United States Department of Labor
Employees' Compensation Appeals Board

J.Y., Appellant	)	
and	)	**Docket No. 11-971**
	)	**Issued: November 17, 2011**
DEPARTMENT OF JUSTICE, DRUG ENFORCEMENT ADMINISTRATION, Atlanta, GA, 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 March 9, 2011 appellant filed a timely appeal from a December 27, 2010 merit decision of the Office of Workers' Compensation Programs (OWCP) affirming denial of a schedule award. 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 loss warranting a schedule award; and (2) whether appellant was entitled to hearing aids.

FACTUAL HISTORY

On April 17, 2009 appellant, then a 55-year-old special agent, filed an occupational disease claim alleging that he sustained binaural hearing loss as a result of prolonged exposure to

[1] 5 U.S.C. § 8101 *et seq.*

gunfire discharge. He was last exposed to industrial noise on February 6, 2009 and retired effective May 1, 2009.

OWCP received several audiometric records. An August 8, 1991 audiogram exhibited the following decibel (dBA) losses at 500, 1,000, 2,000 and 3,000 Hertz (Hz): 15, 15, 10 and 10 for the right ear and 20, 10, 5 and 10 for the left ear. At the same frequency levels, a July 9, 2004 audiogram showed dBA losses of 10, 10, 10 and 5 for the right ear and 5, 10, 10 and 15 for the left ear while an August 3, 2005 audiogram noted dBA losses of 5, 15, 15 and 5 for the right ear and 5, 0, 10 and 20 for the left ear.

At 500, 1,000, 2,000 and 3,000 Hz, a September 11, 2006 audiogram revealed dBA losses of 5, 15, 20 and 5 for the right ear and 15, 10, 15 and 20 for the left ear whereas a November 6, 2008 audiogram exhibited dBA losses of 5, 10, 15 and 5 for the right ear and 0, 0, 10 and 20 for the left ear.

A July 31, 2009 statement of accepted facts related that appellant worked for the employing establishment from September 12, 1983 to May 1, 2009. During this period, appellant was exposed to noise above 85 dBA generated by gunfire discharge in his roles as a special agent, firearms instructor, range officer, group supervisor, policy analyst and task force coordinator.

Appellant was referred for a second opinion examination to Dr. Joel J. Alexander, an osteopath specializing in otolaryngology. In an August 18, 2009 report, Dr. Alexander reviewed the statement of accepted facts and added that appellant was also exposed to loud helicopter noise and experienced intermittent bilateral tinnitus. On examination, he did not observe any physical abnormalities. Dr. Alexander pointed out that prior audiometric data showed binaural, high-frequency sensorineural hearing loss above 4,000 Hz. An audiogram obtained on August 18, 2009 exhibited the following dBA losses at 500, 1,000, 2,000 and 3,000 Hz: 5, 10, 15 and 10 for the right ear and 0, 0, 5 and 30 for the left ear. Dr. Alexander diagnosed high-frequency sensorineural hearing loss secondary to acoustic trauma and opined that appellant's occupational noise exposure from 1982 to 2009 sufficiently caused his condition. In an accompanying form report, he recommended hearing protections.

On September 4, 2009 OWCP's medical adviser reviewed Dr. Alexander's report and agreed that appellant's binaural hearing loss was due to occupational noise exposure. Applying the standard provided by the American Medical Association, *Guides to the Evaluation of Permanent Impairment*[2] (hereinafter A.M.A., *Guides*) to the August 18, 2009 audiogram, he determined that appellant had a nonratable hearing loss. The medical adviser noted that hearing aids should not be authorized and identified August 18, 2009 as the date of maximum medical improvement.

On September 9, 2009 OWCP accepted appellant's claim for bilateral sensorineural hearing loss. Appellant subsequently inquired about a schedule award and hearing aids.

[2] American Medical Association, *Guides to the Evaluation of Permanent Impairment* (6th ed. 2008).

On April 15, 2010 appellant requested reconsideration and submitted additional medical evidence. In an April 12, 2010 progress note, Dr. Eric C. Andrist, a Board-certified otolaryngologist, related that appellant sustained job-related hearing loss and tinnitus as early as 1991. He did not observe any major irregularities on examination while an April 12, 2010 audiogram revealed the following dBA losses at 500, 1,000, 2,000 and 4,000 Hz: 15, 20, 20 and 40 for the right ear and 15, 5, 5 and 60 for the left ear. The audiogram did not test for dBA loss at 3,000 Hz. Dr. Andrist diagnosed binaural tinnitus and sensorineural hearing loss at 4,000 Hz and cleared appellant to "try hearing aids."

In an April 28, 2010 letter, OWCP informed appellant that there was no basis for a reconsideration request as it had accepted his claim. It advised that it would consider his request for a schedule award and hearing aids and issue a decision.

By decision dated May 10, 2010, OWCP denied appellant's claim for a schedule award on the grounds that the extent of hearing loss was not ratable. It also found that the weight of the medical evidence did not support authorization of hearing aids.

A September 29, 2010 audiogram signed by an audiologist noted dBA losses of 25, 30, 35 and 40 for the right ear and 20, 20, 20 and 40 for the left ear at 500, 1,000, 2,000 and 3,000 Hz. The audiologist diagnosed binaural, high-frequency sensorineural hearing loss and recommended hearing aids in an accompanying September 29, 2010 report.

Appellant requested a telephonic hearing, which was held October 12, 2010. He contended that he was entitled to a schedule award and hearing aids based on the September 29, 2010 audiogram.

On December 27, 2010 the OWCP hearing representative affirmed the May 10, 2010 decision.[3]

LEGAL PRECEDENT -- ISSUES 1 & 2

FECA's schedule award provision and its implementing regulations[4] 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.[5] 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

[3] An OWCP hearing representative pointed out that the September 29, 2010 audiogram did not include a certificate indicating that the audiological equipment met accreditation standards.

