

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

S.A., Appellant

and

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

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**Docket No. 11-1124
Issued: December 7, 2011**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

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

JURISDICTION

On April 5, 2011 appellant filed a timely appeal from an October 25, 2010 merit decision of the Office of Workers' Compensation Programs (OWCP) denying his claim for a schedule award; and a December 16, 2010 nonmerit decision denying his request for review of the written record. 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 cases.

ISSUES

The issues are: (1) whether OWCP properly determined that appellant's hearing impairment was not ratable; (2) whether OWCP abused its discretion by refusing to authorize hearing aids; and (3) whether OWCP properly denied appellant's request for a review of the written record.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On July 14, 2010 appellant, then a 54-year-old administrative support specialist, filed an occupational disease claim, stating that he sustained hearing loss due to noise exposure in his federal employment.

In response to a request for further information from OWCP, appellant submitted his statement of employment history, personnel action forms, position descriptions, as well as employing establishment audiograms.

Appellant's employment records indicate that he began working for the Department of the Navy in 1974 and remained at the employing establishment until the present time. His assignment was modified several times, but the type of noise he was exposed to remained identical until 2008, when he was assigned the current position and was no longer subject to noise. Prior to 2008 appellant was subjected to noise associated with sandblasting, grinding, needle guns and hammering.

OWCP received audiometric examination reports provided by the employing establishment from 1974, 1997 and 2010. The unsigned audiogram dated April 6, 2010 indicated that testing at the frequency levels of 500, 1,000, 2,000 and 3,000 cycles per second revealed decibel losses: right ear 5, 20, 25 and 45 decibels; left ear 15, 20, 20 and 15 decibels.

OWCP referred appellant and a statement of accepted facts to Dr. Eugenia Gray, a Board-certified otolaryngologist, for audiometric and otologic examination and evaluation. Audiometric testing of appellant was performed on September 3, 2010. Testing at the frequency levels of 500, 1,000, 2,000 and 3,000 cycles per second revealed the following: right ear 5, 20, 25 and 50 decibels; left ear 20, 25, 20 and 25 decibels. Dr. Gray concluded that appellant sustained sensorineural bilateral hearing loss as a result of his employment, but that the hearing loss was not ratable. She rationalized this conclusion by stating that the sensorineural hearing loss pattern was consistent with noise exposure, and appellant had a history of being exposed to noise during his federal employment. Dr. Gray also opined that the hearing loss was not ratable as the extent of hearing loss was zero percent, after deduction of the 25 decibel fence. However, she noted that appellant would benefit from hearing aids, stating that he could only hear the television at a volume level that was intolerable for his family, and that his daily conversations were also impaired.

By decision dated October 8, 2010, OWCP notified appellant that his claim was accepted for bilateral sensorineural hearing loss due to workplace exposure to noise. On September 20, 2010 the district medical adviser (DMA) reviewed Dr. Gray's report and the audiometric test of September 3, 2010. The DMA concluded that appellant had a noise-induced sensorineural hearing loss which was not ratable in either ear. In accordance with the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*, (A.M.A., *Guides*), appellant had a zero percent binaural sensorineural hearing loss, and that the date of maximum medical improvement was September 3, 2010. The DMA noted, however, that the medical evidence "does support OWCP authorization of amplification to treat his conditions," and also recommended yearly audiograms and hearing protection for appellant.

In an October 25, 2010 decision, OWCP determined that appellant was not entitled to a schedule award of compensation and that the weight of the medical evidence established that he would not benefit from hearing aids.

Appellant disagreed with the decision and requested review of the written record on November 29, 2010.

OWCP denied appellant's request for a review of the written records, by decision dated December 16, 2010, on the grounds that the request was not timely filed. Appellant was informed that his case had been considered in relation to the issues involved, and that the issues could be addressed by requesting reconsideration before and submitting evidence not previously considered.

LEGAL PRECEDENT -- ISSUE 1

The schedule award provision of FECA² and its implementing regulations³ 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. The A.M.A., *Guides* has been adopted by the implementing regulations as the appropriate standard for evaluating schedule losses.⁴

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 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. 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 requirements of the evidence to be used in evaluating occupational hearing loss claims are defined by the Federal (FECA) Procedure Manual, which provides that an employee should 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

² 5 U.S.C. § 8107.

³ 20 C.F.R. § 10.404 (1999).

⁴ *Id.* See also *Jacqueline S. Harris*, 54 ECAB 139 (2002).

⁵ *J.H.*, Docket No. 08-2432 (issued June 15, 2009); *J.B.*, Docket No. 08-1735 (issued January 27, 2009).

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; a rationalized medical opinion regarding the relationship.⁶

ANALYSIS -- ISSUE 1

The Board finds that OWCP properly relied on the test results of Dr. Gray, the second opinion physician, as her audiometric study was the only report of record that met all the calibration protocol requirements required by OWCP.⁷

An OWCP medical adviser applied OWCP's standardized procedures to the September 3, 2010 audiogram performed for Dr. Gray. Test results for the right ear at the frequency levels of 500, 1,000, 2,000 and 3,000 cycles per second revealed decibel losses of 5, 20, 25 and 50 decibels, respectively. These decibels were totaled at 100 and were divided by 4 to obtain an average hearing loss at those cycles of 25 decibels. The average of 25 decibels was then reduced by 25 decibels (the first 25 decibels were discounted as discussed above) to equal 0, which was multiplied by the established factor of 1.5 to compute a zero percent monaural loss of hearing for the right ear.

