United States Department of Labor
Employees' Compensation Appeals Board

W.H., Appellant	)	
and	)	**Docket No. 13-2083**
	)	**Issued: February 25, 2014**
DEPARTMENT OF THE NAVY, NAVAL SEA SYSTEMS COMMAND, Philadelphia, PA, Employer	)	

Appearances:
Thomas R. Uliase, Esq., for the appellant
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 September 11, 2013 appellant, through his attorney, filed a timely appeal from a June 12, 2013 merit 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 the decision.

ISSUE

The issue is whether appellant met his burden of proof to establish more than a 13 percent impairment based on the hearing loss of the left ear for which he received a schedule award.

On appeal appellant's attorney asserts that a conflict in medical evidence has been established regarding the degree of appellant's left ear hearing loss and the case should be remanded for an impartial evaluation in this regard.

[1] 5 U.S.C. §§ 8101-8193.

FACTUAL HISTORY

On February 9, 2009 appellant, then a 56-year-old mechanical engineering technician, filed an occupational disease claim alleging that noise exposure at work caused hearing loss. The record includes copies of employing establishment audiograms dated July 3, 1978 to January 26, 2009. In a January 26, 2009 report, James B. Robertson, an employing establishment audiologist, diagnosed bilateral sensorineural hearing loss and provided results of audiograms dated January 22 and 26, 2009.

OWCP referred appellant to Dr. Emil P. Liebman, a Board-certified otolaryngologist. In a report dated June 17, 2009, Dr. Liebman advised that physical examination and audiometric findings indicated that appellant had a high frequency sensorineural hearing loss in the right ear and a more severe hearing loss on the left. He concluded that appellant's right ear hearing loss was due to noise exposure and that the hearing loss on the left was not due to noise exposure. Dr. Liebman recommended that a magnetic resonance imaging (MRI) scan study be done to rule out a lesion such as an acoustic neuroma and submitted results of an audiogram done on June 16, 2009.[2]

On July 27, 2009 an OWCP medical adviser reviewed the audiogram and determined that appellant had no ratable impairment on the right and a 48.75 percent hearing loss on the left. He advised that the recommended MRI scan study be done. On August 9, 2009 Dr. Kathy L. Goodman, an OWCP consulting audiologist, advised that appellant's left ear hearing loss was not consistent with noise exposure.

On September 8, 2009 OWCP accepted that appellant sustained employment-related hearing loss on the right.

In a supplemental report dated April 14, 2010, Dr. Liebman noted that an MRI scan study of the brain was negative for pathology or tumors. He reiterated his opinion that appellant's left ear hearing loss was not related to noise exposure and indicated that he had a zero percent ratable loss on the right and a 48.8 percent loss on the left. On November 16, 2010 an OWCP medical adviser agreed with Dr. Liebman's hearing loss findings and indicated that appellant had 0 percent impairment of the right ear and 48.75 percent impairment on the left. He incorporated a November 1, 2010 note in which Dr. Goodman indicated that she agreed with Dr. Liebman's opinion that appellant's left ear hearing loss was inconsistent with noise exposure.

Appellant filed a schedule award claim on April 4, 2011. In an April 15, 2011 decision, OWCP found that he was not entitled to a schedule award for his accepted right ear hearing loss because the medical evidence did not demonstrate a measureable impairment on the right.

Appellant, through his attorney, timely requested a hearing that was held on August 17, 2011. He submitted reports from Dr. David Bromberg, an attending Board-certified otolaryngologist, dated August 9 and September 11, 2011. Dr. Bromberg indicated that he

[2] The June 16, 2009 audiogram indicated testing at the frequency levels of 500, 1,000, 2,000 and 3,000 cycles per second and revealed the following: right ear 5, 10, 10 and 35 decibels; left ear 55, 50, 50 and 60 decibels, respectively.

examined appellant on May 12, 2011 and that appellant had audiometric testing that demonstrated severe to profound hearing loss in the left ear. He advised that he could not say with medical certainty that noise exposure caused appellant's hearing loss on the left but could say that it was exacerbated by his work environment.

By decision dated November 2, 2011, an OWCP hearing representative set aside the April 15, 2011 decision and remanded the case to OWCP to prepare a new statement of accepted facts and to ask that Dr. Liebman provide a rationalized explanation regarding appellant's hearing loss on the left.