[4] 20 C.F.R. § 10.404.

[5] 5 U.S.C. § 8107(c)(13).

all claimants. The A.M.A., *Guides* has been adopted by the implementing regulations as the appropriate standard for evaluating schedule losses.[6]

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 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.[7]

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.[8]

ANALYSIS -- ISSUES 1 & 2

Appellant filed a claim for binaural hearing loss and was referred to Dr. Alexander 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 August 18, 2009, Dr. Alexander diagnosed high-frequency sensorineural hearing loss due to industrial noise exposure. OWCP medical adviser's concurred with this finding. Appellant then submitted an April 12, 2010 progress note and audiogram from Dr. Andrist. By decision dated May 10, 2010, OWCP accepted appellant's claim for bilateral sensorineural hearing loss, but denied a schedule award and authorization for hearing aids. Following a telephonic hearing and receipt of an audiologist's September 29, 2010 report and audiogram, an OWCP hearing representative affirmed the denial on December 27, 2010.

The Board finds that OWCP properly denied appellant's schedule award claim. On September 4, 2009 OWCP's medical adviser applied the A.M.A., *Guides* standard for rating hearing impairment to the August 18, 2009 audiogram. Appellant's right ear recorded losses of 5, 10, 15 and 10 dBA. The total loss was 40 dBA. When divided by four, the result was an average hearing loss of 10 dBA. The average hearing of 10 dBA was reduced by the fence of 25 dBA to 0 dBA. This figure was then multiplied by the established factor of 1.5, yielding zero percent monaural impairment of the right ear. At the same frequency levels, appellant's left ear recorded losses of 0, 0, 5 and 30 dBA at 500, 1,000, 2,000 and 3,000 Hz, respectively. The total loss was 35 dBA. When divided by four, the result was an average hearing loss of 8.75 dBA.

[6] 20 C.F.R. § 10.404. *See also Mark A. Holloway*, 55 ECAB 321, 325 (2004).

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

[8] *See F.D.*, Docket No. 10-1175 (issued January 4, 2011); Federal (FECA) Procedure Manual, *Medical Services and Supplies*, Chapter 3.400.3(d)(2).

The average hearing of 8.75 dBA was reduced by the fence of 25 dBA to equal 0 dBA. This figure was then multiplied by the established factor of 1.5, yielding zero percent monaural impairment of the left ear. As the OWCP medical adviser properly determined that appellant did not sustain a ratable hearing loss under OWCP's standard for evaluating hearing loss, he was not entitled to a schedule award.

Although appellant subsequently furnished audiograms dated April 12 and September 29, 2010, neither may be used to demonstrate that he sustained a ratable hearing impairment. The April 12, 2010 audiogram reviewed by Dr. Andrist is incomplete as did not test for dBA loss at 3,000 Hz as required by the A.M.A., *Guides*.[9] The September 29, 2010 audiogram, which was prepared by an audiologist, does not constitute probative medical evidence as it was not certified by a physician as accurate.[10]

The Board also finds that OWCP properly denied appellant's request for hearing aids. As noted, hearing aids and other medical benefits may still be payable if an employment-related hearing loss exists. While OWCP is obligated to pay for medical treatment of a work-related injury, the employee has the burden of establishing that the expenditure is incurred for treatment of the effects of such injury. Proof of causal relationship must include supporting rationalized medical evidence.[11] In the present case, appellant did not meet his burden. In the April 12, 2010 progress note, Dr. Andrist simply remarked that appellant was cleared to "try hearing aids." This brief comment did not offer a clear, rationalized explanation demonstrating that hearing aids were medically necessary due to the accepted condition.[12] The audiologist's September 29, 2010 report lacks probative medical value because an audiologist is not a physician under FECA.[13] In addition, Dr. Alexander did not indicate that hearing aids should be authorized and, in his September 4, 2009 report, the OWCP medical adviser specifically opined that hearing aids were not warranted. Therefore, appellant is not entitled to hearing aids.

On appeal, appellant reiterates that hearing aids are warranted in view of the medical evidence. The weight of the medical evidence, however, does not support authorization of hearing aids.

The Board notes that appellant submitted new evidence on appeal. The Board lacks jurisdiction to review evidence for the first time on appeal.[14] Appellant may request a schedule

[9] *See also Larry S. Robinson*, Docket No. 04-1885 (issued December 3, 2004) at n. 12 (A.M.A., *Guides* standard does not consider losses at frequencies at or above 4,000 Hz).

[10] *See R.B.*, Docket No. 10-1512 (issued March 24, 2011); *Joshua A. Holmes*, 42 ECAB 231 (1990) (OWCP does not have to review audiograms not certified by a physician and it is the claimant's burden to submit a properly certified audiogram for review if he objects to the audiogram selected by OWCP for determining the degree of hearing loss). *See also* 5 U.S.C. § 8101(2) (defines the term "physician"); *infra* note 13.

[11] *See Charlie A. Penney*, Docket No. 04-1432 (issued October 5, 2004).

[12] *See id.*

[13] *T.B.*, Docket No. 09-1504 (issued April 12, 2010). *See also Charley V.B. Harley*, 2 ECAB 208, 211 (1949) (medical opinion, in general, can only be given by a qualified physician).

[14] 20 C.F.R. § 501.2(c).

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 did not sustain a ratable hearing impairment entitling him to a schedule award. The Board also finds that he was not entitled to hearing aids.

ORDER

IT IS HEREBY ORDERED THAT the December 27, 2010 decision of the Office of Workers' Compensation Programs be affirmed.

Issued: November 17, 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