

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

K.B., Appellant

and

**DEPARTMENT OF THE AIR FORCE, 259th
AIR TRAFFIC CONTROL SQUADRON,
Alexandria, LA, Employer**

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**Docket No. 13-443
Issued: May 10, 2013**

Appearances:

*Debra Hauser, Esq., for the appellant
Office of Solicitor, for the Director*

Case Submitted on the Record

DECISION AND ORDER

Before:

COLLEEN DUFFY KIKO, Judge
PATRICIA HOWARD FITZGERALD, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On December 18, 2012 appellant, through his attorney, filed a timely appeal of a September 20, 2012 merit 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 to consider the merits of the case.

ISSUE

The issue is whether appellant has a ratable hearing loss entitling him to a schedule award.

FACTUAL HISTORY

On February 10, 2011 appellant, then a 44-year-old power support systems mechanic, filed an occupational disease claim alleging that he developed a loss of hearing and ringing in his

¹ 5 U.S.C. § 8101 *et seq.*

ears due to noise exposure in the performance of duty. He stated that he first became aware of his condition on November 17, 1993 and first attributed his condition to his employment on that date when the annual audiograms showed “a steady decline” in his hearing.

In a letter dated March 30, 2011, OWCP requested additional factual and medical information in support of appellant’s claim. It referred him for a second opinion evaluation with Dr. Donna Breen, a Board-certified otolaryngologist, who examined him on June 21, 2011 and opined that he had bilateral high frequency sensorineural hearing loss due to noise exposure. Appellant’s audiogram revealed in the right ear at 500, 1,000, 2,000 and 3,000 hertz losses of 15, 20, 25 and 40 decibels respectively. On the left his losses were 5, 10, 10 and 40 decibels respectively. Applying OWCP’s formula for determining hearing loss, Dr. Breen found zero percent bilateral impairment. She concluded that appellant had five percent impairment due to tinnitus which impacted the ability to perform the activities of daily living (ADL).

OWCP’s medical adviser reviewed this report on August 16, 2011 and found that appellant did not have a ratable hearing loss. He further found that as there was no measurable hearing impairment, the impairment rating for tinnitus did not apply. The medical adviser stated, “Sec[ti]on 11.2b, p. 249 [American Medical Association, *Guides to the Evaluation of Permanent Impairment*] (A.M.A., *Guides*) states, ‘if the tinnitus interferes with ADL, enjoyment of quiet recreation and emotional well being, up to five percent may be added to measurable binaural hearing impairment.’ The operable phrase may be added to measurable hearing impairment. There is no measurable hearing impairment in this case, therefore it is my opinion the additional five percent does not apply.”

By decision dated August 25, 2011, OWCP accepted appellant’s claim for bilateral hearing loss. In a separate decision of the same date, it determined that he was not entitled to a schedule award as he did not have a ratable loss of hearing.

Appellant requested an oral hearing but on October 14, 2011 changed that to a request for reconsideration. By decision dated November 2, 2011, OWCP denied his request for reconsideration on the grounds that he failed to submit relevant new evidence or argument in support of his claim.

Appellant requested reconsideration on February 27, 2012 and submitted additional medical evidence. He underwent an additional audiogram on November 18, 2011 which revealed a moderate high frequency sensorineural hearing loss bilaterally. Dr. Matthew Beyer, a Board-certified otolaryngologist, interpreted these results as on the right 20, 25, 30 and 45 decibel losses and on the left, 20, 20, 30 and 50 decibel losses. He determined that appellant had 7.5 percent permanent impairment in each ear under the A.M.A., *Guides* or a bilateral loss of 5 percent.

OWCP determined that there was a conflict of medical opinion evidence regarding the extent of appellant’s hearing loss between Drs. Beyer and Breen and referred appellant for an impartial medical examination with Dr. Richard Dawson, a Board-certified otolaryngologist.

Dr. Dawson examined appellant on August 8, 2012. He related appellant’s medical treatment and history of noise exposure. Dr. Dawson found that appellant had no ratable

monaural or binaural hearing loss and accorded him one percent impairment due to tinnitus. Appellant underwent an audiogram which demonstrated in the right ear at 500, 1,000, 2,000 and 3,000 hertz losses of 10, 30, 30 and 30 hertz. On the left he demonstrated losses of 15, 20, 25 and 40 decibels.

OWCP referred Dr. Dawson's report to OWCP's medical adviser, who on September 18, 2012 found that appellant had no ratable hearing loss. The medical adviser stated, "It is my opinion that Dr. Dawson's evaluation meets the criterion as a valid referee opinion with the exception of his recommendation for an award for tinnitus. Per the [s]ixth [e]dition of the [A.M.A.] *Guides*, page 249, regarding tinnitus awards: 'up to five percent may be added to a measurable binaural hearing impairment.' In this instance, there is no measurable binaural hearing impairment; therefore, no award for tinnitus can be added per the [s]ixth [e]dition of the [A.M.A.] *Guides*."