On remand OWCP prepared an updated statement of accepted facts and referred the case file back to Dr. Liebman. In a February 8, 2012 report, Dr. Liebman advised that appellant's left ear hearing loss was neither the type nor degree one would expect with noise exposure and concluded that it was an idiopathic sensorineural hearing loss with a negative MRI scan study.

In decisions dated March 1, 2012, OWCP denied appellant's claim that his left ear hearing loss was causally related to noise exposure at work and found that he was not entitled to a schedule award for his left ear hearing loss. Appellant's attorney requested a hearing that was held on June 6, 2012.

By decision dated August 6, 2012, an OWCP hearing representative set aside the March 1, 2012 decisions. She advised that there was no medical evidence that adequately addressed the issue of appellant's left ear hearing loss, noting that Dr. Bromberg did not provide examination or audiometric test results, and that Dr. Liebman did not adequately explain his rationale in finding that appellant's left ear hearing loss was not employment related. The hearing representative remanded the case to OWCP to obtain a new second opinion evaluation, to be followed by an appropriate decision.

In a September 4, 2012 report, Dr. Bromberg opined that appellant's left ear hearing loss was either caused or aggravated by noise exposure at work.

OWCP referred appellant to Dr. Louis Rondinella, a Board-certified otolaryngologist, and provided him with an updated statement of accepted facts and the medical record. In a September 11, 2012 report, Dr. Rondinella noted that appellant had retired in November 2011, the date of his last exposure to noise at work. He provided physical examination findings and audiometric test results. Dr. Rondinella opined that, within a reasonable degree of medical probability, appellant had bilateral noise-induced high frequency hearing loss in both ears which was directly caused by noise exposure at work. He indicated that the hearing loss had stabilized with January 26, 2009 as the date of maximum medical improvement. Dr. Rondinella provided verification of audiometric testing and results from an August 10, 2012 audiogram that reflected testing at the frequency levels of 500, 1,000, 2,000 and 3,000 cycles per second which revealed the following: right ear 10, 15, 15 and 40 decibels; left ear 25, 25, 40 and 55 decibels, respectively. He advised that appellant had a 0 percent hearing loss in his right ear and a 13.125 percent loss on the left.

On November 29, 2012 OWCP accepted that appellant sustained bilateral noise-induced hearing loss. Dr. Salim Matar, a Board-certified otolaryngologist and an OWCP medical

adviser, reviewed the medical record. In a December 12, 2012 report, he indicated that maximum medical improvement was reached on January 23, 2009 and advised that he was in full agreement with Dr. Rondinella's report and that, in accordance with the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (hereinafter A.M.A., *Guides*),[3] appellant had a 0 percent ratable impairment of the right ear and a 13.125 percent impairment on the left.

By decision dated December 18, 2012, OWCP granted appellant a schedule award for a 13 percent impairment of his left ear, for 6.76 weeks of compensation, to run from January 26 to March 14, 2009. Appellant, through his attorney, timely requested a hearing that was held on April 11, 2013. At the hearing appellant's attorney asserted that Dr. Rondinella's audiogram results were grossly different from those of Dr. Liebman who had previously examined appellant for OWCP and found a 48.75 percent hearing loss on the left. He submitted a May 12, 2011 audiogram from Dr. Bromberg which also demonstrated a 48.75 percent hearing loss on the left.[4] Counsel maintained that, at the very least, a conflict in medical evidence had been created regarding the degree of appellant's hearing loss in the left ear.

By decision dated June 12, 2013, an OWCP hearing representative reviewed the audiograms from Drs. Liebman, Bromberg and Rondinella and found that the weight of the medical evidence rested with the opinion of Dr. Rondinella and affirmed the December 18, 2012 decision.

LEGAL PRECEDENT

The schedule award provision of FECA,[5] and its implementing federal regulations,[6] 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 for all claimants, OWCP has adopted the A.M.A., *Guides* as the uniform standard applicable to all claimants.[7] For decisions after February 1, 2001, the fifth edition of the A.M.A., *Guides* was used to calculate schedule awards.[8] For decisions issued after May 1, 2009, the sixth edition is to be used.[9]

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

[4] The May 12, 2011 audiogram reflected testing at the frequency levels of 500, 1,000, 2,000 and 3,000 cycles per second and revealed the following: right ear 10, 15, 15, and 40 decibels; left ear 60, 60, 50 and 60 decibels, respectively.

[5] 5 U.S.C. § 8107.

[6] 20 C.F.R. § 10.404.

[7] *Id.* at § 10.404(a).

