loss. He noted that appellant had complained for the past five years of having bilateral tinnitus, which did not affect or hinder activities of daily living or sleep.

On July 20, 2010 an OWCP medical adviser reviewed Dr. Mazer's May 21, 2010 report and audiometric testing. Applying the provisions of the sixth edition of the A.M.A., *Guides* to Dr. Mazer's findings, the medical adviser determined that appellant had a 1.9 percent monaural loss in the right ear and a 9.4 percent monaural hearing loss in the left ear, for a 3.1 percent bilateral hearing loss. Noting that Dr. Mazer described appellant's tinnitus as "an annoyance" not affecting activities of daily living, he concluded that it did not warrant an additional rating for schedule award purposes under the A.M.A., *Guides*. He noted that the date of maximum medical improvement was May 21, 2010.

² On February 18, 2010 Dr. Kevin Feig, Board-certified in the field of occupational medicine, diagnosed bilateral hearing loss, which he opined was work related. On March 11, 2010 Dr. John Martinez, a treating physician, diagnosed bilateral high-frequency hearing loss, noting that appellant had suffered from tinnitus for the past 10 years.

In a decision dated August 30, 2010, OWCP granted appellant a schedule award for a three percent binaural sensorineural hearing loss based upon the reports of Dr. Mazer and an OWCP medical adviser. The period of the award was from May 21 to July 21, 2010. The date of maximum medical improvement was determined to be May 21, 2010.

On September 15, 2010 appellant requested an oral hearing. He stated that his tinnitus affected activities of his daily living, noting that he was forced to sleep with a fan and take sleep aids. Appellant submitted a November 11, 2010 report from Dr. John Harrison, a treating physician, who diagnosed tinnitus. In a November 29, 2010 report, Dr. Ritvik Mehta, a Board-certified otolaryngologist, diagnosed bilateral sensorineural hearing loss and associated bilateral nonpulsatile tinnitus. On February 1, 2001 Dr. Nurani diagnosed hearing loss and tinnitus.

At a January 19, 2011 hearing, appellant testified that the ringing in his ears was worse than his physicians had indicated. Accordingly, he contended that he was entitled to an increased schedule award.

By decision dated April 12, 2011, an OWCP hearing representative affirmed the August 30, 2010 decision, finding that the medical evidence was insufficient to establish that appellant's tinnitus affected activities of daily living.

LEGAL PRECEDENT

FECA's schedule award provision and its implementing regulations³ set forth the number of weeks of compensation payable to employees sustaining permanent impairment from loss of or loss of use of scheduled members or functions of the body. An employee is entitled to a maximum award of 52 weeks of compensation for complete loss of hearing of one ear and 200 weeks of compensation for complete loss of hearing of both ears.⁴ However, FECA does not specify the manner in which the percentage of loss shall be determined. 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. The A.M.A., *Guides* has been adopted by the implementing regulations as the appropriate standard for evaluating schedule losses.⁵

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. The remaining amount is multiplied by a factor of 1.5 to arrive at the percentage of monaural hearing loss. Binaural loss is determined by first 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 20 C.F.R. § 10.404.

⁴ 5 U.S.C. § 8107(c)(13).

⁵ See *supra* note 3. See also Mark A. Holloway, 55 ECAB 321, 325 (2004).

arrive at the amount of the binaural hearing loss.⁶ The Board has concurred in OWCP's adoption of this standard for evaluating hearing loss.⁷

It is well established that the period covered by a schedule award commences on the date that the employee reaches maximum medical improvement from the residuals of the accepted employment injury. The Board has explained that maximum medical improvement means that the physical condition of the injured member of the body has stabilized and will not improve further. The determination of whether maximum medical improvement has been reached is based on the probative medical evidence of record and is usually considered to be the date of the evaluation by the attending physician which is accepted as definitive by OWCP.⁸

The A.M.A., *Guides* provides that, if tinnitus interferes with activities of daily living, such as sleeping, reading and other tasks requiring concentration, up to five percent may be added to a measurable binaural hearing impairment.⁹ However, subjective information regarding the impact of tinnitus on daily life should not be the sole criteria for determining impairment. Objective data must be integrated with the subjective data to estimate the degree of impairment.¹⁰

ANALYSIS

The Board finds that appellant has no greater than a three percent binaural hearing loss for which he received a schedule award.