By decision dated September 20, 2012, OWCP found that appellant was not entitled to a schedule award due to hearing loss or tinnitus as he had no ratable impairment.

LEGAL PRECEDENT

The schedule award provision of FECA² and its implementing regulations³ set forth the number of weeks of compensation payable to employees sustaining permanent impairment for 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 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. OWCP evaluates the degree of permanent impairment according to the standards set forth in the specified edition of the A.M.A., *Guides*.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 hertz, 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 arrive at the amount of the

² *Id.* at §§ 8101-8193, 8107.

³ 20 C.F.R. § 10.404.

⁴ For new decisions issued after May 1, 2009, OWCP began using the sixth edition of the A.M.A., *Guides*. A.M.A., *Guides*, (6th ed. 2009); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Award and Permanent Disability Claims*, Chapter 2.808.6a (January 2010); Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010).

⁵ A.M.A., *Guides* 250.

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 ADL, 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

When there are opposing reports of virtually equal weight and rationale, the case will be referred to an impartial medical specialist pursuant to section 8123(a) of FECA which 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 and resolve the conflict of medical evidence.⁹ This is called a referee examination and OWCP will select a physician who is qualified in the appropriate specialty and who has no prior connection with the case.¹⁰

In situations where there are opposing medical reports of virtually equal weight and rationale, and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual background, must be given special weight.¹¹

ANALYSIS

Appellant filed a claim for hearing loss and was referred to Dr. Breen 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 June 21, 2011, Dr. Breen diagnosed high frequency sensorineural noise-induced hearing loss bilaterally, but found that appellant had no ratable hearing loss. OWCP's medical adviser concurred with these findings, noting that as appellant did not have a ratable hearing loss he was not entitled to a schedule award for tinnitus. By decision dated August 25, 2011, OWCP accepted appellant's claim for binaural hearing loss, but denied a schedule award due to no ratable hearing loss.

Appellant submitted an additional medical report on February 27, 2012 and requested reconsideration. His physician, Dr. Beyer, determined that appellant had 7.5 percent permanent impairment in each ear under the A.M.A., *Guides* or a bilateral loss of 5 percent. Due to the

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 A.M.A., *Guides* 249.

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

⁹ 5 U.S.C. §§ 8101-8193, 8123; *M.S.*, 58 ECAB 328 (2007); *B.C.*, 58 ECAB 111 (2006).

¹⁰ *R.C.*, 58 ECAB 238 (2006).

¹¹ *Nathan L. Harrell*, 41 ECAB 401, 407 (1990).

disagreement between Drs. Beyer and Breen, OWCP properly determined that there was a conflict of medical opinion evidence and referred appellant to Dr. Dawson for an impartial medical examination, pursuant to 5 U.S.C. § 8123(a).

Dr. Dawson reviewed appellant's medical treatment and history of noise exposure. Appellant underwent an audiogram which demonstrated in the right ear at 500, 1,000, 2,000 and 3,000 hertz losses of 10, 30, 30 and 30 hertz. On the left he demonstrated losses of 15, 20, 25 and 40 decibels. Dr. Dawson reviewed these test results and found that appellant had no ratable monaural or binaural hearing loss. The right ear hearing thresholds of 10, 30, 30 and 30 total 100 decibels for an average of 25 decibels. Because this average is equal to the fence of 25 decibels, appellant is deemed to have no impairment in his ability to hear everyday sounds under everyday listening conditions on the right. The left ear hearing thresholds of 15, 20, 25 and 40 also total 100 for an average of 25 decibels. Again as this average is equal to the fence of 25 decibels, appellant has no ratable hearing loss in his left ear. Dr. Dawson also accorded appellant one percent impairment due to tinnitus. The Board finds that his report is sufficiently detailed, well reasoned and based on a proper history of injury to constitute the special weight of the medical opinion evidence and establish that appellant does not have a ratable loss of hearing entitling him to a schedule award.

OWCP's medical adviser reviewed Dr. Dawson's report and found it was correct except for the one percent impairment for tinnitus. He found that as appellant did not have a ratable hearing loss he was not entitled to a schedule award for tinnitus.

The Board finds that OWCP properly denied a schedule award for tinnitus.¹² 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 interferes with ADL, up to five percent may be added to a measurable binaural hearing impairment.¹³ 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. As appellant's hearing loss is not ratable, the Board will affirm OWCP's September 20, 2012 decision finding that he was not entitled to a schedule award for 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.

CONCLUSION

The Board finds that appellant does not have a ratable loss of hearing entitling him to a schedule award.

¹² *R.R.*, Docket No. 12-1840 (issued February 14, 2013).

¹³ *Supra* note 7.

ORDER

IT IS HEREBY ORDERED THAT the September 20, 2012 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: May 10, 2013
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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