United States Department of Labor
Employees' Compensation Appeals Board

H.M., Appellant	)	
and	)	**Docket No. 11-108**
	)	**Issued: August 9, 2011**
DEPARTMENT OF THE NAVY, NORFOLK NAVAL SHIPYARD, Portsmouth, VA, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
RICHARD J. DASCHBACH, Chief Judge
ALEC J. KOROMILAS, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On October 19, 2010 appellant filed a timely appeal from August 18 and October 6, 2010 decisions of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act (FECA)[1] 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 sustained a ratable hearing impairment entitling him to a schedule award; and (2) whether OWCP properly denied appellant's request for reconsideration under 5 U.S.C. § 8128(a) without further merit review.

FACTUAL HISTORY

On October 20, 2007 appellant, then a 65-year-old retired rigger, filed an occupational disease claim alleging hearing loss due to 17 years of exposure to noise generated by diesel

[1] 5 U.S.C. § 8101 *et seq.*

cranes.[2] He became aware of his condition and its relationship to his employment on July 22, 2007. Appellant retired effective April 29, 1989.[3]

In an undated statement, appellant detailed that he was in the military reserve from 1960 to 1968 and worked as a rigger in private industry from 1964 to 1972, but was minimally exposed to noise. After he was hired by the employing establishment, his hearing diminished starting around 1982. Appellant denied having any preexisting condition. A supervisor's statement dated December 12, 2007 and various employing establishment records confirmed that his former job involved the operation and maintenance of cranes, hoists, forklifts and other motor vehicles.[4]

Appellant provided an August 7, 2007 report, from Dr. Charles H. Dennis, a Board-certified otolaryngologist, who related that appellant experienced gradual hearing loss over a 20-year period as well as dizziness and tinnitus. He previously worked as a rigger for 18 years and was last exposed to loud noise in 1989. Dr. Dennis did not observe any physical abnormalities on examination while an audiogram conducted for him on August 7, 2007 exhibited the following decibel (dBA) losses at 500, 1,000, 2,000 and 3,000 Hertz (Hz): 35, 30, 35 and 35 for the right ear and 40, 35, 35 and 35 for the left ear. Applying the standard provided by the American Medical Association, *Guides to the Evaluation of Permanent Impairment*[5] (hereinafter A.M.A., *Guides*) to the audiometric data, an audiologist calculated a binaural hearing impairment of 14 percent and then added five percent on account of tinnitus for a total of 19 percent.[6] Dr. Dennis diagnosed noise-induced sensorineural hearing loss and tinnitus and recommended hearing aids.

OWCP referred appellant for a second opinion examination to Dr. Lorenz F. Lassen, an otolaryngologist. In a May 27, 2008 report, Dr. Lassen noted that appellant operated a crane from 1972 to 1989 and was exposed to industrial noise generated by diesel engines, grinders, turbines, sirens, air horns and power equipment. He also mentioned that he did not receive appellant's prior audiogram. Physical examination results were normal while a May 27, 2008 audiogram showed dBA losses of 20, 15, 25 and 25 for the right ear and 25, 20, 25 and 25 for the left ear, respectively, at 500, 1,000, 2,000 and 3,000 Hz. Dr. Lassen's supported that appellant's hearing loss was "more than what might be expected from presbycusis" and caused by workplace noise, but he also checked a form box "not due" as to whether his hearing loss was work related.

[2] Appellant previously received a schedule award for 80-percent lung impairment. Also, the record contains medical documents pertaining to his knee. Neither condition is presently before the Board.

[3] This information was subsequently incorporated into April 29 and July 30, 2008 statements of accepted facts. In addition, the April 29, 2008 version noted that appellant worked as a rigger for the employing establishment beginning February 1975 and retired as a result of a separate, nonhearing-related condition.

[4] A December 14, 2007 report from an employing establishment official added that while appellant was routinely exposed to hazardous noise on the job, the employing establishment provided and mandated the use of hearing protection in areas where noise exceeded 84 decibels (dBA).

[5] A.M.A., *Guides* (6th ed. 2008).

[6] Appellant later submitted a September 22, 2008 hearing impairment computation worksheet, which duplicated these findings.

He concluded that appellant's condition was likely due to presbycusis and not occupational noise exposure, taking into account the absence of a noise-notch pattern between 4,000 and 6,000 Hz. Dr. Lassen did not recommend hearing aids.

In an August 13, 2008 report, OWCP's medical adviser opined that appellant had binaural sensorineural hearing loss. He applied the standard provided by the A.M.A., *Guides* to the May 27, 2008 audiogram, and calculated that appellant had no ratable hearing loss for schedule award purposes. OWCP's medical adviser advised against authorization of hearing aids. He listed May 27, 2008 as the date of maximum medical improvement. OWCP's medical adviser did not address the August 7, 2007 audiogram. In a September 10, 2008 memorandum, OWCP stated that Dr. Lassen's May 27, 2008 second opinion examination report made no distinction on the issue of causal relationship. The claims examiner advised that the claim would be accepted for bilateral sensorineural hearing loss was work related.

By decision dated September 10, 2008, OWCP accepted appellant's claim for bilateral sensorineural hearing loss, but denied his claim for a schedule award and medical benefits on the grounds that the condition was not ratable.