Appellant's claim of occupational hearing loss was accepted by OWCP based on the report of Dr. Mazer, a Board-certified otolaryngologist. An OWCP medical adviser properly applied OWCP's standardized procedures to the May 21, 2010 audiogram performed for Dr. Mazer. Test results for the right ear at the frequency levels of 500, 1,000, 2,000 and 3,000 cycles per second revealed decibel losses of 20, 30, 25 and 30 decibels, respectively. These decibels were totaled at 105 and were divided by 4 to obtain an average hearing loss at those cycles of 26.25 decibels. The average of 26.25 decibels was then reduced by 25 decibels (the first 25 decibels were discounted as discussed above) to equal 1.25 which was multiplied by the established factor of 1.5 to compute a 1.9 percent monaural loss of hearing for the right ear.¹¹

Testing for the left ear at the frequency levels of 500, 1,000, 2,000 and 3,000 cycles per second revealed decibel losses of the left ear of 25, 25, 30 and 45 decibels, respectively. These decibels were totaled at 125 and were divided by 4 to obtain the average hearing loss at those

⁶ A.M.A., *Guides* (6th ed. 2009).

⁷ *E.S.*, 59 ECAB 249 (2007); *J.H.*, Docket No. 08-2432 (issued June 15, 2009); *J.B.*, Docket No. 08-1735 (issued January 27, 2009).

⁸ *Mark A. Holloway*, *supra* note 5 at 325.

⁹ A.M.A., *Guides* 249. *See also R.D.*, 59 ECAB 127, 131 (2007).

¹⁰ *Robert E. Cullison*, 55 ECAB 570 (2004).

¹¹ *E.S.*, 59 *supra* note 7.

cycles of 31.25 decibels. The average of 31.25 decibels was then reduced by 25 decibels (the first 25 decibels were discounted as discussed above) to equal 6.25, which was multiplied by the established factor of 1.5 to compute a 9.4 percent hearing monaural loss for the left ear.

OWCP's medical adviser proceeded to calculate binaural loss by taking the lesser loss, 1.9, multiplying it by 5 (9.5), then adding it to the greater loss of 9.4 (18.9). This amount was divided by six to arrive at the amount of the binaural hearing loss of three percent after rounding.

Under FECA, the maximum award for binaural hearing loss is 200 weeks of compensation.¹² Appellant is entitled to three percent of 200 weeks or 6 weeks of compensation, the amount granted in this case. There is no medical evidence conforming to OWCP's standards that supports a greater impairment.¹³

Appellant argues on appeal that the schedule award should have accounted for his tinnitus. The A.M.A., *Guides* provides that if tinnitus interferes with activities of daily living such as sleeping, reading and other tasks requiring concentration, up to five percent may be added to a measurable binaural hearing impairment.¹⁴ The Board has held, however, that a claimant is not entitled to an additional schedule award where the record contains no medical evidence directly addressing the impact of tinnitus on appellant's activities of daily living.¹⁵ In this case, Dr. Mazer acknowledged that appellant presented with bilateral tinnitus, but he advised that appellant's subjective complaints of hearing loss and tinnitus were out of proportion to the objective findings and indicated that appellant's description of his tinnitus constituted an annoyance not affecting activities of daily living or sleep. None of the medical reports submitted by appellant contains an opinion supporting his claim on appeal that his tinnitus condition interferes with activities of daily living. Appellant therefore is not entitled to further compensation due to tinnitus.

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.

¹² It is well established that, if calculations based on the monaural hearing loss result in greater compensation, then the monaural hearing loss calculation should be used. The maximum number of weeks of compensation for hearing loss in one ear is 52 weeks. The Board finds that the hearing loss in appellant's left ear should be rounded to nine percent, the nearest whole number. Nine percent of 52 weeks equals 4.7 weeks of compensation. The right ear loss of two percent equals 1.04 weeks of compensation. Since the binaural loss results in a greater number of weeks, OWCP properly based the award on binaural hearing loss. *See C.C.*, Docket No. 11-826 (issued October 13, 2011).

¹³ A claimant retains the right to file for a schedule award or increased schedule award, at any time, based on new exposure or on medical evidence indicating progression of an employment-related condition, resulting in permanent impairment or increased impairment.

¹⁴ A.M.A., *Guides*, *supra* note 6 at 249. *See also R.D.*, *supra* note 9.

¹⁵ *R.D.*, *supra* note 9.

CONCLUSION

The Board finds that appellant has no more than a three percent binaural hearing loss, for which he received a schedule award.¹⁶

ORDER

IT IS HEREBY ORDERED THAT the April 12, 2011 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 6, 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

¹⁶ On appeal, appellant contends that he is entitled to hearing aids. The Board has jurisdiction to consider and decide appeals from final decisions of OWCP. The April 12, 2011 decision, however, did not address the issue of hearing aids. Therefore, the Board does not have jurisdiction over this issue. *See* 20 C.F.R. § 501.2(c)