United States Department of Labor
Employees' Compensation Appeals Board

D.B., Appellant	)	
and	)	**Docket No. 13-1907**
	)	**Issued: February 10, 2014**
DEPARTMENT OF THE INTERIOR, OFFICE OF THE INSPECTOR GENERAL, Sacramento, CA, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Alternate Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On August 15, 2013 appellant filed a timely appeal from an August 8, 2013 schedule award decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[1] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant sustained more than 29 percent binaural hearing loss for which he received a schedule award.

FACTUAL HISTORY

By decision dated September 16, 2003, OWCP accepted appellant's claim for bilateral sensorineural hearing loss and bilateral tinnitus. This case has previously been before the Board.

[1] 5 U.S.C. § 8101 *et seq.*

In a June 7, 2004 decision, the Board affirmed OWCP's November 14, 2003 decision, finding that appellant had not established that he sustained a ratable hearing loss causally related to factors of his federal employment. The facts of the case as set forth in the Board's prior decision are incorporated by reference.

By letter dated November 23, 2011, Dr. Julia A. Tanner, an audiologist, stated that appellant's hearing loss has progressed and that he was now a candidate for hearing amplification. She noted that he had bilateral moderately severe high-frequency sensorineural hearing loss and constant bilateral tinnitus. Dr. Tanner performed an audiogram evaluation on the same date.

On November 28, 2011 appellant requested authorization for hearing aids.

On December 7, 2011 appellant filed a claim for a schedule award.

On December 22, 2011 appellant submitted records of audiogram testing dating from August, 1995 through October 28, 2011.

On January 17, 2012 Dr. David N. Schindler, a Board-certified otolaryngologist and OWCP medical consultant, reviewed Dr. Tanner's November 23, 2011 report and found that appellant's diagnosis of bilateral normal to severe high-frequency neurosensory hearing loss was aggravated by conditions of his federal employment. Because Dr. Tanner reported speech reception thresholds and speech discrimination scores that were inconsistent with the pure-tone averages, Dr. Schindler recommended that appellant be seen by an otolaryngologist to clarify the discrepancies. He also recommended that the physician make a statement regarding whether appellant had tinnitus and how it affected activities of daily living.

In a report dated April 9, 2012, Dr. Michael Kearns, a Board-certified otolaryngologist, diagnosed appellant with occupational hearing loss and mild to moderate bilateral tinnitus. He noted that appellant's tinnitus could at times interfere with sleep. Audiometric testing obtained on the same date at the frequency levels of 500, 1,000, 2,000 and 3,000 hertz (Hz) revealed the following: left ear 10, 20, 55 and 80 decibels; right ear 15, 25, 60 and 70 decibels.

By letter dated April 18, 2012, Dr. Kearns noted that appellant was a hearing aid candidate and would benefit from binaural hearing aids as the only means to improve his hearing function in daily life.

On June 20, 2012 Dr. Schindler reviewed Dr. Kearns' April 9, 2012 report and found that appellant's diagnosis of bilateral normal to severe high-frequency neurosensory hearing loss was aggravated by conditions of federal employment. He rated appellant's binaural hearing loss at 24.7 percent and noted that appellant was a candidate for binaural hearing aids. Dr. Schindler would add two percent to appellant's binaural hearing impairment for tinnitus, because Dr. Kearns had mentioned mild to moderate tinnitus that occasionally interfered with sleep.

On July 18, 2012 OWCP authorized hearing aids for appellant. On November 15, 2012 it authorized a hearing aid accessory for appellant.

By letter dated December 5, 2012, OWCP requested that Dr. Schindler clarify appellant's total binaural impairment rating. By letter dated December 18, 2012, Dr. Schindler clarified that appellant's total binaural hearing impairment was 26.7 percent, adding 2 percent for tinnitus impacting activities of daily living.

By letter dated January 16, 2013, OWCP responded to appellant's claim for a further schedule award filed on December 7, 2011. It requested additional factual evidence from appellant and to respond to its inquiries regarding his duties and facts surrounding his condition.[2] OWCP also requested that appellant's employer respond to its inquiries regarding appellant's duties and facts surrounding his condition.

By letter dated January 17, 2013, appellant stated that he had worked for the employing establishment since 2003 as a special agent in charge of the Western Region. At least on a quarterly basis, he attended and provided eight hours of firearms training, using outer earmuffs for hearing protection. Appellant was still exposed to hazardous noise at work. He asserted that he had no hobbies involving exposure to loud noise and had not been exposed to other loud noises outside of his employment since 2003.

The employing establishment responded to OWCP by letter dated January 23, 2013. It stated that the employing establishment concurred with appellant's allegations, describing the source of his exposure to hazardous noise as firearms training.