Appellant requested a telephonic hearing, which was held on March 10, 2009. At the hearing, he testified that his condition continued to worsen. Appellant's representative also pointed out that the August 7, 2007 audiometric data showed significant hearing loss and that three physicians recommended hearing aids.

On May 21, 2009 OWCP's hearing representative affirmed the September 10, 2008 decision. On August 18, 2010 OWCP reissued the May 21, 2009 decision to preserve appellant's appeal rights.[7]

Appellant requested reconsideration on August 25, 2010. In a June 10, 2010 report, Dr. Dennis attended to complaints of left inner ear pain, right pterygoid tenderness and bilateral tinnitus. The otolaryngologist noted an ongoing, 23-year history of binaural hearing loss and that appellant was last exposed to hazardous noise in 1989. He did not observe any physical abnormalities on examination while a June 9, 2010 audiogram showed dBA losses of 45, 60, 65 and 70 for the right ear and 50, 60, 55 and 60 for the left ear, respectively, at 500, 1,000, 2,000 and 3,000 Hz. Dr. Dennis diagnosed mild to severe bilateral sensorineural hearing loss and tinnitus due to occupational noise exposure and recommended hearing aids.

By decision dated October 6, 2010, OWCP denied appellant's request for reconsideration on the basis that he did not present new evidence or legal contentions warranting further merit review.

[7] The original May 21, 2009 decision did not have complete appeal rights.

LEGAL PRECEDENT -- ISSUE 1

FECA's schedule award provision and its implementing regulations[8] 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. 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.[9] 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.[10]

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 Hz, the losses at each frequency are added up and averaged. Then, the "fence" of 25 dBA is deducted because, as the A.M.A., *Guides* points out, losses below 25 dBA 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 arrive at the amount of the binaural hearing loss. The Board has concurred in OWCP's adoption of this standard for evaluating hearing loss.[11]

ANALYSIS -- ISSUE 1

In support of his occupational disease claim, appellant provided an August 7, 2007 report from Dr. Dennis, who detailed the history of injury, diagnosed bilateral sensorineural hearing loss and tinnitus related to occupational noise exposure and recommended hearing aids. The report included an August 7, 2007 audiogram that exhibited the following dBA losses at 500; 1,000; 2,000 and 3,000 Hz: 35, 30, 35 and 35 for the right ear and 40, 35, 35 and 35 for the left ear. OWCP subsequently referred appellant for a second opinion examination to Dr. Lassen, who obtained a May 27, 2008 audiogram that showed losses of 20, 15, 25 and 25 dBA for the right ear and 25, 20, 25 and 25 dBA for the left ear, respectively, at 500, 1,000, 2,000 and 3,000 Hz. OWCP thereafter accepted appellant's claim for bilateral sensorineural hearing loss. However, after applying the standard provided by the A.M.A., *Guides* to the May 27, 2008 audiometric results, it found that his condition was not ratable and denied his claim for schedule award and medical benefits.

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[8] 20 C.F.R. § 10.404.

[9] 5 U.S.C. § 8107(c)(13).

[10] 20 C.F.R. § 10.404. *See also Mark A. Holloway*, 55 ECAB 321, 325 (2004).

[11] *J.H.*, Docket No. 08-2432 (issued June 15, 2009); *J.B.*, Docket No. 08-1735 (issued January 27, 2009).

The Board finds that the case is not in posture for decision. When several audiograms are in the case record, made approximately within two years of each other, and submitted by more than one specialist, OWCP should evaluate the audiograms to determine the percentage of hearing loss shown by each. In making a determination of this percentage for a schedule award, OWCP should give an explanation as to why it selected a particular audiogram over the others. It should not arbitrarily select one audiogram without explanation, even though the one selected is the most recent, in those instances where other specialists have submitted current audiograms.[12]

In this case, OWCP failed to provide rationale for choosing the May 27, 2008 audiogram over the earlier August 7, 2007 audiogram for computing appellant's hearing impairment. On remand, OWCP shall evaluate the audiograms of record that were obtained by a physician to determine the percentage of hearing loss shown by each. If OWCP determines that there is a conflict regarding the percentage of hearing loss, it shall resolve this conflict by presenting medical rationale for selecting one report as more reliable than the other or, in the alternative, arranging another medical evaluation of appellant's condition.[13] After conducting further development as it may find necessary, OWCP shall render an appropriate decision.[14]

CONCLUSION

The Board finds that the case is not in posture for decision.[15]

[12] *John C. Messick*, 25 ECAB 333 (1974). *See Joshua A. Holmes*, 42 ECAB 231, 236 (1990).

[13] *See id.*

[14] The Board notes that appellant submitted new evidence on appeal. The Board lacks jurisdiction to review evidence for the first time on appeal. 20 C.F.R. § 501.2(c).

[15] In light of the Board's disposition of the first issue, the second issue is moot.

ORDER

IT IS HEREBY ORDERED THAT the October 6, 2010 decision of the Office of Workers' Compensation Programs is set aside and the case remanded for further action consistent with this decision of the Board.

Issued: August 9, 2011
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

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