

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

M.W., Appellant

and

**DEPARTMENT OF THE AIR FORCE, AIR
FORCE NATIONAL GUARD, Meridian, MS,
Employer**

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**Docket No. 12-1267
Issued: November 2, 2012**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On May 15, 2012 appellant filed a timely appeal from a January 13, 2012 decision of the Office of Workers' Compensation Programs (OWCP) denying a schedule award for an employment-related hearing loss and a May 8, 2012 nonmerit hearing representative's decision denying his request for a hearing. 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 OWCP properly denied his February 16, 2012 request for an oral hearing as untimely.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On September 7, 2011 appellant, then a 59-year-old aircraft mechanic supervisor, filed an occupational disease claim alleging that he sustained bilateral hearing loss as a result of noise exposure from jet aircraft and aerospace ground equipment at work for 35 years. He experienced ringing in his ears and had difficulty understanding normal conversational speech. Appellant first realized his condition resulted from his employment on September 6, 2002. He retired on February 1, 2010.

On September 12, 2011 OWCP advised appellant that no evidence was submitted to support his claim and requested additional factual information. Appellant was requested to provide information regarding his employment history, when he related his hearing loss to his employment conditions and a history of other nonoccupational exposure to noise. OWCP also requested that he provide medical documentation pertaining to any treatment he received for ear or hearing problems. It requested that the employing establishment 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 a September 2011 statement, appellant outlined his employment history. He worked in several aviation-related positions during his career and was exposed to starting in January 1971. Appellant worked as an aircraft mechanic, did technical and maintenance work, a crew chief and a maintenance coordinator and supervisor. He wore ear protection but was exposed to the noise of aircraft, diesel and electrical engines, turbines and other equipment six to seven hours a day over a period of years. The employment history was extensive and detailed. It showed a long period of exposure to a variety of noise sources associated with aircraft operation, support and repair. Appellant stated that he did not have a prior history of hearing problems and that he was no longer exposed to hazardous noise at work after February 1, 2010. He first noticed his hearing loss in September 2002 when he underwent an audiogram and audiological evaluation and the doctor discussed his hearing loss with him. Appellant also noted that he periodically engaged in deer hunting with a rifle.

In an October 4, 2011 letter, the employing establishment responded to OWCP's development letter. It submitted various personnel records, noise survey reports, audiograms from June 4, 1974 to January 8, 2011, handwritten employee health notes and position descriptions for the various jobs appellant performed.

In a January 23, 2003 audiological evaluation, Judy F. Hammack, an audiologist, related that appellant worked for the National Guard for 32 years and noted his complaints of tinnitus in his right ear and occasional bouts of vertigo. The audiologist reported that audiometric testing revealed a mild drop in thresholds in the high frequencies in the left ear and a more severe drop in thresholds in the right ear. Tympanometry further showed normal middle ear function. An audiogram conducted on that date reflected testing at 500, 1,000, 2,000 and 3,000 hertz (Hz) and showed the following decibel losses: 15, 20, 5 and 30 in the right ear and 0, 5, 0 and 15 in the left ear.

By letter dated December 2, 2011, OWCP referred appellant, together with a statement of accepted facts and the medical record, to Dr. Bryan M. Clay, a Board-certified otolaryngologist,

for a second opinion as to whether appellant sustained hearing loss causally related to his federal employment.

In a December 13, 2011 medical report, Dr. Clay reviewed appellant's medical records and noted that several hearing tests from the mid-1970s revealed normal hearing in both ears. He reported that the current audiometric findings demonstrated a significant dip in high frequency hearing in both ears that was in excess of normal presbycusis. Dr. Clay opined that appellant's exposure to loud noises at his employing establishment was sufficient as to intensity and duration to have caused his hearing loss. He diagnosed moderate to high frequency bilateral sensorineural hearing loss and opined that the hearing loss was a result of appellant's history of noise exposure in his federal employment. An audiogram conducted that day reflected testing at 500, 1,000, 2,000 and 3,000 Hz and showed the following decibel losses: 15, 15, 15 and 55 in the right ear and 10, 10, 15 and 40 in the left ear. Dr. Clay recommended hearing protection and stated that he may require hearing aids as his hearing loss progressed.