[8] Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010).

[9] FECA Bulletin No. 09-03 (issued March 15, 2009).

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 and averaged.[10] The "fence" of 25 decibels is then 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.[11] The remaining amount is multiplied by a factor of 1.5 to arrive at the percentage of monaural hearing loss.[12] 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.[13] The Board has concurred in OWCP's adoption of this standard for evaluating hearing loss.[14]

Further, OWCP procedures provide that the employee undergo audiological evaluation and otological examination; that the audiological testing precede the otologic examination; that the audiological evaluation and otologic examination be performed by different individuals as a method of evaluating the reliability of the findings; that the clinical audiologist and otolaryngologist be certified; that all audiological equipment authorized for testing meet the calibration protocol contained in the accreditation manual of the American Speech and Hearing Association; that the audiometric test results include both bone conduction and pure-tone air conduction thresholds; speech reception thresholds and monaural discrimination scores; and that the otolaryngologist's report include the date and hour of examination; date and hour of the employee's last exposure to loud noise; and a rationalized medical opinion regarding causal relationship.[15]

ANALYSIS

OWCP accepted that appellant sustained a bilateral hearing loss due to noise exposure at work and granted him a schedule award for 13 percent impairment of the left ear, based on the September 11, 2012 report of Dr. Rondinella, who provided a second opinion evaluation for OWCP.

In the September 11, 2012 report, Dr. Rondinella noted examination findings and reviewed a September 10, 2012 audiogram that was obtained on his behalf. Using OWCP's standard procedures described above, he advised that appellant's employment-related noise exposure did not cause a ratable hearing loss on the right but was sufficient to cause 13 percent impairment on the left. The September 10, 2012 audiogram tested frequency levels of 500, 1,000, 2,000 and 3,000 decibels and reflected losses of 25, 15, 40 and 55 decibels respectively on

[10] A.M.A., *Guides*, *supra* note 3 at 250.

[11] *Id*.

[12] *Id*.

[13] *Id*. at 251; *see* Federal (FECA) Procedure Manual, *supra* note 8 at section 3.700.b(2)(a) and (b).

[14] *Horace L. Fuller*, 53 ECAB 775 (2002).

[15] Federal (FECA) Procedure Manual, Part 3 -- Medical, *Specific Conditions*, Chapter 3.600.8(a) (September 1995); *see D.S.*, Docket No. 13-1463 (issued November 14, 2013).

the left, for a total decibel loss of 135 and loss of 10, 15, 15 and 40 decibels on the right.[16] Following OWCP procedures described above, the decibel total of 80 for the right ear, when divided by 4, yields an average of 20, which is less than the fence of 25, for no impairment of the right ear. Therefore, appellant's right ear impairment was not ratable. For the left ear, dividing the total decibel loss of 135 by 4 resulted in an average hearing loss of 33.75 decibels. This average was reduced by 25 decibels, yielding an 8.75 loss which, when multiplied by 1.5, yielded a 13.125 monaural loss on the left. OWCP properly rounded this fraction down to reflect a 13 percent impairment of the left ear.[17] OWCP's medical adviser supported Dr. Rondinella's conclusion.

The record also includes employing establishment audiometric test results from 1978 to 2009. These, however, do not comport with the appropriate standards because there is no evidence that appellant underwent examination by an otolaryngologist, that the audiometric testing was performed by a certified audiologist or that all the equipment used for testing met the required standards.[18] Moreover, the most recent employing establishment report was dated in January 2009, almost four years prior to the December 18, 2012 schedule award. Likewise, Dr. Liebman's June 16, 2009 audiogram does not constitute contemporaneous medical evidence. Finally, Dr. Bromberg's May 12, 2011 audiogram does not comport with appropriate standards because it too does not indicate that the audiometric testing was performed by a certified audiologist or that all the equipment used for testing met the required standards.[19] Thus, there is no probative medical evidence showing that appellant had a greater hearing loss than the 13 percent for which he received a schedule award.

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 has no more than 13 percent impairment of the left ear for which he received a schedule award.

[16] The decibel total of 80 on the right, when divided by 4, yields an average of 20, which is less than the fence of 25, for a zero impairment of the right ear.

[17] *Id*. at Chapter 3.700.4.b(2)(b) (January 2010).

[18] *Supra* note 15.

[19] *Id*.

ORDER

IT IS HEREBY ORDERED THAT the June 12, 2013 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: February 25, 2014
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