On January 30, 2013 appellant filed an occupational disease claim (Form CA-2) alleging hearing loss and tinnitus as a result of factors of his federal employment.[3] He became aware of his condition on January 1, 1996, and of its relationship to his employment on January 1, 2000. By letter dated February 8, 2013, OWCP advised appellant that it had combined Claim No. xxxxxx246 with the present claim for administrative case management purposes.[4]

By letters dated February 14 and 19, 2013, OWCP referred appellant to Dr. David Kiener, a Board-certified otolaryngologist. It included a statement of accepted facts regarding appellant's federal employment history. In a report dated March 12, 2013, Dr. Kiener reviewed appellant's history of exposure to hazardous noise and performed an otologic evaluation. Audiometric testing obtained on March 12, 2013 at the frequency levels of 500, 1,000, 2,000 and 3,000 Hz revealed the following: left ear 20, 25, 60, 70 decibels; right ear 20, 35, 65, and 70 decibels. Dr. Kiener noted that the testing occurred at 2:00 p.m. and that the audiological equipment had been last calibrated on February 27, 2013. He determined that appellant

[2] In a record of a telephone call dated January 15, 2013, OWCP notified appellant that his schedule award claim was not developed correctly after he filed his schedule award claim on December 7, 2011 and that it would need to be developed correctly and sent to a district medical adviser.

[3] In a record of a telephone call dated January 30, 2013, a claims examiner stated that he informed the employing establishment that appellant would have to file a new claim for occupational disease. In a record of a telephone call from the same date, a claims examiner told appellant that he was required to file a new claim because he had new exposure to factors of his federal employment. In a record of a telephone call dated January 31, 2013, a claims examiner noted that appellant needed to file a new claim because he was claiming a new period of exposure, stating that this new period of exposure was continued exposure after 2003.

[4] However, the case files were not fully merged in iFECS.

sustained significant bilateral hearing loss causally related to his federal employment, noting that appellant's prior audiograms demonstrated progression over time. Hearing aids were recommended. Dr. Kiener also noted that appellant had high-pitched constant ringing tinnitus.

By decision dated April 17, 2013, OWCP accepted appellant's claim for binaural hearing loss.

In reports dated July 8 and 30, 2013, Dr. Schindler, calculated that, under the sixth edition of the A.M.A., *Guides*, appellant had a 29.1 percent ratable binaural hearing loss. He stated that Dr. Kiener had noted tinnitus as constant, but that he did not rate it as affecting daily activities.

By decision dated August 8, 2013, OWCP granted appellant a schedule award for 29 percent binaural hearing loss.[5] The award ran for 58 weeks from March 12, 2013 through April 21, 2014. OWCP based the award on Dr. Kiener's March 12, 2013 report and the July 30, 2013 report of its medical adviser.

LEGAL PRECEDENT

The schedule award provision of FECA[6] and its implementing regulations[7] 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. 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.[8] The A.M.A., *Guides* have been adopted by the implementing regulations as the appropriate standard for evaluating schedule losses.[9]

OWCP evaluates industrial hearing loss in accordance with the standards contained in the A.M.A., *Guides.*[10] 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* point 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. 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

[5] This decision superseded an August 8, 2013 decision containing typographical errors.

[6] 5 U.S.C. § 8107.

[7] 20 C.F.R. § 10.404.

[8] *See D.K.*, Docket No. 10-174 (issued July 2, 2010); *Michael S. Mina*, 57 ECAB 379, 385 (2006).

[9] 20 C.F.R. § 10.404; *see F.D.*, Docket No. 09-1346 (issued July 19, 2010).

[10] *See* A.M.A., *Guides* 250 (6th ed. 2009).

binaural hearing loss. The Board has concurred in OWCP's adoption of this standard for evaluating hearing loss.[11]

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.[12]

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.[13] The A.M.A., *Guides* state that, if tinnitus interferes with activities of daily living (ADLs), 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.[14]

Proceedings under FECA are not adversarial in nature, nor is OWCP a disinterested arbiter. While the claimant has the burden to establish his or her claim, OWCP also has a responsibility in the development of the evidence.[15]

ANALYSIS

The Board finds that this case is not in posture for decision. By decision dated September 16, 2003, OWCP accepted appellant's initial claim for bilateral sensorineural hearing loss and bilateral tinnitus. On January 30, 2013 he filed another claim for compensation for hearing loss, based upon continued noise exposure since 2003. By decision dated April 17, 2013, OWCP accepted appellant's new claim for bilateral sensorineural hearing loss. The issue is whether appellant sustained more than 29 percent binaural hearing loss, for which he received a schedule award.

The Board finds that Dr. Schindler properly calculated appellant's percentage of impairment based on the numerical results of audiometric testing performed for Dr. Kiener on March 12, 2013; but OWCP failed to procure medical evidence to resolve the issue of whether appellant's tinnitus affected activities of daily living.

OWCP's standardized procedures were applied to Dr. Kiener's March 12, 2012 report to arrive at a binaural impairment rating of 29 percent. Test results at the frequency levels recorded

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

[12] *Mark A. Holloway*, 55 ECAB 321, 325 (2004).

[13] *See* A.M.A., *Guides* 249 (6th ed. 2009).

