

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

L.N., Appellant)

and)

DEPARTMENT OF THE NAVY, NORFOLK)
NAVAL SHIPYARD, Portsmouth, VA, Employer)

**Docket No. 14-1168
Issued: November 13, 2014**

Appearances:

David G. Jennings, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA HOWARD FITZGERALD, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On April 23, 2014 appellant, through counsel, timely appealed the April 1, 2014 merit decision of the Office of Workers' Compensation Programs (OWCP) which granted a schedule award. 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 this case.

ISSUE

The issue is whether appellant has greater than 21.24 percent binaural hearing loss.

FACTUAL HISTORY

Appellant, a 68-year-old former welder, has an accepted occupational disease claim for bilateral sensorineural hearing loss, which arose on or about March 15, 1987.² OWCP accepted

¹ 5 U.S.C. §§ 8101-8193 (2006).

² Appellant retired effective December 31, 1999.

the claim based on the May 29, 2013 opinion of Dr. Eugenia M.G. Gray, a Board-certified otolaryngologist and OWCP-referral physician.

Dr. Gray diagnosed employment-related bilateral sensorineural hearing loss. She also rated a 26.25 percent binaural hearing loss, which included an additional 5 percent bilateral impairment due to tinnitus.³ Dr. Gray noted a history of tinnitus began in the 1970's. Tinnitus reportedly made appellant's headaches worse, but once he began using earplugs, it helped with the bothersome noise and the tinnitus as well. However, earplugs did not resolve the headaches or tinnitus completely. Dr. Gray further noted that currently appellant's tinnitus was most bothersome for him. It was nagging and irritating and kept him from sleeping. The right side was a little worse than the left. Appellant reported that he occasionally felt off balance because of the tinnitus, and sometimes associated a little mild nausea with the severity of the tinnitus. He would go to sleep, but when he awoke the sound never went away.

OWCP referred Dr. Gray's findings to a district medical adviser, Dr. Duane J. Taylor, a Board-certified otolaryngologist, who found 21.24 percent binaural hearing loss. Dr. Taylor also found that appellant reached maximum medical improvement as of May 29, 2013. His impairment rating mirrored Dr. Gray's, with one exception -- he did not include impairment for tinnitus.

On April 1, 2014 OWCP granted a schedule award for 21.24 percent binaural hearing loss. The award covered a period of 42 weeks beginning May 29, 2013. OWCP explained that the award was based on Dr. Taylor's findings, which differed from Dr. Gray's impairment rating.

On appeal, counsel noted that Dr. Taylor provided no explanation for excluding Dr. Gray's five percent rating for tinnitus.

LEGAL PRECEDENT

Section 8107 of FECA sets forth the number of weeks of compensation to be paid for the permanent loss of use of specified members, functions and organs of the body.⁴ FECA, however, does not specify the manner by which the percentage loss of a member, function or organ shall be determined. To ensure consistent results and equal justice under the law, good administrative practice requires the use of uniform standards applicable to all claimants. The implementing regulations have adopted the American Medical Association, *Guides to the Evaluation of Permanent Impairment* as the appropriate standard for evaluating schedule losses.⁵

³ The May 29, 2013 audiogram which Dr. Gray relied upon noted losses at the frequencies of 500, 1,000, 2,000, and 3,000 cycles per second (cps). The right ear losses were recorded as 30, 40, 40 and 55 decibels (dB). The left ear losses were recorded as 20, 30, 50 and 55 dB.

⁴ For complete loss of hearing of one ear, an employee shall receive 52 weeks' compensation. 5 U.S.C. § 8107(c)(13). For complete loss of hearing of both ears, an employee shall receive 200 weeks' compensation. *Id.*

⁵ 20 C.F.R. § 10.404 (2014).

Effective May 1, 2009, schedule awards are determined in accordance with the sixth edition of the A.M.A., *Guides* (2008).⁶

Using the frequencies of 500, 1,000, 2,000 and 3,000 cps, the losses at each frequency are added up and averaged.⁷ Then, the “fence” of 25 dB is deducted because, as the A.M.A., *Guides* points out, losses below 25 dB result in no impairment in the ability to hear everyday speech under everyday conditions.⁸ The remaining amount is multiplied by a factor of 1.5 to arrive at the percentage of monaural hearing loss.⁹ 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, and then added to the greater loss and the total is divided by six to arrive at the amount of the binaural hearing loss.¹⁰

ANALYSIS

Based on the May 29, 2013 audiogram, appellant’s right ear hearing losses at 500, 1,000, 2,000, and 3,000 cps were 30, 40, 40 and 55 dB, which totaled 165 dB. His left ear losses were 20, 30, 50 and 55 dB, which totaled 155 dB. The right ear hearing loss of 165 dB resulted in an average loss of 41.25, and the left ear loss averaged 38.75 dB. After subtracting the 25 dB fence, the right ear loss was 16.25 and the left ear loss was 13.75 dB. Each loss was multiplied by 1.5, resulting in a right ear loss of 24.375 dB and a left ear loss of 20.625 dB. The lesser of the two (20.625 dB) was multiplied by 5 and added to the greater loss (24.375 dB), then divided by 6 (127.5÷6) to calculate the binaural loss of 21.25 dB. Dr. Gray rated an additional 5 percent binaural hearing loss due to tinnitus, for an overall rating of 26.25 percent. Dr. Taylor did not address the additional five percent for tinnitus.

The A.M.A., *Guides* allow for up to an additional five percent impairment for tinnitus. Specifically, the A.M.A., *Guides* provide that if the 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.¹¹

Dr. Gray noted a history of tinnitus dating back to the 1970’s. Tinnitus reportedly made appellant’s headaches worse. While earplugs helped, this protective measure did not resolve appellant’s headaches or tinnitus completely. Dr. Gray also noted that currently appellant’s tinnitus was most bothersome for him. The tinnitus was nagging and irritating and kept him

⁶ See Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010); and Part 2 -- Claims, *Schedule Awards & Permanent Disability Claims*, Chapter 2.808.6a (February 2013).

⁷ See Section 11.2, Hearing and Tinnitus, A.M.A., *Guides* 248-51 (6th ed. 2008).

⁸ *Id.* at 250.

⁹ *Id.* at 250-51.

¹⁰ *Id.* at 251.

¹¹ Section 11.2b, Tinnitus, A.M.A., *Guides* 249 (6th ed. 2008).

from sleeping. The right side was noted to be a little worse than the left. Appellant also reported occasionally feeling off balance because of the tinnitus. Dr. Gray further noted that appellant sometimes associated a little mild nausea with the severity of the tinnitus.

The Board finds that Dr. Gray's May 29, 2013 report provided sufficient explanation to support an additional five percent binaural hearing loss due to tinnitus. As noted, Dr. Taylor offered no explanation for excluding the additional rating for tinnitus. Consistent with OWCP procedures, Dr. Gray's overall rating of 26.25 percent is rounded down to 26 percent binaural hearing loss.¹² Accordingly, the April 1, 2014 decision shall be modified to reflect appellant's entitlement to a schedule award for 26 percent binaural hearing loss.

CONCLUSION

The Board finds that appellant has proven he sustained hearing loss greater than 21.24 percent. The record establishes that appellant has 26 percent binaural hearing loss and such disability benefits are therefore awarded on this appeal.

ORDER

IT IS HEREBY ORDERED THAT the April 1, 2014 decision of the Office of Workers' Compensation Programs is affirmed, as modified.

Issued: November 13, 2014
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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

¹² Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.4b(2)(b).