In a January 11, 2012 report, OWCP's district medical adviser reviewed Dr. Clay's findings and diagnosed bilateral sensorineural hearing loss. He further determined that appellant had no ratable hearing loss and did not authorize hearing aids.

In a decision dated January 13, 2012, OWCP accepted appellant's claim for hearing loss but determined that his hearing loss was not severe enough to be considered ratable under the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (2009) (A.M.A., *Guides*).

In a letter dated February 15, 2012, addressed to the claims examiner, appellant disagreed with the January 13, 2012 decision. He stated that, when he attended the second opinion examination, the first person who administered the hearing test had difficulty testing him and a second person was brought in to administer the test. The second individual did not have any difficulty administering the examination.

By appeal request form postmarked February 16, 2012 and received by OWCP on February 23, 2012, appellant requested a review of the written record and an oral hearing.

By decision dated May 8, 2012, OWCP's hearing representative denied appellant's request for an oral hearing as untimely. The hearing representative found that the most recent OWCP decision was issued on January 13, 2012 but appellant's request was postmarked on February 16, 2012, more than 30 days after the January 13, 2012 decision. OWCP indicated that it had exercised its discretion and further denied appellant's request finding that the relevant issue of the case could be equally addressed by requesting reconsideration and submitting evidence not previously considered by OWCP.

LEGAL PRECEDENT -- ISSUE 1

The schedule award provision of FECA² and its implementing regulations set forth the number of weeks of compensation payable to employees sustaining permanent impairment from

² 5 U.S.C. §§ 8101-8193.

loss or loss of use, of scheduled members or functions of the body. FECA, however, does not specify the manner in which the percentage of 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.³

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 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.⁴ 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 binaural hearing loss. The Board has concurred in OWCP's adoption of this standard for evaluating hearing loss.⁵ The Board has also noted OWCP's policy to round the calculated percentage of impairment to the nearest whole number.⁶

Regarding tinnitus, the A.M.A., *Guides* provides 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), enjoying of quiet recreation and emotional well-being, up to five percent may be added to a measurable binaural hearing impairment.⁸

ANALYSIS -- ISSUE 1

The Board finds that OWCP properly denied appellant's schedule award claim because the evidence of record does not establish that he sustained a ratable hearing loss.

OWCP referred appellant's claim to Dr. Clay for a second opinion examination. In a December 13, 2011 medical report, Dr. Clay noted that several hearing tests from the mid-1970s revealed normal hearing in both ears and stated that the current audiometric findings demonstrated a significant dip in high frequency hearing in both ears that was in excess of normal presbycusis. He diagnosed moderate to high frequency bilateral sensorineural hearing

³ *R.D.*, 59 ECAB 127 (2007); *Bernard Babcock, Jr.*, 52 ECAB 143 (2000); *see also* 20 C.F.R. § 10.404.

⁴ *See* A.M.A., *Guides* 250.

⁵ *E.S.*, 59 ECAB 249 (2007); *Reynaldo R. Lichtenberger*, 52 ECAB 462 (2001).

⁶ *J.H.*, Docket No. 08-2432 (issued June 15, 2009); *Robert E. Cullison*, 55 ECAB 570 (2004). *See* Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.4(b) (2) (b) (September 2010).

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).

loss and opined that the hearing loss was a result of appellant's history of noise exposure in his federal employment. In a report dated January 11, 2012, OWCP's medical adviser concurred with Dr. Clay's findings and concluded that appellant had no ratable hearing loss to warrant a schedule award according to the A.M.A., *Guides*. Hearing aids were not authorized. By decision dated January 13, 2012, OWCP accepted appellant's claim for bilateral hearing loss but denied his schedule award claim finding that his hearing loss was not severe enough to be considered ratable.