[14] *Id*. *See also R.O.*, Docket No. 13-1036 (issued August 28, 2013); *R.H.*, Docket No. 10-2139 (issued July 13, 2011); *Robert E. Cullison*, 55 ECAB 570, 573 (2004).

[15] *See Claudia A. Dixon*, 47 ECAB 168, 170 (1995).

at 500, 1,000, 2,000 and 3,000 Hz on the left revealed decibel losses of 20, 25, 60 and 70 decibels respectively, for a total of 175 decibels. This figure, divided by four, results in an average hearing loss of 43.8 decibels. The average of 43.8 decibels, when reduced by the 25 decibel fence and multiplied by 1.5, results in a 28.2 percent monaural hearing loss of the left ear. Testing for the right ear at the frequency levels of 500, 1,000, 2,000 and 3,000 Hz revealed decibel losses of 20, 35, 65 and 70 decibels respectively, for a total loss of 190 decibels. One hundred and ninety decibels divided by four results in an average of 47.5 decibels, which when reduced by the 25 decibel fence and multiplied by 1.5, results in a 33.8 percent monaural hearing loss of the right ear. Multiplying the lesser loss of 28.2 decibels by five arrives at a product of 141 decibels. Adding this figure to the 33.8 percent hearing loss for the right ear obtains a total of 174.8. Dividing this total by six in order to calculate a binaural hearing loss yields a 29.1 percent binaural impairment, which was rounded to 29 percent in computing the final percentage impairment for award purposes.[16] Therefore, Dr. Schindler properly calculated appellant's percentage of impairment based on the numerical results of the audiogram performed by Dr. Kiener.

However, the Board notes that Dr. Kiener stated that appellant had high-pitched constant ringing tinnitus. Dr. Kearns also mentioned tinnitus and stated that it sometimes interfered with appellant's sleep. Dr. Schindler added two percent to appellant's impairment rating based on Dr. Kearns' diagnosis and explanation of the condition's interference with activities of daily living. While Dr. Kiener did not opine as to whether tinnitus impacted appellant's activities of daily living, he acknowledged that appellant had tinnitus. The case record indicates that Dr. Kearns found the condition interfered with sleep and Dr. Schindler previously rated impairment for tinnitus. The A.M.A., *Guides* state that, if tinnitus interferes with activities of daily living, 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.[17]

Once OWCP undertakes development of the record it must do a complete job in procuring medical evidence that will resolve the relevant issues in the case.[18] OWCP referred appellant to Dr. Kiener for evaluating appellant's hearing acuity. It relied on Dr. Kiener's opinion in rating appellant's percentage of impairment. Given the ambiguity of Dr. Kiener's report on the issue of whether appellant's tinnitus interfered with activities of daily living. OWCP should have requested clarification from Dr. Kiener regarding this issue before issuing a final determination regarding the percentage of impairment. Accordingly, the Board will remand the case to OWCP for further appropriate medical development.

[16] OWCP's procedures provide that in computing binaural hearing loss, percentages should not be rounded until the final percent for award purposes is obtained and fractions should be rounded down from .49 or up from .50. Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.4.b(2)(b) (March 2005).

[17] *Id*. *See also supra* note 14.

[18] *Phillip L. Barnes*, 55 ECAB 426, 441 (2004); *see also Virginia Richard* (*Lionel F. Richard*), 53 ECAB 430, 433 (2002); *Dorothy L. Sidwell*, 36 ECAB 699, 707 (1985); *William J. Cantrell*, 34 ECAB 1233, 1237 (1993).

On remand, OWCP should ask Dr. Kiener to clarify his opinion on whether appellant's tinnitus affected activities of daily living.[19] After this and such further development as deemed necessary, OWCP shall issue an appropriate decision.[20]

On appeal, appellant contends that OWCP erred in calculating his percentage impairment by not adding two percent due to tinnitus impacting activities of daily living. The Board notes that the medical evidence requires further development on this issue, as noted. Appellant contends that he is entitled to 406 weeks of compensation as expressed in OWCP's decision of August 8, 2013. This argument is without merit, as that decision was superseded to correct a typographical error. The Board notes that the statute provides 200 weeks of compensation as the maximum amount of compensation for bilateral loss of hearing.[21]

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 this case is not in posture for decision as to whether appellant has more than 29 percent binaural hearing loss.

[19] When a medical evaluation is made at its request, OWCP has the responsibility of obtaining a proper evaluation. *Leonard Gray*, 25 ECAB 147, 151 (1974). *See also W.H.*, Docket No. 12-38 (issued June 11, 2012); *S.K.*, Docket No. 12-1926 (issued May 10, 2013).

[20] *See P.K.*, Docket No. 08-2551 (issued June 2, 2009); *see also Horace Langhorne*, 29 ECAB 820, 822 (1978).

[21] *See* 5 U.S.C. § 8107(c)(13)(B).

ORDER

IT IS HEREBY ORDERED THAT the August 8, 2013 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded to OWCP for further development consistent with this decision.

Issued: February 10, 2014
Washington, DC

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

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

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