Testing for the left ear at the frequency levels of 500, 1,000, 2,000 and 3,000 cycles per second revealed decibel losses of ear 20, 25, 20 and 25, respectively. These decibels were totaled at 90 and were divided by 4 to obtain the average hearing loss at those cycles of 22.5 decibels. The average of 22.5 decibels was then reduced by 25 decibels (the first 25 decibels were discounted as discussed above) to equal 0 which was multiplied by the established factor of 1.5 to compute a zero percent hearing monaural loss for the left ear. As such, the binaural loss also comes out to be zero percent.

The Board finds that OWCP properly concluded that appellant's binaural hearing loss was not ratable.

LEGAL PRECEDENT -- ISSUE 2

Section 8103(a) of FECA provides that the United States shall furnish to an employee who is injured while in the performance of duty, the services, appliances and supplies prescribed or recommended by a qualified physician, which the Secretary of Labor considers likely to cure, give relief, reduce the degree or the period of any disability or aid in lessening the amount of any

⁶ *Joshua Holmes*, 42 ECAB 231 (1990).

⁷ The April 6, 2010 employing establishment audiogram was unsigned and did not contain complete calibration information. It does not comply with OWCP procedures.

monthly compensation.⁸ OWCP must therefore exercise discretion in determining whether the particular service, appliance or supply is likely to affect the purposes specified in FECA.⁹

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 loss exists, as supported by medical rationale.¹⁰

ANALYSIS -- ISSUE 2

The Board finds that OWCP abused its discretion in denying appellant's request for hearing aids. OWCP justified its decision by stating that "the weight of the medical evidence established that [appellant] would not benefit from hearing aids." This statement lacks evidentiary basis, as both medical reports from the DMA and Dr. Gray explicitly recommended hearing aids for treatment of appellant's condition. Dr. Gray's November 8, 2010 well-rationalized report determined that appellant sustained a nonratable, employment-related hearing loss, but that authorization of hearing aids was appropriate in view of his impairment in daily conversation and communication. The DMA agreed with Dr. Gray's conclusion and stated that the medical evidence supported use of hearing aids. There is no contradicting medical evidence.

The facts of this case are comparable to those presented in *A.S.*¹¹ In that case, both the referee physician and the DMA agreed that OWCP should furnish the employee hearing aids, while OWCP denied the request without providing any factual findings or reasoning in support of its conclusion. The Board found that the employee was entitled to hearing aids.

The Board concludes that appellant is entitled to hearing aids.

LEGAL PRECEDENT -- ISSUE 3

Section 8124(b)(1) of FECA provides that, before review under section 8128(a) of this title, 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.¹² Section 10.616(a) of the federal regulations implementing this section of FECA provides that a claimant, injured on or after July 4, 1966, who has received a final adverse decision by OWCP may obtain a hearing by writing to the address specified in the decision. The hearing request must be sent within 30 days (as determined by the postmark or other carrier's date marking) of the date of the decision for which a hearing is sought.¹³

⁸ 5 U.S.C. § 8103(a).

⁹ See *Marjorie S. Geer*, 39 ECAB 1099 (1988); see also *W.S.*, Docket No. 11-707 (issued September 28, 2011).

¹⁰ *A.S.*, Docket No. 10-2048 (issued June 7, 2011); see also *F.D.*, Docket No. 10-1175 (issued January 4, 2011).

¹¹ *A.S.*, *supra* note 10.

¹² 5 U.S.C. § 8124(b)(1).

¹³ *N.M.*, 59 ECAB 511 (2008).

OWCP, in its broad discretionary authority in the administration of FECA, has the power to hold hearings in certain circumstances where no legal provision was made for such hearings, and OWCP must exercise this discretionary authority in deciding whether to grant a hearing. OWCP's procedures, which require OWCP to exercise its discretion to grant or deny a hearing when a hearing request is untimely or made after reconsideration under section 8128(a), are a proper interpretation of FECA and Board precedent.¹⁴

ANALYSIS -- ISSUE 3

Appellant requested a review of the written record before OWCP's Branch of Hearings and Review on November 29, 2010. As the request was submitted more than 30 days following issuance of the October 25, 2010 decision, it was untimely filed.

OWCP considered the matter in relation to the issue involved and found that additional evidence could be submitted with a request for reconsideration. It has administrative discretion in determining whether a hearing should be granted even though the request is untimely. An abuse of discretion is generally shown through proof of manifest error, a clearly unreasonable exercise of judgment, or actions taken which are contrary to both logic and probable deductions from established facts.¹⁵ Because reconsideration exists as an alternative appeal right to address the issues raised by OWCP's October 25, 2010 decision, the Board finds that OWCP did not abuse its discretion in denying appellant's untimely request for a review of the written record.

CONCLUSION

The Board finds that appellant did not sustain a ratable hearing loss; that OWCP abused its discretion in denying appellant's request for hearing aids, and that OWCP properly denied appellant's request for review of the written record as untimely.¹⁶

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

¹⁴ *Sandra F. Powell*, 45 ECAB 877 (1994).

¹⁵ *Samuel R. Johnson*, 51 ECAB 612 (2000).

¹⁶ 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.

ORDER

IT IS HEREBY ORDERED THAT the December 16, 2010 decision of the Office of Workers' Compensation Programs is affirmed, and the October 25, 2010 decision is affirmed in part and reversed regarding the issue of appellant's entitlement to hearing aids.

Issued: December 7, 2011
Washington, DC

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

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

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