The Board finds that OWCP's medical adviser correctly determined that appellant did not sustain a ratable hearing loss. An audiogram conducted on December 13, 2011 reflected testing at 500, 1,000, 2,000 and 3,000 Hz and showed the following decibel losses: 15, 15, 15 and 55 in the right ear and 10, 10, 15 and 40 in the left ear. These thresholds total 100 and 75 decibels, respectively, for averages of 25 and 18.75 decibels. The fence of 25 decibels is then subtracted from each average. After the fence was subtracted, appellant had no ratable hearing loss and he is deemed to have no impairment in his ability to hear everyday sounds under everyday listening conditions.⁹ This does not mean that he has no hearing loss, but only that the degree of his hearing loss is not sufficient to establish a permanent impairment pursuant to the A.M.A., *Guides*. Thus, the Board finds that OWCP's medical adviser properly determined that appellant had no ratable hearing loss and that OWCP properly denied his claim for schedule award.

Appellant has also alleged that he is entitled to a schedule award because he has tinnitus, which causes ringing in his ears. FECA does not list tinnitus in the schedule of eligible members, organs or functions of the body. While the A.M.A., *Guides* allow for up to a five percent award if tinnitus interferes with ADL, the award for tinnitus can only be added to a measurable binaural hearing impairment. The Board has repeatedly held 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. Since appellant did not have a measurable hearing impairment, he is also not entitled to an award for tinnitus.¹⁰

On appeal, appellant contends that the second opinion examination was improperly conducted and may have led to an improper rating. While he noted that the first individual who attempted the hearing test, during the December 2011 second opinion evaluation had difficulty administering the test, he also stated that a second individual then administered a complete examination without problem. Appellant has not submitted any evidence to demonstrate that the second opinion examination was performed incorrectly.

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

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

¹⁰ See *D.P.*, Docket No. 12-666 (issued August 9, 2012).

LEGAL PRECEDENT -- ISSUE 2

Section 8124(b)(1) of FECA provides that a claimant for compensation not satisfied with a decision of the Secretary is entitled, on request made within 30 days after the date of the issuance of the decision, to a hearing on his claim before a representative of the Secretary.¹¹ Sections 10.617 and 10.618 of the federal regulations implementing this section of FECA provide that a claimant shall be afforded a choice of an oral hearing or a review of the written record by a representative of the Secretary.¹² A claimant is entitled to a hearing or review of the written record as a matter of right only if the request is filed within the requisite 30 days as determined by postmark or other carrier's date marking and before the claimant has requested reconsideration.¹³ Although there is no right to a review of the written record or an oral hearing if not requested within the 30-day time period, OWCP may within its discretionary powers grant or deny appellant's request and must exercise its discretion.¹⁴ OWCP procedures require that it exercise its discretion to grant or deny a hearing when the request is untimely or made after reconsideration under section 8128(a).¹⁵

ANALYSIS -- ISSUE 2

By decision dated January 13, 2012, OWCP denied appellant's schedule award claim. Appellant had 30 calendar days from this decision, or until February 12, 2012, to request an oral hearing. Because a letter requesting an appeal was dated February 15, 2012 and his appeal form was postmarked February 16, 2012, his request was untimely. The Board finds that appellant was not entitled to an oral hearing as a matter of right under section 8124(b)(1) of FECA. In its May 8, 2012 decision, OWCP further exercised its discretion to grant an oral hearing and denied his request on the grounds that he could equally well address the relevant issue in his case by requesting reconsideration. Because reconsideration exists as an alternative appeal right to address the issue raised by OWCP's January 13, 2012 decision, the Board finds that it did not abuse its discretion in denying appellant's untimely request for an oral hearing.¹⁶

CONCLUSION

The Board finds that appellant has not established a ratable hearing loss entitling him to a schedule award. The Board further finds that OWCP properly denied his request for an oral hearing as untimely filed.

¹¹ 5 U.S.C. § 8124(b)(1).

¹² 20 C.F.R. §§ 10.616, 10.617.

¹³ *Id.* at § 10.616(a).

¹⁴ *Eddie Franklin*, 51 ECAB 223 (1999); *Delmont L. Thompson*, 51 ECAB 155 (1999).

¹⁵ See *R.T.*, Docket No. 08-408 (issued December 16, 2008); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Hearings and Review of the Written Record*, Chapter 2.1601.2(a) (October 2011).

¹⁶ See *Gerard F. Workinger*, 56 ECAB 259 (2005).

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated May 8 and January 13, 2012 are affirmed.

Issued: November 2, 2012
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board

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